THE GRAND JURY—SPIRIT OF THE COMMUNITY?

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Today, as often in the American past, the grand jury is the subject of considerable legal and political controversy. In the eyes of former Chief Justice Warren, the grand jury "serves the invaluable function . . . of standing between the accuser and the accused."[1] Justice Douglas, however, has a different view: "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."[2] This disagreement as to the grand jury's function and value echoes through the writings of many other jurists, lawyers and laymen.[3]

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1. Wood v. Georgia, 370 U.S. 375, 390 (1962).

2. United States v. Mara, 410 U.S. 19, 23 (1973) (Douglas, J., dissenting).

3. Justice Black wrote that the incorporation of the grand jury in our Constitution "shows the high place it held as an instrument of justice." Costello v. United States, 350 U.S. 359, 362 (1956). *See also* Stirone v. United States, 361 U.S. 212, 218-19 (1960) (Black, J.). Similar words of praise have been expressed by other jurists. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 687-88 (1972) (White, J.); Hannah v. Larche, 363 U.S. 420, 489-90 (1960) (Frankfurter, J., concurring).

But doubts and often stinging criticism of this venerable institution have become more and more prevalent in recent years. Judge William Campbell, a veteran of 33 years on the federal bench, has urged that the "once exalted institution" be abolished. Campbell, *Eliminate the Grand Jury*, 3 J. CRIM. L. & CRIMINOLOGY 174 (1973). So has Judge Melvin Antell of New Jersey, a former prosecutor with substantial grand jury experience. Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A.J. 153 (1965). Justice Marshall recently expressed concern about the potential for "prosecutorial exploitation of the grand jury process." United States v. Dionisio, 410 U.S. 1, 47 (1973) (Marshall, J., dissenting). Justice Stewart, speaking for the majority in the same case, cautioned that "[t]he grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor. . . ." *Id.* at 17. Noted trial attorney Edward Bennett Williams has called mandatory use of the grand jury "an outmoded, archaic fetish of yesteryear." Williams, *Crime, Punishment, Violence: The Crisis in Law Enforcement*, 54 JUDICATURE 418, 420 (1971). One of our leading treatises on federal practice concludes that in modern times the grand jury "has lost much of its independent force;" that "at best it is capable of acting as something more than a rubber stamp," but "when technical and theoretical considerations are put aside, the true nature of the grand jury emerges [as] basically . . . a law enforcement agency." 8 J. MOORE, FEDERAL PRACTICE ¶ 6.02, at 6-7, 9, 10 (2d ed. 1973). *See also* Nilsson, *Grand Jury Called Tool of the Prosecutor*, The Arizona Daily Star, Feb. 10, 1974, § A at 1, col.

Despite its critics, the grand jury has probably achieved greater prominence in the public eye during the last year then ever before, due to its role in the Watergate scandals. It has apparently become a "household word," and may well remain one for several years. The grand jury's impartial investigative value has also been attested to in the recent announcement by United States Assistant Attorney General J. Stanley Pottinger that the "inquisitional powers of the grand jury" will be used to investigate the fatal shootings in 1970 at Kent State University.[4] In these cases, the grand jury may fulfill the prescription of New Jersey's late Chief Justice Vanderbilt: "What cannot be investigated in a republic is likely to be feared. The maintenance of popular confidence in government requires that there be some body of laymen which may investigate any instances of public wrongdoing."[5]

In the midst of all this public attention, several recent cases have raised anew basic issues regarding the purpose, function and authority of grand juries, and the rights and duties of citizens who are called to testify before them. This article will consider these cases as well as the Anglo-American law from which the grand jury system emerged. Possible answers will be suggested to the problems posed by either the continued existence or total elimination of the grand jury.

THE FORMATION AND DEVELOPMENT OF THE GRAND JURY

Historical Background

Contrary to the common belief that the grand jury was originally conceived as a buffer to protect the individual citizen from the despotic power of the King,[6] the grand jury in fact was first developed by King Henry II in 1166 as a means of consolidating royal power.[7] Bodies

3. *Trial* magazine has called for a national study of the "archaic" grand jury system to provide recommendations for its elimination or the development of appropriate controls on its use. Editorial, *Grand Jury Failure?*, TRIAL, Jan.-Feb. 1973, at 7. Even a former grand jury member has called attention to its shortcomings by contending that the grand jury fails to represent the community, serves largely as a prosecutorial agency, and is used to harass and intimidate witnesses. Bernstein, *A Grand Juror's Critique of the Jury*, Los Angeles Times, Feb. 25, 1973, § 6 at 3, col. 1. *See also The Grand Jury . . . A Layman's Assessment*, Vol. 48 No. 6 CAL. STATE BAR J. Nov./Dec. 1973. During the political unrest of the late 1960's and early 1970's, federal grand juries investigating radicial groups were accused of political persecution. Winograd & Fassler, *The Political Question*, TRIAL, Jan.-Feb. 1973, at 16.

4. New York Times, Nov. 14, 1973, at 1, col. 1.

5. *In re* Presentment by Camden County Grand Jury, 10 N.J. 23, 65, 89 A.2d 416, 443 (1952).

6. United States v. Mara, 410 U.S. 19, 23 (1973) (Douglas, J., dissenting); Campbell, *Delays in Criminal Cases*, 55 F.R.D. 229, 253 (1972).

7. For brief histories of the grand jury, see Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?*, 55 COLUM. L. REV. 1103 (1955); Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701 (1972). For more detailed history see W. HOLDSWORTH, A HISTORY OF ENGLISH LAW (3d ed. 1923); T. PLUCKNETT, CONCISE HISTORY OF THE COMMON LAW (4th Ed. 1948); F. POLLOCK & F. MAITLAND, A HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I (2d ed.

of the "most lawful" laymen in each county, hundred and vill were directed to discover and report to the King's sheriffs or justices anyone in their areas who was accused or believed to be guilty of certain serious crimes. Charges were based on community repute as well as on competent evidence. At first, hearings were held in public by the Grand Assize, but later the custom of hearing witnesses in private developed. The persons accused were delivered to royal officers for trial, first by ordeal and later by petit jury. It was not until several hundred years later that the grand jury began to function as a protection against arbitrary action by the crown.[8]

The Grand Jury in the United States

The newly evolved concept of a grand jury independent of the crown was carried to the American colonies, where its twin functions of bringing accused persons to trial and protecting citizens against unfounded accusations became established.[9] In 1734 a courageous New York grand jury refused the urging of English Governor Cosby to indict John Peter Zenger for criminal libel.[10] Half a century later the grand jury system was enshrined as a federal right by the fifth amendment to our Constitution.[11] Although the Supreme Court held nearly a century ago that due process does not require a grand jury indictment in state criminal proceedings,[12] a majority of states now require that certain kinds of criminal prosecutions be initiated by indictment. In

1899); R. YOUNGER, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941 (1963).

8. In 1681, grand juries twice denied indictments for treason despite the Royal Prosecutor's strong urging. Earl of Shaftesbury's Case, 8 How. St. Tr. 759 (1681); Colledge's Case, 8 How. St. Tr. 550 (1681).

9. *See Ex parte* Bain, 121 U.S. 1, 10-11 (1887).

10. C. HEARTMAN, JOHN PETER ZENGER AND HIS FIGHT FOR THE FREEDOM OF THE AMERICAN PRESS (1934); R. MORRIS, FAIR TRIAL 69-95 (1952).

11. "[N]o 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; . . . ." U.S. CONST. amend. V.

The 300-plus year experience with grand juries in this country offers a fascinating study in the ebb and flow of legal history:

> They proved their effectiveness during the colonial and Revolutionary periods in helping the colonists resist imperial interference. They provided a similar source of strength against outside pressure in the territories of the western United States, in the subject South following the Civil War, and in Mormon Utah. They frequently proved the only effective weapon against organized crime, malfeasance in office, and corruption in high places.
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> But appreciation of the grand jury was always greater in times of crisis, and, during periods when threats to individual liberty were less obvious, legal reformers, efficiency experts, and a few who feared government by the people worked diligently to overthrow the institution.

R. YOUNGER, *supra* note 7, at 3. Interestingly, today a major criticism of grand juries is that they threaten individual liberties. Winograd & Fassler, *supra* note 3. Efficiency now is raised in *defense* of the grand jury. Nilsson, *DeConcini Defends Wide Use of Jury*, The Arizona Daily Star, Feb. 11, 1974, § A at 1, col. 1.

12. Hurtado v. California, 110 U.S. 516 (1884).

some of these states, however, indictment may be waived. Even those states which do not require indictment by grand jury make use of this body by permitting indictment by grand jury in certain types of criminal prosecutions, by using it as an investigative agency, or for both purposes. These different approaches to the grand jury result in wide variances in the frequency of its use.[13]

Today's grand jury is an arm of the court.[14] Under federal law it may be composed of from 16 to 23 members, with 12 votes necessary for indictment.[15] Grand jury sessions are conducted in secrecy and proceedings may not be reported,[16] although certain testimony may be provided defendants when necessary at trial.[17] Besides the witness under examination, only a prosecutor may be present with the jurors during the sessions, and even he is normally excluded during deliberations and voting.[18] A witness may not have an attorney present with him while being questioned,[19] but he may step outside the chambers to consult with counsel before answering.[20] Probable cause to believe that the defendant has committed the crime charged is the standard for indictment.[21]

The dual functions of the grand jury are commonly said to be "determining if there is probable cause to believe that a crime has been

13. Spain, *The Grand Jury, Past and Present: A Survey*, 2 AM. CRIM. L.Q. 119, 126-42 (1964). *See also* Calkins, *Abolition of the Grand Jury Indictment in Illinois*, 1966 U. ILL. L.F. 423, 424 n.6.

As pointed out above, in some jurisdictions an indictment is not required for any criminal case. *See* text & notes 12-13, *supra*. Although required in some other jurisdictions, indictment can be waived. *See, e.g.*, 8 J. MOORE, *supra* note 3, ¶ 7.03, at 7-9 to 7-14. Thus, the frequency of use of the grand jury varies widely. In federal courts, because of the fifth amendment, it is used for the great majority of felonies. Telephone interview with Ralph Guy, United States Attorney for the Eastern District of Michigan, November 13, 1973. The same is true in Texas, where indictment is a state constitutional right, and in Pima County, Arizona, where the grand jury is used in 80 percent of criminal cases as an efficiency tool. Nilsson, *Pima County Grand Jury Cases Outnumber Maricopa's*, The Arizona Daily Star, Feb. 12, 1974, § B, at 1, col. 1. In other areas, indictment may be a rarity. For example, "[n]o county in California takes more than 10 percent of its cases to the grand jury," according to Logan McKechnie, special assistant to the district attorney, San Diego County, Calif. *Id.* The statewide average in California is 3½ percent. Ruffner, *Two are Better Than One*, TRIAL, Jan.-Feb. 1973, at 24. In Michigan they comprise less than 1 percent. Telephone interview with Dominick Carnovale, Chief, Appellate and Recorders (Criminal) Court Divisions, Wayne County (Mich.) Prosecutor's Office, November 16, 1973.

14. United States v. Smyth, 104 F. Supp. 283, 291 (N.D. Cal. 1952); *see* Note, *The Grand Jury as an Investigative Body*, 74 HARV. L. REV. 590, 592 (1961); Sharp, *An Investigative Force*, TRIAL, Jan.-Feb. 1973, at 10.

15. FED. R. CRIM. P. 6(a). The size of state grand juries, as well as the minimum vote required to indict, varies widely from state to state. *See* Spain, *supra* note 13, at 126-42.

16. FED. R. CRIM. P. 6(e); Sharp, *supra* note 14, at 10; address by James Willis to National Conference of Metropolitan Courts, Oct. 18, 1973.

17. *See* Dennis v. United States, 384 U.S. 855, 868-75 (1966); The Jencks Act, 18 U.S.C. § 3500 (1970); 8 J. MOORE, *supra* note 3, ¶ 6.05.

18. FED. R. CRIM. P. 6(d); Sharp, *supra* note 14, at 27.

19. Fahringer, *Lawyer for the Witness*, TRIAL, Jan.-Feb. 1973, at 12.

20. Winograd & Fassler, *supra* note 3, at 16, 18.

21. United States v. Doe (Popkin), 460 F.2d 328, 331 (1st Cir. 1972); FED. R. CRIM. P. 6; 8 J. MOORE, *supra* note 3, ¶ 6.02, at 6-14; Spain, *supra* note 13, at 124.

committed and . . . protecting citizens against unfounded criminal prosecutions."[22] A careful analysis suggests that a somewhat different description would be more accurate. One purpose of the grand jury is to investigate wrongdoing for the purpose of preferring criminal indictments where appropriate.[23] This function is primarily prosecutorial in nature. The jury's other purpose is to insure that indictments are supported by evidence showing probable cause to believe that the defendants named have committed the crimes charged. This is basically a judicial function in which the impartial judgment of jurors is said to be a check against prosecutorial excesses.

The advantages of the grand jury from a prosecutor's standpoint include the power to subpoena witnesses and require them to testify or deliver records on pain of being held in contempt of court,[24] and the authority to grant witnesses immunity from prosecution in order to require them to testify on matters which they might otherwise refuse to discuss under a claim of the privilege against self-incrimination.[25] The advantage of the jury to defendants lies in the authority of its citizen-members to refuse to indict or take other action requested by the prosecutor. In this regard the grand jury serves as at least a potential restraint on overzealous government officials. Unfortunately, such restraining influence is often more theoretical than actual.[26]

Power and Authority to Investigate

The authority of the grand jury to inquire into facts and require testimony is extremely broad. More than 50 years ago Justice Pitney outlined the almost unlimited scope of a grand jury investigation:

> [A grand jury] is a grand inquest, a body with the powers of investigation and inquisition, the scope of whose inquiries is not to

22. Branzburg v. Hayes, 408 U.S. 665, 686-87 (1972); *id.* at 737 (Stewart, J., dissenting); *Ex parte* Bain, 121 U.S. 1, 11 (1887).

23. Johnson v. United States, 319 U.S. 503, 510 (1943); 8 J. MOORE, *supra* note 3, ¶ 6.02, at 6-20 to -24; *id.* ¶ 6.04, at 6-47.

Investigations may be initiated in the process of preparing indictments, as in Watergate. However, in some jurisdictions grand juries may be directed to investigate such matters as corruption or organized crime, and issue reports (or presentments) without formal indictments. These latter are sometimes called "watchdog" grand juries. *See* Kuh, *supra* note 7; Ruffner, *supra* note 13, at 24. The presentment power for federal grand juries is contained in 18 U.S.C. § 3333 (1970). Investigative panels have won considerable prominence for such prosecutors as the late Thomas E. Dewey of New York, who first gained public notice during the 1930's for his work with racket-busting grand juries; his success spurred a revival of interst in grand juries. R. YOUNGER, *supra* note 7, at 234-37.

24. *See* United States v. Dionisio, 410 U.S. 1 (1973); Branzburg v. Hayes, 408 U.S. 665, 688 (1972) and cases cited therein. This power of compulsion is said to date back at least to 1612 in England. *See* Blair v. United States, 250 U.S. 273, 279-80 (1919).

25. *See, e.g.*, Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972); Kastigar v. United States, 406 U.S. 441 (1972); Fraser v. United States, 452 F.2d 616 (7th Cir. 1971).

26. *See* text & notes 2-3, 13 *supra.*

> be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. . . . [T]he identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning.[27]

The public, through the grand jury, has a right to "every man's evidence,"[28] and the duty to testify[29] is limited by only a few exceptions. The most significant of these is the privilege against self-incrimination. Neither the grand jury nor the court can compel a witness to testify as to matters which may incriminate him.[30] If he is properly granted immunity, however, the witness must answer *all* questions.[31] If no immunity is given, he still may be required to answer nonincriminating questions and to undergo nontestimonial identification procedures, such as fingerprinting or giving voice exemplars, which are not within the fifth amendment privilege.[32] Courts have also recognized the right to refuse to testify as to certain privileged communications, such as those between attorney and client,[33] husband and wife[34] and clergyman and communicant.[35] Furthermore, it is improper for one grand jury to gather evidence to be used against a defendant who has already been indicted for another offense.[36]

In general, a witness has no standing to object that evidence is incompetent or inadmissible,[37] nor does the fact that incompetent or

27. Blair v. United Stats, 250 U.S. 273, 282 (1919).

28. Branzburg v. Hayes, 408 U.S. 665, 688 (1972); 8 J. WIGMORE, EVIDENCE § 2192, at 70 (rev. ed. 1961).

29. Kastigar v. United States, 406 U.S. 441, 443-44 (1972).

30. *E.g.*, United States v. Dionisio, 410 U.S. 1, 11 (1973); Branzburg v. Hayes, 408 U.S. 665, 689-90 (1972); Blair v. United States, 250 U.S. 273, 281 (1919); Hale v. Henkel, 201 U.S. 43, 66 (1906). *But cf.* Wilson v. United States, 221 U.S. 361 (1911).

31. Kastigar v. United States, 406 U.S. 441, 448-62 (1972); Hale v. Henkel, 201 U.S. 43, 68-69 (1906); Fraser v. United States, 452 F.2d 616, 617-19 (7th Cir. 1971); *cf.* United v. Winter, 348 F.2d 204, 207-208 (2d Cir.), *cert. denied*, 382 U.S. 955 (1965).

32. Dionisio v. United States, 410 U.S. 1, 5-7 (1973); Mara v. United States, 410 U.S. 19, 22 (1973); United States v. Doe (*In re* Schwartz), 457 F.2d 895, 896-97 (2d Cir. 1972).

33. Continental Oil Co. v. United States, 330 F.2d 347, 350 (9th Cir. 1964); Schwimmer v. United States, 232 F.2d 855, 863 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956).

34. Blau v. United States, 340 U.S. 332 (1951).

35. *In re* Verplank, 329 F. Supp. 433 (C.D. Cal. 1971). The doctor-patient privilege has been refused. *Id.* at 438. Whether a privilege is recognized depends on the local state law. The new federal rules of evidence, when enacted, will not recognize the doctor-patient privilege.

36. 8 J. MOORE, *supra* note 3, ¶ 6.04, at 6-50 to -52. The United States Court of Appeals for the First Circuit, however, recently refused to enjoin a grand jury sitting in Boston from investigating matters involving Daniel Ellsberg after he had been indicted by a federal grand jury in Los Angeles. The court ruled that it could not (or would not) look behind the Boston investigation to determine whether it had some different legitimate investigative purpose. United States v. Doe (Ellsberg), 455 F.2d 1270, 1275-76 (1st Cir. 1972).

37. 8 J. MOORE, *supra* note 3, ¶ 6.03[2].

improper evidence may have been considered by the grand jury provide a defendant with a right of relief.[38] Hearsay is admissible and a defendant cannot object to an indictment based entirely on hearsay,[39] or one supported by third-party testimony before the grand jury regarding otherwise inadmissible statements of the defendant.[40]

Most recently, a six-member majority of the Supreme Court held that a witness could not invoke the exclusionary rule for the purpose of objecting to grand jury questions based on evidence obtained from an unlawful search and seizure.[41] A statutory exclusionary rule still obtains in the case of evidence obtained by an illegal wiretap.[42]

Although the Supreme Court held in *Hale v. Henkel*[43] that a grand jury witness could not be required to respond to a subpoena duces tecum that was too sweeping to be reasonable, relief has been granted on this basis only rarely. A few cases have held that subpoenas for production of papers and documents consituting a substantial body of material, such as a variety of accumulations or accumulations covering a long period, may be unreasonable.[44] However, in one case the subpoena was held valid although it required search of the Borden Company files extending back more than 20 years. A prior subpoena to the same company had produced *10 truck loads* weighing *over 50* tons and required the full time of 28 of the company's employees for several months just to collect the material.[45] Although that case

38. *Id.* at ¶ 6.03[3]; *see* United States v. Blue, 384 U.S. 251 (1966).

39. *See* Costello v. United States, 350 U.S. 359 (1956).

40. Holt v. United States, 218 U.S. 245, 247-48 (1910). The question has been raised whether there is a duty to warn potential defendants or "targets" of investigations of their right to consult with an attorney and to refuse to incriminate themselves. In United States v. Scully, 225 F.2d 113 (2d Cir.), *cert. denied*, 350 U.S. 897 (1955), it was held that a warning was not required since there is no differentce at a grand jury sharing between the rights of parties, or targets, and other witnesses. In Mattox v. Carson, 424 F.2d 202 (5th Cir. 1970), the court held that failure to give *Miranda* warnings would not require dismissal of the charge, even assuming that *Miranda* applies to grand jury interrogations. *Id.* at 204. The American Bar Association states that a prosecutor should warn a potential defendant of his rights and his status. *Standards Relating to the Prosecution Function and the Defense Function*, ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE § 3.6(d) (Approved Draft, 1971).

At least two state cases require that target defendants be warned. People v. Diponio, 48 Mich. App. 128, 210 N.W.2d 105 (1973); State v. Sarcone, 96 N.J. Super. 501, 233 A.2d 406 (1967).

41. United States v. Calandra, 94 S. Ct. 613 (1974).

42. 18 U.S.C. § 2515 (1970). *See also id.* § 3504. It was held in Gelbard v. United States, 408 U.S. 41 (1972), that, despite the general rule that a witness cannot object to incompetent evidence, he could not be required to answer questions derived from unlawful electronic eavesdropping. That case left unanswered the question whether a defendant could have an indictment dismissed or a conviction reversed if facts obtained by the grand jury were based on such illegal surveillance. *See In re* Grand Jury Proceedings, Harrisburg, Pa. (Egan), 450 F.2d 199, 204-06 (3d Cir. 1971), *aff'd sub nom.* Gelbard v. United States, *supra* (suggesting that a defendant could not have the indictment dismissed).

43. 201 U.S. 43, 76-77 (1906).

44. Schwimmer v. United States, 232 F.2d 855 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956); *In re* Verplank, 329 F. Supp. 433 (C.D. Cal. 1971).

45. Petition of Borden Co., 75 F. Supp. 857 (N.D. Ill. 1948).

may have set an all-time record for volume of material, other burdensome subpoenas have been upheld.[46]

At times a grand jury investigation or subpoena may conflict with first amendment rights, as where the jury wants the testimony of newsmen[47] or seeks information concerning political associations.[48] In such situations some courts have held the government must show a "compelling" need for the information sought.[49] This requirement is also placed on inquiries by state and federal legislative bodies.[50] Where tension with the first amendment is involved, some authorities have equated the right of a grand jury to information with that of legislative investigations.[51] However, the Court of Appeals for the First Circuit has recently rejected this comparison.[52] In *Branzburg v. Hayes*,[53] the Supreme Court acknowledged the compelling need claim, but stopped short of specifically adopting it for federal grand juries.[54] It is clear that courts will at least examine subpoenas more carefully where there is possible conflict with first amendment rights and may, if warranted, excuse a witness from testifying or producing evidence.

The "Reasonable and Relevant" Debate

No part of the law of grand juries is more confusing and confused than the question whether a witness can have a subpoena quashed on the ground that the demand for evidence is unreasonable or not relevant to any subject the grand jury is authorized to investigate. It is obvious that, except where specifically authorized by statute or court order, grand juries *should not* inquire into matters that do not relate to possible criminal conduct. They are not monitors of our morals, and except for facts related to lawful investigations they have no right to inquire into private lives or to go on fishing expeditions in the hope of coming upon possible violations of the law.

Recent revelations concerning Watergate have demonstrated again that high ranking officials as well as undercover agents may, if un-

46. *See, e.g.*, United States v. Gurule, 437 F.2d 239 (10th Cir. 1970), *cert. denicd*, 403 U.S. 904 (1971); Application of Certain Chinese Family Benev. & Dist. Ass'ns, 19 F.R.D. 97 (N.D. Cal. 1956); Application of Linen Supply Cos., 15 F.R.D. 115 (S.D.N.Y. 1953); United States v. Invader Oil Corp., 5 F.2d 715 (S.D. Cal. 1925); People v. Allen, 410 Ill. 508, 103 N.E.2d 92 (1951), *cert. denied*, 344 U.S. 815 (1952).

47. Branzburg v. Hayes, 408 U.S. 665 (1972).

48. Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972); *In re* Verplank, 329 F. Supp. 433 (C.D. Cal. 1971).

49. *See In re* Verplank, 329 F. Supp. 433, 437 (C.D. Cal. 1971).

50. Gibson v. Florida Legis. Investig. Comm., 372 U.S. 539, 546-47 (1963).

51. *In re* Grand Jury Proceedings (Schofield), 486 F.2d 85, 90 (2d Cir. 1973); *see* Liveright v. Joint Comm. of Gen. Assem., 279 F. Supp. 205 (M.D. Tenn. 1968); Weisman & Postal, *The First Amendment as a Restraint on the Grand Jury Process*, 10 AM. CRIM. L. REV. 671, 691 (1972).

52. United States v. Doe (Popkin), 460 F.2d 328, 331-32 (1st Cir. 1972).

53. 408 U.S. 665 (1972).

54. *Id.* at 680, 700; see *id.* at 713 (Douglas, J., dissenting).

checked, engage in acts that go far beyond the bounds of propriety or their authority. The grand jury, acting in secrecy with the powers of the subpoena, immunity and contempt, is a natural vehicle for some types of government overreaching, even though the jurors themselves may act in good faith. For example, suppose a prosecutor, for possible future use, wants photographs, voice prints and fingerprints of persons he thinks might be involved in drug traffic now or in the future. Should he be able to subpoena everyone who falls into a given category of age, education or race? Or, knowing that a given area has abnormally high crime rates, might he subpoena and question everyone in that area? Worse yet, but far from impossible, could he use grand jury interrogation to harass anyone he considers a political opponent or to seek facts which may be useful in gaining political advantage?

The answer to each of these questions should obviously be a resounding no. But such prosecutorial excesses, if they do occur, are not easily curbed. Grand jury members are largely under the prosecutor's control.[55] He normally chooses the subjects to investigate and subpoenas the witnesses. The grand jury can provide a check of sorts on his purely arbitrary activity, but this negative restraint is usually limited to deciding whether or not to indict—the culmination of the inquiry. It is almost impossible for the members, unskilled in the law or in criminal investigations, to control inquiries initiated by the prosecutor.

On the other hand it is not desirable for courts to hold too tight a rein on grand jury actions.[56] That body must have broad powers to use "rumors, hearsay, reports and even suspicion in initiating an investigation. . . ."[57] To be effective it must serve an "inquisitorial function."[58] It must run down "every available clue."[59] If the court were to scrutinize each step of the investigation, it would be an impossible handicap to the vital process of ferreting out and indicting criminal conduct. As Justice Frankfurter said, "judicial administration must not be leaden-footed."[60] Perhaps more important, close judicial control would tend to insert the court into the partisan business of the investigator and prosecutor.

It is evident that the task of charting a course which limits the grand jury's authority, while leaving it free to conduct wide-ranging

55. *See* United States v. Mara, 410 U.S. 19, 23-24 (1970) (Douglas, J., dissenting); note 3 *supra.*
56. *See* Bursey v. United States, 466 F.2d 1059, 1073-75 (9th Cir. 1972).
57. United States v. Smyth, 104 F. Supp. 283, 298 (N.D. Cal. 1952).
58. Blair v. United States, 250 U.S. 273, 280 (1919).
59. Branzburg v. Hayes, 408 U.S. 665, 701 (1972), *citing* United States v. Stone, 429 F.2d 138, 140 (2d Cir. 1970).
60. Cobbledick v. United States, 309 U.S. 323, 325 (1940).

investigations, is not easy. Nor is it one in which the courts have been notably successful. It is not difficult, however, to conceive of certain restrictions which could be placed on grand jury subpoenas without compromising the body's need for broad authority. For example, a subpoena might be required to be relevant to a matter being investigated or to suspected criminal activity. Another possibility might be a requirement that demands for evidence or testimony be reasonable, though still short of probable cause standards. These and other standards have been used by courts in an abundance of cases, but no definitive criteria have surfaced. In fact, judicial contradictions have become so numerous that almost any conclusion can be either supported or refuted by apparently valid court decisions.

With respect to the *relevance* requirement, there is authority that a witness may not be required to answer questions that are not relevant or material to the matter under investigation.[61] On the other hand, there is at least as much authority supporting the proposition that a witness may not object to the inquiry on the ground that the line of questioning is not relevant or material.[62] With regard to the grand jury's authority to investigate, it is apparently the law that a witness can challenge neither the constitutionality of the statute which was the basis of the investigation, nor the jurisdiction of the grand jury.[63]

Some courts have ruled that a witness may challenge a subpoena on the ground of *reasonableness*,[64] but a contrary conclusion has also

61. *See* Bursey v. United States, 466 F.2d 1059, 1073 (9th Cir. 1972); United States v. Gurule, 437 F.2d 239, 241 (10th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971); Schwimmer v. United States, 232 F.2d 855, 862-63 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956); Application of Certain Chinese Family Benev. & Dist. Ass'ns, 19 F.R.D. 97, 99 (N.D. Cal. 1956); Hobson v. District Court of Linn County, 188 Iowa 1062, 1063-65, 177 N.W. 40, 41 (1920).

62. *See* Blair v. United States, 250 U.S. 273, 282 (1919); Nelson v. United States, 201 U.S. 92, 115 (1906); United States v. Doe (Popkin), 460 F.2d 328, 332-33 (1st Cir. 1972); United States v. Doe (*In re* Schwartz), 457 F.2d 895 (2d Cir. 1972); Fraser v. United States, 452 F.2d 616 (7th Cir. 1971). *See also* Branzburg v. Hayes, 408 U.S. 665, 747 n.31 (1972) (Stewart, J., dissenting); 8 J. MOORE, *supra* note 3, ¶ 6.04 at 6-48.

It is worthy of note that the Court in *Blair* held that a *witness* cannot object to incompetency or irrelevancy, "such as a *party* might raise." 250 U.S. at 282 (emphasis added). The Court does not explain who a party is (presumably a defendant or prospective defendant), and the case cited at that point, Nelson v. United States, 201 U.S. 92 (1906), does not refer to the distinction. A few cases have distinguished between rights of parties and witnesses in grand jury proceedings, but United States v. Scully, 225 F.2d 113 (2d Cir.), *cert. denied*, 350 U.S. 897 (1955), states that there is no difference between them at the grand jury stage because there are no defendants at grand jury hearings, which *culminate* in indictment or a finding of "no true bill," *Id.* at 114-16. See note 40 *supra*, for a brief discussion of the duty to warn a potential defendant of his rights. *See also* United States v. Lawn, 355 U.S. 339 (1958).

63. Blair v. United States, 250 U.S. 273, 282-83 (1919); Carter v. United States, 417 F.2d 384, 386-87 (9th Cir. 1969).

64. Hale v. Henkel, 201 U.S. 43, 76 (1906); Schwimmer v. United States, 232 F.2d 855, 862-63 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956); Application of Linen Supply Cos., 15 F.R.D. 115 (S.D.N.Y. 1953).

been reached.[65] In a related area, some courts have stated that a subpoena is subject to review on fourth amendment grounds,[66] while others have denied such review.[67] Lower courts have often said that grand juries may not engage in fishing expeditions,[68] although at least one court has concluded that some fishing is inevitable[69]—a point echoed recently by Watergate Special Prosecutor Leon Jaworski.[70] While courts often say that grand juries are not to be used as instruments of oppression or harassment,[71] and that relief is appropriate to protect against a clear showing of abuse of power[72] or a lack of good faith,[73] it has been held that the court does not have authority to control the course of the grand jury's investigation.[74]

RECENT DEVELOPMENTS

Dionisio-Mara: The Seventh Circuit View

In a pair of 1971 decisions, the United States Court of Appeals for the Seventh Circuit formulated significant limits on the right of grand juries to make unchallengeable demands for exemplary evidence.

The first case, *In re Dionisio*,[75] grew out of a grand jury investigation of gambling activities. About 20 persons, including appellant Antonio Dionisio, were subpoenaed by a federal grand jury in Chicago to furnish voice exemplars for comparison with unidentified voices

65. Fraser v. United States, 452 F.2d 616, 618 (7th Cir. 1971).

66. Hale v. Henkel, 201 U.S. 43, 76 (1906); Schwimmer v. United States, 232 F.2d 855, 862-63 (8th Cir. 1956).

67. United States v. Doe (*In re* Schwartz), 457 F.2d 895 (2d Cir. 1972); Fraser v. United States, 452 F.2d 616 (7th Cir. 1971); United States v. Weinberg, 439 F.2d 743, 749 (9th Cir. 1971).

68. *See, e.g., In re* September 1971 Grand Jury, 454 F.2d 580, 585 (7th Cir. 1971), *rev'd sub nom.* United States v. Mara, 410 U.S. 19 (1973); *In re* Dionisio, 442 F.2d 276, 279 (7th Cir. 1971), *rev'd sub nom.* United States v. Dionisio, 410 U.S. 1 (1973); Schwimmer v. United States, 232 F.2d 855, 861-62 (8th Cir. 1956).

Considering a somewhat similar issue, the Supreme Court has held that a general subpoena of documents was as indefensible as would be a search warrant couched in similar terms. Hale v. Henkel, 201 U.S. 43, 77 (1906).

69. Schwimmer v. United States, 232 F.2d 855, 862 (8th Cir. 1956).

70. Detroit News, Dec. 3, 1973, § A at 3, col. 1: "Every investigation is a fishing expedition up to a certain point. . . . If you don't go fishing and try to find whatever the facts are, then you're going to be accused of not having gone into the matter thoroughly."

71. United States v. Dionisio, 410 U.S. 1, 12 (1973), *citing* Branzburg v. Hayes, 408 U.S. 665, 707-08 (1972); United States v. Gurule, 437 F.2d 239, 241 (10th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971); Hobson v. District Court of Linn County, 188 Iowa 1062, 1063-65, 177 N.W. 40, 41 (1920).

72. Petition of Borden Co., 75 F. Supp. 857, 868 (N.D. Ill. 1948); Application of Linen Supply Cos., 15 F.R.D. 115, 118 (S.D.N.Y. 1953).

73. Branzburg v. Hayes, 408 U.S. 665, 707, 710 (1972); United States v. Aronson, 319 F.2d 48, 52 (2d Cir. 1963).

74. Bursey v. United States, 466 F.2d 1059, 1073, 1075 (9th Cir. 1972) (dictum); United States v. Doe (Ellsberg), 455 F.2d 1270 (1st Cir. 1972) (dictum).

75. 442 F.2d 276 (7th Cir. 1971).

which had been lawfully recorded by wiretap under court order. The witnesses were notified that they were potential defendants in the investigation. They were requested to go to the United States Attorney's office where, in the presence of FBI agents and their own counsel, they were to read from transcripts of the prior wiretap recordings. Dionisio refused to furnish the exemplars and was jailed for civil contempt.

On appeal of the contempt order, the court of appeals summarily rejected the claim that requiring the voice exemplars violated Dionisio's fifth amendment privilege.[76] It held, however, that a government order for production of such exemplars was subject to the fourth amendment requirement of reasonableness.[77] Accepting the fact that probable cause need not exist to support a grand jury subpoena,[78] it found the dragnet effect of the subpoenas as offensive as the mass roundup of possible suspects for fingerprinting condemned in *Davis v. Mississippi*,[79] and therefore unreasonable.[80] It also considered the argument that the fourth amendment forbids only overbroad grand jury subpoenas which call for documentary evidence, but held that a person's voice, like his books and papers, is protected by the Constitution.[81]

The court of appeals in *Dionisio* thought it important that the government was seeking to continue an FBI investigation by using the grand jury process to compel evidence which, under *Davis*, law enforcement agents could not have otherwise obtained, since they lacked subpoena power and had no probable cause for arrest. Accordingly, it denied the prosecution's claimed right to resort to the grand jury when other avenues of proceeding were blocked by probable cause requirements.[82]

In re September 1971 Grand Jury (Mara)[83] involved a probe of conspiracy and thefts of interstate shipments. The federal grand jury advised the appellant that he was a potential defendant and directed him to furnish handwriting exemplars. When he objected, an FBI agent submitted an affidavit to the court showing why the exemplars were essential to the investigation. After considering the affidavit *in camera*, the district court ordered Mara to provide the requested evi-

76. *Id.* at 278.
77. *Id.* at 279.
78. *Id.* at 281.
79. 394 U.S. 721 (1969).
80. 442 F.2d at 281.
81. *Id.* at 279. The Second Circuit in United States v. Doe (*In re* Schwartz), 457 F.2d 895 (2d Cir. 1972), also reviewed this question but, contrary to the *Dionisio* court, concluded that decisions dealing with government intereferences with property relationships or private papers were only "marginally relevant" to issues dealing with voice or handwriting exemplars. *Id.* at 900.
82. 442 F.2d at 280-81.
83. 454 F.2d 580 (7th Cir. 1971).

dence. He refused and was held in civil contempt. On appeal, the Seventh Circuit held that the government had to show the reasonableness of its request *in open court* so that Mara could contest its sufficiency.[84] Pointing out that there was no need for secrecy in the case and citing constitutional objections to *in camera* proceedings,[85] the court found Mara's contempt citation to be unjustified. It again condemned apparent government efforts to circumvent fourth amendment restrictions on investigatory activity by use of the grand jury, repeating the *Dionisio* equation of exemplary evidence with subpoenas for documents.[86] The court demanded that the government show (1) that the grand jury investigation was properly authorized, (2) that it was for a purpose Congress could order, (3) that the information sought was relevant to the inquiry, and (4) that the grand jury's request for exemplars was adequate but not excessive for the purposes of the relevant inquiry.[87]

The reasoning of these two cases, with their requirement of preliminary showings before evidence could be compelled, was rejected by the Second Circuit four months after *Mara* was announced.

Schwartz: The Second Circuit's Response

United States v. Doe (In re Schwartz)[88] involved a grand jury demand for samples of a witness' handwriting, supported by a government affidavit that there was evidence of resemblances of the witness' handwriting to that on exhibits relating to the jury's investigation of possible mail and wire frauds.

In an opinion by Judge Friendly, the Second Circuit panel rejected Mrs. Schwartz' claim that the fourth amendment required a showing of probable cause before the evidence could be compelled. No showing of relevancy need be made before a witness—or even the subject of an investigation—can be made to *appear* before the grand jury, the court said, because every citizen has a duty to give unprivileged information requested by a grand jury.[89] The specific evidence sought by the jury—samples of Mrs. Schwartz' handwriting—enjoys no fifth amendment privilege, and handwriting characteristics are in no sense private or confidential; thus, the court concluded, there was no fourth amendment interest being "seized" by the subpoena.[90]

84. *Id.* at 582-84.
85. *See* Alderman v. United States, 394 U.S. 165, 182-83 (1969); Dennis v. United States, 384 U.S. 855, 873-75 (1966).
86. 454 F.2d at 584-85.
87. *Id.*
88. 457 F.2d 895 (2d Cir. 1972).
89. *Id.* at 897-98.
90. *Id.* at 898-99.

Judge Friendly rejected any equation of grand jury subpoenas with arrests, for which probable cause is needed:

> The distinction between the compulsion exerted by a subpoena and detention by law enforcement officers is far from being a mere matter of words. The latter is abrupt, is effected with force or the threat of it, and is often in demeaning circumstances, and, in the case of arrest, results in a record involving social stigma. A subpoena is served in the same manner as other legal process; it involves no stigma whatsoever; if the time for appearance is inconvenient, this can generally be altered; and it remains at all times under the control and supervision of a court.[91]

The fact that the grand jury would give law enforcement officials access to information they could not otherwise have obtained was deemed insufficient grounds for reversal, because the grand jury's added function of protecting citizens from oppression was thought to be sufficient safeguard.[92]

Most of the discussion in *Schwartz* was unnecessary to the result reached by the court. The affidavit submitted to the district court clearly satisfied the reasonableness and relevance criteria of *Dionisio-Mara,* and Mrs. Schwartz' contempt citation could have been sustained on that basis. It appears, then, that the court intended a specific response to the Seventh Circuit's limiting of grand jury authority vis-à-vis witnesses.

As a result of prior decision law and the circuit conflict resulting from *Schwartz* and *Dionisio-Mara,* the law of grand juries was in substantial disarray with regard to a number of issues. These included:

1. The kind of showing (if any) the government must make in subpoena-contempt matters in order to establish that its demands are reasonable or relevant.

2. The degree to which fourth amendment requirements apply to grand jury subpoenas.

3. Whether the standards differ for documentary, testimonial or exemplary evidence.

4. Whether fishing expeditions or dragnet investigations are as opprobrious when applied to grand juries as when applied to other law enforcement efforts.

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91. *Id.* at 898. But "[t]he duty to testify may on occasion be burdensome and even embarrassing. It may cause injury to a witness' social and economic status. Yet the duty to testify has been regarded as 'so necessary to the administration of justice' that the witness' personal interest in privacy must yield to the public's overriding interest in full disclosure." United States v. Calandra, 94 S. Ct. 613, 618 (1974).

92. 457 F.2d at 899.

5. The extent to which law enforcement agencies may utilize grand jury powers to obtain evidence which might not otherwise be available because of probable cause constraints.

6. The difference (if any) between the rights of a witness and those of a "party" summoned before a grand jury?

Supreme Court Review

Granting certiorari and treating *Dionisio* and *Mara* as companion cases, the Supreme Court undertook to answer some of these questions. A six-member majority cited *Schwartz* with approval in reversing both Seventh Circuit decisions.[93] It held that a subpoena requiring a person to appear before a grand jury was not a seizure for fourth amendment purposes, in view of every person's duty to appear and give evidence.[94] Nor were voice and handwriting exemplars found to be within the zone of privacy protected from public intrusion by the fourth amendment.[95] Furthermore, the Court distinguished the function and needs of grand juries from police investigations in holding that the *Davis*-type limits on roundups of suspects do not necessarily apply to grand juries; the mere fact that many others were subjected to the same compulsion does not afford grounds for complaint.[96] Thus, since neither the summons to appear nor the order to make the exemplars infringed upon any interest protected by the fourth amendment, the Court concluded that the grand jury was not subject to "even the minimal requirement" of reasonableness before it could order such evidence to be produced.[97] Without referring to the party/witness distinction adverted to in *Blair v. United States*,[98] the majority reaffirmed the statement in *Blair* that no witness is entitled to set limits to a grand jury investigation.[99]

As author of the Court's opinions, Justice Stewart pointed out that the fourth amendment does provide protection against a subpoena for documents too sweeping to be regarded as reasonable.[100] He also repeated earlier statements that the Constitution cannot tolerate use of the grand jury as an instrument of oppression and that the grand jury must operate within the limits of the first amendment as well as the fifth.[101] Firmly opposing new, more specific restrictions, the ma-

93. United States v. Dionisio, 410 U.S. 1 (1973); United States v. Mara, 410 U.S. 19 (1973).
94. 410 U.S. at 9-10.
95. *Id.* at 14-15.
96. *Id.* at 13.
97. *Id.* at 15.
98. 250 U.S. 273, 282 (1919).
99. 410 U.S. at 15.
100. *Id.* at 11-12.
101. *Id.* at 12.

jority rejected rules that would have encumbered grand jury investigations with "mini-trials" and preliminary showings, which could frustrate the public's interest in the fair and expeditious administration of the criminal laws.[102] The four-fold "reasonableness" test devised by the court of appeals in *Mara* was dismissed without mention.[103]

Dissenting, Justice Douglas agreed with the lower court's holding that there must be a prior showing of reasonableness and that exemplars were protected by the right of privacy. He criticized the action of the government in avoiding constitutional restraints by obtaining through the grand jury process evidence which would not otherwise be available.[104] Justice Marshall wrote a separate dissent, arguing that requiring a handwriting or voice exemplar violates the fifth amendment.[105] He also contended that, although every man may have a duty to *testify* before a grand jury, there was no precedent for requiring evidence such as exemplars without at least a prior showing of reasonableness.[106]

Dionisio and *Mara* have provided at least partial answers to all six questions raised by the previous split between the Second and Seventh Circuits. The law under *Dionisio-Mara* seems to be as follows:

1. *Requirement of a prior showing of relevance or reasonableness.* At least with respect to nontestimonial or identification-type evidence, such as exemplars, fingerprints and obvious physical characteristics, *Dionisio* seems clearly to hold that there is no burden on the government to make a prior showing of relevancy. On the other hand, a witness can still assert the fifth amendment or other *testimonial* privileges, such as the attorney-client or husband-wife relations. He can also seek to show that the grand jury's actions are oppressive or in bad faith, although it is fair to assume that such a burden will not be easily met. Additionally, conflict of a subpoena with first amendment rights may still require a prior showing of a compelling need in order to justify a subpoena.

2. *Grand jury subpoenas and the fourth amendment.* A sub-

102. *Id.* at 17. This concern was voiced again when the Supreme Court refused to extend the exclusionary rule to grand jury proceedings. The majority reasoned that the burden on the jury from suppression hearings and the like would outweigh the added deterrence of unlawful police conduct to be gained by such an extension. United States v. Calandra, 94 S. Ct. 613, 620-22 (1974).

103. United States v. Mara, 410 U.S. 19 (1973).

104. *Id.* at 23-31 (Douglas, J., dissenting).

105. *Id.* at 31-38 (Marshall, J., dissenting).

106. *Id.* at 41-42 (Marshall, J., dissenting). Justice Brennan's brief dissent agreed generally with Justice Marshall's view that the government must first show reasonableness before a witness can be required to give the exemplars under consideration. *Id.* at 22-23 (Brennan, J., dissenting).

poena to testify or give exemplars is not subject to fourth amendment restraints on unreasonable seizures. When summoned, every witness must appear and (subject to the exceptions just noted) give evidence.

3. *Standards for documentary, as opposed to testimonial or exemplary, evidence.* *Hale v. Henkel*[107] and the cases relying on it[108] which proscribe subpoenas that are too sweeping have all involved subpoenas duces tecum for papers or documentary evidence. *Dionisio* referred to the *Hale v. Henkel* rule with approval.[109] In each of the "too sweeping" cases, the line was drawn according to the volume of papers required and the scope of the subject matter. Such facts are readily apparent on the face of the subpoena or can easily be demonstrated. On the other hand, the fact that many witnesses have been called imposes no great burden on each individual witness, and thus is no ground for complaint.[110] If a subpoena for testimonial or exemplary evidence is so demanding and extensive that it constitutes unreasonable oppression or harassment, it should be subject to the same objection as the subpoena for documentary evidence. For example, a witness might seek relief if he were subjected to repeated recalls or lengthy sessions of voice comparisons and identification procedures in such volume that they were out of all reasonable proportion to the investigative needs. This writer knows of no case so holding, however, perhaps because normally there would be no advantage to the government in making such demands.

A subpoena of private papers and effects, unlike a demand for identification-type evidence, may infringe upon fifth amendment rights against compelled self-incrimination.[111] This factor may also provide a broader basis for relief from demands for documents.

Justice Marshall insisted in *Dionisio-Mara* that, while requiring testimonial evidence may not constitute a seizure under the fourth amendment, taking fingerprints or exemplars does come within the proscription against unreasonable seizures.[112] However, this argument was rejected by the majority and does not appear to be supported by other authority.

4. *Fishing expeditions and dragnet investigations.* As pointed out above,[113] broad, unfocused efforts to obtain evidence have often been criticized, not only in police or prosecutorial activities, but also

107. 201 U.S. 43 (1906). *See* text accompanying note 43 *supra.*
108. See note 44 *supra.*
109. 410 U.S. at 11-12, 15-16.
110. *Id.* at 13.
111. *See* Boyd v. United States, 116 U.S. 616 (1886).
112. United States v. Mara, 410 U.S. 19, 41-43 (1973) (Marshall, J., dissenting).
113. *See* text & note 68 *supra.*

in grand jury cases. It is not clear just what sort of inquiries might exceed the extensive inquisitorial powers approved by the Supreme Court in *Dionisio* and *Branzburg v. Hayes*,[114] but grand juries clearly will not be hampered to any serious degree under the guidelines that exist. It does not appear that "fishing" and "dragnet" charges will be particularly useful to witnesses, at least in federal grand jury cases.

5. *Use of grand juries to avoid fourth amendment restraints.* Absent probable cause, law enforcement officials cannot make arrests or obtain warrants; nor can they require citizens to make statements or furnish other evidence. Thus, it is handy, when police or FBI investigations are stymied by probable cause restrictions, to utilize grand juries in order to subpoena the desired testimony or evidence. The claim that such use of the grand jury is an improper subversion of the Constitution was ignored by the *Dionisio* and *Mara* majority opinions, although it was stressed unsuccessfully by Justices Douglas[115] and Marshall[116] in their dissents. It would appear that, barring a change in the Court's outlook or personnel, the claim is not now a viable defense.

6. *Rights of a party and a witness.* Both Mara and Dionisio were notified that they were potential defendants in the investigations, yet they were in all respects considered by the Court as witnesses. Thus, though the Court may once have distinguished between the rights of "parties"—*viz.*, actual or potential indictees—and those of "mere witnesses" in grand jury investigations,[117] that difference now appears completely dead, save for possible requirements that potential defendants be warned of their *Miranda* rights and broader consideration be given to claims involving the privilege against self-incrimination.[118]

Schofield: The Debate Revived

Despite the plain language of the *Dionisio* and *Mara* opinions, a court of appeals case has already revived the issue of whether the government must show that its demand for evidence is reasonable or relevant.[119] Jacqueline Schofield was subpoenaed to appear before a federal grand jury in Philadelphia. She was directed to furnish handwriting exemplars and to permit her photograph and fingerprints to be taken by the FBI. The order permitted her counsel to be present during the process. She refused and was held in civil contempt.[120]

114. 409 U.S. 665 (1972).
115. United States v. Mara, 410 U.S. 19, 29-30 (1973) (Douglas, J., dissenting).
116. *Id.* at 47 (Marshall, J., dissenting).
117. *See* note 62 *supra.*
118. *See* note 40 *supra.*
119. *In re* Grand Jury Proceedings (Schofield), 486 F.2d 85 (3d Cir. 1973).
120. *Id.* at 87-88. In *Dionisio, Mara* and *Schwartz* the witnesses were each advised of the nature of the investigation and the reason the evidence was needed.

On first analysis the case seems to fit perfectly within the *Dionisio* holding. There are factual differences, however, which the Third Circuit panel stressed in requiring the government to make a prior showing of relevancy. Mrs. Schofield was not advised that she was a potential defendant. She was informed of neither the nature of the grand jury investigation nor the reason her evidence was needed. Additionally, no *in camera* showing of such need or relevance was made to the court.[121] The court of appeals refused to accept the government's contention that under *Dionisio* it need make no such showing.[122] After noting that the judiciary has the inherent power to control grand jury proceedings, the court held that a civil contempt order could not be sustained without a showing by affidavit that each evidentiary item requested was at least relevant to a grand jury investigation that was *properly within its jurisdiction.*[123] In addition, the court said, this showing must be made in open court unless extraordinary circumstances justify an *in camera* proceeding.[124]

Two factors seemed to influence the court's interpretation of *Dionisio.* The government was seeking evidence to which it had no general right, absent some connection to a matter within the grand jury's jurisdiction;[125] no such connection was established from the meager facts before the court.[126] Perhaps more important was the court's concern that sustaining the government's position would leave no practical method of preventing investigatory agencies from using grand jury proceedings to collect whatever information they wanted regarding private citizens.[127] This could easily lead to political subversion of the grand jury function and a threat to important freedoms.[128]

ANALYSIS AND CONCLUSION

It is difficult to justify the *Schofield* court's conclusion that *Dionisio* and *Mara* do not prohibit a witness from challenging the relevance of a subpoena. Justice Stewart's majority opinions twice stated that the government was not required to make *any* showing of reasonableness.[129] The Court also stated that no grand jury witness may set lim-

121. *Id.*
122. *Id.* at 93-94.
123. *Id.* at 93.
124. *Id.*
125. *Id.* at 93-94.
126. *Id.* at 87-88.
127. *Id.* at 91-92.
128. Significantly, the court of appeals suggested to the district court that it return or destroy any materials, such as handwriting exemplars, fingerprints or photographs which it might subsequently order Mrs. Schofield to provide, if the materials did not prove to be relevant to the investigation or to a subsequent indictment. *Id.* at 93-94.
129. United States v. Dionisio, 410 U.S. 1, 15 (1973); United States v. Mara, 410 U.S. 19, 22 (1973).

its to the investigation[130] and stressed the danger of impeding the grand jury's function by saddling it with mini-trials.[131]

The fourth amendment protects against *unreasonable* intrusions into privacy. It says nothing about relevance, but presumably an inquiry that was not relevant to the jury's probe would be unreasonable. There is no justification for a rule that would permit a witness to challenge relevance but not reasonableness, yet, unless one totally ignores the plain holdings of *Dionisio* and *Mara*, that seems to be the result reached in *Schofield*. The *Schofield* decision becomes more dubious if one recalls a statement by Justice Stewart (who wrote the *Dionisio* and *Mara* majority opinions) dissenting in *Branzburg v. Hayes*: "witnesses customarily are not allowed to object to questions on the grounds of materiality or relevance, since the scope of the grand jury inquiry is deemed to be of no concern to the witness."[132] In addition, the *Schwartz* case (cited with approval by Justice Stewart in *Dionisio*[133]) flatly stated that no preliminary showing of need or relevance is required.[134] Other cases have reached the same conclusion.[135] Finally, the *Schofield* court relied strongly on cases involving subpoenas issued by federal administrative agencies which it found "exactly analogous" to grand jury subpoenas.[136] This reliance is questionable, at least with regard to the issue of relevancy, and is contrary to a recent First Circuit case.[137] It can be argued that the factual differences noted above between *Schofield* and *Dionisio-Mara* justify the *Schofield* holding. It is my view, however, that this decision is erroneous in light of the Supreme Court's recent pronouncements.

The fact that *Schofield* may have been wrong according to the case law does not necessarily mean that it is wrong as a matter of basic policy. To be sure, the grand jury has great value. It is undoubtedly an effective instrument for discovering unlawful conduct and bringing appropriate charges against the guilty. When functioning properly, it can be a bulwark protecting citizens from unfounded charges and improper government oppression or harassment. On the other hand it has great potential for abuse. The criticism it has suffered is not totally unjustified.

There should be reasonable checks on grand jury and prosecutorial power. The privilege against compulsory self-incrimination and the

130. United States v. Dionisio, 410 U.S. 1, 15, *quoting* Blair v. United States, 250 U.S. 273, 282 (1919).
131. 410 U.S. at 17.
132. Branzburg v. Hayes, 408 U.S. 665, 742 n.31 (1972) (Stewart, J., dissenting).
133. 410 U.S. at 10, 15.
134. United States v. Doe (*In re* Schwartz), 457 F.2d 895, 898 (2d Cir. 1972).
135. *See* note 62 *supra*.
136. 486 F.2d at 90.
137. United States v. Doe (Popkin), 460 F.2d 328, 332 (1st Cir. 1972).

privileged communication rules provide protection in some areas. So does the prohibition against subpoenas that are too sweeping. But the vague assurances provided in *Dionisio* and *Branzburg* that courts will not permit the grand jury to become an instrument of oppression or harassment[138] are of little value if the witness cannot even learn the nature of the inquiry or the reasons for the questions. Without according at least those rights to a witness, the power of the prosecutor to collect evidence becomes virtually unchallengeable. It is noteworthy in this regard that *Dionisio, Mara* and *Schofield* all involved cases where the evidence was apparently sought by FBI agents, rather than by the grand jury itself. The juries in those cases were functioning as an arm of the constabulary rather than as independent prosecuting agencies.

A New Approach

In all but a few cases it would impose no serious burden on the government to advise a witness as to the reason evidence is sought and, where appropriate, his status as a potential defendant. In fact, it is my understanding that this is now common practice in many jurisdictions. Such information was given to witnesses Schwartz, Dionsio and Mara. This procedure should help eliminate the need to burden the court or grand jury with the "mini-trials" which were of such concern to the Supreme Court in *Dionisio*[139] because a witness, knowing the purpose of the subpoena, will usually know whether it is relevant to an investigation within the grand jury's jurisdiction. In the event of objection to the subpoena, the information given the witness would also provide the court with a basis for determining whether the grand jury subpoena was proper.

It is true that on rare occasions—as where there is danger that the witness might advise prospective defendants or other witnesses concerning the investigation, or might himself flee the jurisdiction or destroy evidence[140]—it may be necessary to withhold such information from a witness. In those instances, however, the prosecutor should be required to submit an affidavit to the court *in camera*, explaining the reasons for the subpoena. The court could then rule on possible objections to the subpoena *ex parte*. This procedure would not be a novel one to courts since arrest and search warrants are currently issued *ex*

138. *See* notes 92 & 134 *supra*.
139. United States v. Dionisio, 410 U.S. 1, 17 (1973).
140. Regarding the need for secrecy in grand jury proceedings, *see* Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 405 (1959) (Brennan, J., dissenting); 8 J. MOORE, *supra* note 3, ¶ 6.05, at 6-52 *et seq.*

parte. Although grand jury witnesses might prefer to litigate the issues in open court, it would not appear to do violence to their rights to permit resolution of likely objections on the basis of facts submitted to the court *in camera.*

This procedure would guard against the dangers of unchecked government power to investigate, while imposing very little added burden on the government and its investigative officials. It would also restore to the courts more control over grand jury investigations, which remain at least formally functions of the judiciary, not the executive. A minimal requirement of this sort probably could be imposed by courts in spite of the *Dionisio* and *Mara* holdings. In those cases, the Supreme Court was dealing only with the limitations created by the Constitution. The courts still retain "a supervisory power . . . aimed at preventing abuses of [the grand jury's] process or authority."[141] Indeed, the Third Circuit relied largely on its supervisory authority in *Schofield* to avoid the limitations of *Dionisio-Mara.*[142]

Although such a policy seems preferable to the *Dionisio-Mara* rule, which almost completely shields the grand jury from challenge by a witness, it does not fully address the problem of prosecutorial domination of the grand jury. Serving on a temporary basis, that body of laymen can hardly avoid following the leads of the prosecutor during the investigative stage.[143] It is the almost universal rule that the grand jury indictment is the prosecutor's indictment. His dominance during the *investigative* stage not only is appropriate, it is indispensable. No one today seriously expects inexperienced laymen to direct investigations into criminal conduct. At this stage grand jury members can do little more than restrain overzealous government agents.

The grand jury's role in the *indictment* process is different. There the lay members cast their votes outside the prosecutor's presence. Their basic function is to review the evidence and make an independent, impartial judgment as to the sufficiency of government evidence supporting indictment. Yet even in this function the jurors are now generally under the influence of and rely heavily on the prosecutor.[144]

141. 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 101, at 151 (1969). *See In re* Grand Jury Subpoena to Central States, Southeast and Southwest Areas Pension Fund, August Term, 1963, 225 F. Supp. 923, 925 (N.D. Ill. 1964).

142. *In re* Grand Jury Proceedings (Schofield), 486 F.2d 85, 89, 93 (3d Cir. 1973).

143. *See* Antell, *supra* note 3, at 154-55; Campbell, *supra* note 3, at 177-78.

144. A major factor in the choice of indicting by grand jury instead of by a preliminary hearing before a justice of the peace or magistrate (where this is permitted) may be the ease of obtaining indictments by this method. In Tucson, Arizona, almost 80 percent of the criminal cases handled by the Pima County Attorney's Office went before the grand jury and indictments were returned in 98.7 percent of these cases. Nilsson, *Grand Jury Called Tool of the Prosecutor,* The Arizona Daily Star, Feb. 10, 1974, § A, at 1, col. 5. These figures have led defense attorneys to allege that the grand jury is merely "rubber stamping" the cases selected by the prosecutor. *Id.* This asser-

Such an arrangement is completely at odds with our basic jurisprudential principle that the "judge" (in this case the grand jury) must not be dominated by either side.

These problems can be cured without turning the grand jury into an open, adversary, preliminary "mini-trial." It seems appropriate that the panel operates in secret and that defense attorneys are barred from its proceedings. But if it is to serve the function of impartial review, the prosecutor's guiding hand should be eliminated during the process of judging the sufficiency of indictments.

Some commentators have suggested that the only way to eliminate the admitted evil of prosecutorial domination is to abolish the grand jury entirely.[145] One such proposal would transfer the jury's investigative functions to the prosecutor, with the determination of probable cause to be resolved at a preliminary hearing.[146] The trouble with this approach is the danger of vesting in the prosecutor alone the powers of issuing subpoenas, requiring testimony under oath and granting immunity. The public would be faced with the unacceptable alternatives of opening these potent devices to an even greater danger of abuse or else having to sacrifice vital investigative tools entirely. Another approach has been to give the grand jury's functions to a single investigative officer or judge, who has all the powers now exercised by grand juries. This approach has been tried in Michigan with the "one-man grand jury"[147] and has recently been adopted in the state of Washington by creation of an "inquiry judge,"[148] who operates as an alternative to the grand jury. In Michigan the experiment met with little success and has been almost entirely abandoned in recent years.[149] No information is yet available as to its success in Washington.

As pointed out earlier in this article, the grand jury performs two functions that are substantially different: investigation, which is primarily prosecutive in nature, and review of evidence for purposes of indictment, which is a quasi-judicial responsibility. These functions are inconsistent in their very nature, and should not be performed by the same persons, just as a judge should not also serve as prosecutor. It would seem feasible to separate the functions and assign them to separate panels, one body serving as an investigative jury and the other

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tion is bolstered by the remark of one former prosecutor that "[i]f you gave them a napkin, they'd sign it." *Id.*

145. Antell, *supra* note 3, at 154; Campbell, *supra* note 3, at 174.

146. Campbell, *supra* note 3, at 174, 180-82.

147. MICH. COMP. LAWS § 767.3 (Supp. 1952).

148. WASH. REV. CODE ANN. § 10.27.050 (Supp. 1972).

149. Interview with Michigan Attorney General Frank Kelley, Nov. 8, 1973; interview with Roy C. Hayes, Chief, Organized Crime Task Force, Wayne County (Mich.) Prosecutor's Office, Nov. 20, 1973.

as an indictment jury.[150] The investigative body would function in the same manner and with the same personnel as the grand jury does now when it performs an investigative function, subject still to the rule suggested above requiring notice of investigative purpose to witnesses. The indictment body would continue to hear evidence *ex parte,* in secret proceedings, but it would be presided over by an impartial legal officer or referee who would be present during the introduction of all evidence. Subject to judicial supervision he would advise witnesses of their rights, instruct the jury on matters of law, and in addition make rulings on the admission of evidence, grants of immunity, objections by witnesses to subpoenas, or to particular questions, and other legal matters. The prosecutor would, of course, continue to present evidence. Both he and the presiding referee, however, would be absent during grand jury deliberations and voting.

Under this bifurcated system, the "inquisitorial" grand jury would remain free to pursue "every available clue"[151] in its goal of ferreting out crime and corruption wherever they may exist. When Judge Gibbons wrote in *Schofield* that grand juries "are 'basically . . . a law enforcement agency'[,] . . . an investigative and prosecutorial arm of the executive branch of government,"[152] he was, of course, speaking of this investigative function. Even though this statement probably reflects the political realities of the grand jury system, the differences between giving these functions to the prosecutor and leaving them with the grand jury remain significant. The investigative jury would be able to probe vaguely defined problem areas to bring facts and issues into focus. Its ability to act as a barometer of community morality, as well as our historically justified reluctance to give wide inquisitorial powers to a single bureaucrat, fit it well for this undertaking; however, since the investigative jury would not have the power to indict, cumbersome procedural safeguards beyond the privileges already guaranteed certain witnesses would not be needed.

When the investigative jury's report indicates that criminal charges may be in order, the matter should be taken to the indictment jury. However valid Judge Gibbons' characterization may be when applied to the investigative phase, it is inapposite at the indictment stage. The finding or probable cause is essentially a judicial function, and it has

150. A somewhat similar proposal is made by Judge Ruffner, *see* Ruffner, *supra* note 13. He does not, however, recommend a legal officer or referee for indictment juries. Attorney General Younger of California also proposed a grand jury dual panel system, Assembly Bill 410, Feb. 20, 1973. It died in the California Assembly Criminal Justice Committee.

151. United States v. Stone, 429 F.2d 138, 140 (2d Cir. 1970).

152. 486 F.2d 85, 90 (3d Cir. 1973).

been the shortcomings of grand jury performance of this function which have drawn the most valid criticism. The insertion of a referee would assist the jury in maintaining a dispassionate approach and would curb the present temptation for prosecutorial excess. The essential *ex parte* nature of the proceeding would be preserved, however, so that the additional steps required for a two-tiered grand jury proceeding would not yield the kind of burdens inherent in a universal system of adversary preliminary hearings. The presiding officer could expedite the proceeding by editing transcripts of investigative hearings to remove privileged, irrelevant or otherwise improper matter; witnesses would be called in the flesh if the prosecutor or jurors wished additional information.

In a time when the growth of government power presents perhaps the greatest threat to individual freedom, a vigorous grand jury offers a vehicle for reasserting democratic sovereignty. The framework for restructuring presented above will, I believe, minimize the dangers attendant to the institution while retaining the grand jury's greatest virtues. As an ad hoc body of laymen with no vested interests or political ambitions to be furthered by abusing the criminal justice process, it will be able again to breathe "the spirit of a community into the enforcement of law."[153]

153. United States v. Smyth, 104 F. Supp. 283, 291 (N.D. Cal. 1952).