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THE GRAND JURY—PROSECUTORIAL ABUSE OF THE INDICTMENT PROCESS

ROBERT GILBERT JOHNSTON*

INTRODUCTION

From its inception in the United States, the grand jury has been regarded as security to the accused against oppressive prosecution and as protector of the community against public malfeasance and corruption.¹ Nevertheless, it is now the subject of considerable controversy. Critics of the grand jury argue that it is inefficient, expensive and unnecessary.² In Great Britain the grand jury was abolished in 1933. In many American jurisdictions its powers have been limited or superseded by other devices or institutions.³

Significantly, this disfavor has come at a time when there is renewed concern over the competency and integrity of those public officials whom the grand jury is suppose to control.⁴ It has occurred

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¹ See, e.g., *Wood v. Georgia*, 370 U.S. 375, 390 (1962), where the Supreme Court stated that the grand jury:

has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function . . . of standing between the accuser and the accused, . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.

See also Dewey, *Grand Jury, The Bulwark of Justice*, 19 THE PANEL 3 (1941), where the grand jury is described as the "bulwark of protection for the innocent and the sword of the community against wrongdoers."

² See, e.g., *United States v. Dionisio*, 410 U.S. 1, 17 (1973); *People v. Sears*, 49 Ill. 2d 14, 33, 273 N.E.2d 380, 390 (1971); Calkins, *Abolition of the Grand Jury Indictment in Illinois*, 1966 ILL. L.F. 423 (1966); Campbell, *Eliminate The Grand Jury*, 64 J. CRIM. L. & C. 174 (1973); Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AMER. CRIM. L. REV. 701 (1972); Shannon, *The Grand Jury: True Tribunal of the People or Administrative Agency of the Prosecutor?*, 2 N. MEX. L. REV. 141 (1972).

³ See Calkins, *Abolition of the Grand Jury Indictment in Illinois*, 1966 ILL. L. F. 423, 424 n.6 (1966); Harno, *Some Significant Developments in Criminal Law and Procedure in the Last Century*, 42 J. OF CRIM. LAW 422, 451 (1951).

⁴ See Lumbard, *The Criminal Justice Revolution and the Grand Jury*, 39 N.Y.S.B.J. 397, 400 (1967), where the author states:

We should not forget that our District Attorneys are elected officials, that they must stand for election at stated intervals, and this makes them subject to pressures and temptations if they have the power to act alone, and there are some cases where it would not be in the public interest to

even though the grand jury has been actively participating in the investigation and prosecution of public corruption. It also arises amidst a growing awareness that an indictment can have serious effects on the reputation of the accused, and force both the accused and the state to incur the considerable expenses associated with trial.⁵

The purpose of this article is: (1) To identify and explain the underlying reasons for the current dissatisfaction with the grand jury; (2) To analyze the reactions of our courts to these developments; and (3) To suggest several ways in which the operation of the grand jury can be improved. In order to understand the basis for this dissatisfaction, it is essential to look first at the evolution of the grand jury from its common law origins to its current structure and procedure.

THE GRAND JURY: PAST AND PRESENT

The grand jury originated in England as the accusatory body in the administration of criminal justice.⁶ In the Assize of Clarendon of 1166, Henry II established the first grand jury whose function was to disclose under oath the names of those in the community believed to be guilty of criminal offenses.⁷ At one time the grand jury determined the guilt of the accused as well as made accusations, but eventually the accusatory and guilt-

give them the sole power to determine when charges should be brought.

⁵ See, e.g., Judge Frank's statement in *In re Fried*, 161 F.2d 453, 458-59 (2d Cir. 1947):

The government further argues that an indictment founded upon illicit evidence will do the applicant no harm, since such evidence will not be admitted at the trial which follows the indictment. This is an astonishingly callous argument which ignores the obvious. For a wrongful indictment is no laughing matter; often it works a grievous irreparable injury to the person indicted. Prosecutors have an immense discretion in instituting criminal proceedings which may lastingly besmirch reputations. . . .

⁶ See generally G. ADAMS, *THE ORIGINS OF THE ENGLISH CONSTITUTION* 106-35 (2d ed. 1935); G. EDWARDS, *THE GRAND JURY* 1-44 (1906); I. W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 321 (7th ed. 1956); Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AMER. CRIM. L. REV. 701 (1972).

⁷ See I. W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 321 (7th ed. 1956); T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 112 (5th ed. 1956).

determining functions were divided between the grand jury and the petit jury.⁸ At that stage the grand jury undertook the task of screening out unfounded prosecutions. Despite limited assistance from governmental officials, the grand jury was able to operate independently of government influence. For the most part, the grand jurors had personal knowledge of criminal activity, which was supplemented by their right to interview witnesses in private chambers.⁹ It is important to note that at this time secrecy began to surround the deliberations of the grand jury, primarily to protect the grand jurors and their witnesses from government persecution.¹⁰

As a result of several instances in which the grand jury refused to return indictments, it soon gained considerable popularity in England as a protective institution against government oppression. In one case, the grand jury refused to return an indictment against Stephen College on charges of treason.¹¹ Originally, the King's counsel had insisted that the grand jury hear in open court testimonial evidence supporting the Crown's allegations. Following the public hearings, however, the jurors insisted upon and obtained a private hearing in which the grand jury alone examined witnesses. Although the Crown expected the usual acquiescence, the grand jury did not indict College. The jurors refused to explain their decision except to say that their consciences dictated that an indictment not be returned.¹² In the same year, the Crown attempted to indict the Earl of Shaftesbury on the same charges.¹³ After examining witnesses in private chambers, the grand jury again refused to indict the accused. While the reasons for refusing to return indictments in these cases may have stemmed from the grand jurors' political opposition to policies of the government,¹⁴ the grand jury was nevertheless

able to withstand considerable pressure from the Crown and establish itself as an institution independent of government influence.

The English colonies in America adopted the grand jury as part of their judicial system.¹⁵ During the colonial period the powers of the grand jury expanded. It proposed new laws, protested against abuse in government and performed many administrative tasks. Despite proddings by royal officials, it chose to enforce laws and to allow prosecutions as it saw fit.¹⁶

In one such instance the Governor's Council of Massachusetts twice sought to indict Isaiah Thomas, publisher of the *Massachusetts Spy*, who published an article in 1772 announcing that the Lieutenant-Governor was a "perjured traitor" and the Governor should be removed and punished as a "usurper."¹⁷ When Thomas refused to answer to the Council for his "libel," the Council ordered the attorney general to prosecute Thomas. But the grand jury refused to indict. The Council then ordered the attorney general to prosecute Thomas by information, but public pressure forced the Council to abandon the prosecution.¹⁸

During the American revolution, the activities of the grand jury again expanded. As the representative of local communities, it often became a propaganda agency while performing its traditional and newly established powers in the community.¹⁹

Following the revolution, the federal and state governments adopted the grand jury as part of their judicial systems.²⁰ Federal grand juries, packed by Federalist officials, made militantly partisan reports and advanced political prosecutions against Republicans.²¹ In their turn, the Republicans sought indictments against Aaron

¹⁵ R. YOUNGER, *THE PEOPLE'S PANEL; THE GRAND JURY IN THE UNITED STATES* 26 (1963). See generally, Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 *AMER. CRIM. L. REV.* 701 (1972); Shannon, *The Grand Jury: True Tribunal of the People or Administrative Agency of the Prosecutor?*, 2 *N. MEX. L. REV.* 141 (1972).

¹⁶ R. YOUNGER, *THE PEOPLE'S PANEL; THE GRAND JURY IN THE UNITED STATES* 26 (1963).

¹⁷ See L. LEVY, *FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* 72-74 (1960).

¹⁸ Another early manifestation of grand jury independence arose in connection with the case of Peter Zenger. There, two New York grand juries refused to return indictments against Zenger for statements he made against the royal governor. See R. MORRIS *FAIR TRIAL* 69-95 (1952).

¹⁹ R. YOUNGER, *THE PEOPLE'S PANEL; THE GRAND JURY IN THE UNITED STATES* 83-84 (1963).

²⁰ *Id.* at 55.

²¹ *Id.* at 44-55.

⁸ I. W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 313, 321 (7th ed. 1956).

⁹ *Id.* at 322.

¹⁰ See Calkins, *Grand Jury Secrecy*, 63 *MICH. L. REV.* 455, 457 (1965).

¹¹ See *Trial of Stephen College, at Oxford for High Treason*, 8 *How. St. Tr.* 550 (1681).

¹² *Id.*

¹³ See *Proceedings at the Old Bailey, upon a Bill of Indictment for High Treason, against Anthony Earl of Shaftesbury*, 8 *How. St. Tr.* 759, 771-774 (1681).

¹⁴ The grand jury was unable to protect either College or Shaftesbury for long. The Crown presented its accusations against College to another grand jury who indicted him for treason. He was subsequently convicted and executed. Shaftesbury was eventually forced to flee England and died in exile. See G. TREVELYAN, *ENGLAND UNDER THE STUARTS* 403, 404-06 (1960).

Burr before three different grand juries.²² The first indictment sought was before a Kentucky grand jury for the offense of trying to involve the United States in war with Spain, but the grand jury refused to indict Burr. Undeterred, the government sought a second indictment before a Mississippi grand jury for the same act. The grand jury again refused to indict Burr. Instead it filed a report denouncing the prosecutors. The third indictment was sought before a Virginia grand jury. Although this grand jury returned an indictment, the prosecution was unsuccessful and Burr was acquitted.²³

During the westward movement, the territories and local communities adopted the grand jury.²⁴ The territorial grand juries exercised the power to indict and to report. Any person could address the grand jury and could present grievances about private or public citizens. During this period,

jurors commended those (public officials) whom they found doing a good job, but were unflinching in their criticism of those who were not. They did not hesitate to use the ample powers that they possessed to conduct searching investigations into corruption in government and widespread evasion of the laws.²⁵

In the Utah Territory, the grand jury became embroiled in the political struggles between the Mormons and the federal authorities. No indictments against Mormon leaders were returned despite the efforts of the federal prosecutors. Finally, ignoring statutory authority for the method of selecting jurors, one federal marshal hand-picked more amenable jurors. The result was the return of indictments against the Mormon leaders.²⁶ However, those indictments were eventually voided by the United States Supreme Court in *Clinton v. Englebrecht*²⁷ in which the Court held that the method of selecting the grand jurors was improper.

Aside from its popular support as a means of controlling or exposing public malfeasance during the westward movement, the grand jury also directed its efforts against crime and corruption in municipal government and big business:²⁸

Under extraordinary circumstances grand juries

²² See generally, L. LEVY, *JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE* (1963).

²³ *Id.* at 70-92.

²⁴ R. YOUNGER, *THE PEOPLE'S PANEL; THE GRAND JURY IN THE UNITED STATES* 83-84 (1963).

²⁵ *Id.*

²⁶ *Id.* at 180-81.

²⁷ 80 U.S. 434 (1872).

²⁸ R. YOUNGER, *THE PEOPLE'S PANEL; THE GRAND JURY IN THE UNITED STATES* 208, 223 (1963).

proved that they could, if necessary, unseat an entire municipal administration and using their power of indictment, take over and run a city in the name of the people. In both Minneapolis and San Francisco, grand juries governed the city for long periods while they rooted out crime and corruption. City bosses, corrupt officials, and racketeering criminals learned to fear the grand inquest, but to citizens seeking to rid their city of corruption, it was often the only hope.²⁹

Significantly, the grand jury was also credited with ridding New York of public corruption at the turn of the century.³⁰

From these reported instances involving the operation of the grand jury during the development of the English and American legal systems, it is fair to conclude that the function of the grand jury was to investigate criminal activity and decide whether to hold an accused for trial. At first the grand jury was chosen for this task because the grand jurors themselves were the ones who knew of criminal activity in the community. Once assembled, however, the grand jurors soon realized that they could use their powers to prevent the government from prosecuting persons for political purposes. As with any institution given certain powers and responsibilities, there were instances in which the grand jury aided and abetted the government in harassing and prosecuting certain individuals. In many of these cases, the grand jury was embroiled in controversial political issues which added to its notoriety. More than anything else, they demonstrate the need for an institution to check the discretion of the prosecutor and protect the interests of the accused.

The principal power of the grand jury today is to decide whether prosecutions for more serious offenses should proceed to trial. The Federal Constitution and some state constitutions require that criminal proceedings for "infamous crimes" shall be prosecuted only on a grand jury indictment.³¹ Some states have similar statutory provi-

²⁹ *Id.* at 208.

³⁰ *Id.*

³¹ See Calkins, *Abolition of the Grand Jury Indictment in Illinois*, 1966 ILL. L. F. 423, 424 n.6 (1966); Harno, *Some Significant Developments in Criminal Law and Procedure in the Last Century*, 42 J. OF CRIM. LAW 422, 451 (1951). An "infamous crime" is usually one which exposes the accused person to one year or more confinement. See *People v. Bradley*, 7 Ill. 2d 619, 131 N.E.2d 538 (1956). The "indictment" is the written accusation by the grand jury alleging the commission of a crime. It is the pleading on which the person accused is prosecuted. See *United States v. Bridges*, 432 F.2d 692 (D.C. Cir. 1970).

sions.³² In addition to the power to indict, some jurisdictions extend the power of the grand jury to report on public malfeasance and corruption.³³ The power to report may extend to situations affecting the morals, health or general welfare; or, it may be limited to situations affecting specific institutions or agencies.³⁴ However, a report, or a presentment as it is sometimes called, is not a pleading on which an accused may be prosecuted in a judicial proceeding.³⁵

The grand jury is ordinarily convened at the discretion of the court. The federal rules, for example, provide that the court "shall order one or more grand juries to be summoned at such times as the public interest requires."³⁶ Under this rule only the court may summon the grand jury; moreover, its decision whether to summon a grand jury is not subject to review or mandamus.³⁷ The grand jury's powers and procedures also are prescribed to it by the court.³⁸ Once the court instructs the grand jurors as to their powers, they are then bound by oath or affirmation to conduct themselves in accordance with those instructions.³⁹ In addition, without court process and its contempt powers, the grand jury cannot compel a witness to appear or testify. Even if a private person

³² See Harno, *Some Significant Developments in Criminal Law and Procedure in the Last Century*, 42 J. OF CRIM. LAW 422, 451 (1951).

³³ See Kuh, *The Grand Jury "Presentment." Foul Blow or Fair Play*, 55 COLUM. L. REV. 1103 (1955); Note, *The Grand Jury as an Investigatory Body*, 74 HARV. L. REV. 590 (1961).

³⁴ See Kuh, *The Grand Jury "Presentment." Foul Blow or Fair Play*, 55 COLUM. L. REV. 1103 (1955). For example, ILL. REV. STAT., ch. 75, § 26 (1973) authorizes the Illinois grand jury to examine and report to the court as often as every other term upon the condition of the Cook County Jail and the treatment of prisoners.

³⁵ See *United States v. Bridges*, 432 F.2d 692 (D.C. Cir. 1970). See also Kuh, *The Grand Jury "Presentment." Foul Blow or Fair Play*, 55 COLUM. L. REV. 1103 (1955).

³⁶ FED. R. CRIM. P. 6(a). According to the common law, courts have the inherent power to impanel grand juries. See *Petition of A&H Transp., Inc.*, 319 F.2d 69 (4th Cir.), cert. denied, 375 U.S. 924 (1963); *United States v. Wallace & Tiernan, Inc.*, 234 F. Supp. 780 (D.D.C. 1964), rev'd on other grounds, 349 F.2d 222 (D.C. Cir. 1965); *People v. Sears*, 49 Ill. 2d 14, 273 N.E.2d 380 (1971).

³⁷ See L. ORFIELD, *CRIMINAL PROCEDURE UNDER FEDERAL RULES* 425 (1966).

³⁸ See, e.g., ILL. REV. STAT., ch. 38, § 112-2 (1973).

³⁹ *Id.* The court usually appoints the foreman, whom it may remove and replace. It may also refuse to authorize the expenditure of funds by the grand jury to employ independent investigators or counsel. See *United States v. Smyth*, 104 F. Supp. 283, 300 (N.D. Calif. 1952).

volunteers to testify, it is questionable whether the grand jury may hear such persons. Although according to the common law a private individual could communicate with the grand jury, a private communication to a grand jury except through recognized channels may constitute contempt of court.⁴⁰ Thus, as a practical matter, the grand jury today is dependent on the court for its existence and effectiveness.

In most jurisdictions the grand jury proceedings have remained secret.⁴¹ During those proceedings, the prosecutor may present hearsay information to the grand jury to obtain an indictment,⁴² and an indictment will normally not be dismissed even though he presents illegally seized evidence.⁴³

THE CURRENT PROBLEM

While the grand jury in England was able to maintain considerable independence from government prosecutors, the grand jury today is much more dependent on the prosecutor for its successful operation. Indeed, the grand jury normally hears only those cases presented by the prosecutor and only the prosecution's side of those cases.⁴⁴ He is responsible for securing the attendance of witnesses whom he selects, and also for the presentation of other evidence.⁴⁵ He conducts the examination of

⁴⁰ See *People v. Sears*, 49 Ill. 2d 14, 31, 273 N.E.2d 380, 388 (1971). But see *United States v. Smyth*, 104 F. Supp. 283, 300 (N.D. Calif. 1952), where the court stated:

[I]t might be necessary for a single grand juror (in his line of duty) to seek information in a night club, a bar or a house of ill fame.

⁴¹ See note 82 *infra*. See also FED. R. CRIM. P. 6(e); HAWAII R. CRIM. P. 6; ILL. REV. STAT., ch. 38, § 112-6(b) (1973).

⁴² See *Costello v. United States*, 350 U.S. 359 (1956).

⁴³ See *Tarvestad v. United States*, 418 F.2d 1043 (8th Cir. 1969); *United States v. Rundle*, 383 F.2d 424 (3d Cir. 1967); *West v. United States*, 359 F.2d 50 (8th Cir. 1966); *United States v. American Radiator & Standard San. Corp.*, 278 F. Supp. 249 (W.D. Pa. 1967).

⁴⁴ See, e.g., *United States v. Smyth*, 104 F. Supp. 283, 293 (N.D. Calif. 1952).

⁴⁵ See *Lumbard, The Criminal Justice Revolution and the Grand Jury*, 39 N.Y.S.B.J. 397, 399 (1967), where Judge Lumbard points out that:

although grand jurors are also required by law to report any crimes of which they may have knowledge themselves, as a practical matter almost all cases presented to the grand jury are brought there by the District Attorney.

The same proposition is put forth in *Antell, The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A.J. 153, 154 (1965), but with some cynicism:

In short, the only person who has a clear idea of what is happening in the grand jury room is the public official whom these twenty-three novices are expected to check.

witnesses, instructs the grand jurors as to what laws are alleged to have been violated, and draws the indictment.⁴⁶ As a public official and lawyer, the prosecutor may also command considerable respect from the lay persons constituting the grand jury.

With this added responsibility and power comes the danger that the prosecutor may also be able to prejudice or even manipulate the grand jurors and obtain an indictment when there may not be sufficient evidence to hold an accused for trial. This conduct may take several forms and may occur at different stages in the indictment process. It may occur, for example, when the prosecutor is permitted to use abusive language when discussing the character of the accused before the grand jury. The prosecutor may also attempt to create pre-indictment publicity, which might include unsubstantiated factual assertions, in the hope of inflaming public sentiment and reaching prospective grand jurors. The conduct may even be unintentional. But if the prosecutor is successful in obtaining an indictment under these conditions, the grand jury becomes the "tool" of the prosecutor and no longer protects the interests of the accused.⁴⁷ This danger may be more apparent in

cases where the accused is a public official or public figure and the prosecutor is using the grand jury to further his own political ends, but it may also arise in those instances where the prosecutor's performance is judged by the number of indictments or convictions returned.⁴⁸

THE JUDICIAL RESPONSE

In several recent decisions both state and federal courts have considered the issues raised by prosecutorial manipulation of the indictment proc-

contributions and reporting of the mayor. Following the investigation, evidence was then presented to the grand jury which had returned indictments against the unsuccessful mayoral candidates. Honolulu Star-Bulletin, Feb. 23, 1973, A-1, col. 1. While the first of the hearings was underway, an assistant attorney general and the prosecutor held "press conferences" with members of the news media who "buzzed" around the grand jury room. Honolulu Star-Bulletin, Feb. 23, 1973, A-1, col. 1.

The grand jury met four times to hear evidence concerning the mayor. However, before it completed its proceeding, the foreman of the grand jury held the first of his press conferences with a local newspaper. He discussed the proceedings, including the evidence presented and alleged threats to the individual jurors. Honolulu Star-Bulletin, March 5, 1973, at A-1, col. 1. The court subsequently dismissed the grand jury, but not before the attorney general had subpoenaed the mayor's books and records.

Undeterred by the dismissal of one grand jury, the attorney general made plans to present evidence to another grand jury. However, on the day on which the proceeding was to begin, the court ordered the attorney general to hold up the proceeding in order to consider the legality of the attorney general's actions in conducting the investigations. The attorney general filed information on the next day against several of the mayor's campaign workers for improprieties in reporting campaign contributions. At this writing the outcome of these investigations is still in doubt. See State v. Good Guys for Fasi, Crim. No. 5521 (Hawaii Sup. Ct., filed July 26, 1973). See also State v. Altiery, Crim. No. 45364 (Hawaii Circuit Ct., 1st Circuit, Jan. 30, 1973), where the court dismissed the case because of prosecutorial misconduct occurring before the grand jury.

⁴⁸ One commentator has argued that in five current celebrated cases the decisions of the grand jury,

make at least an arguable case that in many instances political officers or prosecuting attorneys now control and direct grand juries in order to protect narrow and subjective interests contrary to the common good and even to shield from prosecution law officers whose conduct *on its face* violates the law. To say all this is not to say that opposite conclusions were necessary in any or all of the cases cited above, but rather to say that in each instance there is at least an *arguable* charge of criminal conduct against the persons responsible for the nine listed homicides. And in each of these instances the grand jury said there is no such arguable case to be raised.

Shannon, *The Grand Jury: True Tribunal of the People or Administrative Agency of the Prosecutor*, 2 N. MEX. L. REV. 141, 166 (1972).

⁴⁶ See, e.g., United States v. Gather, 413 F.2d 1061 (D.C. Cir. 1969); State v. Joao, 53 Hawaii 226, 491 P.2d 1089 (1971); People v. Sears, 49 Ill. 2d 14, 31, 273 N.E.2d 380, 389 (1971).

⁴⁷ The situation which arose in Hawaii recently regarding alleged campaign violations illustrates the way in which the grand jury can become embroiled in political conflicts. Following the general election in 1972, the Honolulu prosecutor initiated prosecutions against candidates for office for failure to report properly campaign contributions or perjury in reporting campaign contributions. Honolulu Advertiser, Jan. 17, 1973, at A-7, col. 1. During the 1972 term of the grand jury, the prosecutor, an appointee of the successful incumbent Democratic candidate for mayor, presented evidence to the grand jury against the unsuccessful Republican candidate for mayor in the general election and against the unsuccessful Democratic candidate for mayor in the primary election. The grand jury did not return indictments against either candidate, Honolulu Advertiser, Jan. 17, 1973, at A-7, col. 1.

During the 1973 term of the grand jury, the prosecutor again presented evidence to the grand jury and an indictment was returned against the unsuccessful Democratic candidate, who subsequently sought to dismiss the indictment on the grounds of alleged misconduct by the prosecutor. Honolulu Advertiser, May 9, 1973, at A-1, col. 1; Honolulu Advertiser, March 20, 1973, at A-7, col. 2. An indictment was also returned against a state representative. Honolulu Star-Bulletin, March 12, 1973, at A-1, col. 5. The indictment was later dismissed due to insufficient evidence. Honolulu Star-Bulletin March 12, 1973, at A-1, col. 5.

During the same period of time, the state attorney general initiated an investigation into the campaign

ess.⁴⁹ In *State v. Joao*,⁵⁰ the prosecuting attorney, in obtaining an indictment for murder against the defendant, made certain statements to the grand jurors about the credibility of his only witness after he had given testimony.⁵¹ The trial court found that the grand jury might not have returned an indictment without these statements and dismissed the indictments. In sustaining the findings of the trial court, the Hawaii supreme court held that the conduct of the prosecutor violated due process of law:

[W]here the indictment mechanism is employed, it must be through a grand jury which is not only

⁴⁹ Several earlier federal cases also considered the issue of misconduct by the prosecutor before the grand jury. In *United States v. Wells*, 163 F. 313 (D. Idaho 1908), where the motion to dismiss the indictment was supported by affidavits of grand jurors alleging that the prosecutor made statements to the grand jury about the strength of his case against the defendant, the court dismissed the indictment, holding that when the prosecutor not only expresses his opinion but urges the finding of an indictment, and it is clearly shown that the grand jurors must necessarily have been influenced, then prejudice will be presumed. The court in supporting that decision stated:

[T]o sustain such an indictment would be to establish a precedent to which political partisanship, religious intolerance—for the latter is quite apt to exist as the former—could point as a justification for upholding the return of an indictment through popular demand, public excitement, persecution, or personal ill will.

Id. at 327.

In *United States v. Farrington*, 5 F. 343 (N.D. N.Y. 1881), the issue before the court was the alleged misconduct by the special prosecutor in presenting evidence to the grand jury. Here the court asserted that the duty of the court was to exercise supervision over the grand jury, even if it meant removing the veil of secrecy from around the grand jury proceeding. *Id.* at 344.

In *United States v. Bruzgo*, 373 F.2d 383 (3rd Cir. 1967), the court was faced with the allegation that the prosecutor threatened a witness before the grand jury. Accepting the allegation as true, the court nevertheless held that the threats were not prejudicial so as to create a defect of constitutional or legal proportions. *Id.* at 387.

In *United States v. Kilpatrick*, 16 F. 765 (W.D. N.C. 1883), the court dismissed an indictment because the prosecutor had made statements about the weight of the evidence before the grand jury.

⁵⁰ 53 Hawaii 226, 491 P.2d 1089 (1971).

⁵¹ The prejudicial statement made by the prosecutor was as follows:

As Mr. Chung [Prosecuting Attorney for the City and County of Honolulu] has said, the witness that we will present to you this afternoon is Cole U. Kekahuna. Very briefly, Cole Kekahuna was the original defendant charged with the murder. . . . Cole Kekahuna has been in jail for 3½ months, and as Mr. Chung says, he has decided to make a clear breast. On his testimony, we seek an indictment. . . .

Id. at 227, 491 P.2d at 1090.

'legally constituted', but also unbiased. . . . A tendency to prejudice may be presumed when, in presenting cases to the grand jury, the trial court finds that the prosecutor or his deputies have engaged in words or conduct that will invade the province of the grand jury or tend to induce actions other than that which the jurors in their uninfluenced judgment deems warranted on the evidence fairly presented before them.⁵²

While the court did not discuss the possibility of imposing other restrictions on the prosecutor, it did recognize the constitutional right of an accused to be indicted by a grand jury free of government instigated prejudice.⁵³ The *Joao* case is also significant because it allowed the defendant to raise objections over the manner in which the prosecutor presented the evidence to the grand jury without imposing severe burdens of proof upon the defendant, and because the lower court allowed the defendant access to the grand jury transcript to show prejudicial conduct.⁵⁴

In *State v. Good*,⁵⁵ an Arizona appellate court also held that prosecutorial misconduct violated due process of law. There, the prosecutor severely castigated the defendant before the grand jury for allegedly attempting to influence its decision.⁵⁶ Citing several earlier cases which held that the prosecutor must refrain from conducting himself improperly,⁵⁷ the court concluded that the prose-

⁵² *Id.* at 228-29, 491 P.2d at 1091.

⁵³ *Id.*

⁵⁴ *Id.* at 227, 491 P.2d at 1090. In *McMahon v. City and County of Honolulu*, 51 Hawaii 589, 465 P.2d 549 (1970), the Hawaii supreme court held that an official court reporter must be present to record all evidence presented to the grand jury. The court has subsequently amended its rules to require that all statements made before the grand jury be recorded. See HAWAII R. CRIM. P. 6(d).

⁵⁵ 10 Ariz. App. 556, 460 P.2d 662 (1969).

⁵⁶ The crux of what the prosecuting attorney said is: [D]eliberate sometime today and decide whether you feel as strongly as I feel that this is an attempt to obstruct the grand jury in the performance of its duties. . . . Before, we felt that the letter was a declaration of war on the grand jury, on the grand jury proceedings. Its attempted to create an obstruction, to create havoc with our proceeding. . . . I feel, if you do not respond to a show of force to a declaration of war, that to all intents and purposes you are done. You are over with. Only for that reason. For all the other reasons that you will decide when you get together, I feel that that's indicated, somebody has punched you. Now, are you going to punch them back or are you just going to lay down? That's my approach to it.

Id. at 559, 460 P.2d at 655.

⁵⁷ See *Commonwealth v. Favulli*, 352 Mass. 95, 224 N.E.2d 422 (1967) (prosecutor must refrain from words or conduct that will invade the province of the grand

ductor's conduct upset the system of checks and balances established between the prosecutor, judge and grand jury.⁵⁸ As in *Joao*, the court concluded that the defendant need not demonstrate actual prejudice because such a burden would not adequately protect the defendant's rights.⁵⁹

Consistent with these two state court rulings is the decision by the District Court for the Northern District of Illinois in *United States v. Di Grazia*.⁶⁰ Here the court also dismissed an indictment because it felt that the language used by the prosecutor inflamed the grand jurors against the accused.⁶¹ Without citing constitutional grounds for its holding, the court stated that the purpose of the grand jury as protector of the accused was sufficient authority for its decision.⁶² According to the court, "these principles are so well grounded in our jurisprudence as not to require elaboration."⁶³

In contrast to these holdings, the Illinois supreme court in 1971 held that a trial court could not conduct a hearing to receive testimony of grand jurors for the purpose of demonstrating that the prosecutor had conducted himself improperly before the grand jury.⁶⁴ Here indictments were returned against members of the Cook County

State's Attorney's office and the Chicago Police Department for their participation in a search of an apartment in which two members of the Black Panther Party were killed.⁶⁵ The defendants filed motions to dismiss the indictments, supported by affidavits of several of the grand jurors, alleging that:

[T]he Special State's Attorney frequently went off the record and made derogatory comments with respect to the veracity of some of the witnesses, that one of his assistants referred to a witness as a whore, a slut and a liar, that the Special State's Attorney expressed his opinion that the evidence of guilt was "overwhelming", that he scolded the grand jury for voting no bills on the preceding day, that when one of the grand jurors stated that an indictment was a serious thing, the Special State's Attorney said, "Don't worry, an indictment is nothing but a piece of paper."⁶⁶

Despite these allegations, the Illinois supreme court refused to allow challenges to the indictments. The court reasoned that: (1) The secrecy surrounding the grand jury proceeding could be removed only in exceptional circumstances;⁶⁷ (2) The Illinois Rules of Criminal Procedure had limited those circumstances to permit disclosure

jury); *Attorney General v. Pelletier*, 240 Mass. 164, 134 N.E. 407 (1922) (conduct of district attorney before the grand jury grounds for his removal); *Hammers v. State*, 337 P.2d 1097 (Okla. Cr. App. 1959) (the county attorney's expressions of opinion as to the guilt of the persons under investigation and as to the weight of the evidence was highly prejudicial and constitutes substantial error). *Commonwealth v. Smart*, 378 Pa. 630, 84 A.2d 782 (1951) (indictment can be challenged when prosecutor has acted improperly).

⁵⁸ 10 Ariz. App. at 558, 460 P.2d at 664.

⁵⁹ *Id.* at 560, 460 P.2d at 666.

⁶⁰ 213 F. Supp. 232 (N.D. Ill. 1963).

⁶¹ The prejudicial conduct here constituted the type of questions posed to the accused:

Q. Are you married?

Q. To whom are you married?

Q. You have a son, don't you?

Q. Do you love your son?

Q. Why are you ashamed to answer questions about your son?

Q. Who is the father of your child?

Q. What right have you to refuse to answer my questions? I'll bring you before the judge and require you to answer my questions.

Q. What is the Fifth Amendment? Do you know what it means?

Q. Are you an American citizen?

Id. at 234-35.

⁶² *Id.* at 235.

⁶³ *Id.*

⁶⁴ *People ex rel. Sears v. Romiti*, 50 Ill. 2d 51, 277 N.E.2d 705 (1971). See Note, *A Pre-indictment Attack on Grand Jury Proceedings*, 66 Nw. U. L. Rev. 877 (1972).

⁶⁵ For a more complete description of the factual setting of this case, see *People v. Sears*, 49 Ill. 2d 14, 273 N.E.2d 380 (1971). There the special prosecutor in what came to be known as the Black Panther case was found guilty of contempt of court for refusing to subpoena certain witnesses for testimony before the grand jury. The lower court also found certain statements made by the prosecutor embarrassing to the court and fined him \$100. The Illinois supreme court reversed both contempt citations, though it did state that under certain circumstances the lower court could require the prosecutor to subpoena witnesses.

⁶⁶ *People ex rel. Sears v. Romiti*, 50 Ill. 2d at 67-68, 277 N.E.2d at 713 (Goldenhersh, J., dissenting). There was a vigorous dissent in this case:

The action taken by the majority today renders meaningless the principles and protections of due process insofar as they apply to proceedings before the grand jury. As I read the majority opinion the action taken is to counteract the allegedly increasing tendency to try some person other than the defendant. This, of course, does not warrant the far-reaching action taken.

Id. at 68, 277 N.E.2d at 713.

⁶⁷ See *Gritchell v. People*, 146 Ill. 175, 185, 33 N.E. 757, 760 (1893), where the Illinois supreme court stated in part:

The hardship which an accused may suffer because he is not allowed to go behind an indictment to see how it has been found will be small, compared with the incalculable mischief which will result to the public at large from a disclosure of what the law deposits in the breast of a grand juror as an inviolable secret.

of testimony of witnesses appearing before the grand jury for purposes of impeachment at trial, but had not expanded disclosure to provide for the use of grand jurors' statements for the purpose of establishing the demeanor of the prosecutor before the grand jury.⁶⁸ The Illinois supreme court also concluded that the trial court could not consider the motion to dismiss on grounds of preindictment publicity.⁶⁹ The court argued that to permit such an attack upon an indictment would place a severe strain on the administration of criminal justice.⁷⁰

Though the result of the Illinois supreme court decision on the issue of the misconduct of the prosecutor before the grand jury does not receive support in other recent cases, its position on the issue of preindictment publicity has much support in the case law.⁷¹ The opinion by the Court of Appeals for the First Circuit in *Gorin v. United States*⁷² exemplifies the mood of the majority of courts. In *Gorin*, the defendant, who was charged with bribing an employee of the Internal Revenue Service, complained of massive publicity surrounding his indictment,⁷³ most of which was alleged to

⁶⁸ The rule provides in part:

... [M]atters occurring before the grand jury other than deliberations and vote of any grand juror may be disclosed when the court, preliminary to, or in conjunction with a judicial proceeding, directs such in the interests of justice.

ILL. REV. STAT., ch. 38, § 112-6(b) (1973).

⁶⁹ *People ex rel. Sears v. Romiti*, 50 Ill. 2d at 63, 277 N.E.2d at 709.

⁷⁰ *Id.* at 62, 277 N.E.2d at 711.

⁷¹ For federal court rulings, see *United States v. Osborne*, 350 F.2d 497 (6th Cir. 1965), *aff'd*, 385 U.S. 323 (1967); *Gorin v. United States*, 313 F.2d 641 (1st Cir. 1963); *Beck v. United States*, 298 F.2d 622 (9th Cir. 1962); *United States v. Nunan*, 236 F.2d 576 (2d Cir. 1956), *cert. denied*, 353 U.S. 912 (1957); *United States v. Anzelmo*, 319 F. Supp. 1106 (E.D. La. 1971); *United States v. Sweig*, 316 F. Supp. 1148 (S.D.N.Y. 1970); *United States v. Kahaner*, 204 F. Supp. 921 (S.D.N.Y. 1962); *United States v. Hoffa*, 205 F. Supp. 710 (S.D. Fla. 1962), *aff'd sub. nom. Hoffa v. Lieb*, 371 U.S. 892 (1962); *United States v. Dioguardi*, 20 F.R.D. 33 (S.D.N.Y. 1956); for state court rulings see *Commonwealth v. Monahan*, 349 Mass. 139, 207 N.E.2d 29 (1965); *State v. Winsett*, 200 A.2d 692 (Super. Ct. Del. 1964).

⁷² 313 F.2d 641 (1st Cir. 1963).

⁷³ The court described the publicity as follows:

It boils down, however, to news releases printed in local newspapers and repeated in substance over radio and television on August 26, 1961, the day two of the appellants and Bergman were arrested, and for the next two days, purporting to quote the Attorney General as extolling the vigor, skill and integrity of the Internal Revenue Service and as saying that the Charles J. McCaffrey mentioned in the indictment had reported Glassman's offer to bribe him to his superiors and upon their instruc-

have been relayed to the press by prosecuting officials.⁷⁴ The court first refused to recognize a right under the due process clause of the fifth amendment to be indicted by grand jurors free of government instigated prejudice, and then it dismissed the appeal by saying that "the publicity complained of was not serious enough to warrant the drastic remedy of dismissing the indictment, if, indeed, that remedy is available at all."⁷⁵

The District Court for the Southern District of New York has rendered the most comprehensive ruling on the preindictment publicity issue, and certainly the most favorable to the accused. In *United States v. Sweig*,⁷⁶ the defendants alleged that the Department of Justice and other governmental agencies had generated publicity prior to their indictments.⁷⁷ In considering their motions to dismiss, the court admitted that the type of relief they sought was unprecedented, but nevertheless pointed out that:

Unless the role of the grand jury as a shield for the citizen as well as a prosecutorial agency is to become an empty slogan, there are kinds of pressures that must obviously be avoided to the extent possible. . . . The generation of public animus against a prospective defendant, with the attendant danger that grand jurors may be subjected to subtle or explicit "demands" for prosecution. . . is no part of the prosecution's business. It may be that. . . such "atmospheric" influences have to be dealt with by measures short of dismissing indictments when the sources and causes are wholly nonofficial. But interest in the integrity of the criminal process may require sterner measures if the prosecution forgets its duty. . . .⁷⁸

tions had pretended to go along with the plan and is a courageous American and typifies the loyalty and integrity of the Internal Revenue Service.

Id. at 645.

⁷⁴ *Id.* The court did voice its disapproval of government instigated publicity:

We do not approve of pretrial publicity, particularly when it emanates from prosecuting officials. In the interest of fair trial it is better avoided. But the publicity here complained of was minor. It was not continuous but was pretty much a single shot affair. And although it related to serious crimes involving corruption of public officials, it did not relate to a spectacular crime likely to arouse strong public emotion, excitement or passion such as murder or rape.

Id.

⁷⁵ *Id.*

⁷⁶ 316 F. Supp. 1148 (S.D.N.Y. 1970).

⁷⁷ *Id.* at 1153.

⁷⁸ *Id.* The court further developed the argument that greater demands should be placed upon the court's own officers by citing one of its own rules:

'With respect to a grand jury or other pending in-

The court, however, refused to dismiss the indictments because it felt that the defendants had failed to link the news releases with the prosecuting officials. It did give the defendants the opportunity to establish the necessary connection, suggesting that it might be appropriate to permit the defendants to study the grand jury minutes to establish a claim of prejudice.⁷⁹

POLICY CONSIDERATIONS

Underlying those decisions which have refused to remedy alleged prosecutorial misconduct are several policy considerations. First, there is some question as to the authority of courts, absent some statutory or constitutional provision, to impose restrictions on the conduct of the prosecutor in his relations with the grand jury.⁸⁰ Second, it has been argued, most recently by the Illinois supreme court, that to allow challenges to indictments, particularly on the basis of preindictment pub-

vestigation of any criminal matter, a lawyer participating in the investigation shall refrain from making any extrajudicial statement, for dissemination by any means of public communication, that goes beyond the public record or that is not necessary to inform the public that the investigation is underway, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers, or otherwise to aid in the investigation.⁷

Id. at 1154.

⁷⁹ *Id.* at 1155.

⁸⁰ See *United States v. Knowles*, 147 F. Supp. 19, 21 (D.D.C. 1957), where the court stated:

The basic theory of the functions of a grand jury does not require that grand jurors should be impartial and unbiased. In this respect their position is entirely different from that of petit jurors. The Sixth Amendment to the Constitution expressly provides that the jury trial in a criminal case be impartial. No such requirement in respect to grand juries is found in the Fifth Amendment. . . .

In Illinois the criminal code provides that an indictment may be dismissed for a number of reasons, including the following: The indictment was returned by a grand jury improperly selected and which results in substantial injustice to the accused; the indictment was returned by a grand jury which acted contrary to Section 112 (Grand Jury Section) of the code and which results in substantial injustice to the accused; the indictment is based solely on the testimony of an incompetent witness. ILL. REV. STAT. ch. 38, § 114 (1971). Arguably, since the code does not specifically grant courts the right to dismiss on the grounds that the prosecutor acted improperly, then they lack the power to do so. However, Section 112 provides that the grand jury shall hear all evidence presented by the prosecuting attorney. ILL. REV. STAT. ch. 38, § 112 (1971). By implication one could as easily argue that Section 112 defines the limit of the prosecutor's conduct—to present evidence. Any variation would violate the express words of the statute, and therefore become grounds for dismissal under Section 114.

licity, would unduly burden the administration of criminal justice by causing great delays in bringing an accused to trial.⁸¹ Finally, the argument has been advanced that the secrecy surrounding the grand jury proceeding would prohibit challenges to indictments where the defendant must use grand jury transcripts or take testimony from grand jurors to sustain his claim of prejudice.⁸²

If these reasons are accepted without exception, they would seriously reduce the likelihood that the

⁸¹ The Court of Appeals for the Eighth Circuit has elaborated upon this objection in a decision in which the court refused to quash an indictment because illegally seized evidence had been presented to the grand jury:

If we adopt appellants position we would be faced with two alternatives. We could leave the essential nature of the grand jury proceeding unchanged. The government would then be forced to make an ex parte determination of the legality of the offered evidence without the guidance of opposition or ruling from judicial authority. The penalty for making such a mistake would be striking down of the entire grand jury proceeding. We could on the other hand, change the nature of the grand jury investigation, making it into an adversary system. . . . Such a change, however, would add an additional burden to judicial time, completely alter our judicial system, and seriously cripple the supposedly investigatory purpose of the grand jury.

West v. United States, 359 F.2d 50, 56 (8th Cir. 1966). See also *Costello v. United States*, 350 U.S. 359, 363 (1956).

⁸² See *Gritchell v. People*, 146 Ill. 175, 183, 185, 33 N.E. 757, 759-60 (1893), which held:

In furtherance of justice, and upon grounds of public policy, the law requires that the proceedings of the grand jury room shall not be revealed. . . . The hardship which an accused party may suffer because he is not allowed to go behind an indictment to see how it has been found will be small, compared with the incalculable mischief which will result to the public at large from a disclosure of what the law deposits in the breast of a grand juror as an inviolable secret. An innocent person will not be hurt by being forbidden to thus go behind the indictment, for he can always vindicate himself in a trial upon the merits.

In *Commonwealth v. Smart*, 368 Pa. 630, 633-34, 82 A.2d 782, 784 (1951), the Pennsylvania supreme court analyzed the role of secrecy as follows:

In view of the large amount of literature that has been written concerning the origin and history of the Grand Jury as one of the administrative agencies of the criminal law employed for centuries throughout the Anglo-Saxon world, it is wholly unnecessary to attempt to elaborate on these themes. Likewise there is no need to stress the vital importance of the maintenance of secrecy in regard to the deliberations and proceedings of Grand Juries, for the policy of the law in that respect has been so long established that it is familiar to every student of the law. . . . Generally speaking, the rule is that grand jurors cannot be sworn and examined to impeach the validity and correctness of their finding if an indictment has been regularly returned.

grand jury would operate to check the prosecutor and protect the accused. Examination of each of them, however, reveals that none justify severe limitations on the power of a court to hear challenges for prosecutorial misconduct nor do they justify restricting the ability of the accused to prove grand jury prejudice.

Although no provision of the United States Constitution specifically guarantees the right of an accused to be indicted by a grand jury free of prosecutorial instigated prejudice,⁸³ a strong historical basis exists for holding that the grand jury should operate to control abuses by the government and protect the interests of the accused.⁸⁴ Since the prosecutor now plays a much more significant role in the indictment process, the judiciary may have to take more positive action to insure that the grand jury functions effectively, but that action would be consistent with the purposes underlying the existence of the grand jury. Such action would also be consistent with the relationship which has developed between the court and the grand jury in which the courts have assumed the responsibility of assembling, instructing and overseeing the actions of the grand jurors.⁸⁵ If, for example, the court determined that the prosecutor had violated his duty to the grand jury, it could refuse to allow its process and authority to be used in furtherance of that violation. The court might also suspend the proceedings until the violations were corrected.⁸⁶

It is important to note that the Hawaii supreme court and the Arizona appellate court suggested an alternative basis for allowing challenges to indictments on the grounds of prosecutorial misconduct. According to both courts, a defendant

⁸³ The United States Supreme Court has considered the issue of grand jury bias under the fourteenth amendment, but failed to hold that lack of grand jury objectivity constituted a violation of due process of law. See note 87 *infra*.

⁸⁴ See note 1 *supra*.

⁸⁵ As put by one court:

A grand jury has no existence aside from the court which calls it into existence and upon whom it is attending. A grand jury does not become, after it is summoned, an independent planet, as it were, in the judicial system, but still remains an appendage of the court on which it is attending. . . . A court would not be justified, even if it were so inclined, to create or call into existence a grand jury, and then go off and leave it. A supervisory duty, not only exists, but is imposed upon the court, to see that its grand jury and its process are not abused, or used for purposes of oppression and injustice.

In re National Window Glass Workers, 287 F. 219, 225 (N.D. Ohio 1925).

⁸⁶ See notes 39-45 *supra*.

who has been indicted by a grand jury which has been prejudiced by the prosecutor has been denied due process of law.⁸⁷ While the United States Supreme Court has not ruled on the issue, it has indicated that it may be willing to extend due process protections to the indictment procedures established by the states. In *Beck v. United States*,⁸⁸ the Court stated:

It may be that the Due Process Clause of the Fourteenth Amendment requires the state, having once resorted to a grand jury procedure, to furnish an unbiased grand jury. . . . But we find that it is not necessary for us to determine this question; for even if due process would require a state to furnish an unbiased body once it resorted to a grand jury procedure—a question which we do not remotely intimate any view—we have concluded that Washington, so far as shown by the record, did so in this case.⁸⁹

While the issue remains unsettled, both the state and federal courts still have sufficient supervisory control over the grand juries to reduce the possibility that the prosecutor will be able to prejudice the interests of the accused.

The caveat about the undesirability of turning the indictment process into a trial on the merits deserves special attention, since significant changes in the grand jury proceeding could have a marked effect on the administration of criminal justice.⁹⁰ However, those courts which have heard challenges to indictments on grounds of prosecutorial misconduct have not suggested vast changes in the operation of the grand jury, or changes which would delay the speedy trial of the defendant.

⁸⁷ See notes 50, 55 *supra*.

⁸⁸ 369 U.S. 541 (1962). In this case the defendant had been investigated at highly publicized hearings by a subcommittee of the United States Senate. Beck was subsequently indicted by a Washington grand jury for improper use of union funds. He was convicted and his conviction was upheld by the Washington supreme court. The United States Supreme Court upheld the conviction.

It should be noted that the Court was considering the issue of grand jury bias in general, not merely bias created by the prosecutor or other government officials. This article takes the position that government instigated prejudice must be controlled to insure that the grand jury can operate to check the prosecutor. It is not intended to deal with the broader issue of grand jury bias from other sources such as adverse publicity generated solely by the press. See generally, Bartlett, *Defendant's Right to an Unbiased Federal Grand Jury*, 47 B.U.L. REV. 551 (1967).

⁸⁹ *Id.* at 546.

⁹⁰ As a countervailing consideration, however, it should be noted that an indictment can work serious harm to an accused. See note 5 *supra*.

They have advocated a review limited to the determination of the demeanor of the prosecutor in his relations with the grand jury or the press. The court would not have to weigh the evidence against the accused, but would only have to decide whether the prosecutor has properly presented his case to the grand jury. This procedure would place the prosecutor on notice that if he acts improperly, the court will take appropriate action.⁹¹ In the case of pre-indictment publicity, review would be limited to publicity actually generated by the prosecutor or other government officials,⁹² and to the determination of whether the grand jurors have been exposed to the publicity. Courts, however, need not limit their actions to a review of grand jury proceedings only after an indictment has been returned. As pointed out before, courts which assemble grand juries have the responsibility of supervising their operations.⁹³ Proper instructions to grand jurors and continued supervision over grand jury proceedings could remove the defects caused by prosecutorial improprieties.

Finally, the need to maintain grand jury secrecy has been used to justify limitations on challenges to indictments. Courts have done so by severely limiting access to grand jury transcripts, or by refusing to allow the accused to question the grand jurors once the indictment has been returned.⁹⁴ At present, courts have advanced four reasons for maintaining grand jury secrecy: (1) To insure freedom to the grand jury in its deliberations; (2) To prevent the escape of the accused; (3) To prevent tampering with grand jury witnesses; (4) To protect those who have been investigated but not indicted.⁹⁵ Although these reasons may justify secrecy while the grand jury is assembled and considering evidence, they are much less significant (1) once the indictment has been returned, (2) when the defendant himself is attempting to go behind the indictment, and (3) when the reason for lifting secrecy is to expose the misconduct of the prosecutor. Since an indictment becomes public knowledge soon after it has been returned, secrecy need not be maintained to prevent the escape of the accused. Once the accused has been indicted, it is no longer necessary to protect his reputation. And pre-trial discovery will normally

reveal the identity of witnesses and their expected testimony, so that the threat of witness tampering will exist whether or not the grand jury proceedings are disclosed. Furthermore, the discovery which would be necessary to demonstrate the misconduct would not require disclosure of grand jury deliberations or vote, and would normally come after the indictment had been returned. In the case of pre-indictment publicity, the defendant might need to question grand jurors to determine whether they have been subjected to prosecutorial instigated publicity, but again the scope of the investigation would be very limited and subject to the discretion of the court.⁹⁶ If the court needed to investigate charges prior to indictment, it could make an *in camera* inspection of the minutes of the proceedings, or interrogate the grand jurors in private chambers.⁹⁷

Within the last several years there have been significant legislative enactments which recognize that under certain circumstances disclosure would be permissible. For example, Rule 6(e) of the Federal Rules of Criminal Procedure now allows virtually anyone associated with the grand jury to give testimony about what happened at the proceedings upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.⁹⁸ Rule

⁹⁶ It should be noted that in many instances the grand jurors will be the only ones who can identify the prosecutor's misconduct, since the defendant is not represented at the grand jury and the record may be silent as to certain exhortations which the prosecutor makes. By denying the defendant the authority to use grand jurors' testimony, a court might be eliminating his only means of demonstrating the misconduct. The authority to take testimony of grand jurors has been sustained in several cases. *See* *United States v. Bruzgo*, 373 F.2d 383 (3d Cir. 1967); *United States v. Wells*, 163 F. 313 (D. Idaho 1908); *United States v. Kilpatrick*, 16 F. 765 (W.D. N.C. 1883); *United States v. Farrington* 5 F. 343 (N.D. N.Y. 1881); *State v. Will*, 97 Iowa 58, 65 N.W. 1010 (1896); *State v. Kifer*, 186 La. 674, 173 So. 169 (1937); *Attorney General v. Pelletier*, 240 Mass. 264, 134 N.E. 407 (1922); *State v. Manney*, 24 N.J. 571, 133 A.2d 313 (1957).

⁹⁷ This procedure has been sustained by the Illinois supreme court. *See* *People v. Sears*, 49 Ill. 2d 14, 273 N.E.2d 380 (1971).

⁹⁸ The rule in part provides:

[A] juror, attorney, interpreter, stenographer, operator of an operating device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminary to or in conjunction with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss because of matters occurring before the grand jury.

FED. R. CRIM. P. 6(e)

⁹¹ *See* notes 36-40 *supra*.

⁹² *See* notes 72-79 *supra*.

⁹³ *See* note 85 *supra*.

⁹⁴ *See* note 64 *supra*.

⁹⁵ *See, e.g.,* *United States v. Rose*, 215 F.2d 617 (3rd Cir. 1954); *Gritchell v. People*, 146 Ill. 175, 33 N.E. 757 (1893).

6(b) of the Illinois Rules of Criminal Procedure permits disclosure of matters other than accounts of deliberations or votes when a court directs such in the interests of justice.⁹⁹ Closely associated with the federal rule are several United States Supreme Court decisions which hold that a defendant has a right to the testimony of witnesses appearing before a federal grand jury when he can show a particular need for this testimony.¹⁰⁰

What these changes suggest is a more pragmatic approach to the issue of grand jury secrecy. As urged by one court:

Secrecy for secrecy sake should no longer be the rule. . . . Rather, the maintenance of the wall of secrecy around grand jury testimony should be grounded on sound reason.¹⁰¹

The position that defendants should be able to investigate grand jury minutes, or question grand jurors once an indictment has been returned, to establish the demeanor of the prosecutor does not violate the policies underlying the maintenance of grand jury secrecy, and is also consistent with the approach taken by recent legislative enactments.

⁹⁹ See note 28 *supra*. The Illinois supreme court in *People ex rel. Sears v. Romiti*, 50 Ill. 2d 51, 63, 277 N.E.2d 705, 711 (1971), interpreted this rule very narrowly to limit the methods by which the defendants could demonstrate the prosecutor's misconduct. The dissent countered this interpretation by arguing:

The majority traces the origin of the 1965 amendment of section 112-6 to Rule 6(e) of the Federal Rules of Criminal Procedure. We agree that failure to include in the statute the provision of 6(e) for disclosure upon a showing 'that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury' is significant. Under the prior holdings of the court, however, its significance is precisely opposite to that attributed to it by the majority. A basic rule of statutory construction is that enumeration of certain matters in a statute implies the exclusion of all others, and the corollary rule is that exceptions other than those designated by statute cannot be read into it. . . . It is apparent, therefore, that the amendment to section 112-6 authorizes disclosure "in the interest of justice" and not as the majority holds—in the interests of justice except under circumstances which the majority does not approve.

Id. at 66; 277 N.E.2d at 712-13 (Goldenhersh, J., dissenting).

¹⁰⁰ *United States v. Dennis*, 384 U.S. 855 (1966); *United States v. Proctor & Gamble*, 356 U.S. 677 (1958).

¹⁰¹ *Parpliano v. District Court*, 176 Colo. 521, 527, 491 P.2d 965, 968 (1971). See also *United States v. Marion*, 404 U.S. 307 (1972); *In re Proceedings before the Grand Jury Summoned October 12, 1970*, 321 F.Supp. 238 (N.D. Ohio 1970).

CONCLUSION

Because the grand jury is dependent upon the prosecutor, it is often called by its critics a "rubber stamp" or "tool" of the prosecutor. It is beyond debate that the grand jury in the vast majority of cases returns an indictment. Moreover, it is clear that the prosecutor need not offer an extensive evidentiary case to obtain an indictment. However, this does not lead to the conclusion that the grand jury merely reflects the will of the prosecutor no matter what safeguards are provided to insure that the prosecutor presents his case properly.

If a person is arrested without a warrant, he is processed by the police. Presumably the officer making the arrest had some basis for his decision to arrest, and this decision may have been reviewed by another officer.¹⁰² The accused is usually taken without unnecessary delay before a judicial officer to advise him of his rights and set bail.¹⁰³ At least in some jurisdictions, the decision to arrest is reviewed by a judicial officer to determine whether probable cause existed for the arrest.¹⁰⁴ If a person is arrested with a warrant, similar procedures attach. The initial decision to present the complaint to the judicial officer for a warrant may also be reviewed by the prosecutor.

In view of these screening procedures, it is reasonable to conclude that the police are presenting cases for which there is a substantial basis to believe that an offense has been committed. A high indictment rate may be evidence that the prosecutor and his staff are doing their jobs properly.¹⁰⁵

The attempts of courts to place checks on the prosecutor when he is clearly violating his duty to

¹⁰² See Graham & Leturn, *The Preliminary Hearing in Los Angeles; Some Field Findings and Legal Policy Observations*, 18 U.C.L.A.L. REV. 635 (1971).

¹⁰³ FED. R. CRIM. P. 5.

¹⁰⁴ See Commentary, Proposed Fed. R. Crim. P. 5, 48 F.R.D. 551, 566 (1970).

¹⁰⁵ It is possible to argue that no matter what precautionary measures are taken the grand jury will always act as a "rubber stamp" for the prosecutor. If this were true, the opponents of the grand jury would have a strong argument for its abolition. However, this position has not been supported by any objective study, such as those made in connection with the operation of the petit jury. See, e.g., Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen*, 42 COLO. L. REV. 1 (1970); Jurrow, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1971); Kalven, *A Study of the California Death Penalty Jury in First-Degree—Murder Cases*, 21 STAN. L. REV. 1297 (1969); See also G. SCHUBERT, *THE JUDICIAL MIND* (1965).

the grand jury have met with varying success. If the affidavits of the grand jurors in the *Romiti* case¹⁰⁶ were accurate, the indictments were extracted by the special states attorney in an unconscionable manner. Those courts which have dismissed indictments for such conduct have taken action consistent with the purpose of the grand jury, and yet not disruptive of its fundamental operations. In addition, they have established procedures to avoid the loss of public confidence in the institution of the grand jury and the financial costs associated with unnecessary prosecutions. Most importantly, they have reduced the possi-

¹⁰⁶ See note 64 *supra*.

bility that an innocent accused will have to go through the ordeal and expense of trial.

To further these goals, the judiciary and the legislature, where appropriate, should provide defendants with access to grand jury transcripts, or allow them to interview grand jurors—after indictment, when necessary for the purpose of establishing prosecutorial misconduct. At the same time our courts should take a more active role during the indictment process to insure the proper functioning of the grand jury. Once this is accomplished, the foundation can then be established for the grand jury to operate as protector of the accused.