1972

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Available at: http://lawecommons.luc.edu/luclj/vol3/iss2/7
GRAND JURY: BULWARK OF PROSECUTORIAL IMMUNITY?

On December 4, 1969, Chicago police officers went to an apartment on West Monroe Street to execute a search warrant for illegal weapons. The incident that followed, now known as the Black Panther raid, resulted in the death of two members of the Black Panther Party and injuries to several other persons. A Federal grand jury investigated the incident and published a written report that raised questions concerning possible violations of Illinois criminal law by members of the Chicago Police Department, the Illinois State's Attorney's Office, and the Black Panther Party. Pursuant to this report, the Presiding Judge of the Circuit Court of Cook County ordered that a venire be issued for a special grand jury to conduct further investigations. The Cook County State's Attorney was not allowed to prosecute the action because his official conduct was subject to investigation by the grand jury. In his place the court appointed as Special State's Attorney Barnabus F. Sears, a member of the Illinois Bar. Sears was given all the powers and authority accorded by law to a State's Attorney. The court impaneled and instructed the Special Grand Jury in December, 1970, and approximately six months later the Grand Jury returned an indictment charging the State's Attorney of Cook County, an Assistant State's Attorney and twelve police officers with conspiracy to obstruct justice.¹

The proceedings of the Special Grand Jury and the supervision of that jury by the presiding judge were contested on various grounds by both parties. All questions were ruled on by the Illinois Supreme Court in three separate actions.² Most of the questions, in one way or another, concerned the limits of authority of supervising judges and prosecutors in dealing with grand juries in Illinois. However, the specific issue of interest to this article is the primary question raised in the ruling of the Illinois Supreme Court in People ex rel Sears v. Romiti (hereinafter referred to as Sears v. Romiti).³ The conflict arose when

¹ People v. Sears, 49 Ill. 2d 51, 14, 273 N.E.2d 380 (1971).
² Id. People ex rel Sears v. Romiti, 50 Ill. 2d 51, 277 N.E.2d 105 (1971).
³ People ex rel Sears v. Romiti, 50 Ill. 2d 51, 277 N.E.2d 705 (1971).
the presiding judge of the Criminal Division of the Criminal Court of Cook County gave the defendants oral permission to question members of the Grand Jury about that body's proceedings, excepting the jurors' votes and deliberations. The defendants obtained affidavits from three grand jurors which they submitted to the presiding judge in support of their charge that the prosecutor exerted undue influence over the grand jury by debasing witnesses off the record but in front of the grand jury, opinionizing on the weight of the evidence, and urging the return of an indictment.\footnote{Id.} Based on these allegations and the supporting affidavits, the defendants asked the court to quash the indictment. The presiding judge considered the affidavits and ordered a hearing to determine the truth of the allegations. The special prosecutor then asked the Illinois Supreme Court for writs of mandamus and prohibition to bar the hearing, and that court took the action up for review.\footnote{People ex rel Sears v. Romiti, 50 Ill. 2d 51, 277 N.E.2d 705 (1971).}

The supreme court said the question was:

Whether a trial court may conduct a hearing to receive the testimony of grand jurors concerning charges that relate to the demeanor of a prosecutor while examining witnesses before the Grand Jury and to the quality of his argument or advice to them.\footnote{Id.}

The court held that Illinois courts may not receive the affidavits of grand jurors for the purpose of impeaching their indictment, and granted writs barring the hearing.\footnote{Id.}

Three dissenting judges said that if the defendants' affidavits charging such serious misconduct did not warrant a hearing, then they could not perceive what circumstances would warrant a hearing. Therefore, they concluded that the decision “... renders immune to judicial scrutiny the conduct of a State's Attorney before a grand jury no matter how violative of due process or fundamental fairness.”\footnote{Id.} The majority decision-upholds a policy that has long been inherent in the grand jury system, namely, that grand jury proceedings must remain secret.

\footnote{The dissenting opinion stated the charge: [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 the 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 very serious thing, the Special State's Attorney said, 'Don't worry, an indictment is nothing but a piece of paper.'}

\footnote{Id.}

\footnote{Id.}

\footnote{Id.}
Today, much discredit is being heaped upon the grand jury system for its adherence to secrecy of proceedings. Discontent with the rules of grand jury secrecy has contributed to assertions that the system is inefficient, regressive, and of little use in modern criminal proceedings. Many states have abolished the grand jury entirely; others maintain the system but have relaxed the requirement of secrecy in many ways. Illinois has continued to uphold the grand jury system and a concomitant rule of secrecy that grand jurors will not be heard to impeach their indictment. To understand why the Illinois grand jury is shrouded in secrecy, and why the secrecy requirement's viability is in doubt, it is necessary to look at the historical development of the system.

**Origins of the Grand Jury**

Modern secrecy policies of the grand jury have, at least in part, evolved from English history. In 1166 Henry II of England issued the Grand Assize, a progenitor of our grand jury. The Grand Assize was composed of laymen from each county whose job it was to ferret out crimes in the locale and inform the Crown. There were no pretensions of guarding individual rights; the Grand Assize was created simply "... to give a strongly centralized government the advantage that would be derived from communal accusation of crime." Accusation by the Grand Assize raised a presumption of guilt which forced the accused to undergo the trial methods of compurgation, or ordeal, to prove his innocence; even if acquitted he was often stigmatized by the charges. Thus, without independence from the Crown, the grand jury served as a potent instrument of governmental oppression.

Grand juries achieved only a small measure of independence from the Crown's domination until 1681, when in the trial of the Earl of
Shaftesbury an insurrection occurred that established secrecy as the means to prevent the Crown's intrusion into grand jury autonomy.15 In this case, the Crown charged the Earl with treason and insisted that the grand jury hear evidence in open court. After the hearing, jurors demanded and received the right to question witnesses in private. Notwithstanding that concession, the Crown still expected full acquiescence to its charge. But the indictment ultimately returned by the jury had the word “ignoramus” (we know nothing of it) written across it. In addition, the jurors would give only their consciences as a reason for refusing to indict.16 This was a bold act, for only three months prior another grand jury had attempted the “ignoramus” tactic, and for this act of insolence the Crown sent the jury foreman to the Tower of London.17

Ultimately, the Earl of Shaftesbury grand jury prevailed, and the custom developed of grand jurors receiving testimony in private, without the presence of the prosecutor or the defendant.18 As time passed, however, the autocracy of the Crown and the fear of governmental coercion diminished in England and the prosecutor was permitted to attend the grand jury and assist in taking testimony.19

The grand jury in England thus emerged as an investigative and accusative body with two distinguishing characteristics: it was composed entirely of laymen and it acted in secrecy. As a result of these two attributes the grand jury helped safeguard the rights of individuals by standing between the prosecutor and the accused, thus protecting the citizen from unfounded accusation of crime. This was the historic purpose of the grand jury in England, and the reason for its secrecy.20

THE GRAND JURY IN THE UNITED STATES

When this country adopted the grand jury system, it was esteemed as a bulwark against ungrounded state prosecution of citizens. The fifth amendment of the United States Constitution guarantees indictment by grand jury in cases of capital or other infamous crimes.21 A 1962

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15. 8 HOW. ST. TR. 759, 771-74 (1681).
19. Id.
21. The fifth amendment reads: "No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury.
Supreme Court opinion emphasizes the traditional importance of the position held by the grand jury as an instrument of justice:

Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive prosecution; it serves the invaluable function in our society of standing between the accuser and the accused, . . . to determine whether a charge is dictated by an intimidating power or by malice and personal ill will.\(^2\)

The states evidently shared the federal government's high regard for the Grand Jury. Although the fifth amendment requirement is not binding upon the states,\(^3\) nearly all state constitutions provided for indictment by grand jury in the early nineteenth century.\(^4\)

The fifth amendment is silent concerning the procedure of the grand jury. This meant that federal grand juries were intended to operate in accordance with procedures established in English common law.\(^5\) In addition, when the thirteen colonies federated in 1787 they adopted the English common law, and by virtue of this adoption, the English grand jury system was in force in the states.\(^6\) The grand jury system was, therefore, recognized as a secret proceeding in both federal and state jurisprudence. However, American courts set forth five reasons for secrecy that "bear little similarity" to the traditional purpose of assuring the protection of the citizen from oppressive prosecution.\(^7\) These reasons are: (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to pre-
vent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.  

It is normally accepted that strict secrecy (regarding the jurors' votes and deliberations, and the exoneration of innocent suspects) is justified and commendable while the jury is in session, and after its dismissal. The question at hand is the justification for keeping secret the conduct of the prosecutor before the grand jury when, after dismissal of the grand jury, a question is raised concerning the propriety of his conduct. Only one of the five stated reasons for secrecy supports a policy of not allowing jurors to testify concerning misconduct of the prosecutor, that being “to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors.” There is fear that grand jurors will not feel completely free to act if their actions are subject to review. Also, there is compelling fear that defendants, in order to evade trial or delay further proceedings, may cajole or intimidate grand jurors in an effort to make them impeach their indictments. These fears are pre-eminent in the rulings of many American courts.

However, when looking at the question in terms of the protection of the accused from the abuses of the prosecutor, secrecy seems detrimental in that the secrecy rules may allow the prosecutor to act with impunity before the grand jury. The grand jury would not, therefore, be able to perform its function of “standing between the accuser and the accused.” Affidavits and oral testimony of grand jurors are normally the only means available to a defendant to show that his indict-

30. All five secrecy reasons have been criticized as being irrelevant with respect to post-dismissal secrecy. Calkins, The Fading Myth of Grand Jury Secrecy, 1 John Marshall J. 18 (1967).
31. See p. 309 supra.
32. The third secrecy goal contemplates subornation of Grand Jury witnesses by accused parties. However, the imposition of strict secrecy after the dismissal of the Grand Jury may conceal subornative acts of the prosecutor. If subornation by a prosecutor is contemplated by the third reason, as it should be, then post-dismissal secrecy is an impediment to achieving the third goal.
33. See p. 308 supra.
ment resulted from undue influence of the prosecutor over the grand jurors rather than from evidence presented.\textsuperscript{34} If the court refuses to admit such testimony, the grand jury may be a "skirt" behind which a malicious prosecutor can hide to prosecute unjustly an accused.\textsuperscript{36} One federal court had this to say on the matter:

If malicious, ambitious or over-zealous men, either in or out of office, may with impunity persuade grand juries without any legal evidence, either by hearsay testimony, undue influence, or worse means, to indict whom they will, and there is no way in which the courts may annul such illegal accusations, the grand jury, instead of that protection of "the citizen against the unfounded accusation" . . . which it was primarily designed to provide, may become an engine of oppression and a mockery of justice.\textsuperscript{36}

Critics of the grand jury contend that even without bad-faith on the part of the prosecutor, the grand jury has lost its independence because of the dominance of the prosecutor.\textsuperscript{37} Grand jurors are laymen who lack legal expertise, and who are completely dependent on the prosecutor. The jurors may take part in the interrogation of witnesses, but must rely on the prosecutor to initiate investigations, to tell them what the charge is, and to select the witnesses and facts to be presented (hearsay evidence is permissible). They must turn to the prosecutor to discover the legal principles involved, to interpret the laws that apply and to judge the weight of the evidence.\textsuperscript{38}

Even if a grand jury were disposed to assert its historic independence in the interest of an individual's liberty, it must, paradoxically, look to the very person whose misconduct they are supposed to guard against for guidance as to when he is acting oppressively.\textsuperscript{39}

\textsuperscript{34} In Illinois, the State's Attorney may instruct his reporter to attend the sessions of the Grand Jury. If the State's Attorney does not provide for the reporter, the court may, for good cause, appoint a reporter. "Only the grand jurors shall be present during the deliberations and vote of the Grand Jury." ILL. REV. STAT. ch. 38, sec. 112-6(a) (1969).


\textsuperscript{36} Schmidt v. United States, 115 F.2d 394, 397 (6th Cir. 1940).

\textsuperscript{37} Supporters of the grand jury have challenged the accusation that the body is a 'rubberstamp' of the prosecutor on two grounds: "First . . . they explain that the high incidence of agreement between the grand jury and the prosecutor indicates only that the state is careful in its selection of cases. Second, they argue that the small number of cases in which the grand jury disagrees are alone sufficient justification for its existence." Note, Examination of the Grand Jury in New York, 2 COLUM. J.L. & Soc. Prob. 88, 98 (1966).


\textsuperscript{39} Id.
Prosecutors' immunity from judicial review of their conduct would serve to increase their dominance over the grand jury. There are evident dangers to justice in either allowing or refusing to allow grand jurors' testimony to impeach an indictment. Some courts have decided the issue by balancing the dangers in light of the facts presented, and some courts, like Illinois, have established a rule to be applied in all cases.

**Illinois Decisions**

The prosecutor in Illinois is allowed a great deal of independence before the grand jury, for Illinois courts have not favored the admission of grand juror testimony for impeachment purposes. The landmark ruling in this area is an 1893 case, *Gitchell v. People*, wherein the court was called upon to decide whether grand jurors' affidavits were admissible to show that twelve grand jurors did not consent to the finding of the indictment. At that time the Illinois Criminal Code did not expressly give the court discretion to order disclosure when justice required it, as it does today. The statute simply stated:

No grand juror, officer of the court, or other person shall disclose that an indictment for felony is found, . . . nor shall any grand juror state how any member of the jury voted or what opinion he expressed on any question before them. . . .

The court held that an allowance of the affidavits would be tantamount to disclosing how the jurors voted, which would directly contravene the Code's prohibition. The Illinois statute provided that the grand jury foreman's endorsement of a "true bill" on an indictment was evidence that it was found by twelve jurors. The court would not admit the affidavits to rebut this evidence.

The holding in this case is not directly on point with the situation in *Sears v. Romiti*. The *Gitchell* court ruled that in light of the wording of the Code, jurors may not disclose their votes; misconduct of the prosecutor was not in question as there was nothing in the record indicating any improper conduct on his part. Nevertheless, in dicta, the court advised that the prosecutor may be present before the grand jury to interrogate witnesses and give general instructions, but not to "influence or direct them in respect of their finding; nor ought he be present when they are deliberating upon evidence, or when their vote is tak-

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40. 146 Ill. 175, 33 N.E. 757 (1893).
41. See p. 315 infra.
42. 1 STARR & CUR. ANNO. ILL. STAT. ch. 38, sec. 595 (1893).
43. *Gitchell v. People*, 146 Ill. at 185, 33 N.E. at 760 (1893).
The court did not indicate whether jurors' testimony could be allowed to prove misconduct of a prosecutor. However, it noted with approval the "general policy of the law" that "the proceedings of grand juries shall be regarded as privileged communications, and that the secrets of the grand jury room shall not be revealed." The court laid down a general maxim of secrecy which served as precedent to many Illinois cases that followed:

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."

While the Gitchell court did not state that there are no circumstances under which grand jurors' testimony should be heard, it clearly felt that protection of the accused was adequately provided for at trial, and was secondary to indictment secrecy in the facts of that case. "Incalculable mischief" here likely refers to the possibility of defendants making improper overtures to grand jurors, in an attempt to cause quashing of the indictment or a delay of trial. Such actions would cause vexation to grand jurors and increased expense and time for the administration of justice.

In a 1909 decision, Kirsch v. Walter, an Illinois appellate court evidently determined that the Gitchell decision did not strictly bar grand jurors' testimony because it held that rules of grand jury secrecy would not bar the introduction of evidence of the clerk and foreman of the grand jury to show that the grand jury voted a true bill without knowing that the defendant's name was included in it. The indictment of the defendant was simply a mistake, and the court quashed the indictment.

Another appellate court decision in 1910, People v. Strauch, allowed grand jurors' affidavits for a limited use. The defendant therein alleged that the presiding judge improperly appeared before the grand jury during its deliberations for the purpose of presenting a written charge concerning the crime at hand. The court said that grand jurors' testimony would not be heard because it would be "injurious to the public interest."
affidavits may not be received for the purpose of invalidating an indi-
cement, but may be used in support of one, and noted two affidavits
that showed the judge to be less culpable than the defendant claimed. 49

These appellate court decisions show that Gitchell cannot be read as
establishing an absolute rule against the admission of grand jurors’
testimony; nevertheless, no Illinois Supreme Court decision has allowed
such testimony. The Gitchell holding served as precedent for the 1910
case of People v. Arnold. 50 The defendant therein charged that three
witnesses were present in the grand jury room at the same time, and
he produced affidavits of grand jurors to verify this occurrence. The
rule holds that witnesses must be alone during questioning in order to
preserve the secrecy of the proceedings. The defendant’s motion to
quash the indictment was denied. The court saw no need to consider
the affidavits because other evidence was available to prove the de-
fendant’s contentions, and it concluded that the occurrence could not
have prejudiced the defendant before the grand jury. 51

Conduct of the prosecutor was called into question in the 1910 case
of People v. Nall, 52 but on considerably different facts than in Sears v.
Romiti. 53 The defendant attempted to question the grand jury fore-
man and special counsel for the state to prove that the special counsel
appeared before the grand jury during its deliberations, thereby taint-
ing the indictment with malice and corruption. The court, using Git-
chell as precedent, refused to allow the questioning, saying that it found
nothing in the record indicating improper conduct of the special coun-
sel. 54

In a subsequent Illinois Supreme Court decision, a grand juror’s af-
fidavit was offered to prove a lack of witness before the grand jury; 55
other grand jurors gave affidavits to the contrary. The court cited the
Gitchell and Nall decisions and ruled that it would be improper to act
upon the affidavit of a grand juror seeking to impeach his indictment.

These Illinois Supreme Court decisions evidence a rather strong ad-
herence to secrecy of grand jury proceedings. However, in each case
the court noted that the improprieties charged were either unlikely to be
ture, or not prejudicial to the accused, or both. This left open the pos-

49. 153 Ill. App. at 549.
50. 248 Ill. 169, 93 N.E. 786 (1910).
51. Id. at 172, 93 N.E. at 787.
52. 242 Ill. 284, 89 N.E. 1012 (1909).
53. 50 Ill. 2d 51, 277 N.E.2d 705 (1971).
54. People v. Nall, 242 Ill. at 290, 89 N.E. at 1015.
55. People v. Miller, 264 Ill. 148, 152, 106 N.E. 191, 195 (1914).
sibility that the court might hear grand jurors' testimony if a defendant produced solid evidence of prejudicial misconduct of a prosecutor. In a 1966 Illinois case, People v. Petruso, the defendant claimed that the grand jury which indicted him was illegally drawn and therefore, the indictment was defective. The Illinois Supreme Court concluded that the trial court properly refused to quash the indictment "in the absence of any showing of improper influence, undue prejudice or other matters which might have caused a true bill to be improperly returned. . . ." The court did not elaborate on how the undue influence or prejudice might be proved, but clearly entertained the possibility that an indictment would be quashed if the defendant produced sufficient evidence.

The court in Sears v. Romiti did not feel that its previous decisions left open an opportunity to hear the testimony of grand jurors. Rather, the court flatly stated that Illinois courts had established a strict policy of secrecy whereby grand jurors may not be heard to impeach their indictment. The Sears court did not say that the conduct of a prosecutor was immune from attack by a defendant, but offered no suggestions as to how misconduct might be shown. The majority opinion echoed the Gitchell rationale by quoting Mr. Justice Black in Costello v. United States:

If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury.

In reaching its decision, the court construed Section 112-6(b) of the Illinois Code of Criminal Procedure, which reads:

Matters occurring before the Grand Jury other than the deliberations and vote of any grand juror may be disclosed when the court, preliminary to or in connection with a judicial proceeding, directs such in the interests of justice.

This section reflects the modern trend of expanding disclosure, as its predecessor was more restrictive. It is clear that one purpose of 112-
6(b) was to give the court discretion to provide the defendant with transcripts of relevant testimony given to the grand jury, so that he could better prepare for trial. After the enactment of 112-6(b), the Illinois Supreme Court issued Rule 412 which eliminates the court's discretion and gives a defendant the right to mandatory disclosure of relevant testimony. The court in Sears was not as expansive in regard to grand jurors' impeachment, saying that previous decisions did not sanction the hearing of jurors' testimony and that "section 112-6(b) does not authorize the kind of hearing proposed to be conducted by the trial court." The Committee Comments to section 112-6(b) lend support to the court's interpretation, stating that "... inquiry into the finding of the indictment is prevented in order to preserve the secrecy of the proceedings. The defendant has his chance at trial (Gitchell v. People)." Thus, the rule in Illinois which prohibits jurors from being heard to impeach their indictment was crystallized by statutory interpretation.

The dissenting opinion in Sears v. Romiti considered section 112-6(b) analogous to Rule 6(e) of the Federal Rules of Criminal Procedure, which states in part that occurrences before the grand jury may be disclosed, upon direction of the court, "... at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." A comparable provision is not found in section 112-6(b), but the dissenting Justices contend that a basic rule of construction in Illinois is that "... exceptions other than those designated by statute cannot be read into [a statute]." Therefore, the clause in section 112-6(b) reading "in the interests of justice" could encompass the authorization of jurors' affidavits for impeachment purposes "in the interests of justice." Although this interpretation of the statute did not prevail, many federal court decisions were cited in both opinions to support their positions.

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When the State uses, for the purpose of examining any witness, any part of a transcript of matters occurring before the Grand Jury, that portion of the transcript may be disclosed when the court, preliminary to or in connection with a judicial proceeding, directs such in the interests of justice.

This statute gave the court power to disclose testimony to the defendant only when the state first used the testimony. Grand Jury minutes not used by the state could not be revealed to the defendant. See Calkins and Wiley, *Grand Jury Secrecy Under the Illinois Criminal Code—Unconstitutional*, 59 Nw. L. Rev. 577 (1964).

64. ILL. REV. STAT. ch. 38, sec. 112-6 (1969).
65. 50 Ill. 2d 51, 277 N.E.2d 705 (1971).
66. FED. R. CRIM. PR. 6(e).
support the view that impeachment should be allowed in some circumstances. These decisions are worthy of note.

**FEDERAL DECISIONS**

The question of grand juror impeachment has not yet raised any constitutional issues in the federal courts. The right of an accused to an unbiased grand jury under the due process clause of the fifth amendment may be crystallizing, but there are no direct holdings on this point. Thus, federal courts, like state courts, have decided the question with a blend of common law and public policy considerations.

In raising infirmities concerning the proceedings of a federal grand jury, the defendant must overcome a strong legal presumption that the indictment is valid. Federal courts have been very cautious in quashing indictments for alleged misconduct of the prosecutor and, therefore, one treatise on federal procedure concludes that the conduct of the prosecutor in obtaining the indictment is “virtually unreviewable” by the court.

Federal courts’ predilection favoring validity of the indictment is shown by a portion of the opinion in *United States v. Mitchell*:

> The district attorney may explain both his case and his law to the jury. . . . If he went beyond this, his acts may constitute an irregularity, but the case must be extreme before the court will try the district attorney or the grand jury . . . in order to determine whether it will try a defendant.

This view was upheld in the case of *United States v. A.M.A.*, wherein the defendant made a motion to investigate proceedings of the grand jury, including examination of the jurors, to discover possible defects upon which the validity of the indictment could be attacked. The court refused to grant the motion, saying: “Considerations of public

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68. Costello v. United States, 350 U.S. 359, 363 (1956): “An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits.” Mr. Justice Burton concurred, but cautioned: “. . . I agree with Judge Learned Hand that ‘if it appeared that no evidence had been offered that rationally established the facts, the indictment ought to be quashed; because then the grand jury would have in substance abdicated.” *Id.* at 363. The term “unbiased” as used by the majority likely refers to the systematic exclusion of Negroes from the grand jury rolls. *See,* Pierre v. Louisiana, 306 U.S. 354 (1939); Beck v. Washington, 369 U.S. 541 (1962); and, Bartlett, *Defendant’s Right to an Unbiased Federal Grand Jury,* 47 BOSTON U.L.R. 551 (1967).


70. *Id.*

71. 8 MOORE, FEDERAL PRACTICE, sec. 6.04 at 6-22 (1968).


policy demand a lasting secrecy. Jurors are thereby inspired with assurance of security in discharging their important duties and restrained from impeaching their findings.74

Despite judicial caution, federal courts have quashed indictments when it was shown that the conduct of the district attorney before the grand jury was clearly prejudicial to the defendant.75 And the courts have, at times, allowed jurors' affidavits to prove prejudicial irregularities in the proceedings. In an 1881 case, United States v. Farrington, the court acknowledged the absolute supremacy of secrecy in many states, but decided that grand jurors' affidavits should be allowed in cases of extreme irregularity.76 This court allowed affidavits documenting the presence and conduct of unauthorized persons before the grand jury. The Farrington court's reason for its holding is interesting in that it focuses solely on the protection of the accused:

It is the duty of the court, in the control of its grand jury proceedings, to see to it that no person shall be subjected to the expense, vexation, and contumely of a trial for a criminal offense unless the charge has been investigated and a reasonable foundation shown for an indictment. . . . It is only practicable to do this by removing the veil of secrecy whenever evidence of what has transpired before [the grand jury] becomes necessary to protect public or private rights.77

In a 1908 decision, United States v. Wells, the defendant moved to quash the indictment because of alleged misconduct of the prosecutor.78 The district attorney had appeared before the grand jury and reviewed and discussed the evidence given to that body, had applied the law thereto and expressed his opinion that the accused was guilty, and had urged the return of an indictment. The defendant offered jurors' affidavits to prove the misconduct and the court allowed them. The grand jurors testified that they were not influenced by the prosecutor's statements, and the court determined that there was sufficient proof to justify the return of an indictment. Nevertheless, the court quashed the indictment on the basis that an accused has a constitutional right to be indicted only by the judgment of a properly conducted grand jury. If a reviewing court decides that a grand jury was conducted improperly and proceeds to judge the sufficiency of the evidence itself, it is

74. Id. at 430.
76. United States v. Farrington, 5 F. 343 (N.D.N.Y. 1881).
77. Id. at 345.
78. 163 F. 313 (D. Idaho 1908).
substituting its judgment for that of a fair grand jury and denying the accused his constitutional right. This compelling rationale is conveniently overlooked by many courts.

The Wells decision was characterized as "extraordinary" in a 1967 ruling, United States v. Bruzgo, wherein the appellate court upheld the trial court's refusal to allow the defendant to take affidavits of grand jurors to show improper statements allegedly made by the prosecutor in front of the grand jury. The appellate court would not allow the affidavits because it found that even if the alleged statements of the prosecutor were proved, there was still sufficient evidence to justify the indictment. This decision seems to ignore the caveat given by the Wells court concerning the injustice caused when a reviewing court usurps the function of a properly conducted grand jury. However, this decision is in line with the general rule in federal courts that misconduct must be clearly prejudicial before "... the court will try the district attorney or the grand jury... in order to determine whether it will try a defendant." The courts often balance the gravity of the prejudice to the integrity of the grand jury against the policy of secrecy and the concomitant presumption of indictment validity. The Bruzgo court distinguished the facts in the Wells decision, saying that the district attorney therein virtually coerced the jury into returning an indictment, and it concluded:

Insofar as [the Wells decision] recognizes that there can be situations where the propriety of the action of a prosecutor may be so extreme as to require a court to vitiate an indictment on that ground, we have no occasion here to quarrel with the case.

In a recent decision, United States v. DiGrazia, the District Court for the Northern District of Illinois quashed an indictment because of misconduct of the prosecutor. The defendant testified before a grand jury without having been told of his constitutional rights to remain silent and consult with counsel, and without being informed that his statements could be used against him. No grand juror's affidavits or testimony were offered, and the court found no evidence that the de-

79. Id. at 327.
80. 373 F.2d 383 (3rd Cir. 1967). The facts of the Wells case were also distinguished in United States v. Rintelen, 235 F. 787, 794 (S.D.N.Y. 1916), wherein the court said: "A plea based on the conduct of the district attorney before the grand jury should be adjudged insufficient unless it clearly shows prejudice to the defendant and indicates that the alleged irregularities affected the action of the grand jury."
81. United States v. Bruzgo, 373 F.2d at 386 (3rd Cir. 1967).
83. United States v. Bruzgo, 373 F.2d at 387 (3rd Cir. 1967).
The defendant made any incriminating statements. Nevertheless, the court said it could not be sure that the defendant did not tend to incriminate himself by his appearance, and that this doubt, standing alone, is sufficient to quash an indictment when constitutional rights are involved. In concluding its opinion, the court said that the express purpose of the grand jury is to insure that people will not be accused of crimes because of the zeal or malice of the prosecutor, and therefore:

It is the duty of a prosecutor presenting a case to a grand jury not to inflame or otherwise improperly influence the jurors against any person. Even the presence of the prosecutor while the jurors are deliberating their action, though he say nothing, may be grounds for quashing the indictment.85

Although no decision has specifically held that Rule 6(e) (permitting disclosure if grounds may exist for quashing an indictment) authorizes grand juror impeachment of an indictment, the cases would support this interpretation. Federal courts are hesitant to encroach upon grand jury secrecy, but have continued to view the grand jury as a means of protecting the accused from the prosecutor. Therefore, in extreme cases of misconduct on the part of the prosecutor, federal courts will quash an indictment. And they have, when warranted, allowed grand jurors’ testimony to show such misconduct.

STATE DECISIONS

A general, though not universal, rule throughout the states is that testimony of grand jurors is not admissible to impeach an indictment which they returned.86 In Hall v. State,87 an Alabama case, the defendant moved to quash his indictment, alleging that the prosecutor and presiding judge repeatedly urged the grand jury to return an indictment. The court held that grand jurors’ testimony was inadmissible to prove the charge, saying that allowance of the testimony

[would] be destructive and subversive of the grand jury as an institution of our judicial system, and destructive of that security of freedom of thought and action, and therefore of that independence so absolutely essential to the faithful discharge of the duties imposed upon that body, which if impaired or destroyed would be fatal to a vigorous administration of the criminal law.88

This line of reasoning has been followed by some other states, thereby imposing a strict policy of secrecy that may not be breached to show

85. Id. at 235, citing United States v. Wells, 163 F. 313 (D. Idaho 1908).
87. 134 Ala. 90, 32 So. 750 (1902).
88. Id. at 113.
improper proceedings, even if they may have resulted in prejudice to the defendant. The courts often justify this reasoning by pointing out that an indicted defendant has an opportunity to exculpate himself at trial; if he is acquitted little harm is done, and if he is found guilty justice has prevailed. Establishing new procedural safeguards for an accused before a grand jury would, at best, unnecessarily complicate the function of a trial, and at worst, turn the grand jury into a costly and time consuming preliminary hearing. Some jurisdictions have embraced a policy of lowering the secrecy barrier when, in the court's discretion, the facts warrant it. This policy has engendered problems in evaluating the credibility of the grand jurors' testimony which the courts must resolve on a case-by-case basis.

Pennsylvania courts followed a rather strict policy of grand juror secrecy, but in a well-reasoned opinion, Commonwealth v. Smart, that state's superior court modified its position. The defendant therein asked the court to investigate improper and prejudicial actions of the prosecutor before the grand jury; however, the defendant's only support for his allegation was his own testimony that an anonymous grand juror had revealed such improper actions to him. The court said:

Even though it might be possible to imagine a situation which presented justification, and even necessity, to investigate the acts and conduct of a prosecuting officer during the course of his attendance upon the Grand Jury, it is certainly true that such an investigation should never, under any circumstances, be instituted except on the basis of credible, detailed, sworn and persuasive averments by witnesses of the irregularities complained of.

The defendant's motion did little more than ask for a fishing expedition, so the motion was denied. Had the defendant substantiated his charge with sworn affidavits of grand jurors, a hearing would have followed.

Other state courts have allowed jurors' testimony in a variety of circumstances. The Supreme Court of Iowa received the affidavits of grand jurors to prove that a supervising judge entered a grand jury room and personally urged the indictment of a defendant. In Massachusetts, a court heard testimony of grand jurors regarding undue influence exercised by the prosecutor over the grand jury. The court

89. United States v. Tallmadge, 14 N.M. 293, 91 P. 729 (1907); Lewis v. State, 132 Miss. 200, 96 So. 169 (1923); People v. Nall, 242 Ill. 284, 89 N.E. 1012 (1909); Annot., 110 A.L.R. 1025 (1937).
90. 368 Pa. 630, 84 A.2d 782 (1951).
91. Id. at 636, 84 A.2d at 786.
said that "... justice may be outraged or go unsatisfied unless such conduct before the grand jury can be disclosed." The Louisiana Supreme Court held that grand jurors could testify that a prosecutor was present during their deliberations, stating that it was unable to conceive of how such presence could be proved other than by such testimony.

In a New Jersey case, *State v. Manney*, the court had no quarrel with the allowance of grand jurors' affidavits to show the presence of an unauthorized person in the grand jury room during voting and deliberations, but was quite concerned with the competency of the affidavits. The court said the affidavits contained only conclusions, not facts. Furthermore, as the affidavits were obtained eight months after the indictment, the court questioned the jurors' recall of the incident. Holding that such vital questions should not be determined on affidavits alone, the court stated that: "The public interest requires a full inquiry."

The court in *Sears v. Romiti* considered these state decisions allowing impeachment. The majority labeled the decisions "scattered and sporadic" and declined to deviate from a policy of strict secrecy.

It is apparent that when an Illinois court refuses to hear grand jurors' testimony that the prosecutor procured an indictment in bad faith, the protection of citizens from abusive prosecution is diminished. However, indictment by an Illinois grand jury does not result in the punitive consequences that an old English indictment did. Whereas in England the indictment raised presumptions of guilt that were often difficult to rebut, the indicted defendant in Illinois is presumed innocent of the crime charged and is given a trial in which his constitutional rights are vigorously protected. The oppression that drove the English to use the grand jury as a bulwark against the abuses of the prosecutor vanished with the development of the American trial system. Justice Field once stated:

> In this country, from the popular character of our institutions, there has seldom been any contest between the government and

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95. 24 N.J. 571, 133 A.2d 313 (1957).
96. *Id.* at 577, 133 A.2d at 316.
97. 50 Ill. 2d 51, 277 N.E.2d 705 (1971).
98. *Grand Jury Indictment Procedure* at 349.
the citizens, which required the existence of the grand jury as a protection against oppressive action of the government.99 In addition, as the apprehension and prosecution of criminals becomes increasingly prolonged and complex, courts are placing emphasis on assuring the ability of the grand jury to function as an efficient method of bringing suspects to trial. To promote its efficiency the court must prevent a defendant from using the grand jury as an evasive mechanism. If investigations into the conduct of prosecutors were allowed, mischievous defendants would seize the opportunity to initiate dilatory tactics and divert the course of the proceedings from themselves to attacks upon the prosecutors. Judge Learned Hand once said,

No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price . . . . To grant [a defendant's motion to investigate proceedings before the grand jury] would do violence to salutary rules strongly rooted in our jurisprudence which, without sacrificing any of the fundamental safeguards, look to the speedy and practical administration of criminal justice. . . .100

Judge Hand's argument is impressive, but regardless of the protection afforded an individual at a trial, and regardless of the need for speedy administration of justice, it is still a very serious thing for a man to be indicted for a crime. One federal court pointed out that whether the accused is innocent or guilty he cannot escape " . . . the ignominy of the accusation, the dangers of perjury and error at his trial, the torture of suspense and the pains of imprisonment or the burden of bail."101 The Illinois Supreme Court recognized these dangers in People v. Sears, stating:

Nor do we find persuasive the argument that a defendant wrongfully indicted has his day in court at trial, and assuming vindication by acquittal has not been harmed thereby. We agree . . . that a wrongful indictment inflicts substantial harm on a defendant not entirely remedied by acquittal.102

It is curious that the court, in its subsequent decision of Sears v. Romiti, ignored that statement and embraced a policy of secrecy, commonly justified by disparaging the importance of an indictment and extolling the remedial qualities of a trial.

The smear of a reputation may be the most obnoxious result of an indictment, especially to a public figure such as a state's attorney.

101. Schmidt v. United States, 115 F.2d 394, 397 (6th Cir. 1940).
Americans have been characterized as possessing a strong tendency to equate accusation with guilt: "Where there's smoke, there's fire." In this respect an indictment can be much more damaging than an accusation by information because of the tremendous publicity that attaches to grand jury indictment procedures. Conversely, the grand jury protects the prosecutor from adverse publicity. The grand jury can shield a bad faith prosecutor from the adverse public opinion which would otherwise result if the prosecutor sought to press charges by an information without a semblance of probable cause. The chief criticism of the grand jury system is that proof of probable cause prior to trial is not insured because the prosecutor has so much control over the proceedings. Accordingly, it has been suggested that preliminary hearings should replace grand juries because they afford greater protection for the accused and entail a speedier and less expensive procedure. At a preliminary hearing, the prosecutor must justify his information by establishing probable cause to a magistrate. A predatory prosecutor is not likely to be held in check by a body of confused laymen that comprise a grand jury but he can be checked by the court at a preliminary hearing.

In view of the fifth amendment, it is improbable that the grand jury will fall into disuse in the federal system, at least with respect to its accusatory function. Use of the grand jury by the states is not dictated by the fifth amendment, and use of the information is increasing throughout state jurisprudence. A 1964 survey showed that 18 states have abolished the necessity of the grand jury in all cases; all criminal accusations can be made by information. Two other states have restricted the use of the grand jury to cases of capital crimes only. Most Americans have been characterized as possessing a strong tendency to equate accusation with guilt: "Where there's smoke, there's fire." In this respect an indictment can be much more damaging than an accusation by information because of the tremendous publicity that attaches to grand jury indictment procedures. Conversely, the grand jury protects the prosecutor from adverse publicity. The grand jury can shield a bad faith prosecutor from the adverse public opinion which would otherwise result if the prosecutor sought to press charges by an information without a semblance of probable cause. The chief criticism of the grand jury system is that proof of probable cause prior to trial is not insured because the prosecutor has so much control over the proceedings. Accordingly, it has been suggested that preliminary hearings should replace grand juries because they afford greater protection for the accused and entail a speedier and less expensive procedure. At a preliminary hearing, the prosecutor must justify his information by establishing probable cause to a magistrate. A predatory prosecutor is not likely to be held in check by a body of confused laymen that comprise a grand jury but he can be checked by the court at a preliminary hearing.

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of the remaining states have restricted the use of the grand jury to cases of felonies, "serious crimes", or "public offenses." The movement against use of the grand jury by states would be curtailed if the United States Supreme Court rules that all rights guaranteed by the first ten amendments to the Federal Constitution are binding on the states by means of the fourteenth amendment. However, this possibility is remote; the proposition has never commanded a majority of the Court.

The 1870 Illinois Constitution provided for grand jury indictment in felony cases, but gave the legislature the authority to abolish it by law. The Illinois State and Chicago Bar Associations' Joint Committee to Revise the Illinois Criminal Code supported inclusion of the grand jury in the 1963 Illinois Criminal Code of Criminal Procedure, and the legislature concurred. The 1970 Illinois Constitution continues the provision of grand jury indictment in felony cases, but authorizes the General Assembly to limit as well as abolish use of the system. Thus, it is conceivable that the General Assembly will curtail the use of the grand jury. In this respect, it must be noted that most Illinois grand jury proceedings follow a preliminary hearing. Therefore, the grand jury merely duplicates the efforts of the magistrate who found probable cause. If, in fact, the preliminary hearing is the superior mechanism for safeguarding the rights of the accused, the grand jury is expensive surplusage in Illinois. It may be contended that grand juries are especially useful in bringing malfeasant public officials to trial; that is, that a body of laymen will more readily accuse a public official than would a magistrate who is sensitive to political or peer pressure. Today this argument is largely illusory because the grand jury is an arm of the court and depends on that court for its power and direction.

The court's decision in Sears v. Romiti warrants concern over the grand jury's viability as an instrument of justice for an accused in Illinois. The decision sets forth a practicable rule under which presiding courts must operate; grand jurors may not impeach their indictment. This rule will conveniently expedite the administration of jus-

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109. See, the dissent of Mr. Justice Black, Adamson v. California, 332 U.S. 46, 68 (1947).
114. People v. Sears, 49 Ill. 2d 14, 73 N.E.2d 380 (1947).
115. 50 Ill. 2d 51, 277 N.E.2d 705 (1971).
tice in Illinois and will be harmless in most cases because the indictment is normally just a pro forma requirement. However, the grand jury's finding is extremely important in some cases, such as those involving public officials, and the rule sacrifices a little more of the protection that the grand jury once offered an accused. The court's decision in *Sears* gives strength to the contention that the grand jury no longer stands between a prosecutor and an accused. In view of the divergent holdings throughout this country on the question of grand juror impeachment, and the formidable arguments supporting every holding, it would be futile to attempt to decide whether the *Sears* court's decision is a proper solution. There are simply too many irreconcilable policy considerations. But the decision does call into question the value of the grand jury in Illinois jurisprudence. The legislature should re-examine the grand jury in Illinois, and determine what function it should serve in the administration of justice. If it can fulfill its function only at the expense of protection of an accused, or at great expense of the court's time and the citizens' money, an alternative should be found.

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