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ELIMINATE THE GRAND JURY

WILLIAM J. CAMPBELL*

INTRODUCTION

Following almost two hundred years of continuous and unwavering support of the institution we know as the grand jury, the Supreme Court recently announced an opinion which seems to suggest the first "leak in the dike" of its regard for that once exalted institution. Speaking for the six-member majority in *United States v. Dionisio*,¹ Justice Stewart acknowledged that "the Grand Jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor. . . ."² Even stronger expressions of concern over the continuing viability of the grand jury are found in the dissenting opinions filed there by Justices Douglas and Marshall. Justice Douglas, in graciously referring to my report to the Conference of Metropolitan Chief District Judges of the Federal Judicial Center,³ observed that, "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."⁴ Justice Marshall emphasized the dangers facing grand jury independence as compounded by the *Dionisio* decision itself.⁵

These comments are significant not only because of their source but also because they were not germane to the resolution of the problem before the Court. The volunteered concern of the highest judicial officers of our land over the method

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¹ 93 S.Ct. 764 (1973). See also *United States v. Mara*, 93 S.Ct. 774 (1973). In both *Dionisio* and *Mara* the majority of the Court acknowledged the grand jury's right to subpoena witnesses and also to require them to produce nontestimonial evidence where the physical characteristics sought to be produced are "constantly exposed to the public."

² 93 S.Ct. 764, 773 (1973).

³ See Campbell, *Delay in Criminal Cases*, 55 F.R.D. 229, 253 (1972). See also Campbell, *Proposals for Improvements in the Administration of Criminal Justice*, 54 CHI. BAR REC. 75 (1972).

⁴ 93 S.Ct. 777 (1973) (Douglas, J., dissenting).

⁵ 93 S.Ct. 781 (1973) (Marshall, J. dissenting).

by which criminal prosecutions are initiated merits the careful reflection of all Americans, especially those involved with the administration of justice in this country.

My thesis is simple, although I hope not simplistic. The grand jury should be abolished; prosecution should be commenced upon an information filed by the prosecuting official and followed by a probable cause hearing before a judicial officer, such as a magistrate, who would determine whether there is sufficient evidence to permit the prosecution to continue.

Abolition of the grand jury is not a revolutionary idea. In England, from whom we borrowed this noble institution of the past, the grand jury was abolished except in rare cases by the Administration of Justice Act of 1933.⁶ Many of our own states have to a greater or lesser degree followed suit. According to a survey compiled in 1964, only five states require prosecution of all crimes by indictment; 22 states demand that only serious offenses be initiated by indictment, and 23 states permit prosecution of substantially all crimes by either information or indictment.⁷

In my view, the movement away from the grand jury process was and is prompted by the realization that the historical assumption concerning its neutrality is no longer true. Today, the grand jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at any time, for almost anything, before any grand jury. I intend no criticism of prosecuting officials by this observation. I am a former prosecutor. I know that the talented and dedicated men and women of our prosecuting offices perform a necessary and laudable public function. I merely wish here to call attention to the present states of affairs.

My objective is to analyze the operations of the grand jury in the context of its stated purpose and function, and to suggest, within the same framework, an alternative method of initiating prosecutions which in my judgment will ultimately im-

⁶ See T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 112 n. 1 (5th ed. 1956).

⁷ See Spain, *The Grand Jury Past and Present: A Survey*, AM. CRIM. L.Q. 119, 126-42 (1964).

prove the status and the performance of the prosecutor, as well as restore the original purpose of the grand jury—protecting the citizen. This approach differs substantially from that of many others who have considered the subject matter.⁸ The comments and conclusions made herein represent in large measure the product of over thirty-five years personal involvement in the administration of criminal justice, both as prosecutor and judge. It is from this perspective that the analysis is made.⁹

EVOLUTION OF THE GRAND JURY

Although the early history of the grand jury is clouded, the ancestor of our present-day inquest made its first appearance in England during the reign of King Henry II. Laymen were summoned by the King to what was called the Assize of Clarendon. They were responsible for ferreting out crimes in their locale and informing the Crown.

⁸ See, e.g., NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION NUMBER 4 (1931) (KNOWN AS WICKERSEAM COMMISSION REPORT); R. YOUNGER, *THE PEOPLES' PANEL; THE GRAND JURY IN THE UNITED STATES, 1634-1941* (1963); Antell, *The Modern Grand Jury: Bewitched Super Government*, 51 A.B.A.J. 153 (1965) (hereinafter cited as Antell); Coates, *Grand Jury: The Prosecutor's Puppel. Wasteful Nonsense of Criminal Jurisprudence*, 33 PENN. B.A.Q. 311 (1962); Foster, *Grand Jury Practice in the 1970's*, 32 OHIO ST.L.J. 701 (1971) (hereinafter cited as Foster); Lumbard, *The Criminal Justice Revolution and the Grand Jury*, 39 N.Y.S.B.J. 397 (1967) (hereinafter cited as Lumbard); Mar, *The California Grand Jury System: A Vestige of Aristocracy*, 1 PAC. L.J. 36 (1970); Moley, *The Initiation of Criminal Prosecutions by Indictment or Information*, 29 MICH. L. REV. 403 (1931); Morse, *A Survey of the Grand Jury System*, 10 ORE. L. REV. 101 (1931) (hereinafter cited as Morse); Shannon, *The Grand Jury: True Tribunal of the People or Administrative Agency of the Prosecutor?*, 2 N. MEX. L. REV. 141 (1972) (hereinafter cited as Shannon); Watts, *Grand Jury: Sleeping Watchdog or Expensive Antique?*, 37 N.C.L. REV. 290 (1959); Wickersham, *The Grand Jury: Weapon Against Crime and Corruption*, 51 A.B.A.J. 1157 (1965) (hereinafter cited as Wickersham); Younger, *The Grand Jury Under Attack*, 104 PA. L. REV. 429 (1955); Note, *An Examination of the Grand Jury in New York*, 2 COLUM. J.L. & SOC. PROB. 88 (1966); Note, *Evaluating the Grand Jury's Role in a Dual System of Prosecution: An Iowa Case Study*, 57 IA. L. REV. 1354 (1972); Note, *Should the Grand Jury System be Abolished?*, 45 KY. L.J. 151 (1967); Note, *Grand Jury: Bulwark of Prosecutorial Immunity?*, 3 LOYOLA (CHICAGO) L.J. 305 (1972); Note, *Grand Jury Proceedings: The Prosecutor, The Trial Judge, and Undue Influence*, 39 U. CHI. L. REV. 761 (1972).

⁹ Over the years I have maintained in many bound volumes long-hand notes of my impressions during each trial. In order to challenge the validity of my own convictions, I have attempted to remain current with the vast literature in the field. However, my remarks here are my own.

The investigations were conducted largely by the "grand jurors" themselves, and charges were lodged not simply upon evidence but upon the prevailing belief within the community concerning a suspect's guilt. No one viewed these bodies as bold guardians of individual rights. They were conceived as a device for enlarging and centralizing the authority of the King and providing his rule with the benefits derived from community accusation of crime. Upon return of a charge, a presumption of guilt arose and the task of demonstrating innocence fell to the accused. Having no independence from the Crown, these early inquests became potent weapons for enforcing the royal authority.¹⁰

Although it did not specifically refer to any grand inquest, the famed Magna Carta wrested from King John at Runnymede by his barons on June 15, 1215, is, in its broad amplification of the legal procedural improvements originally granted by the Charter of Henry I in 1100, frequently credited with having started the process which we know as the grand jury. The procedure, however, even as slightly enlarged in 1216 and 1217 by Henry III and again in 1297 by Edward I remained completely within the absolute control of the Crown and generally public in the nature of its hearings.

The concept of the grand jury as a body free from royal influence did not appear until 1681 during the famed Earl of Shaftesbury's case.¹¹ The Crown had charged the Earl with treason and had demanded that the grand jury hear the evidence in open court. The jury insisted on secrecy, however, and later refused to indict despite extreme pressure from the Attorney General. With the advent of secrecy in its proceedings, this council of laymen thereafter developed into the guardian of individual rights, standing between the prosecutor and the accused and protecting the citizen from unfounded accusation of crime.

With these historical underpinnings, the grand jury was transported to this country by the early colonists and its was preserved, after independence,

¹⁰ For more detailed history, see generally I. W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* (1922); Antell, *supra* note 8, at 155; Morse, *supra* note 8, at 106-18; Note, *Evaluating the Grand Jury's Role in a Dual System of Prosecution: An Iowa Case Study*, 57 IA. L. REV. 1354, 1357-60 (1972); Note, *Should the Grand Jury System be Abolished?*, 45 KY. L.J. 151 (1967); Note, *Grand Jury: Bulwark of Prosecutorial Immunity?*, 3 LOYOLA (CHICAGO) L.J. 305, 307 (1972).

¹¹ Proceedings Against the Earl of Shaftesbury, 8 State T. 759 (1968).

through the fifth amendment to the Constitution of the United States.¹² It thus became entrenched in our judicial heritage despite many early criticisms that it was not necessary to protect individuals from governmental oppression in a country with a representative form of government.¹³ Although England and many of our own States have long since abandoned the grand jury as the exclusive means of initiating criminal prosecutions, the Supreme Court, for obvious constitutional reasons, has consistently resisted any efforts to limit the broad powers of this body in the federal field. Thus, until *Dionisio* the devotion of our highest judicial tribunal to the grand jury system was unrelenting, and is pointedly illustrated in *Ex Parte Bain*,¹⁴ with a quotation from an actual grand jury charge as follows:

The institution of the Grand Jury, . . . is of very ancient origin in the history of England . . . For a long period its powers were not clearly defined . . . it was at first a body which not only accused, but which also tried public offenders. However this may have been its origin, it was at the time of the settlement of this country an informing and accusing tribunal only, without whose previous action no person charged with a felony could, except in certain special cases, be put upon his trial. And in the struggles which at times arose in England between the powers of the King and the rights of the subjects, it often stood as a barrier against persecution in his name; until, at length, it came to be regarded as an institution by which the subject was rendered secure against oppression from unfounded prosecutions of the Crown. In this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen which required the existence of the Grand Jury as a protection against oppressive action of the government. Yet the institution was adopted in this country, and is continued from considerations similar to those which gave to it its

chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government or be prompted by partisan passion or private enmity.

As to the expansive powers of this body, the Supreme Court has observed that "[i]t is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to 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."¹⁵ This early adulation of the high Court for the grand jury process was reaffirmed in later decisions. Thus, we see it described as standing between the prosecutor and the accused, preventing charges based upon intimidating power, malice of personal ill will;¹⁶ we find it championed as the embodiment of a constitutional guarantee that presupposes an investigative body acting independently of either prosecutor or judge;¹⁷ and we observe it characterized as recently as 1972 as "[a]n important instrument of effective law enforcement."¹⁸

However the Court chose to view it, early in this century a growing body of critics of this institution began to surface.¹⁹ Scholars, prosecutors, judges and students of the law began questioning whether the historical underpinnings of the grand jury were

¹² *Blair v. United States*, 250 U.S. 273, 282 (1919).

¹³ Historically, [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.

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

¹⁴ The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.

Stirone v. United States, 361 U.S. 212, 218 (1960).

¹⁵ *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972).

¹⁶ See, e.g., Atkinson, *The Useless Grand Jury*, 15 LAW NOTES 109 (1911); Bronaugh, *Shall the Grand Jury Be Abolished*, 25 LAW NOTES 187 (1922); Thompson, *Shall the Grand Jury in Ordinary Criminal Cases Be Dispensed with in Minnesota*, 6 MINN. L. REV. 615 (1922); Note, *The Proposed Abolition of Grand Juries*, 58 SOL. J. 199 (1914); Note, *Should the Grand Jury System Be Abolished*, 15 YALE L.J. 178 (1906); Note, 17 LAW NOTES 218 (1914).

¹⁷ U.S. CONST. amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

¹⁸ See R. YOUNGER, *THE PEOPLES' PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941*, at 138-54 (1963).

¹⁹ 121 U.S. 1, 11 (1887).

still viable in a pluralistic, urban society. Doubts concerning the independence of the institution and its status as the great protector were frequently expressed. The ancient body and its offspring, the criminal indictment, disappeared in England and experienced reduced service in many of our own states.²⁰ Against this massive groundswell of opinion, one wonders why the Supreme Court persisted for so long in its unquestioned acceptance of this body. Whatever the reason, the first inkling of official skepticism from the Court emerged in *Dionisio*. Since the Court has acknowledged that the Constitutional guarantee presupposes an independent investigative body, it seems appropriate to examine the present-day validity of that supposition.

THE GRAND JURY—ITS FUNCTIONS AND OPERATIONS

The grand jury in a traditional sense has quite properly been considered an arm of the court. Its responsibilities are essentially threefold: (1) the investigation of crimes or "public offenses" committed within the boundaries of its jurisdiction; (2) the identification of persons suspected of having committed the offenses, and the related determination of whether there is probable cause to charge a person with an offense; and (3) the publication of its findings to the court by way of an indictment, presentment, or report.

In most jurisdictions, including the federal system, grand jurors are selected on a random basis usually from voting lists.²¹ Some states, notably California, still follow the old practice of permitting the judges themselves to select the grand jurors.²² Whatever the method of selection, the qualifications for service are quite minimal. Customary legal qualifications include only a minimum age, mental and physical competency and residence in the jurisdiction for a certain period of time.²³ Although this is satisfactory—even desirable for petit jurors who function within an adversary system under the constant guidance of an impartial judge—it provides grand jurors who possess no

particular skill or training for the different and highly important responsibilities they are to assume.

Once assembled, the jurors are usually treated to a rather lofty explanation of the enormity and significance of their task by the presiding judge of the particular jurisdiction. The formality of apprising them concerning their powers and obligations having been disposed of, the jurors are then dispatched to commence their duties.

It is at this juncture that the prosecuting official makes his first appearance. Although technically subject to the direction of the grand jury, in practice the prosecutor actually conducts the proceedings.²⁴ The prosecutor selects which witnesses the grand jury will subpoena, what evidence it will hear, which documents it will examine, and which suspected criminal violations it will consider. It is the prosecutor who will explain and construe the myriad of laws that the grand jury is charged to enforce. Moreover, this representative of the executive branch of the government will also instruct the jury as to the quantum of proof necessary to justify an indictment.

The impact of the prosecutor's position in this scheme of things cannot be overestimated. Its pervasiveness is high-lighted by the simple fact the grand jury proceedings are non-adversarial in nature. There is no requirement that both sides be heard. Witnesses appearing before a grand jury are not entitled to the presence of counsel.²⁵ Questions propounded a witness are not subject to the ordinary rules of evidence.²⁶ The scope of the grand jury's inquiry, although unlimited in theory, is subject to the skillful control and direction of the prosecutor. So also is its result limited by its inability, at least in the federal system, to return an indictment without the prosecutor's written approval.²⁷

Because of the way in which modern society has developed, grand jurors are no longer summoned

²⁴ FED. R. CRIM. P. 6 (d) authorizes the presence of prosecutors in the grand jury room during its sessions, except when the jury is deliberating or voting. Compare *Antell*, *supra* note 8, at 155, wherein the author states that in New York the deliberative sessions are attended by the prosecutor.

²⁵ See, e.g., *Antell*, *supra* note 8; *Foster*, *supra* note 8; *United States v. Corallo*, 413 F.2d 1306 (2d Cir.), *cert. denied* 396 U.S. 958 (1969). Cf. *FED. R. CRIM. P. 6 (d)*; *United States v. Levinson*, 405 F.2d 971 (6th Cir. 1968).

²⁶ See, e.g., *Costello v. United States*, 350 U.S. 359 (1956).

²⁷ *FED. R. CRIM. P. 7(c)*; *Cox v. United States*, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965).

²⁰ The Constitution does not require the states to initiate all serious prosecutions by grand jury indictment. *Hurtado v. California*, 110 U.S. 516 (1884).

²¹ See, e.g., 28 U.S.C. § 1861 *et seq.* (1970); ILL. REV. STAT. ch. 78, § 9 *et seq.* (1972); N.Y. JUDICIARY LAW §§ 594, 684 (McKinney 1968).

²² See, e.g., CAL. PENAL CODE § 903.4 (WEST 1970).

²³ See, e.g., ILL. REV. STAT. ch 78, § 2 (1972); FLA. STAT. ANN. §§ 40.01, 905.01 (1973); MO. ANN. STAT. § 494.010 (1973).

to bear witness from their own knowledge or from knowledge gained through their own community experiences, as was the case at the time the grand jury was first established. In our vast, urban society jurors have no intimate knowledge of the goings-on within the community. They must depend, therefore, upon the facts and knowledge brought before them from extrinsic sources. They have no investigative skills or resources of their own and thus the task of gathering facts must be performed for them by the professional investigative agencies at their disposal—law enforcement agencies.

Against this framework, the findings of Wayne Morse's monumental survey of grand jury operations in twenty-one states came as no surprise to experienced observers of this institution.²⁸ The then Professor (later Senator) Morse, discovered that of the thousands of cases presented to the grand juries sitting in those states, less than 5% of the investigations had been initiated by the jurors themselves.

In my thirty-five years of judicial experience, which includes twelve years as Chief Judge in the Northern District of Illinois and a term as United States Attorney for the same district, there has not been a single criminal investigation begun by a grand jury.

The survey conducted by Professor Morse also uncovered the fact that in those cases where the grand jury refused to indict, the prosecutor concurred in that decision 95% of the time.²⁹ This finding also comports with my own observations. Furthermore, it is not uncommon for a prosecutor confronted with pressures from the news media to shift the burden for declining prosecution to the grand jury. In this way he avoids any personal accountability for the ultimate decision. The indictment system thus can provide a prosecutor with a convenient scapegoat for his actions.

In support of the independence of the grand jury, it is suggested by some that this body of laymen enjoys certain powers which counter-balance the potential for prosecutorial influence.³⁰ It is pointed out that grand jurors may extend or broaden investigations,³¹ may call and question

witnesses themselves,³² may direct the production of documentary evidence,³³ and may seek legal advice from the court itself.³⁴ Too, in most jurisdictions the prosecutor may not volunteer unrequested comment upon the sufficiency of the evidence and may not be present in the jury room during actual deliberations.³⁵ The forceful exercise of its powers could well operate to insure and maintain the independence of the grand jury.

In my experience, however, these powers are rarely, if ever, invoked by the jurors. Investigations of any consequence are always preceded by careful study and evaluation by the prosecutor's office. Witnesses are interviewed, documents are sorted and examined, and the evidence as a whole is prudently analyzed. The twenty-three laymen who make up the grand jury possess neither the skills nor the training for this sophisticated task. Only after such detailed preparation by law enforcement officials is the case presented to the grand jury. The prohibition against volunteered prosecutorial comment is usually rendered nugatory by the inevitable jurors' request for the prosecutor's advice on the sufficiency of the very evidence he prepared and presented to them. Rarely is any transcript taken or written on this advice. Indeed, in most districts no stenographic record is required of grand jury proceedings except when the prosecutor desires a particular witness' testimony under oath preserved for his own use. At its best, the grand jury today operates as a sounding board for the predetermined conclusions of the prosecuting official.

If the independence of the grand jury constitutes the rationale for the grand jury clause of the fifth amendment to the Constitution, as the Supreme Court has itself suggested,³⁶ then I respectfully submit that, as we did with our unfortunate "noble experiment" with prohibition, we should eliminate by constitutional amendment the requirement of grand jury indictment. In response to the exigencies of modern society, the grand jury has ceased to function as an agency independent from prosecutorial influence. It is today but an

²⁸ See, e.g., *City of Los Angeles v. Williams*, 438 F.2d 522 (9th Cir. 1971).

²⁹ See, e.g., *United States v. United States District Court*, 238 F.2d 713 (4th Cir. 1956), *cert. denied sub nom. Valley Bell Dairy Co. v. United States*, 352 U.S. 981 (1956).

³⁰ See, e.g., Note, *Grand Jury Proceedings: The Prosecutor, The Trial Judge, and Undue Influence*, 39 U. CHI. L. REV. 761, n.8 (1972).

³¹ See, e.g., FED. R. CRIM. P. 6 (d).

³² *Stirone v. United States*, 361 U.S. 212, 218 (1960).

²⁸ Morse, *supra* note 8.

²⁹ *Id.* at 151.

³⁰ See, e.g., Brown, *Ten Reasons Why the Grand Jury in New York Should be Retained and Strengthened*, 22 THE RECORD 471 (1967); Lumbard, *supra* note 8; Wickersham, *supra* note 8.

³¹ See, e.g., *United States v. Kysar*, 459 F.2d 422 (10th Cir. 1972); *In re Dymo Industries, Inc.*, 300 F. Supp. 532 (D.C. Cal. 1969).

alter ego of the prosecutor. It has outlived its reputation as the bulwark of democracy. Indeed, it is that very pretention that has led some to suggest that the grand jury has become instead the bulwark of prosecutorial immunity, encouraging abuses by permitting the prosecutor to carry on his work with complete anonymity.³⁷

In the face of the demonstrated inability of the grand jury to function as an independent investigative agency, and the obvious reasons therefore, it is surprising to me that opposition to its abolition continues in some circles.³⁸ Those who favor its continuation point to the famous grand jury investigations of the 1920's and 1930's most notably New York's "racket busting" grand juries directed by Special Prosecutor (later Governor) Thomas E. Dewey. Through these examples, it is contended that absent an independently functioning body such as a grand jury, society may not protect itself against the recalcitrant, corrupt or politically-motivated prosecutor. At the outset it should be observed that these exceptional investigations were prompted not by any forceful initiative of any grand jury but solely as a result of newspaper exposures. The investigations were organized, controlled and directed by Special Prosecutor Dewey with his talented special assistants. The role of the grand jury was, as usual, passive, only placing its official stamp upon the labors of these special prosecuting authorities. Could not Mr. Dewey have achieved the same praiseworthy result in a probable cause hearing before a competent legal officer?

It has also been suggested that the mere existence of the grand jury acts as a deterrent to the presentation of unfounded accusations by overzealous and malicious prosecutors.³⁹ Of course, no empirical data is available to support this theory. Although difficult to refute for the same reason, in my judgment both logic and my experience mitigate its persuasiveness. In the first place, the theory, like all others in support of the grand jury,

³⁷ See, e.g., Antell, *supra* note 8, at 156; Note, *Grand Jury: Bulwark of Prosecutorial Immunity?*, 3 LOYOLA (CHICAGO) L.J. 305 (1972); Note, *Grand Jury Proceedings: The Prosecutor, The Trial Judge, and Undue Influence*, 39 U. CHI. L. REV. 761 (1972).

³⁸ See, e.g., R. YOUNGER, *THE PEOPLES' PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941* (1963); Wickersham, *supra* note 8.

³⁹ The Grand Jury serves two great functions. One is to bring to trial persons accused of crime upon just grounds. The other is to protect persons against unfounded or malicious prosecutions. . . . Orfield, *The Federal Grand Jury*, 22 F.R.D. 343, 394 (1958).

presumes the existence of a strong independent body intelligently and carefully analyzing the evidence presented to it. As we have seen, such independence has long since vanished under the strain of outside forces. Moreover, this myth of grand jury independence affords the prosecutor anonymity in the exercise of his discretion. I suggest that the consequence of such misplaced responsibility for the initiation of a prosecution encourages, rather than stifles, mal-intended prosecution and character assassination.

In a recent national telecast of the brilliant and popular series entitled "America—A Personal History of the United States," that infamous part of our colonial history known as the Salem trials was realistically re-enacted before millions of Americans. In one of the moving scenes of this portrayal its outstanding author and commentator, Alistair Cooke, is seen sitting at the fireside of historic Rebecca Nurse House and heard speaking about the self protective community reflexes which inspired the Salem witch hunts. His beautifully delivered analysis of that horrible tragedy brought him logically and dramatically to the following startling conclusion:

I am thinking about the Grand Jury system which was invented in England centuries ago. The idea being that before a man was brought to trial a company of his neighbours who knew him would have a pretty good idea whether there was a plausible case. Well, it was abolished in England on the grounds that in a city of several millions it was very unlikely that a Grand Jury would know him. But its been retained here, and when the Grand Jury meets and says there is a case it brings in a bill of indictment. And I often wonder how many Americans see headlines, "so and so indicted," how many people confuse indictment with conviction, how many tend to think with the good neighbours of Salem, that a man accused is a man guilty.

After a lifetime of personal observation, I concur completely in the curt observations of a recent commentary:

The grand jury has thus become in effect an administrative agency, executing in secrecy and with unlimited discretionary power, the policies, also determined in secret, of law enforcement officers who continue to maintain the fiction that the grand jury is a free and autonomous body impartially ferreting out objective truth. This proposition is simply no longer believable.⁴⁰

⁴⁰ Shannon, *supra* note 8, at 167.

It is sadly ironic that the secrecy of the grand jury, the original source of its independence in the Earl of Shaftesbury's case, has through the passage of time been transformed into a shield of the prosecutor, immunizing him from public scrutiny and responsibility for his conduct.⁴¹

I am convinced that the myth of the grand jury, with its price in terms of time,⁴² money, and energy to the system of criminal justice in this country, must be abandoned. If we are to continue to meet the challenges and demands placed upon our system of justice, then we must devise and implement a meaningful alternative to this archaic and inefficient institution.

AN ALTERNATIVE TO THE GRAND JURY

As I stated at the outset, I favor a system which would bring theory into line with reality by placing the responsibility for initiating criminal prosecutions where it in fact already exists—with the prosecuting attorney. Prosecutions should be commenced upon the filing of an information signed by the prosecutor, and be followed by a probable cause hearing before a judicial officer who would determine whether there is sufficient evidence to allow the prosecution to continue to trial. A most salutary result of such a process would be the removal of the anonymity which presently enshrouds the exercise of prosecutorial discretion through the vehicle of the grand jury.

My suggestion would encompass the transfer to the prosecutor all powers which currently belong to the grand jury. Thus, for example, the subpoena power would be lodged with the prosecuting

officer. This concept insofar as it relates to non-testimonial identification or evidence, has already been suggested to the Judicial Conference by its Advisory Committee.⁴³ It might also be noted that most federal regulatory agencies already possess subpoena power.⁴⁴ Witnesses could be examined under oath as well as in secret, their testimony being recorded by an official court reporter. Testimony would thus be preserved for use at trial, if necessary.⁴⁵ Authority to extend immunity from prosecution in exchange for testimony would also be given the prosecuting attorney. Indeed, federal prosecutors already enjoy such authority under the new Omnibus Crime Act.⁴⁶

Upon reaching a determination that a prosecution should be initiated, the prosecutor would then file a criminal information with the court in much the same fashion as indictments are now presented. A hearing to determine whether there is probable cause to proceed with the prosecution would then be scheduled. The hearing would be conducted before a judicial officer such as a magistrate. I suggest that the hearing be adversary in nature, with the accused given the right to appear with counsel, cross-examine the prosecution's witnesses and present evidence in his own behalf.⁴⁷

The benefits which would accrue from the system which I have described seem to me to be unlimited. The determination of whether a citizen would be required to answer criminal charges brought against him would be made by a member of the judiciary. The sham of the "autonomous" grand jury would be discarded in favor of a judgment made by one trained and skilled in the law, and more importantly not subject to the direction and control of the prosecuting agency. True independence would be restored, thereby revitalizing the concept that a citizen should be protected against unfounded accusation of crime, whatever its source.

⁴³ Committee on Rules of Practice and Procedure, Proposed Amendments to Criminal Rules, rule 41.1, reported in 52 F.R.D. 409, 462-67 (1971).

⁴⁴ See, e.g., Communications Act of 1934, 47 U.S.C. § 409 (e) (1970); Federal Trade Commission Act, 15 U.S.C. § 49 (1970); Securities Exchange Act of 1934, 15 U.S.C. § 78 (u) (1970).

⁴⁵ See *Dennis v. United States*, 384 U.S. 855 (1966), wherein the Court held that the petitioners would be allowed to examine the grand jury minutes relating to trial testimony of four government witnesses, despite the fact that these witnesses were available for cross-examination.

⁴⁶ Omnibus Crime Act, 18 U.S.C. § 6003 (1970).

⁴⁷ This procedure is now successfully used in our military justice system. Military Justice Act of 1969, 10 U.S.C. § 832 (1970).

⁴¹ Professor Kenneth Culp Davis strongly remonstrates the present state of affairs:

In our entire system of law and government, the greatest concentrations of unnecessary discretionary power over individual parties are not in the regulatory agencies but are in the police and prosecutors. Unfortunately, our traditional legal classifications—"Administrative Law," the "Administrative Process" and "Administrative Agencies"—have customarily excluded police and prosecutors. . . . [T]here has been a failure to transfer know-how from advanced agencies, such as the federal regulatory agencies, to such backward agencies as the police departments of our cities. I think that both police and prosecutors, federal as well as state and local, should be governed by many principles that have been created by and for our best administrative agencies. The police are among the most important policy-makers of our entire society. And they make far more discretionary determinations in individual cases than any other class of administrators; I know of no close second.

K. DAVIS, *DISCRETIONARY JUSTICE* 222 (1969).

⁴² See Campbell, *Delays in Criminal Cases*, 55 F.R.D. 229, 253 (1972).

Investigative powers so necessary to the orderly maintenance of a peaceful society would not be curtailed. They would simply be lodged with the prosecuting authority, where their de facto exercise has already come to reside. Constitutional guarantees would not be diluted in the slightest. Judges would remain available to entertain motions seeking to prevent any over-reaching by prosecutors. The civil analogue to such a procedure would be the protective order issued in the context of discovery disputes.⁴⁸ Also, a transcript of the prosecutor's investigative proceedings would always be available for review by the judge.

The advantages which some contend flow from the secret nature of grand jury proceedings would also be preserved under the system I propose. Although this secrecy has been the subject of well-intended criticism in recent years,⁴⁹ no one can question that in some cases it has its benefits, during the investigatory phase of a prosecution. It is said to encourage disclosure by witnesses who have information concerning the commission of a crime, to prevent outside influences from contaminating the investigation, to prevent the accused from fleeing prior to being charged, to limit subornation of perjury, and to protect the innocent from the harm that might be visited upon them by disclosure of an investigation not leading to a formal charge.

Perhaps the most significant by-product of my suggestion will be the focusing of responsibility and concomitant accountability for the initiation of a criminal prosecution with the prosecuting authority. No longer will the prosecutor be able to hide anonymously behind the shield of the grand jury. His decision to prosecute will be reviewable by a trained and independent legal officer. As with the conduct of our other institutions of government, public scrutiny will follow his actions. In my considered judgment, such a scheme cannot help but have a sobering impact upon the so-called "overzealous" prosecutor. Furthermore, our courts would be relieved of many cases now returned by grand juries at the urging of such prosecutors despite woefully insufficient evidence to convict.

Another important contribution which would result from the system I advocate would be a substantial increase in the efficiency and economy of our system of criminal justice. It cannot be doubted that the daily operation of grand juries in the communities across this land constitutes a

very expensive project. Nor can we underestimate the unnecessary waste in the energies of our law enforcement and prosecuting personnel generated by the totally repetitious task of making presentations before the grand jury. The elimination of this needless squandering of resources would be a great boon to the administration of justice.

The defenders of the grand jury system, I suspect, will greet my proposals with the customary loud cry that the problem of the recalcitrant or politically-motivated prosecutor remains unresolved. They will no doubt urge that the concentration of so much power in the hands of the prosecutor permits him to protect his political friends from criminal investigations. Thus, political fraud and corruption will stand as the unwitting, but nonetheless, grateful beneficiaries of my suggestions.

In response, I would submit that a prosecutor so inclined under our present system would simply fail to present such investigations to a sitting grand jury. Referring again to the famed racket busting grand juries in New York during the 1930's, I note that it was the extrinsic pressure of the news media which brought about the appointment of Special Prosecutor Dewey. And it was the resourcefulness of Dewey and his staff which ultimately produced evidence sufficient for indictments. I would suggest that the problem could be solved similarly under my proposal. The court, either on its own motion or upon application of an interested citizen, would retain the power to appoint a special prosecutor. It would then conduct an investigation in the same manner that I have prescribed for its duly constituted counterpart.

In regard to what we know as the grand jury presentment or report, I feel that characterizing such reports as the product of the grand jury is again a misnomer. Their preparation, from the initial fact investigation to the final drafting, represents the exclusive effort of the prosecutor and his staff. The grand jury merely affixes its imprimatur prior to the filing of the report with the court. Under my suggestion, the prosecutor would retain the authority to file such reports and the court would retain its present power to accept or reject them. I think it worthy of mention that this almost disused function of the grand jury has now been generally supplanted by legislative investigating commissions and regulatory agencies with elaborate staffs and highly skilled experts at their disposal.

⁴⁸ See FED. R. Crv. P. 26 (c).

⁴⁹ See, e.g., Antell, *supra* note 8; Foster, *supra* note 8.

CONCLUSION

In light of the Supreme Court's recent observations concerning the grand jury, I feel that the time is now at hand to eliminate that ancient institution's place in our system of law. I have long contended that it has outlived its usefulness and has degenerated into nothing but a convenient shield for the prosecutor. Today, it represents a misallocation of the responsibility for the decision

to initiate a criminal prosecution by perpetuating the myth that it stands as a bulwark between the prosecutor and the accused. Before the ever-growing demands placed upon our system of justice completely overwhelm us, it is time to face reality. A constitutional amendment is necessary to effect such a change on the federal level. The enormity of that task must not deter us. Let us begin—now!