

# THE GRAND JURY AS THE NEW INQUISITION

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This article was the basis for Mr. Tigar's luncheon address September 21, 1971 during the 36th Annual Meeting of the State Bar of Michigan.



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**T**HIS ARTICLE stems from our concern with the democratic value of the Bill of Rights. One theme of our writing and work has been that the constitutional guarantees of political freedom have been undermined for two reasons:

First, the constitutionalization of private property has led to the creation of aggregations of power not subject to control by those who are victims of power's exercise. The Lockean theory of private property, and its labor theory of value, rests in part upon the view that "property" is a relation between a person and a thing.

But when the "things" are means of production, housing and places of public accommodation, ownership carries with it power over people's lives. This power, endemic to capitalist social relations, undermines constitutional guarantees of freedom. This point is beyond the reach of this paper.<sup>1</sup>

Second, the system of "checks and balances" is designed to assure that abuses of power and of constitutional principle are subject to constant correction. The grand jury is an institution

1. See, however, Tigar, "Socialist Law and Legal Institutions," in *Law Against the People* (Random House, 1971).

which by design is counterposed to the power of the Executive and the Judiciary for the protection of citizens.

In fact, as we shall argue, it fails to perform this function. Such is the fate of many institutional guarantees of liberty in the Constitution and Bill of Rights, in the face of the new repression. To borrow from de Jouvenel: In their haste to reach a certain result, the authors of repression forget or ignore deep-seated values about who is to decide and how decisions are to be reached. We believe that this systematic overthrow of democratic guarantees cannot be ended within the present system of social relations.

### GRAND JURY IMAGE

Public impressions of the grand jury are myriad: "Mr. District Attorney" on TV; some knowledge of racism in grand and trial jury selection in the South; garbled newspaper versions of Sister Jogues Egan's travail.

The grand jury's low visibility, at least until recently, is explainable. Many states have no provision for a grand jury at all. Some, like California, keep the grand jury but use it principally as a body of middle and upper-class citizens—selected by the judges in each county—who look into and write reports about county government. In California, fewer than ten percent of felony cases begin with a grand jury indictment.

The grand jury performs its historic function, sifting evidence to determine whether a crime has been committed, in very few cases. Most district attorneys send only controversial cases to the grand jury—for example, cases involving alleged police misconduct, in which the D.A. can present a less-than-credible case for indictment; the grand jury can return "no bill" (fail to indict) and the decision has an air of impartiality nonetheless.

As any lawyer who frequents the criminal courts knows, the D.A. can get an indictment almost at will, and the grand jury's institutional disinterest can be used to insulate him from criticism for indicting or failing to indict.

In England, the country of its birth, the grand jury was abolished in 1933, save for very few cases. Reflecting the disuse and near-abandonment of the grand jury as an institution, teachers of criminal procedure in our law schools have paid little attention to it. The leading criminal procedure case book, Paulsen and Kadish, barely mentions the grand jury and constitutional law case books treat the subject only with reference to racial discrimination.

Yet in the federal courts, the grand jury has remained as a sometimes somnolent but always potentially powerful investigative and law enforcement device. In our history, the questions have been: "Investigation of what?" and "Whose law?"

The fifth amendment requires that all federal felony prosecutions begin by grand jury indictment. And the 1968 and 1970 crime bills give the grand jury a potentially great role in federal criminal procedure.

These remarks concentrate on the federal grand jury and on its expanding use in suppressing dissent. By way of prologue, we look first at the origin and operation of the grand jury in the federal system, and second at the recent history of repressive moves by government against dissent. What we say is relevant also to those states, particularly New York, where the grand jury in the hands of an ambitious district attorney can wreak as much anguish as a federal grand jury on the loose under the direction of one of Attorney General Mitchell's "strike forces."

### SOME HISTORY OF GRAND JURIES

The grand jury emerged in the twelfth century as an instrument of royal power. The Assize of Clarendon in 1166 provided that in each community a body of the "most lawful men" should have the power and duty to make "inquiry . . . whether in their hundred or vill there be any man who is accused or believed to be a robber, murdered, thief or receiver of robbers, murderers or thieves since the King's accession."

This body would make its accusation

of crime and the accused would then be put on "trial," to consist of some ordeal prescribed by law. The Assize dictated:

And he who shall be found . . . accused or believed to be a robber, murderer, thief, or a receiver of such since the King's accession shall be taken and put to the ordeal of water and made to swear that he was no robber, murderer, thief, or receiver of such up to the value of five shillings, so far as he knows, since the King's accession.<sup>2</sup>

The creation of the grand jury was the parallel in the field of criminal justice to the *Domesday Book*, William the Conqueror's record of the population, land and chattel holdings of every manor. *Domesday Book*, and the inquisitions which collected information for it, provided the Crown with information necessary to exercise taxing jurisdiction over the whole realm.

The grand jury brought the royal presence into the lucrative field of the criminal law, where fines and forfeitures would provide new additions to the royal treasury. Persons accused under the Assize of Clarendon were to be brought before the King's officers or justice, not before a manorial court.

This procedure after "presentment" of an accused felon by an indicting jury underwent rapid change in the next century. Often the presenting jury would simply be asked whether the accused was guilty. More usually, the indicting jury and two or three other similar bodies from other communities would sit together as a trial jury.

In the mid-13th century, the formal

2. It apparently did not help much if one came through the ordeal in the proper way, for the Assize also provided: "The Lord King also wishes that those who make their law and clear themselves shall nevertheless, forswear the King's land if they are of bad renown and publicly and evilly reputed by the testimony of many lawful men, and cross the sea within eight days unless detained by the weather, and with the first favourable wind they shall cross the sea and never come back to England save by the King's permission, and shall be outlawed, and if they come back shall be captured as outlaws."

separation of the indicting or "grand" jury and the trial or "petit" jury, occurred. From the many grand jurors from many communities there would be picked a trial jury of twelve.

Of course, the trial jury might include some members of the same grand jury which returned the indictment—hardly fair to the accused, one might say. But "if the indictors be not there it is not good for the King," as one judge put it in 1341. In 1352, however, the separation became complete and grand jurors could thereafter be challenged off a petit jury.

The origins of the grand jury are thus in the royal search for prerogative. Of course, the possibility of initiation of criminal proceedings by other means still remained after the Assize of Clarendon, and the precise role of the grand jury was not settled until the 17th century, a period in which struggle and tumult led to great change in the English legal system. From this period, the American Bill of Rights derives most of its provisions on criminal procedure.

The practice in the Court of Star Chamber of proceeding by "information"—a sworn statement by a public official or private person that the defendant had committed a crime—became a focus of opposition. By the end of the century, it was settled that an informant could be used only in cases of misdemeanor and that felonies could be tried only upon indictment of a grand jury.

#### "BULWARK OF LIBERTY"

The grand jury—like the petit jury—was regarded as a "bulwark of liberty," a body which might interpose independent judgment between the State and the individual. This function could not credibly be termed "historic," given the motive behind the Assize of Clarendon, but in the rewriting of history which characterized the 17th century legal reform, it seemed helpful to say that the grand jury should play a certain role because it had "always" done so.

In this form the ideology of the grand jury came to this country in the Fifth Amendment guarantee that "no person shall be held to answer for a capital or

otherwise infamous crime except upon presentment or indictment of a grand jury," a provision which found echo in most state constitutions and statutes.

The grand jury's role in the federal courts was not intended to create much of a stir in criminal justice. The 1790 Crimes Act defined few offenses and early federal criminal trials were mostly for piracy, smuggling and offenses (or sometimes insurgencies), against the revenue.

Hopes that the grand jury could function independent of the Executive were proven false by 1798, when the Adams government began its war on dissidents. A word on how a grand jury works will show how the abuses under Adams evolved: A grand jury modernly consists of twenty-three persons, usually untrained in the law, with the power to issue subpoenas under seal of the court. While the grand jurors may question witnesses, and do to some extent, this function is usually usurped by a United States Attorney or other government lawyer. This lawyer also advises the jurors on the law and draws up indictments to be voted upon.

The grand jury meets in secret and its proceedings may not be disclosed by jurors or government counsel. When a grand jury is sworn, it receives general instructions as to its duties from a United States district judge. If a grand jury is specially summoned to consider some particular event, it may receive a more precise "charge."

Under the Alien and Sedition Acts of Adams' administration, the control of the grand jury which inheres in its structure was effectively exercised. Charged in a rambling, tendentious and inaccurate manner by the likes of Chief Justice Chase,<sup>3</sup> and acting under the direction of Adams-appointed prosecutors, grand juries readily indicted Republicans for seditious activity.

This ability of a party in power to turn the criminal process to its politi-

3. Until after the Civil War, Supreme Court Justices presided over trials "on circuit," sitting in the circuit courts, equivalent to our Federal district courts of today.

cal ends has been the subject of careful study by later governments. The increasing professionalization of the federal prosecutorial establishment, the expansion of federal criminal jurisdiction, and the devising of new means to compel testimony gave the grand jury a fearsome potential power. The 1968 and 1970 crime bills, ostensibly directed at organized crime, seek to exploit this potential.

### SOME RECENT REPRESSION

The principle devices of the McCarthyite (Joe, not Gene) terror were the extravagant accusation, the publicity-studded investigation, and the threat of contempt for refusal to answer questions. These tactics were pursued in the years after World War II as a kind of domestic political prop to an international cold war.

The notoriety which surrounded the targets of accusation and the recipients of subpoena was calculated to chill dissent: The public papers of McCarthy, the Committee on Un-American Activities, and the various state carbon copies of these, attest that this was so.

The threat of a jail term for failure to appear and answer questions was, as the early experience of the Hollywood Ten and the later cases of Carl Braden and Frank Wilkinson show, a not inconsiderable adjunct to the power of subpoena.

But the power of McCarthyism waned (though its spores have found fertile ground and trace deep roots yet). The discredit of McCarthy himself was no doubt a factor. Contempt citations, too, proved a cumbersome and uncertain threat. First, the committee and the house concerned had to certify the contempt. Then, a grand jury had to indict and a trial jury convict.<sup>4</sup>

The Supreme Court began, too, to whittle away at the compulsory process available to congressional committees,

4. Although contempt of Congress was only a misdemeanor, the provisions of 2 U.S.C. §§ 192 et seq. (and predecessor statutes) provided since the 1860's that a grand jury indictment is necessary. Of course, each house of the Congress retains the power to punish contempt summarily by summoning the offender to the bar of the house.

to redefine the contempt power narrowly and to provide some procedural deficiencies for witnesses.

The availability of the privilege against self-incrimination was upheld in the *Emspak* and *Quinn* cases, the *Watkins* case placed restrictions on the scope of the committee inquiry; procedural guarantees in contempt cases were strengthened in *Russell* and *Seeger*; the first amendment was upheld in *Sweezy* and *Gibson*. Even the affirmances by a closely-divided Court in *Barenblatt*, *Braden* and *Wilkinson* signaled that the inquisitors' most extravagant claims would not likely be sustained.

With the growing strength of the youth and peace movements in the early 1960's, the committees lost the power to inspire fear. The HCUA efforts to investigate the SDS and the Youth International Party were pathetic and largely unproductive; the Senate Internal Security Subcommittee's attempted inquiries of German SDS leader Karl Dietrich-Wolff were rather a joke.

#### THE CONSPIRACY PROSECUTION

In 1968, the government received a weapon, the conspiracy prosecution, used earlier against other movements for social change. Such prosecutions sought to indict the leaders of a movement and eventually jail them while burdening the defense with staggering costs, scaring away potential supporters and imposing a regime of silence on the left. The *Spock* case, directed at militant antiwar dissent, followed the pattern until the conviction was reversed in 1969.

The Chicago Eight conspiracy case illustrates the point more vividly: A grand jury was convened, charged in highly inflammatory terms by Judge Campbell, dominated first by Mayor Daley's own Tom Foran and then, after Nixon's inauguration, by Foran and a Jerris Leonard emissary, and subjected to a highly biased version of Chicago, August 1968. But the trial, though it cost the defense enormous sums and took many fine movement workers out of action for the duration, didn't scare many people.

The Seattle Eight conspiracy trial, directed at a local movement rather than a national event, saw the government unable to keep its case afloat past the 11th trial day.

Clearly, the Justice Department under Mitchell needed new weapons which would more certainly silence irresponsible dissent and put movement leaders in jail. Spiro Agnew's attacks were just the thing for P.T.A. Sunday suppers but they didn't frighten enough hard-core dissenters.

In 1969 and 1970, the Justice Department gave serious study to this problem. The Supreme Court in January 1970 lent renewed urgency to it by holding that Selective Service local boards could not be vehicles to punish dissent, rejecting Attorney General Mitchell's anguished plea that local boards had to have such power because the criminal process and its safeguards were too expensive and uncertain.

In the Department, the Internal Security Division received new attention. Long a haven for lawyers of little talent and less imagination, the Division was given a new chief, Robert Mardian, a healthy budget addition and a new breed of lawyer. Internal Security strike forces began to appear in major investigations of radical activity.

These strike forces, led by special assistant attorneys general empowered by law to seek the summoning of, and conduct proceedings before, federal grand juries anywhere in the nation, moved into Vermont, New York, Seattle, Los Angeles, Detroit, San Francisco, Tucson, Harrisburg, Brooklyn and numerous other jurisdictions.

#### TYPICAL PATTERN

The typical pattern began to appear: FBI agents would visit a number of activists, asking probing questions and implying or saying that a grand jury subpoena would soon follow if there were no ready answers. A grand jury would be convened under authority of the 1970 Crime bill, which permits a grand jury inquiry into organized crime, sedition or riot-connected offenses, to sit for three years. Then the subpoenas would issue.

Consider the case of a grand jury in Tucson, convened under the direction of Guy Goodwin, the best-known of the anti-left strike force lawyers. The subject of investigation was assertedly a plot to transport explosives in interstate commerce.

Because of the conspiracy law, that medieval creature in modern dress, permits a prosecution to be brought anywhere an "overt act" was committed in furtherance of the conspiracy, Tucson was chosen as the site for the grand jury though almost all the witnesses were to be summoned from Los Angeles, five hundred miles away.

The grand jury promptly put out a number of subpoenas and one material witness warrant for Los Angeles movement leaders. One center of the alleged plot was, so the government believed, a man named Robert Gottlieb. Witnesses were asked, "Do you know Robert Gottlieb?" and then, "Relate every conversation you had with Gottlieb in 1970."

The sweep of the inquiry could not have been broader. The Justice Department lawyers, with Goodwin at the lead, wanted to know the structure, organization, membership and operation of an entire grouping of movement activists in Venice, California. Prying into associations, beliefs, speeches and conversations clearly protected by affirmative constitutional guarantees, the inquisitors gave notice that government was marshaling its force to shatter the political and personal privacy of those who were, or knew, activists in seeking social change.

At the drama's end, five young people who had resisted the imprecations to testify were in jail for indefinite terms, and a quiet and watchful hush had replaced politics as usual in West Los Angeles.

The drama was replayed elsewhere: A *New York Times* reporter may yet go to jail in San Francisco for refusal by silence to shatter the political privacy of his sources; the F.B.I. defrauded a district judge and secured Leslie Bacon's removal to Seattle and her incarceration there; and there have been a dozen more such instances across the nation.

It was remarkably like the good old congressional witch-hunt, but with the new and scarifying power of summary contempt: A witness before a grand jury who refuses to testify when ordered to do so may be committed to jail summarily for up to three years, or until she or he answers the questions posed.

### JAILING IMMEDIATE

The jailing is not a "next year" thing, to happen after lengthy appeals. It may be and often is imposed on the spot, within minutes after the refusal. The recalcitrant witness is taken before a United States district judge and, again ordered to answer. Upon refusal, incarceration begins immediately.

Let us examine this new weapon against dissent in more detail, by noting some aspects of trial by grand jury:

First, there is trial in secret, and by inquiry. The grand jury sits in secret, a practice begun to protect the innocent. But the modern-dress version makes the secrecy strikingly reminiscent of the oath *ex officio* procedure which for a time threatened to engulf and still the first stirrings of the adversary system, the presumption of innocence and the right of public trial.

The evils which were disowned in the creation of the right to a fair trial are in fact quite at home in the grand jury room: There is no right to notice of the scope and nature of crimes being investigated; there is no confrontation of the witnesses<sup>5</sup> who have led the trail of the investigation to the witness's doorstep; and collaterally, there is no possibility, much less a right, to cross-examine those witnesses.

Second, there is the ordeal of examination without counsel, which even the

5. 18 U.S.C.A. § 2518 (10) (a) provides for suppression of illegally obtained wiretap evidence "... in any trial, hearing, or any proceeding in or before any ... authority of the United States ... ." The issue of whether or not this section is applicable to grand jury witnesses will be before the United States Supreme Court in *U.S. v. Egan*, cert. pending, (No. 71-263), *Gelbard and Parnas v. U.S.*, cert. pending, (No. 71-110), and *U.S. v. Evans*, cert. pending, (No. 71-256). See discussion below.

Congressional committees never sought to impose. In the grand jury room, counsel is not permitted. True, the witness may ask the government lawyer to be excused and go out to the anteroom to consult counsel, but the atmosphere is heavily weighted in favor of the government. There is no judge or other supposedly impartial official present—only the grand jurors and government counsel.

Third, there is trial by the ordeal of distance. A federal *conspiracy prosecution* may be brought, as noted before, in any judicial district in which the overt act in furtherance of the conspiracy was committed. However, if the prosecutor's venue choice is too disadvantageous to the defense, the court can order a change of venue "for the convenience of parties and witnesses and in the interest of justice."

There is no such corrective available for a venue choice in the site of a *grand jury investigation*. So in Tucson, the witnesses from Los Angeles were required to bring their counsel with them and to face their summary contempt hearings and jail terms at a great distance from home. At one time, the Tucson witnesses were serving sentences in rural Arizona jails scattered all over the state.

#### LIMITS ON BAIL AND APPEAL

Fourth, there are limitations on the right to bail and to appeal. A defendant charged with crime, even a serious offense, can usually—in the federal courts—secure prompt release on bail pending trial. A grand jury witness found summarily in contempt for refusal to answer can expect serious and often insurmountable difficulty in obtaining release pending appellate review.

And the review available, under the 1970 crime bill, is truncated, providing in many cases no opportunity even to have the record of proceedings below transmitted to the appellate court.

Fifth, the new grand jury dispenses with the privilege against self-incrimination. By the consistent course of federal decision, a witness may decline to provide any information which may form a

link in a chain of evidence incriminatory to him or her.

When government casts wide its conspiracy net, and the inquisition begins into friendships and associations, almost any question is potentially productive of incriminatory testimony. To undermine the privilege against self-incrimination, the 1970 crime bill greatly expands the scope of the so-called "immunity" provision of the United States Code.

Immunity laws have been recognized in American law since the late 19th century. In their "old form," they provide that a witness could be granted immunity from prosecution about all subjects of her or his testimony. Thus, even if the testimony were incriminatory, the witness could not be prosecuted and thus has, in theory, no need for a privilege against self-incrimination.

Immunity may thus be used when A has information that will incriminate not only her or him, but also B, whom the authorities really want to prosecute. Some deeper objections to this technique are discussed below.

The 1970 crime bill, however, provides not for complete immunity, but for a partial or "use" immunity. If A incriminates herself or himself, the government may not use the incriminatory testimony *itself* at a later trial of A, but there is no provision that, having discovered the misdeed the government may not seek to prosecute it by gathering other evidence.

This undermining of the privilege against self-incrimination has been held unconstitutional by the Court of Appeals for the 7th Circuit and by U.S. District Judge Constance Baker Motley of New York.

#### FREEDOM OF ASSOCIATION

Let us consider this problem in the broader context of a sixth objection: The grand jury inquisition destroys associational freedom by an assault upon political privacy.

To begin, the grand jury's organ grinder, the government lawyer, has access to wiretap and other electronic surveillance material which can be used as

a basis for questioning and intimidating witnesses.<sup>6</sup>

This is not the occasion to dwell upon the wholesale grant of indiscriminate wiretap authority in the 1968 crime bill, nor upon the President's announced intention to exceed even the powers granted in the act when "subversives" are to be tapped. These issues are in the Supreme Court this term. The technology of privacy-invasion, and the public sense of its unbridled use, makes the grand jury on the loose doubly chilling.

Another aspect of privacy-invasion arises from indiscriminate poking and prying into associational freedom. In an active political organization, meetings, friendships, discussions and interchange of ideas are the means by which business is done.

Assume that one member is subpoenaed to testify. That member can invoke the privilege against self-incrimination as to his or her own activities, but not with respect to the activities, words or beliefs of others. To the real worry that in a student radical organization there is a paid FBI informer, is added the certainty that any member may, against his or her will, be made an informer in the secrecy of the grand jury room.

Seventh, the grand jury only pretextually inquires into a specific crime or crimes. More often it is convened to surveil a group or groups whom the Attorney General suspects, seeking some pretext for making a formal charge. Often, the indictments that do result are for offenses peripheral to the purported purpose of the grand jury, or are so ludicrously unsupported as to be *post hoc* apologies for having begun the investigation in the first place.

The grand jury's work is not, under Mitchell, to make charges to be tried, openly and fairly. The grand jury is designed to do what witch-hunting congressional committees were designed to do: Probe, expose, and punish the exercise of political freedom by its imme-

diate targets and chill dissent among all but the hardest of the onlookers.

#### NEW DIMENSION

Eighth, the grand jury has taken on a new dimension, un contemplated by its creators and in defiance of its traditional role: It has become an evidence-gathering body once an indictment has been returned. Grand juries have continued in session long after voting indictments, in an attempt to give government lawyers compulsory process for obtaining criminal discovery explicitly forbidden them by the Federal Rules of Criminal Procedure.

Federal Rule 15 gives only defendants the right to take depositions to perpetuate testimony, and Federal Rule 16(c) severely limits the right of government lawyers to discovery. The remainder of Federal Rule 16 limits the defendant's right to discovery. Thus, the use of the grand jury's power of subpoena is a clear evasion of the law.

The grand jury's power to affect political freedom and to undermine constitutional guarantees of fairness must be curbed. In the legal arena, new tactics against repressive use of grand juries are being devised and tested. It is also important to begin creating an informed and concerned body of public opinion which will consider the conduct of grand juries as carefully and critically as the conduct of Congressional witch-hunts was studied in the Fifties—and more so.

Many responsible law enforcement officials believe that the grand jury could be abolished in favor of a universal "preliminary hearing" method of instituting criminal charges. Such a system would at least be public and would permit participation by defense counsel. Such hearings are conducted in many criminal cases in the federal system under the Federal Rules of Criminal Procedure,<sup>7</sup> and are the alternative means to bringing criminal charges in systems, such as California's, which make indictment by grand jury optional.

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6. This issue is in the Supreme Court this term in *Egan, Evans, and Gelbard-Parnas*, cited above.

7. The D.C. Circuit cases of *Blue v. U.S.* and *Ross v. Sirica* show that the preliminary hearing can be meaningful.

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And if it be said that the new wave of bombings, marches, "trashings" and other conduct creates a need for "tough law enforcement," we would do well to recall Justice Brandeis' careful words:

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.

This business, begun in the imprecations of Spiro Agnew, in his aping of the "old Nixon," of declaring certain political ideas outlawed or illegitimate, and then moving against them with the full force of the government, is wrong in more than constitutional principle.

It is the means by which we are conditioned to accept even more stringent regulation of the process of politics, to the point that the robust and wide-open debate, which "stirs people to anger," "invites dispute" and "brings about a condition of unrest," becomes an arid dialogue.