CHAPTER 1

Introduction

Chapter Contents

---

§ 1.01 The Grand Jury Institution

Posit an accusatory body that meets in secret, with virtually no restrictions on the nature or the quality of the evidence it considers. The potential accused may not know that his conduct is being examined. If the potential accused is aware that his conduct is being examined, he does not have the right to make a presentation. If the accused appears before the body, he has the right to counsel, but counsel can not accompany him when he is questioned and can not make any presentation to the body. A finding by a majority of the body that a trial is warranted eliminates any right to a pre-trial hearing on the adequacy of the charges and is otherwise virtually immune from judicial review. If a mistake is made, virtually the only remedy is to hope that after considerable time, expense and trauma, vindication of some sort is achieved after trial.

In short, posit the grand jury—an accusatory body with virtually none of the procedural safeguards we have come to consider essential to due process of law. How do you characterize such a body? Consider the following descriptions:

> "Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution. . . ."[1]

---

[1] Wood v. Georgia, 370 U.S. 375, 390, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962).

"In the annals of the world there is not found another institution so well adapted for avoiding all the inconveniences and abuses, which would otherwise arise from malice, from rigor, from negligence, or from partiality in the prosecution of crimes." [2]

"a protector of citizens against arbitrary and oppressive governmental action."[3]

"They are the voice of the community accusing its members . . . [w]ith certain not very well-defined exceptions, they remain what the Grand Assize originally was, and what the petit jury has ceased to be, an irresponsible utterance of the community at large, answerable only to the general body of citizens from whom they come at random, and with whom they are again at once merged."[4]

These are only examples. There is no question but that our judicial lore lionizes the grand jury. Yet, an objective observer of the institution as it operates today, bereft of any historical baggage, might very well question why. Indeed, the institution's critics are numerous. Yet, while many of the states have significantly altered their grand jury practices, no one really expects the institution to change very much, at least at the federal level. To the contrary, our legal system continues to treat its operations as somewhat sacrosanct.

Why is this so? Certainly it is not because the grand jury is provided for in the Constitution. The Constitution has been amended twenty-seven times, with important changes being made to the way we conduct the most basic affairs of government, including the way we apportion our representatives and elect them, and the way we levy taxes.

Nor can our romantic view of the grand jury, and tolerance of its procedures, be explained by its history as a venerable English institution. After all, England eliminated the grand jury in 1933, and the Supreme Court in 1884 concluded that the grand jury was not so integral a part of our legal framework as to require the States to initiate criminal proceedings by means of a grand jury.

Nor can the faith we continue to espouse in grand juries be justified by the grand jury's modern track record as a shield of the people. The fact remains that the grand jury follows the prosecutor's

---

[2] 3 *Wilson's Works*, 363-364.

[3] United States v. Calandra, 414 U.S. 338, 343, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974).

[4] In re Kittle, 180 F. 946, 947 (S.D.N.Y. 1910).

lead—if not properly, at least understandably—in the overwhelming majority of cases. According to a *New York Times* article, grand jurors report that grand jury service is "pointless, confusing, frustrating and dull." The same article notes that one grand juror said after her service that she "learned that it's oxymoronic: it's hardly grand and it's hardly a jury."[5]

Perhaps the answer is that we continue to venerate the grand jury because the most obvious alternative to initiating prosecutions by grand jury indictment would be officially to put the charging power exclusively in the hands of the prosecution. That would be contrary to our national deep-seated and long standing aversion to putting unchecked power in the hands of any one individual or institution. We are therefore willing to excuse the grand jury's faults and, maybe with a degree of conscious self-deception, romanticize its function, recognizing that on some level there is value in citizen participation in our institutions even if the participation takes the form of being a bystander or a witness. As Jefferson noted more than two hundred years ago:

> "We think in America that it is necessary to introduce the people into every department of government as far as they are capable of exercising it; and that this is the only way to ensure a long continued and honest administration of its process."[6]

Nevertheless, while some of these responses may address why we still have the institution, none of them addresses why the institution continues to operate as it does. As the various state grand jury systems make clear, the use of otherwise inadmissible evidence is not essential to the proper functioning of a grand jury system. Nor are absolute secrecy, the absence of counsel or many other aspects of grand jury practice as it currently exists in the federal system necessary for it to perform its accusatory function.

---

[5] Hoffman, "No Longer Judicially Sacred, Grand Jury Is Under Review," New York Times, p. 1 (March 30, 1996).

[6] Malone, *Jefferson and the Rights of Man*, 227 (1951).

§ 1.02 The Grand Jury Debate

This book does not attempt to resolve the philosophical questions surrounding the grand jury as an institution. The debate over the importance and utility of the grand jury is a long-standing one, which has attracted the attention of legal scholars, historians, social scientists, litigators and the public. It will undoubtedly continue with varying levels of intensity as issues are from time to time brought to public attention by controversial incidents and controversial judicial decisions. At least for the near term, this eight hundred year old institution appears to be with us to stay. In addition, at least for the near term, there appears to be very little prospect of any reform, let alone fundamental change in the way the system operates. Given those realities, the purpose of this book is to aid the practitioner by providing a comprehensive guide to both law and lore relevant to situations frequently encountered in a grand jury investigation.

Chapter two provides a history of the development of the grand jury, both in England and in the United States. In dealing with grand jury issues, it is always helpful to have historical perspective, because historical rhetoric frequently shapes current reality.

Chapter three describes the grand jury as it is used today and, in particular, the law governing its impaneling, challenges to its composition, jurisdiction, secrecy, and the indictment.

Chapter four discusses the prosecution's burden and its control over the process, including the restrictions, or more accurately the lack of restrictions, on the evidence available for use before the grand jury.

Chapter five discusses subpoenas and responding to them. The discussion addresses how subpoenas are issued, available objections and motions that can be made in response, and privileges that can be raised.

Chapter six reviews the Fifth Amendment privilege against self-incrimination. This is the most frequently asserted privilege, and issues relating to its availability, scope and waiver are the issues most frequently confronted by the grand jury practitioner. The chapter examines the privilege in depth as it applies to both testimonial evidence and documents.

Chapter seven considers the extent to which the First Amendment can be invoked as a privilege to limit the scope of a grand jury's inquiry.

Chapter eight discusses issues relating to the use of evidence obtained by electronic surveillance before the grand jury. This is a unique area because it is based on statutory law. Unlike other illegally obtained evidence, which is admissible before the grand jury, illegally obtained electronic surveillance evidence is not admissible. This chapter discusses the available objections to such evidence and how they are raised and litigated.

Chapter nine considers parallel proceedings. As "white collar" crime is consistently expanded to include conduct previously left exclusively to the civil realm, simultaneously litigating civil and criminal cases is a more frequently occurring challenge. The focus of this chapter is on the special problems inherent in these situations.

Chapter ten reviews immunity. As a corollary to the Fifth Amendment, this is an issue constantly addressed by grand jury practitioners. This chapter features the nature and different forms of immunity, the scope of the protection it provides, negotiations and procedures for obtaining it, and what happens when the immunized witness is nonetheless indicted.

Chapter eleven discusses contempt proceedings. Frequently, this is the only available context in which to litigate grand jury privilege issues, so familiarity with this subject is essential. Its relevance goes far beyond those cases characterized by a "wall of silence."

Chapter twelve focuses on joint representation of multiple witnesses by a single lawyer. The chapter discusses the advantages and disadvantages of such representation, the ethical issues implicated, and the almost inevitable motion by the government to disqualify counsel from all or a part of the representation.

Chapter thirteen discusses monitoring the investigation. It is more difficult for counsel to stay abreast of the facts and the progress of the case than in other contexts because of grand jury secrecy. However, there are techniques for keeping relatively well-informed, and this chapter addresses them, including debriefing witnesses, joint defense agreements and discovery.

Finally, chapter fourteen reviews prosecutorial misconduct and the available remedies for it. Here, the available options are limited, but they do exist. Given the considerable imbalance in power and influence between prosecution and defense in the grand jury process, it is incumbent upon defense counsel to be familiar with this subject.