The Perversion of the Historic Function of the Grand Jury in Minnesota

Robert M. Paule*

I. Introduction

Historically perceived as an independent body shielding the citizenry from unfounded and malicious prosecutions,[1] the grand jury has instead become a sword in the hands of the prosecution. Today, the grand jury is one of the most powerful weapons in the prosecutor's vast arsenal. The grand jury is also an instrument vulnerable to prosecutorial abuse without being subject to meaningful judicial oversight.[2] This transformation from a means of exoneration into a prosecutorial tool has drawn not only harsh criticism and cries for reform, but also comparisons with such notorious institutions as the Star Chamber[3] and the Ku Klux Klan.[4]

In modern grand jury practice, the prosecutor controls the proceedings from beginning to end. She decides what and who to investigate, who to subpoena, what to develop in the course of the

---

* J.D. 1989, William Mitchell College of Law; B.A. 1985, Gustavus Adolphus College. I would like to express my appreciation to Lisa McNaughton for her invaluable insights and editorial assistance.

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

Wood v. Georgia, 370 U.S. 375, 390 (1961). *See also* Hurtado v. California, 110 U.S. 516, 521 (1883); *Ex Parte* Bain, 113 U.S. 1, 11 (1886); Hale v. Henkel, 201 U.S. 43, 59 (1905). *See generally* Note, *The Grand Jury As An Investigatory Body*, 74 Harv. L. Rev. 590 (1961).

2. *See* Note, *Grand Jury Proceedings: The Prosecutor, The Trial Judge, And Undue Influence*, 39 U. Chi. L. Rev. 761 (1972).

3. "[A] dangerous modern form of star chamber secret inquisition that is trampling the rights of American citizens from coast to coast." *Grand Jury Venue-Northern District of Texas: Hearings Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on Judiciary*, 93rd Cong., 1st Sess. 4 (1973) (testimony of Senator Edward M. Kennedy).

4. "The grand jury functions too much like the Ku Klux Klan. It is shrouded in too much secrecy and only one side is heard. This is incompatible with sound justice." Wayne Morse, *A Survey of the Grand Jury System*, 10 Or. L. Rev. 101, 350-51 n.207 (1931).

questioning, who to indict, and how to draft the indictment itself.[5] Under the watchful eye of the prosecutor, the grand jury may summon any person before it, subject to very few limitations, and force him to disclose any information which he possesses regarding the matter of inquiry. The prosecutor remains with the grand jury throughout the proceedings, except deliberations and voting,[6] and controls the entire process from start to finish.

This article will examine the role of the modern grand jury in Minnesota and contrast it with the historical function of the institution. The article will trace the origin and function of the grand jury and follow it as it evolved in England and crossed the Atlantic with the colonists, eventually becoming part of the criminal process in every state. The article will then examine in detail the role of the grand jury in Minnesota and contrast it with the historical function of the body. The final section will analyze the main criticisms of the grand jury.

II. History

A. English History

The origin and early history of the grand jury is shrouded in obscurity. The inception of the grand jury, if such a distinct event ever actually occurred, has long since blurred with the passage of time. A number of similar institutions existed throughout Europe during the eleventh and twelfth centuries. France,[7] Germany,[8] Norway,[9] Sweden,[10] Denmark,[11] and even England[12] itself manifested progenitors of the grand jury during these so-called Dark

5. *See, e.g.*, Marvin Frankel & Gary Naftalis, The Grand Jury: An Institution on Trial (1977).

6. *See* Minn. Stat. § 628.63 (1988); Minn. R. Crim. P. 18.04 (1988).

7. *See* James Thayer, A Preliminary Treatise on Evidence at the Common Law 104 (1906); Morse, *supra* note 4, at 103; Note, *The Grand Jury: Its Evolution and Alternatives, A National Survey*, 3 Criminology Just. Q. 114, 115-16 (1975).

8. *See* Morse, *supra* note 4, at 105 ("The mistake must be guarded against, of confusing the jurymen with the doomsmen . . . used in the older modes of trial which prevailed in the old Germanic and Anglo-Saxon Courts."); *see also* Edward Jenks, A Short History of English Law 47 (1912) (although possibly acting on an oath, the doomsmen were a tribunal, not a method of trial).

9. *See* William Forsyth, Trial By Jury 16-18 (1875). In Norway there were periodic meetings at which three persons, authorized by the Crown, nominated a certain number of deputies from each district. Thirty-six of the deputies were chosen to act as jurors. These jurors, called laugrettomen, acted not as jurymen, as the term is typically understood, but rather as judges. *Id.*

10. A Nambd, an institution similar to Norway's laugrettomen, existed in Sweden. Forsyth, *supra* note 9, at 19-20; Morse, *supra* note 4, at 106.

11. *See* Morse, *supra* note 4, at 106 (In Denmark, jury-like bodies called Naeuns and Sandemaends developed about 750-790 A.D.).

12. *Id.* at 104 ("It is possible that in England before the Norman Conquest, the

Ages. Legal historians themselves are unable to agree as to the beginnings of the grand jury.[13]

Most commentators agree, however, that a precursor of the grand jury was introduced into England by the Normans following the conquest.[14] The Normans originally used this institution as a means of gathering information. The records from this period indicate the use of a body of "neighbors" summoned by the local sheriff and brought before public officials to answer questions under oath.[15]

During the reign of Henry II, the use of the grand jury was greatly expanded.[16] Henry II made great use of the periodic *As-*

---

seeds of a jury system had been planted, in that the church courts may have been applying an inquisatory procedure . . . ."); *see also* Note, *supra* note 7, at 115.

13. *See generally* Leroy Clark, The Grand Jury: The Use and Abuse of Political Power (1976); Frankel & Naftalis, *supra* note 5; 1 William Holdsworth, A History of English Law (7th ed. 1956); Edward Jenks, A Short History of English Law (1912); Wayne LaFave & Jerold Israel, Criminal Procedure (1984); 1 John Reeves, History of English Law (1916); Thayer, *supra* note 7; Michael Deusch, *Political Activists and the Grand Jury*, 75 J. Crim. L. & Criminology 1159 (1984); Morse *supra* note 4; James Shannon, *The Grand Jury: True Tribunal of the People or Admimistrative Agency of the Prosecutor?*, 2 N.M. L. Rev. 141 (1972); Helen Schwartz, *Demythologyzing the Historic Role of the Grand Jury*, 10 Amer. Crim. L. Rev. 701 (1972).

14. "When Edward the Confessor died in 1066, he left no direct heir to the throne of England." The English nobles bestowed the Crown upon Harold Godwinson, the Earl of Wessex. However, two foreign kings, Harold of Norway and William of Normandy, also claimed the Crown by right of birth. .

Harold Godwinson, fearing an invasion by William from across the English Channel, positioned the majority of his forces in the south of England. Meanwhile, King Harold of Norway invaded to the north with his Viking fleet. Harold Godwinson rushed his army north and engaged the Viking force in York. This caught the Norwegians by surprise, and the English persevered.

On the heels of this victory, Harold Godwinson received news that William had crossed the English Channel. Harold Godwinson marched his weary troops south and confronted the Normans at Hastings. This move played right into the hands of William, whose small army could not withstand a lengthy campaign, giving him an opportunity to land a crushing blow on the English. During the course of the battle, Harold Godwinson was fatally struck in his left eye by an archer's arrow, and the Normans went on to rout the English army, establishing William the Conqueror as the undisputed King of England. David Wallechinsky & Irving Wallace, The Peoples Alamanac 617 (1975). *See generally* George Keeton, The Norman Conquest and the Common Law (1966).

See LaFave & Israel, *supra* note 13, § 8.2(a); Walton Coates, *The Grand Jury, The Prosecutor's Puppet, Wasteful Nonsense of Criminal Jurisprudence*, 33 Pa. B.A.Q. 311 (1962) (Norman conquests may have introduced it); *see also* State v. Falcone, 292 Minn. 365, 195 N.W.2d 572 (1972) (grand jury introduced into England by the Normans); Holdsworth, *supra* note 13, at 313.

15. *See Falcone*, 292 Minn. at 367, 195 N.W.2d at 574; Morse, *supra* note 4, at 106: Note, *supra* note 7, at 116; *see also* Richard Alexander & Sheldon Portman, *Grand Jury Indictment Versus Prosecution by Information—An Equal Protection—Due Process Issue*, 25 Hast. L.J. 997, 998 (1974).

16. *See Falcone*, 292 Minn. at 367, 195 N.W.2d at 574; Morse, *supra* note 4, at 107; *see also* Note, *supra* note 7, at 116-17.

sizes[17] (courts) to centralize royal power, and the grand jury became a prominent tool in his effort to wrest control of the judiciary away from the feudal and ecclesiastial courts, which were very powerful during this period. This is perhaps why the grand jury is commonly perceived as originating from the *Assize of Clarendon*,[18] in which groups of laymen were summoned by the Crown and charged with the responsibility of investigating crime.[19] The grand jury was further entrenched into the English legal process as part of the Magna Carta,[20] passed in 1215.

By the end of the fourteenth century, England had replaced the methods of trial by ordeal[21] and trial by battle[22] with trial by jury. The original grand jury separated into two distinct bodies.[23] The accusatory (grand) jury was expanded into a twenty-four member body that was reduced to twenty-three members in 1368,[24] and the guilt phase of trial was held before a jury of twelve. The accusatory body gradually became known as "Le Grande Inqueste," which provides a logical explanation for the modern title of grand jury.[25] By the seventeenth century, the grand jury began to more closely resemble the modern institution.[26]

As it evolved in England, the historic function of the grand jury was to stand as an independent bulwark protecting the citizenry from unfounded accusations from the Crown.[27] To this end,

---

17. In later English law, the name "Assizes" was given to the court, time, or place where the Judges of Assize . . . who were sent by special commission from the Crown on circuits throughout the Kingdom. Black's Law Dictionary 111 (5th ed. 1977).

18. Issued in 1166. LaFave & Israel, *supra* note 13, § 8.2(a).

19. *See* Holdsworth, *supra* note 13, at 77; William Campbell, *Eliminate the Grand Jury*, 64 J. Crim. L. & Criminology 174, 175 (1973); Morse, *supra* note 4, at 112.

20. *See, e.g.*, Campbell, *supra* note 19, at 175.

21. This marvelous piece of trial ingenuity worked like this: The person who underwent the ordeal appealed to God to prove his innocence by protecting him from harm; at least, he customarily did, though such appeal was by no means obligatory. The trick was then to plunge one's arm to the elbow in boiling water. Small wonder there were few acquittals; even so, the hand was lost in any event.

Theodore Kranitz, *The Grand Jury: Past—Present—No Future*, 24 Mo. L. Rev. 318, 319 (1959). *See also* Holdsworth, *supra* note 13, at 310.

22. The trial by battle was an appeal to providence in the hope that heaven would give victory to the innocent or injured party. *See* William Blackstone, Commentaries *337-41.

23. LaFave & Israel, *supra* note 13, § 8.2(a); *see also* State v. Falcone, 292 Minn. 365, 367, 195 N.W.2d 572, 575 (1972); Holdsworth, *supra* note 13, at 325.

24. *See* Shannon, *supra* note 14, at 143.

25. LaFave & Israel, *supra* note 13, § 8.2(a); *see also Falcone*, 292 Minn. at 367, 195 N.W.2d at 575.

26. Schwartz, *supra* note 13, at 710-11.

27. *See supra* note 1.

the grand jury began to receive testimony in secret to protect both witnesses and jurors from being unfairly influenced by the Crown,[28] and to "guard the people against the oppressive power of autocratic government."[29] The *Colledge*[30] and *Shaftesbury*[31] cases greatly enhanced the image of the grand jury as the guardian of the individual from malicious prosecutions. In both cases, grand juries refused to return indictments against Anglican opponents of the King.[32] These two cases provide an excellent illustration of the traditional independence of the grand jury. The Crown eventually executed *Colledge* and *Shaftesbury*. The grand juries, however, refused to compromise their independent roles, thereby forcing the Crown to use underhanded tactics to achieve its goal.[33] These cases came to symbolize the perception of the English grand jury as the watchdog of the citizens against an overzealous government.

B. American History

When the colonists crossed the Atlantic to America, they brought with them a legal system predominantly based on the British system of jurisprudence, including the grand jury.[34] Grand juries were established in the various colonies almost immedi-

28. LaFave & Israel, *supra* note 13, § 8.2(a); *see also In re* Russo, 53 F.R.D. 564, 568 (C.D. Cal. 1971).

29. *In re* Russo, 53 F.R.D. at 569.

30. 8 How. St. Tr. 549 (1681).

31. 8 How. St. Tr. 759 (1681).

32. In each case, the Royal prosecutor presented evidence of treason to separate grand juries against the Earl of Shaftesbury and Stephen Colledge. In both cases, the grand jury returned bills marked ignoramus, rejecting the accusations put forth by the Crown. In Colledge's case, the grand jury foreman was sent to the Tower and later forced into exile. A subsequent grand jury did return an indictment against Colledge, who was then tried, convicted and executed.

Three months after Colledge's execution, the case against Shaftesbury was presented to a London grand jury, which again refused to indict. When a third grand jury was summoned to hear the case against him, Shaftesbury fled from England. *See* LaFave & Israel, *supra* note 13, § 8.2(a); Schwartz, *supra* note 13, at 710-21.

33. *See* LaFave & Israel, *supra* note 13, § 8.2(a). In Shaftesbury's first grand jury hearing, the Chief Justice of the London Bench (loyal to the King) instructed the grand jury in a most biased manner, threatening them with criminal sanctions if they failed to indict. Further, he discarded the traditional secrecy of the proceedings. Schwartz, *supra* note 13, at 710-21. "Now let me tell you, if any of you shall be refractory, and will not find any bill, where there is probable ground for an accusation, you do therein undertake to intercept justice: and you thereby make yourselves criminals and guilty . . . ." *Id.* at 717.

34. "The grand jury is an integral part of our constitutional heritage which was brought to this coutnry with the common law." Deborah Emerson, Grand Jury Reform, A Review of Key Issues 1 (1983) (quoting United States v. Mandujano, 425 U.S. 564, 571 (1976)).

ately:[35] Massachusetts Bay in 1634-1635,[36] Plymouth in 1635-36,[37] Maryland in 1637,[38] Rhode Island in 1640,[39] Virginia in 1641,[40] Connecticut in 1643,[41] Pennsylvania in 1683,[42] and New Jersey in 1675.[43] The grand jury quickly became the primary vehicle for the colonists to voice their grievances against the British,[44] due to its independence from direct royal control.

As the oppostition to the British became more overt, grand juries became more sympathetic to the colonists and less responsive to the desires of the Loyalists'[45] gaining a degree of independence frowned upon by the British.[46] The famous case of newspaper publisher John Peter Zenger is a prime example: His colonial paper vigorously opposed the British presence, specifically designating the New York Colonial Governor as a primary recipient of criticism. Two separate New York grand juries refused to indict him for criminal libel.[47] Further, in 1765, a Boston grand jury refused to find an indictment against the leaders of the Stamp Act Riots.[48]

As the American Revolution began, the colonial grand juries began to assert themselves even more forcefully. They issued indictments against British sympathizers.[49] Moreover, those accused of siding with the British were prohibited from sitting on grand juries.[50]

---

35. By 1683, all of the colonies had implemented the grand jury in some form. *Id.* at 10.

36. Richard Younger, The People's Panel: The Grand Jury in the United States, 1634-1941, at 6 (1963).

37. *Id.* at 7.

38. *Id.* at 12.

39. *Id.*

40. James Whyte, *Is The Grand Jury Necessary ?*, 45 Va. L. Rev. 461, 461-66 (1959).

41. Younger, *supra* note 36, at 8.

42. *Id.* at 15.

43. *Id.* at 13.

44. *See generally* Clark, *supra* note 13, at 7-9.

45. *See* Emerson, *supra* note 34, at 10.

46. The English grand jury had occasionally used its power of presentment to criticize action or inaction of government officials that fell short of criminal misconduct. The American grand juries made extensive use of that authority, and their presentment "reports" became the primary vehicle for the expression of the complaints of the citizenry on a wide range of matters.

LaFave & Israel, *supra* note 13, § 8.2(b).

47. Ultimately, Zenger was charged by complaint with libel and was acquitted. Many attribute this acquittal to the heroic efforts of his lawyer, Alexander Hamilton. *See* Frankel & Naftalis, *supra* note 13, at 108.

48. *See id.*; *see also*, Note, *supra* note 7, at 121.

49. *See* Clark, *supra* note 13, at 17.

50. *Id.*

Largely as a result of its popular opposition to the British, the grand jury emerged from the American Revolution with newfound power and greatly enhanced prestige. The framers of the Constitution perceived the function of the grand jury as so essential to liberty that they specifically provided for it in the Constitution: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ."[51] Most states also required that all felony prosecutions be instigated either by indictment or by presentment.[52]

During the infancy of the nation, the grand jury occasionally fell prey to partisanship, manipulated by whichever political party was in power at the particular time.[53] The Sedition Act[54] cases reflect this pattern of manipulation. The passage of the Act provided an opportunity for president John Adams to persecute his political foes.[55] When Thomas Jefferson[56] succeeded him, he allowed the Act to expire, pardoned all those prosecuted by the grand jury under it, and attempted to force Congress to recompense all fines.[57] Yet, Jefferson himself proved no less vulnerable to the grand jury's potential for abuse than his predecessor. Jefferson hounded his political enemy, Aaron Burr, with highly questionable charges, and vindictively utilized two Kentucky grand juries in an unsuccessful attempt to eliminate Burr.[58] However, as bitter memories from the Revolution faded, so to did the animosity between the political parties, freeing the grand jury from such direct manipulation.

As the nation expanded westward, the grand jury began to be criticized as costly, cumbersome, and unnecessary.[59] Beginning with Michigan's lead in 1859, many states began to restrict the

---

51. U.S. Const. amend. V; *see also* United States v. Calandra, 414 U.S. 338, 343 (1974); *cf.* Costello v. United States, 350 U.S. 359, 361-62 (1956).

52. A presentment was an accusation arising from personal knowledge of one or more of the grand jurors, forcing the state to issue formal charges against those suspected. *See* Note, *The Grand Jury—Its Investigatory Powers and Limitations*, 37 Minn. L. Rev. 586, 603 (1953).

53. Power shifted between the Federalists, led by Alexander Hamilton, and the Republicans, led by Thomas Jefferson and James Madison. *See* Schwartz, *supra* note 13, at 721-24.

54. Alien & Sedition Act of 1798, ch. 74, §§ 1-4, 1 Stat. 590; *see also* Schwartz, *supra* note 13, at 722-23 (act made illegal all criticism of government officials and policies, a blatant attempt by the Federalists to stifle Republican opposition).

55. The passage of this Act led to the systematic prosecution of some prominent Republicans. *See* Schwartz, *supra* note 13, at 723-24.

56. *See* Wallechinsky & Wallace, *supra* note 14, at 262.

57. *See* Charles & Mary Beard, The Rise of American Civilization 385 (1910).

58. *See generally*, Schwartz, *supra* note 13, at 732-38.

59. *See* LaFave & Israel, *supra* note 13, § 8.2(b); Coates, *supra* note 14, at 316 (quoting 2 Bentham, Rationale of Judicial Evidence 313 (1827).

power of the grand jury, granting prosecutors the option of proceeding either by indictment or by information.[60] The constitutionality of this shift was subsequently affirmed by the United States Supreme Court.[61] Today, six states require a grand jury screening in capital offenses only;[62] fourteen states and the District of Columbia require the grand jury in all felony cases;[63] and four states insist on grand jury review for all crimes.[64] Twenty-five states now give prosecutors the option of proceeding by either indictment or information,[65] and in Pennsylvania the grand jury lacks authority to indict.[66] No state has gone the route of England, which has abolished the grand jury.[67]

III. The Historic Function of the Grand Jury

The historic function of the grand jury, commonly referred to as the shield and the sword, survives to this day.[68] The grand jury is likened to a shield in its performance of screening the government's evidence against the accused and the prosecutor's decision to charge the accused with an offense.[69] The analogy to the sword stems from the investigatory function of the grand jury. Utilizing its investigatory authority, the grand jury is able to discover evi-

60. *See, e.g.*, Minn. Const. art. I, § 7.

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

62. Connecticut, Florida, Louisiana, Massachusetts, Minnesota, and Rhode Island. Emerson, *supra* note 34, at 12.

63. Alabama, Alaska, Delaware, Georgia, Hawaii, Kentucky, Maine, Mississippi, New Hampshire, New York, North Carolina, Ohio, Texas, and West Virginia. *Id.*

64. New Jersey, South Carolina, Tennessee, and Virginia. *Id.*

65. Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Vermont, Washington, Wisconsin, and Wyoming. *Id.*

66. The grand jury has only investigative powers and cannot issue indictments. *Id.*

67. *Id.* at 10. During World War I, the use of grand juries was temporarily halted in part because they were "carried away by war hysteria, and bringing accusations against persons against whom one exercising calm judgment would find no ground for suspicion." Charles Burdick, *Criminal Justice in America*, 11 A.B.A. J. 510, 511 (1925).

68. *See Calandra*, 414 U.S. 338, 343 (1974) ("The grand jury's historic functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions."); *see also* Branzburg v. Hayes, 408 U.S. 665, 686-87 (1972).

69. Wood v. Georgia, 370 U.S. 375, 390 (1962) ("[T]his body 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 . . . ."); *see also* State v. Iosue, 220 Minn. 283, 293, 19 N.W.2d 735, 740 (1945) ("[T]he most valuable function of the grand jury was not only to examine into the commission of crimes, but to stand between the prosecutor and the accused . . . .").

dence which allows the government to prosecute otherwise unattainable charges.[70] These two roles are most commonly performed by the same grand jury.

When performing its traditional function, the grand jury possesses a unique degree of independence.[71] The rationale underlying this independence is to protect the shield function of the body.[72] The authority wielded by the grand jury is not derived from the government, but rather is a grant from the people themselves.[73]

The grand jury does not function as does a formal tribunal and, as such, is relatively free from procedural restraint.[74] Since the grand jury does not finally adjudicate guilt or innocence, it has been allowed to operate without strict observation of many procedural safeguards applicable at trial.[75] Yet, the due process guarantee[76] of a fair trial should not be completely ignored. This is true despite the fact that many of the constitutional principles that are enforced at trial do not apply to grand jury proceedings.[77] The extraordinary breadth of the grand jury's power has been consistently reinforced by the United States Supreme Court. The grand jury may act solely on testimony which would be inadmissible at trial;[78] the persons targeted for prosecution and about to be indicted may not refuse to appear and may be forced to testify;[79] these persons have no right even to be informed of their "dilemma of engaging either in self-incrimination or perjury;"[80] the witnesses may not refuse to answer a question on the ground that it is

---

70. *See* Branzburg, 408 U.S. at 668-87.

71. *In re* April 1956 Term Grand Jury, 239 F.2d 263, 269 (7th Cir. 1956).

72. *See* State v. Falcone, 292 Minn. 365, 367-68, 195 N.W.2d 572, 575 (1972).

> This body adopted the procedure of hearing testimony in private, which proved to be a significant safeguard against the ever-present abuses by the Crown. It was this common-law tradition of secrecy, initially stemming from a need to protect the grand jurors and private citizens from oppression of the state which was the underpinning of our grand jury procedure as it evolved early in American jurisprudence.

Id.

73. *In re* April 1956 Term Grand Jury, 239 F.2d at 269.

74. *See* People v. Glen, 173 N.Y. 395, 400-01, 66 N.E. 112, 114 (1903).

75. United States v. Calandra, 414 U.S. 338, 349 (1974).

76. U.S. Const. amends. IV, XIV.

77. State v. Stepney, 181 Conn. 268, 276-77, 435 A.2d 701, 705 (1980), *cert. denied*, 449 U.S. 1077 (1981).

78. *See* Costello v. United States, 350 U.S. 359, 362-63 (1956) (tax evasion case presented to the grand jury by means of hearsay testimony by paid informants); *see also* United States v. Levine, 700 F.2d 1176, 1179 (8th Cir. 1983); United States v. Neff, 525 F.2d 361, 363 (8th Cir. 1975); United States v. Powers, 482 F.2d 941, 943 (8th Cir. 1973), *cert. denied*, 415 U.S. 23 (1974).

79. *See* United States v. Wong, 431 U.S. 174, 179 n.8 (1977).

80. *Id.* at 177-78.

irrelevant or incompetent;[81] and they may not argue that the grand jury is exceeding its authority.[82] The right to remain silent,[83] and the right to counsel does not apply inside the grand jury room.[84]

Since the grand jury is considered an "arm of the court,"[85] one would expect zealous scrutiny of its actions, especially considering the limited rights of witnesses and potential for abuse. Courts, however, are reluctant to interfere[86] and do so only in cases of flagrant abuse resulting in prejudice.[87] The rationale behind this relative freedom is, simply put, that to convert grand jury proceedings into a trial on the merits would be time-consuming, unnecessary and duplicative.[88] Further, given the choice of dismissing the indictment or trying an allegedly guilty defendant, most courts are hesitant to halt the process, especially because the alternative is charging by complaint.

IV. The Grand Jury in Minnesota

Minnesota law provides that offenses punishable by life imprisonment must be prosecuted by indictment.[89] This is essentially identical to the federal proposition as stated in the Constitution.[90] Minnesota law mandates that grand jurors be drawn at random from throughout the county.[91] A grand jury consists of not more than twenty-three members.[92] No action can take place before the grand jury unless at least sixteen members are present.[93] Allowing the grand jury to drop below the maximum number accom-

81. *See* Blair v. United States, 250 U.S. 273, 282 (1919).
82. *Id.*
83. *See* United States v. Mandujano, 425 U.S. 564, 581 (1976).
84. *Id.*
85. Levine v. United States, 362 U.S. 610, 617 (1960).
86. *See* United States v. Adams, 742 F.2d 927 (6th Cir. 1984) (prosecutor not obligated to present exculpatory evidence); United States v. Cathey, 591 F.2d 268 (5th Cir. 1979) (use of perjured testimony does not mandate automatic dismissal); Loraine v. United States, 396 F.2d 335 (9th Cir. 1968), *cert. denied*, 393 U.S. 933 (1968) (indictment upheld despite willful suppression of impeachment evidence of key witnesses by prosecutor).
87. *See* Minn. R. Crim. P. 17.06, subd. 1 (1988).
88. *See* State v. Inthavong, 402 N.W.2d 799, 801 (Minn. 1987) ("A grand jury proceeding is not a trial on the merits. . . . To insist on the many procedural safeguards and evidentiary rules required at trial 'would contort the grand jury proceedings into a preliminary trial on the merits'." (quoting United States v. Shoeber, 489 F. Supp. 393, 409 (E.D. Pa. 1979))).
89. Minn. R. Crim. P. 17.01 (1988).
90. *See* U.S. Const. amend. V; *see also*; Alexander v. Louisiana, 405 U.S. 628 (1972).
91. Minn. Stat. § 628.41, subd. 1 (1988); Minn. R. Crim. P. 18.01, subd. 2 (1988).
92. Minn. Stat. § 628.41, subd. 1 (1988); Minn. R. Crim. P. 18.03, subd. 1 (1988).
93. Minn. Stat. § 628.41, subd. 1 (1988); Minn. R. Crim. P. 18.03, subd. 1 (1988).

modates the likely need to excuse one or more jurors over the course of the grand jury term, which can extend for up to one year.[94]

The court prepares the grand jury for the proceedings. The court selects one of the grand jurors to serve as jury foreperson[95] and administers the oath to the panel.[96] The court gives an impanelling charge to the grand jury, and, as required by law, reads the grand jury certain statutory provisions.[97] The judge then excuses herself and control of the grand jury is turned over to the prosecutor for the remainder of its term.[98] Challenges to an individual juror, or to the panel itself, have been eliminated.[99] Any objections based on these grounds must be brought in a motion to dismiss the indictment.[100]

The remainder of the grand jury proceedings occurs in secret. The only persons allowed to be present while the grand jury is in session, besides the jurors themselves, are the prosecutor, the witness, and, if necessary, a court reporter and a deputy sheriff.[101] A record of the proceedings is taken only when a witness is before the grand jury.[102] This secrecy requirement is relaxed only upon a showing of good cause, or that grounds for dismissal may exist.[103]

The prosecutor completely controls the grand jury proceedings. The prosecutor decides what to investigate, whom to question, whom to indict, and what to charge.[104] No judge is present to oversee the proceedings, nor is a lawyer allowed to represent the witnesses unless a witness has waived her immunity.[105] Plainly, the grand jury provides a natural opportunity for prosecutorial

94. "A grand jury shall be drawn to serve for a specific period of time, not to exceed twelve months . . . ." Minn. R. Crim. P. 18.09 (1988).

95. Minn. Stat. § 628.56 (1988)

96. *See* Minn. Stat. § 628.56 (1988); Minn. R. Crim. P. 18.03, subd. 3 (1987).

97. *See* Minn. Stat. § 628.56 (1988) ("The grand jury shall then be charged by the court, who, in doing so, shall read to it the provisions of [specified statutes and rules of criminal procedure] and may give it such other information as it may deem proper as to the nature of its duties . . . ."); Minn. R. Crim. P. 18.03, subd. 3 (1988); State v. Inthavong, 402 N.W.2d 799, 801 n.2 (Minn. 1987).

98. In Hennepin County, which handles the majority of grand jury cases in Minnesota, the grand jury room is located in the middle of the County Attorney's office, and the jurors are summoned by the County Attorney when needed.

99. *See* Minn. R. Crim. P. 18.02, subd. 1 (1988) ("Challenges to the grand jury panel and to individual grand jurors are abolished.").

100. *Id.* ("Objections to the grand jury panel and to individual grand jurors shall be made by motion to dismiss the indictment . . . .").

101. *See* Minn. R. Crim. P. 18.04 (1988); *see also* Minn. Stat. § 628.63 (1988).

102. *See* Minn. R. Crim. P. 18.05, subd. 1 (1988).

103. *Id.*

104. *See, e.g.*, Frankel & Naftalis, *supra* note 5.

105. *See* Minn. R. Crim. P. 18.04 (1988).

manipulation.[106]

After the grand jury hears the evidence, it then retires to deliberate and to determine the case as presented by the state.[107] The grand jury may return an indictment "when upon all of the evidence there is probable cause to believe that an offense has been committed and that the defendant committed it."[108] Such a bill may be returned "only upon the concurrence of twelve or more jurors."[109] When this is the case, the foreperson shall attach her signature to the bill and deliver it to the judge in open court.[110] If a majority of the grand jury does not find the requisite probable cause exists, then the foreperson shall likewise report this to the judge in open court, and the charges against the accused will be dismissed.[111] Such a dismissal does not, however, preclude the prosecutor from resubmitting the case to another grand jury upon receiving permission from the court.[112]

Minnesota zealously guards the traditional secrecy surrounding the grand jury. State law provides that nothing occurring before the body is to be disclosed to anyone other than the prosecutor, except upon court order.[113] Additionally, nothing that is voiced by the grand jurors during their deliberations or voting is ever to be disclosed.[114] Violations of these secrecy requirements may result in criminal sanctions against the perpetrator.[115]

A grand jury indictment is rarely overturned on review.[116] In Minnesota, an indictment may be dismissed either when it is "not found or returned as required by law,"[117] or when it "does not substantially comply with the requirements prescribed by law

106. United States v. Remington, 208 F.2d 567, 573 (2d Cir. 1953) (Hand, J., dissenting).

107. *See* Minn. Stat. § 628.57 (1988) ("The grand jury shall then retire").

108. Minn. R. Crim. P. 18.06, subd. 2 (1988).

109. Minn. R. Crim. P. 18.07 (1988).

110. *Id.*

111. *Id.*

112. *Id.*

113. *See* Minn. Stat. § 628.65 (1988); Minn. R. Crim. P. 18.08 (1988).

114. *See* Minn. Stat. § 628.66 (1988); Minn. R. Crim. P. 18.08 (1988).

115. *See* Minn. Stat. § 628.68 (1988).

> [E]very judge, grand juror, county attorney, court administrator, or other officer, who . . . shall disclose, before an accused person shall be in custody, the fact that an indictment found or ordered against the accused person, and every grand juror who . . . shall willfully disclose any evidence adduced before the grand jury, or anything which the juror or any other member of the grand jury said, or in what manner any grand juror voted upon any matter before them, shall be guilty of a misdemeanor.

Id.

116. *See* State v. Inthavong, 402 N.W.2d 799, 801 (Minn. 1987).

117. Minn. R. Crim. P. 17.06, subd. 2(1)(e) (1988).

to the prejudice of the substantial rights of the defendant."[118] Technical defects,[119] or those which do not prejudice the rights of the defendant,[120] are generally insufficient to force dismissal of the indictment. Further, an indictment which is valid on its face is afforded a presumption of regularity,[121] and without an adequate showing of impropriety, will not be dismissed.[122]

This is not, however, to say that indictments are never overturned on review by the appellate courts. In the Minnesota Supreme Court's decision, *State v. Inthavong*,[123] an improper impanelling charge was found to invalidate a challenged indictment.[124] The decision was primarily based on an inaccurate instruction on probable cause by the trial court, which limits the precedential effect on the grand jury's independence. In another Minnesota case, *State v. Grose*,[125] an indictment was dismissed with prejudice because of a number of statements by the prosecutor. The prosecutor commented on the accused's failure to testify,[126] the accused's failure to waive the statute of limitations,[127] and the unlikelihood that the accused would receive a prison sentence.[128] The prosecutor also misstated the law to the grand jury[129] and did not allow the grand jury to deliberate and vote on the indictment after it was drafted.[130] These cases are significant in that dismissal was granted only upon egregious errors striking at bedrock grand jury principles.

V. The Function of the Minnesota Grand Jury Contrasted With the Grand Jury's Historical Function

The historic function of the grand jury was to function both as the shield and the sword, alternatively investigating accusations of wrongdoing and acting as a protector of the citizenry, standing

118. Minn. R. Crim. P. 17.06, subd. 2(2)(a) (1988).

119. *See* Gasper v. District Court, 264 P.2d 679, 681 (Idaho 1953) ("The defect here is a matter of form which does not tend to prejudice any substantial rights of the defendant.").

120. *Id.* at 683.

121. United States v. Cady, 567 F.2d 771, 776 (8th Cir. 1977), *cert. denied*, 435 U.S. 944 (1978). ("[A]bsent some evidence of gross purposeful deception by the prosecutor, an indictment legally valid on its face will not be overturned . . . .")

122. *Id.*; *see also* Hamling v. United States, 418 U.S. 87 (1974).

123. 402 N.W.2d 799 (Minn. 1987).

124. *Id.* at 803.

125. 387 N.W.2d 182 (Minn. Ct. App. 1986).

126. *Id.* at 187.

127. *Id.* at 187-88.

128. *Id.* at 188.

129. *Id.*

130. *Id.* at 189.

between the accuser and the accused.[131] The popular perception of the grand jury focused on the shield aspect, viewing the grand jury as an independent bulwark protecting the citizens from unfounded and malicious prosecutions from the state.[132]

In Minnesota, the reality is that the independence of the grand jury has been eroded to the degree that it now functions as a powerful tool of the prosecution.[133] The Minnesota grand jury continuously interacts with the prosecutor, who screens the case initially, determines the scope of the investigation, and interprets the law for the members of the grand jury.[134] This overt dependence upon the prosecutor leaves the grand jury vulnerable to manipulation and abuse, and raises serious questions about the loss of its traditional independence and the underlying control of the prosecutor.

As the role of the grand jury in Minnesota has evolved, it has deviated from its historical function. The history of the Minnesota grand jury reveals a system that frequently has failed to fulfill its perceived function of protecting innocent persons from vindictive prosecutions by the state.[135] Worse yet, it has become transformed into a powerful weapon in the hands of the prosecution.[136]

VI. Analysis

The grand jury's deviation from its traditional role as the watchdog of the citizenry has drawn not only harsh criticism and cries for reform, but even calls for the abolition of the institution.[137] This condemnation has centered on the abdication of the grand jury's historically independent role and the resultant dependence on the prosecutor. This shift leaves the grand jury extremely vulnerable to prosecutorial abuse and manipulation. This day-to-day dependence on the prosecutor has been noted by everyone from Judge Learned Hand, who penned "[s]ave for torture, it would be hard to find a more effective tool of tyranny than the

131. *See supra* note 68.

132. *See* State v. Grose, 387 N.W.2d 182, 186 (Minn. 1986); State v. Iosue, 220 Minn. 283, 292-93, 19 N.W.2d 735, 740 (1945).

133. *See* Note, *The Grand Jury—Its Investigatory Powers and Limitations*, 37 Minn. L. Rev. 586, 600 (1953).

134. The county attorney has a statutory duty to advise the grand jury on the applicable law. Minn. Stat. § 388.051, subd. 1(d) (1988).

135. *See generally* Clark, *supra* note 13, at 104.

136. *See generally id.*

137. Kranitz, *supra* note 21, at 328. "As an inquisitorial body generally . . . the grand jury is a relic which should take its place on the dusty shelves of legal history, beside other ancient common law practices." *Id.*

power of unlimited and unchecked ex-parte examination,"[138] to an anonymous assistant county attorney who stated that he could get a grand jury to "indict a hamburger."[139] The means by which this dependence can be manipulated are many: impugning the character of the defendant,[140] conveying opinions about the evidence,[141] threatening[142] or harassing[143] the witness, failing to advise a witness of his rights,[144] discrediting a witness' reliance on those rights,[145] or simply interpreting the law for the grand jury in a biased manner.[146]

Yet, some of this dependence is to be expected. The prosecutor stays with the grand jury at all times except during deliberations and voting.[147] Throughout the grand jury term, the various grand jurors may form some degree of a personal relationship with the prosecutor.[148] Further, the lack of any formal legal education on the part of the grand jurors inevitably operates to increase their reliance on the knowledge of the prosecutor.[149] Thus, the very structure of the grand jury process encourages a degree of dependency on the prosecutor.

Yet, this dependence has increased over time, to the degree that the traditional independence of the grand jury may be endangered.[150] Three underlying reasons have been put forth for the abrogation: the failure to record all of the proceedings before the

138. United States v. Remington, 208 F.2d 566, 573 (2d Cir. 1953) (Hand, J., dissenting), *cert. denied*, 347 U.S. 913 (1954).

139. Informal conversation with a member of the Hennepin County Attorney's Office (Mar. 8, 1988). "Today, the grand jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at any time, for almost anything, before any grand jury." Campbell, *supra* note 19, at 174.

140. *See* United States v. Samango, 607 F.2d 877, 883 (9th Cir. 1979) (prosecutors interrogation of accused was designed to prejudice grand jury).

141. *See* United States v. Ciambrone, 601 F.2d 616, 623-24 (2d Cir. 1979); *see also* ABA Standards for Criminal Justice § 3-3.5(a) (1982).

142. *See* United States v. Roberts, 481 F. Supp. 1385, 1389 (C.D. Cal. 1963).

143. *See, e.g.*, United States v. DiGregorio, 605 F.2d 1184, 1189 (1st Cir.), *cert. denied*, 444 U.S. 937 (1979); United States v. Remington, 208 F.2d 567, 571-73 (2d Cir. 1953) (Hand, J., dissenting), *cert. denied*, 347 U.S. 913 (1954).

144. *See* United States v. Jacobs, 531 F.2d 87 (2d Cir.), *vacated*, 429 U.S. 909, *remanded*, 547 F.2d 772 (2d Cir. 1976).

145. *See* United States v. Digrazia, 213 F. Supp 232 (N.D. Ill. 1963).

146. This reflects a conflict inherent in the dual role forced upon the prosecutor appearing before the grand jury, since she is not only attempting to secure an indictment, but also acting as a minister of justice and not merely as an advocate. *See* Minn. R. Prof. Cond. 3.8 comment.

147. Minn. Stat. § 623.63 (1988).

148. Informal conversation with a member of the Hennepin County Attorney's Office (Mar. 8, 1988).

149. *Id.*

150. *See* Note, *Failure to Record Proceedings: Antoher Gap in the Glory of the Grand Jury*, 27 U. Fla. L. Rev. 817, 818 (1975).

grand jury, the difficulty in obtaining a record of the grand jury proceedings, and the reluctance of the judiciary to adequately supervise and correct any errors or misconduct involving the grand jury.

A. Failure to Record

The first point for criticism is the failure to record the entire proceedings before the grand jury. In Minnesota, the only part of the proceedings which must be recorded is that which takes place when a witness is before the body.[151] This means that a relatively large portion of the action before the grand jury is conducted in a way that precludes meaningful review.[152] This renders moot several grounds for challenging an indictment and hinders the ability of a defendant to prepare adequately for trial.

Failure to record the entire proceedings before the grand jury arguably violates due process[153] and is also illogical. A defendant's ability to challenge prosecutorial abuses is largely contingent on a record upon which to base these challenges.[154] Such a record would also eliminate speculative challenges, giving the prosecution documentation of its conduct occurring before the grand jury. Today, the federal rules and many states require recordation of the entire proceedings, except for deliberations and voting.[155] Since recording the testimony of witnesses has always been viewed as desirable,[156] no sound reason exists why the rest of the process should not be recorded. A working example of such a recordation procedure is already in place in two judicial districts[157] and has yet to lend any credence to the fears that such recommendations often arouse.[158] Other jurisdictions would also be likely to find such a

151. *See* Minn. R. Crim. P. 18.05, subd. 1 (1988).

152. *See* Minn. R. Crim. P. 17.06 (1988); Minn. R. Crim. P. 18.02, subd. 2 (1988).

153. *See* Note, *supra* note 151, at 837.

154. *See* ABA Standards for Criminal Justice on the Prosecutorial Function §§ 3-3.5 commentary ("It is particularly desirable that a record be made of the prosecutor's communications and presentations to the jury"); National Prosecution Standards § 14.2 (National District Attorneys Ass'n § 14.2(f) (1977) ("All testimony before the grand jury should be recorded").

155. *See, e.g.*, Fed. R. Crim. P. 6(E) (1988). For a discussion of States' recording policies, see Note, *supra* note 151, at 830-37.

156. *See* United States v. Peden, 472 F.2d 583 (2d Cir. 1973).

157. The First and Fourth Judicial Districts require recordation of all grand jury proceedings, except voting and deliberations. State v. Whitney, No. 87-1609 (Minn. 4th Dist. Feb. 2, 1988).

158. Examples of those fears include exposing the grand jury witnesses to undue influence or threats, groundless threats and transforming the proceedings into a mini-trial on the merits.

procedure acceptable. Further, such disclosure would ensure every accused full protection of his due process rights.

B. Discovery of Grand Jury Records

Proceedings before the grand jury have traditionally been cloaked in secrecy.[159] The reasons for this secrecy were enumerated by the United States Supreme Court in *United States v. Proctor & Gamble Co.*:[160]

> (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 grand jurors; (3) to prevent subornation or perjury or tampering with 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 an 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.[161]

These reasons ring hollow, since they are meaningless once the grand jury's investigation has been completed.[162] The accused is or should be, if necessary, in custody well before any disclosure of the grand jury proceedings is made. The fear that the grand jurors or witnesses who have testified before the body will be subjected to coercion is likewise without merit: the grand jury does not concern itself with a case once it has returned an indictment, and the witnesses are no more susceptible to improper influence than they would be in a case proceeding by complaint. Further, any innocent person would be best served by full disclosure to demonstrate that the indictment is groundless.[163] The secrecy surrounding the grand jury has been ironically twisted to the degree that it now serves the very purpose it sought to guard against.

In addition to enhancing discovery, full diclosure serves other valuable functions, such as measuring the prosecutor's actions

---

159. *See generally* Richard Calkins, *The Fading Myth of Grand Jury Secrecy*, 1 John Marshall J. Prac. & Pro. 18 (1967).

160. 356 U.S. 677 (1958).

161. *Id.* at 681 n.76 (quoting United States v. Rose, 215 F.2d 617, 628-29 (3d Cir. 1954)).

162. *See* 8 John Wigmore, Evidence in Trials at Common Law § 2362 (John McNaughton rev. ed. 1961) ("There remains, therefore, on principle, no cases at all in which *after* the *grand jury's functions are ended*, the privilege of the witnesses not to have their testimony disclosed should be deemed to continue.").

163. *See* Pittsburgh Plate & Glass Co. v. United States, 360 U.S. 395 (1959) (Brennan, J., dissenting).

against the applicable constitutional principles.[164] Full disclosure is also very important to the court's analysis of the sufficiency of the indictment,[165] a condition precedent to bringing a defendant to trial,[166] since errors and improprieties occurring in this non-adversarial procedure can be effectively illuminated only by the trained eye of defense counsel.[167]

Yet, the Minnesota Rules of Criminal Procedure sharply limit disclosure of grand jury records. Under the Rules, the court grants disclosure only upon motion, subject to whatever protective order is deemed necessary.[168]

C. Supervision by the Judiciary

The single most important factor in the transformation of the grand jury into the alter-ego of the prosecutor[169] is the consistent failure of the judiciary to provide meaningful supervision. The few strict rules governing grand jury proceedings are rendered meaningless by the failure of the courts to enforce them[170] and thus provide a deterrent to similar misconduct in the future.[171] This creates a virtual Garden of Eden for prosecutorial manipulation, since prosecutors who are so inclined can rest assured that any improprieties will go unpunished.[172] This creates a vacuum inevita-

---

164. *See* Note, *supra* note 150, at 823 ("Recorded grand jury testimony readily facilitates court supervision of procedures used by both the prosecutor and the grand jury.").

165. *Id.* at 822.

166. Note, *Indictment Sufficiency*, 70 Colum. L. Rev. 876 (1970).

167. "[T]he nonadversary nature of the procedure often denies the judge the important balancing view, both legal and factual, ordinarily provided by defense counsel." Note, *Grand Jury Proceedings: The Prosecutor, The Trial Judge, And Undue Influence*, 39 Chi. L. Rev. 761, 767 (1972).

168. *See* Minn. R. Crim. P. 18.05, subd. 2 (1988).

169. *See* Campbell, *supra* note 19, at 178-79.

170. *See* Bank of Nova Scotia v. United States, 108 S. Ct. 2369, 2379 (1988) (Marshall, J., dissenting); United States v. Mechanik, 475 U.S. 66, 83 (1985) (Marshall, J., dissenting) ("Denying defendants relief for clear violations of their procedural rights reduces the law to 'pretend rules' . . . .").

171. "The extreme sanction of dismissal of an indictment is justified . . . to 'help to translate the assurances of the United States Attorneys into consistent performances by their assistants'." United States v. Fields, 592 F.2d 638, 647 (2d Cir. 1978) (quoting United States v. Estepa, 471 F.2d 1132, 1137 (2d Cir. 1972) (Friendly, J.), *cert. denied*, 475 U.S. 1012 (1979)), *cert. denied*, 442 U.S. 917 (1979); *see also* United States v. Mechanik, 475 U.S. 66, 84 (1985) (Marshall, J., dissenting).

> Respect for the rule of law demands that improperly procured indictments be quashed even after conviction, because only by upsetting convictions so obtained can the ardor of prosecuting officials be kept within legal bounds and justice be secured; for in modern times all prosecution is in the hands of officials.

Mechanik, 475 U.S. at 84 (Marshall, J., dissenting).

172. *See* Hawkins v. Superior Court, 150 Cal. Rptr. 435, 440, 586 P.2d 916, 921 (1978).

bly filled by the prosecutor, the only person who deals with the grand jury on a regular basis.

Despite the fact that the grand jury is a quasi-independent body, it remains an arm of the court and is subject to judicial review. Scrutiny of the prosecutor's actions occurs under two separate doctrines: a court may dismiss an indictment on the basis of the due process clause,[173] where the focus is on the fairness to the defendant and rectifying the prejudice to his rights,[174] or on the court's inherent supervisory power,[175] which is premised on deterring prosecutorial misconduct[176] and protecting the integrity of the judicial system.[177]

Yet, the courts have been extremely reluctant to impose the "extreme sanction" of dismissal,[178] instead applying a more restrictive standard. They operate as if prosecutorial misconduct, by itself, is insufficient to warrant dismissal of an indictment.[179] Rather, the misconduct must rise to such a level that it infringes on the ability of the grand jury to exercise independent judgment.[180] Further, the burden is on the defendent to establish this prejudice.[181]

The United States Supreme Court has acted recently to greatly limit the availability of judicial relief. In *United States v. Mechanik*,[182] the court held that a subsequent guilty verdict issued by a petit jury rendered any errors in the grand jury proceeding harmless.[183] This in effect means that any challenges to the indict-

---

173. *See* United States v. Pino, 708 F.2d 523, 530 (10th Cir. 1983).

174. *Id.* at 530-31; *see also* United States v. McClintock, 748 F.2d 1278 (9th Cir. 1984), *cert. denied*, 474 U.S. 822 (1985).

175. *Pino*, 708 F.2d at 530; *see also* United States v. Kilpatrick, 821 F.2d 1456, 1465 n.6 (10th Cir. 1987), *aff'd sub. nom.* Bank of Nova Scotia v. United States, 108 S. Ct. 2369 (1988).

176. "Under its inherent supervisory powers, . . . dismissal is used as a prophylactic tool for discouraging future deliberate governmental impropriety of a similar nature." United States v. Owens, 580 F.2d 365, 367 (9th Cir. 1978).

177. *See* McClintock, 748 F.2d at 1285 (citing United States v. Payner, 447 U.S. 727, 735 n.8 (1980)).

178. *See* Owens, 580 F.2d at 367 ("However, these supervisory powers remain a harsh, ultimate sanction (which) are more often referred to than invoked.").

179. *See* United States v. Kilpatrick, 821 F.2d at 1465.

180. United States v. Pino, 708 F.2d 523, 530 (10th Cir. 1983).

181. State v. Inthavong, 402 N.W.2d 799, 802 (Minn. 1987).

182. 475 U.S. 66 (1986).

183. *Id.* at 702.

> [T]he petit jury's subsequent guilty verdict not only means that there was probable cause to believe that the defendants were guilty as charged, but that they are in fact guilty as charged beyond a reasonable doubt. Measured by the petit jury's verdict, then, any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt.

Id.

ment must occur prior to trial,[184] otherwise they will be rendered moot. The defendant will either be acquitted or found guilty, in which case any improprieties in the grand jury's decision will be deemed harmless.[185]

Further, in *Bank of Nova Scotia v. United States*,[186] the court held that in cases of non-constitutional error, a harmless error standard would be applied.[187] *Bank of Nova Scotia* was a consolidated appeal, in which the underlying cases presented a veritable "laundry list" of prosecutorial misconduct. Thus, in order to prevail in a grand jury challenge based upon prosecutorial misconduct, a defendant must show that any errors that occurred prejudiced his hearing. The court was careful to limit this holding only to cases where the error did not infringe upon the independence of the grand jury's decision to indict[188] or where the misconduct was not systematic and pervasive, spanning several cases.[189]

All of this results in an extremely difficult trial for a defendant seeking dismissal of an indictment, placing the burden of showing prejudice on the defendant. Not only does this encourage prosecutorial manipulation of the grand jury, but also, in time, gives this conduct an illusion of legitimacy. Today's harmless error becomes tomorrow's standard of conduct. This operates to further infringe upon the traditional independence, since circumstances which in the past clearly would have warranted dismissal are now seen as lawful conduct.[190]

It is time to reverse this trend and restore the grand jury to its traditional independent role. The courts must strictly enforce

---

184. Perhaps in response to the dilemma posed by the *Mechanik* ruling, the Minnesota Supreme Court, in State v. Scruggs, 421 N.W.2d 707, 717 (Minn. 1988), noted in dicta that the proper method for challenging an indictment was a pre-trial motion for dismissal, thus implicitly providing an avenue for judicial review in spite of *Mechanik*.

185. The Courts focus on the effect of the verdict, in combination with its per se rule, gives judges and prosecutors a powerful incentive to delay consideration of motions to dismiss based on an alleged defect in the indictment until the jury has spoken. If the jury convicts, the motion is denied; if the jury acquits, the matter is mooted.

United States v. Mechanik, 475 U.S. 66, 77 (1985) (O'Connor, J., concurring).

186. 108 S. Ct. 2369 (1988).

187. "Having concluded that our customary harmless error inquiry is applicable where, as in the cases before us, a court is asked to dismiss an indictment prior to the conclusion of the trial . . . ." *Id.* at 2374.

188. *Id.* at 2376 ("In the cases before us we do not inquire whether the grand jury's independence was infringed.").

189. *Id.*

190. *See, e.g.*, State v. Ernster, 147 Minn. 81, 85, 179 N.W. 640, 642 (1920) ("If those interested in prosecuting may send a delegation to the grand jury to induce the finding of a bill, so may the criminal send his delegation and lawyer to persuade that no bill be found.").

the few clear rules governing grand jury practice. Although substantial social costs are often involved in dismissing indictments,[191] insuring the integrity of the judicial system is far more important.[192] Moreover, after illustrating the serious consequences of failure to comply with the few firm rules governing grand jury proceedings, prosecutorial compliance with such standards would quickly follow.[193]

VII. Conclusion

The Minnesota grand jury has abrogated its historical independence to the prosecution. The historical function of the grand jury, to act as the shield of the citizenry from oppressive and ill-founded prosecutions has been grossly distorted. Today, the grand jury functions solely as an investigatory body that is dominated by the guiding hand of the prosecutor. This is a violation of the separation of powers doctrine, upon which the very framework of our government rests. The grand jury is no longer a group of laypersons gathered to protect the citizenry from a malicious government; instead, it has become a prosecutorial rubber stamp.

Obviously, the grand jury cannot be expected to function effectively in the modern legal process in the same manner that it did centuries ago. Yet, the traditional independence of the grand jury must not be totally extinguished. Abolition of the grand jury is not the answer; not only would this set a dangerous precedent for amending the Bill of Rights, but, as evidenced by its prominent role in the Watergate investigations, also would remove an effective and trusted means of investigation. However, to sit idly by

---

191. The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend futher time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences . . . . Thus, while reversal may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution, and thereby cost society the right to punish admitted offenders.

United States v. Mechanik, 475 U.S. 66, 72 (1985); *see also* United States v. Serubo, 604 F.2d 807 (3d Cir. 1979).

192. "But the costs of continued unchecked prosecutorial misconduct are also substantial. This is particularly so before the grand jury . . . ." Serubo, 604 F.2d at 817.

193. "The only way to allow even minimally effective enforcement of those rules is to reverse the convictions of defendants whose indictments were tainted . . . . Such an approach would not hamper enforcement of the criminal law." Mechanik, 475 U.S. 83-84; *see also* United States v. Remington, 208 F.2d 567, 574 (2d Cir. 1953) (Hand, J., dissenting) ("[O]nly by upsetting convictions so obtained can the ardor of prosecuting officials be kept within legal bounds and justice be secured . . . ."), *cert. denied*, 347 U.S. 913 (1954).

and allow such a gross perversion does not speak well of our system of justice. The greatest hope lies instead in legislative action incorporating several means of reform.[194] Statutory requirements of full recordation and disclosure of grand jury proceedings, along with increased judicial supervision and willingness to dismiss tainted indictments would go a long way toward the goal of restoring the independence of the grand jury.

In our legal system, the rights of the individual must be continually balanced against the interests of the state. The grand jury is one of the most effective tools in maintaining this balance, and must be restored to its traditional independent role. Our system of jurisprudence demands no less.

---

194. *See, e.g.*, American Bar Association Model Grand Jury Act (Jan. 1982) & ABA, American Bar Association Policy on the Grand Jury (Aug. 9, 1977), *both reprinted in* Deborah Emerson, *Grand Jury Reform: A Review of Key Issues*, 1983 Nat'l Inst. of Just. app. A at 111, app. B at 119 (proposed reforms and model act).