Criminal Justice Policy Review

http://cjp.sagepub.com

The American Grand Jury — Due Process or Rights Regress?

James Halsted

Criminal Justice Policy Review 1987; 2; 103
DOI: 10.1177/088740348700200201

The online version of this article can be found at:
http://cjp.sagepub.com/cgi/content/abstract/2/2/103

Published by:
SAGE
http://www.sagepublications.com

On behalf of:
Department of Criminology at Indiana University of Pennsylvania

CJPR, VOL. 2, NO. 2, 6/87, pp. 103-117

The American Grand Jury — Due Process or Rights Regress?

James Halsted
University of South Florida

Abstract

The grand jury system and due process rights generally are recognized as two of the great "checks" in protecting private citizens from the inherent dangers that may exist should the executive branch of the government be tempted to use the criminal justice system as a vehicle for its own political purposes. These historical checks, however, seem to have dissolved in present practices and procedures implemented by federal prosecutors in their investigations of public officials. A paradigm example of this is the grand jury investigation of Walter L. Nixon, Jr., United States District Judge for the Southern District of Mississippi. Nixon was convicted of two counts of perjury for lying to a grand jury. This author was present throughout the entire Nixon trial. Copious notes were taken and verified by cross-checking them with the trial transcript. What Nixon's case dramatizes is the fundamental problems inherent within the grand jury system: specifically, that prosecutors have the power to use the federal grand jury system to deny systematically grand jury targets their usual due process rights and then to subject them to criminal liability for perjury which is manufactured only because the targets are processed through the grand jury process itself.

A subtle paradox exists among certain rights and privileges of an accused within the American criminal justice system. The federal grand jury system, believed to act as a "buffer" between an accused and an overzealous prosecutor, and Constitutional due process rights, which should insure that the accused receives fundamental fairness during all critical stages of the prosecution against him, are canceling each other out.

The grand jury system and due process rights generally are recognized as two of the great "checks" in protecting private citizens from the inherent dangers that may exist should the executive branch of the government be tempted to use the criminal justice system as a vehicle for its own political purposes. These historical checks, however, seem to have dissolved in present practices and procedures implemented by federal prosecutors in their investigations of public officials. Federal prosecutors have the power to use the federal grand jury system to deny systematically grand jury targets their usual due process rights, and then to subject them to criminal liability for

perjury which is manufactured only because the targets are processed through the grand jury process itself.

Indeed, the Reagan administration seems to use the disintegration of the protectiveness of the grand jury system to its political advantage. In his general study analyzing the statistical significance of the federal prosecution of public officials, Archambeault concludes that while convictions of state-local officials were up nearly 38% in the Reagan administration as compared to those of the Carter administration, convictions of federal officials rose 169% for the same period. The 1981 creation of the "Conflict of Interest Branch" of the Public Integrity Section of the U.S. Justice Department implemented to investigate fraud in the federal sector, Archambeault believes, is mostly responsible for the increase (Archambeault, 1987). However, this study also discovered that the criteria for selection of targets for prosecution under the Reagan administration were strongly related to politics, particularly in the South, as practiced by the political parties of the states' governors. Under the Republican Reagan administration there is some evidence to support the conclusion that Southern states of the country led by governors associated with the Democratic party were more often targeted for federal prosecutions than were states whose governors were of the same party as the president (1987:32).

Archambeault's conclusion places a chill on the belief that checks and balances control the political power of the executive branch:

> Such findings, although highly tentative at best, (raise) the specter of misuse of the extensive and increasing federal authority to prosecute public officials corruption. The process designed to deter public corruption may itself become a source of corruption. For, if the political party of the president in power is able to wield federal prosecutory power against state and local level opposition parties, then it could threaten the very core of democracy in the United States (1987:33).

Through most of the history of the American federal judiciary only two federal district judges, Alcee Hastings of Florida and Harry Claiborne of Nevada, have been indicted while on the bench. Hastings was acquitted of bribery in 1983. Claiborne, whose first trial ended in a hung jury, was convicted in 1985 of willfully failing to report $106,000 on his federal income tax returns.

The third sitting federal judge, Walter L. Nixon, Jr., United States District Judge for the Southern District of Mississippi, described by United States Magistrate John Roper as an excellent jurist and a judge with integrity, character, and a brilliant mind, was convicted of two counts of perjury for lying to a grand jury[1] in 1986. So far, there has been no official investigation into Nixon's case.[2]

Nixon's case should receive national attention in 1988. Seldom does the 18th century mechanism of impeachment become operational in the halls of Congress. As a federal district judge, Walter Nixon has his appointment for life. He can be removed only by resignation or impeachment. Nixon has indicated he will not resign. Hence, the nation will probably view live on C-Span the attempted impeachment of Judge Nixon. At the heart of these hearings will be a policy consideration: How can we have a situation in which

a federal district judge is investigated by a grand jury and subsequently cleared of all allegations, yet who is still convicted of perjury for testimony given in his own defense against accusations of which he was cleared? Is there not something fundamentally wrong with an institution that would allow such an apparent injustice to happen to any man? The fact that it has happened to a person as esteemed as a federal district judge (only three of such judges have been indicted in the history of the United States) underscores the political danger inherent in the institution of the federal grand jury system.

There is an extreme paradox in Nixon's conviction. Walter Nixon, a democrat appointed by Lyndon Johnson, was convicted of lying to a grand jury about activities that the same jury determined were totally legal and aboveboard. What the trial verdict seems to be saying is, in essence, that though he was innocent of the corrupt activities between 1979 and 1983 for which a grand jury had investigated him, he was guilty of lying to a federal grand jury to cover up his innocence. Where were the checks and balances of the federal grand jury system and his due process rights to prevent this obvious injustice? Unfortunately, one check has institutionally self-destructed; and, in the process, it has acted to cancel out the other check's influence on the system.

Is the Grand Jury a Check?

The American grand jury's historical origins are traced to 1166, during the reign of Henry II. Grand juries are composed of groups of private citizens selected either to review or investigate felony cases for terms lasting varied periods of time. Traditionally, the grand jury consists of 23 persons, with a majority required to indict. Presently, two-thirds of American states do not use grand juries (LaFave and Israel, 1985).

The grand jury has performed two functions throughout the years: investigatory and screening. Concerning the significance of the latter function, the Supreme Court announced in **United States v. Dionisio** that the purpose of the grand jury is to stand between the government agents and the suspect as an unbiased evaluator of evidence. Thus, in theory at least, the grand jury should shield a suspect from indictment on an unsubstantiated case presented to them by the prosecutor. Yet this screening role of the grand jury has lessened over time. Today, most states use a preliminary hearing to serve as the "protective" screen. The investigatory role of the grand jury, on the other hand, has become stronger than its historical counterpart. This change in the emphases of grand juries has led to a reversal of their functions over time. As one critic remarked, "The protective function has been trivialized and the investigatory function expanded to the point where the institution is almost precisely the opposite of what the founding fathers intended" (LaFave and Israel, 1985:106).

The historical changes in the priorities and functions of the American grand jury have profound due process implications on the rights of grand jury targets. Since the most celebrated function of the grand jury has been to stand between the government and citizens, it would seem reasonable that its

shielding function should not be abandoned when it investigates. Unfortunately such has not turned out to be the case. Investigative grand juries function now as de facto law enforcement agencies. Indeed, grand juries may be regarded as perhaps the most effective prosecutorial arm of the executive branch of American government.

The introduction of due process rights in criminal investigatory stages was due primarily to the atmosphere in America at the end of World War II. There was great fear of the potential use of public force that could be exerted through the criminal justice system (Allen, 1975). Due process rights were also given to criminal defendants throughout various stages of the criminal justice system for fear that fragmentation of the system would give elective prosecutors an independent power base without formal prosecutiorial policies (Allen, 1975:523). Even the Supreme Court has stated it will not tolerate the transformation of the grand jury into an instrument of oppression (**United States v. Dionisio,** 1973). Yet it seems all these fears and dangers are being realized by the present operations and procedures implemented by the federal prosecutor's manipulative use of investigative grand juries. For whatever vestige of validity there may be today of historical assumptions regarding neutrality, independence and the shielding natures which underlie the grand jury process, it at least must be recognized that modern grand juries are no longer either detached, neutral, or independent. They have effectively surrendered their mediative roles to the prosecutor, thereby increasing the dangers of excessive and unreasonable official interference with personal liberties—exactly the dangers which due process guarantees were intended to prevent.

A prosecutor acts as the legal advisor to the grand jury. He alone issues grand jury subpoenas and determines what witnesses will be called and when they will appear. A prosecutor examines witnesses before the grand jury and advises grand jury members on the legality of its objectives; he seeks contempt citations and grants immunity to grand jury witnesses (Clark, 1972). In many legal circles, the 23 members of a grand jury are referred to as "prosecutor's puppets."

Few prosecutors would bring a case before a grand jury unless they wanted an indictment. Hearing only the prosecution's side of the case, most grand jury members naturally agree with his assessment of the case. In most indictment jurisdictions, grand juries refuse to indict in only three to eight percent of the cases presented to them (Keeney and Walsh, 1971). Such figures do not speak well for the independence and shielding functions of grand juries. To follow a prosecutor blindly is to rubber stamp a figure the Supreme Court describes in **Coolidge v. New Hampshire** (1971) as never neutral and detached from the competitive enterprise of law enforcement.

Often, as was the case with Walter Nixon, Jr., members of the investigatory grand jury become the same members who later vote whether or not to return an indictment on the target of their investigation. In such cases, grand jury members seem to be commingling their separate roles—prosecutorial and adjudicatory. A conflict of interest would seem inevitable if a grand jury acquires a vested interest in returning indictments. No research exists

concerning what percentage of the targets investigated by a grand jury for several months were ultimately indicted by that same grand jury. Yet is it reasonable that a dual-functioning grand jury would later refuse to indict a target of its investigation and thereby admit they have not properly investigated a case which they have been trying to resolve for months? Herein lies the problem. When one grand jury encompasses the roles of prosecutor and judge, a conflict of interest arises of such profundity that it would be highly unusual for such a grand jury ever to refuse to indict. This is why investigative grand juries should not additionally perform a judicial function. Yet such a grand jury indicted Judge Walter Nixon, Jr.

Grand jury proceedings act to deny their targets due process rights in two senses. The first way is that the target of an investigative grand jury receives fewer due process rights than a subject of a police investigation. Secondly, the defendant in a probable cause hearing conducted at a preliminary hearing receives more due process rights than a target at a screening grand jury probable cause hearing.

The Case of Walter Nixon, Jr.

The prosecution and conviction of Federal Judge Walter Nixon, Jr. represents a paradigm case of grand jury abuse used as an instrument of political domination by the executive branch. A recitation of the facts of the Nixon case is important for several reasons. Historically, it will provide one of the few factual bases from which a United States Congress ever has attempted to impeach a United States government official. From a policy standpoint, the facts of the Nixon case demonstrate how the Federal grand jury system has the power to create an appearance of criminality in an otherwise innocent man and how that man has precious few rights with which to protect himself while this is being done to him. Two separate and unrelated series of facts led to the grand jury investigation of Walter L. Nixon, Jr. The first pertains to an oil investment Walter Nixon made with Wiley Fairchild in late 1979 or early 1980. The second set of facts has to do with a drug smuggling investigation which involved Wiley's son, Drew Fairchild, in August 1980.

Sometime during 1979, Walter Nixon became concerned about his personal finances.[3] Aware that he had three teenage daughters growing closer to college age, Nixon concluded he needed to make some financial investments. Because another federal judge, a friend of Nixon's, had been highly successful in making oil investments, Nixon decided to look into such investments for himself. That same year in Jackson, Mississippi, Nixon met with Carroll Ingram, the personal attorney of Hattiesburg, Mississippi millionaire Wiley Fairchild. During their conversation Ingram told Nixon he had a client named Wiley Fairchild who invested heavily in oil and mineral properties. Nixon asked Ingram to inquire whether Fairchild would be interested in having Nixon participate in an oil venture. Nixon told Ingram that with some notice he could borrow up to $10,000 for this purpose. The men then parted.

A period of time passed. Ingram subsequently telephoned Nixon and

informed him that Fairchild had selected three wells and the price would be $9,500. Nixon agreed to the deal, and the contract was completed. This oral contract took place in either late 1979 or early 1980. A considerable length of time passed between the oral agreement of late 1979 or early 1980 and the final written execution of the agreement.

Ingram prepared three promissory notes and dated them February 25, 1980. Ingram then took the deeds and the notes from Hattiesburg to Nixon's office in Biloxi in February 1981. On February 21, 1981, Walter Nixon signed three promissory notes totaling $9,500 and received the three royalty deeds. Those three wells went on line in the Spring of 1984. By his 1986 trial date, Walter Nixon had earned over $60,000 in profit for the Fairchild investment.

The only three participants in the oil investment agreement deal from the beginning—Walter Nixon, Wiley Fairchild, Ingram—all testified that the oil contract and agreement was finalized in early 1980. Specifically, they all agreed that the Nixon-Fairchild investment was verbally finalized many months before August 4, 1980.

On August 4, 1980, a plane landed at Hattiesburg airport. A United States customs plane had followed it there. Four men on the plane were arrested immediately and charged with importing 2,200 pounds of marijuana. Shortly thereafter, FBI investigators began to uncover the possibility that Drew Fairchild, son of Wiley Fairchild (Nixon's mineral royalties seller) and co-manager of the Hattiesburg airport, also was implicated in the case.

Sometime during September 1980, Drew made a plea bargain agreement with George Phillips, the United States Attorney for the Southern District of Mississippi. In the agreement, Drew agreed to cooperate with the federal government by implicating others in the transaction. In exchange for his cooperation, Drew Fairchild was promised a probated sentence and a $15,000 fine. Later on, Phillips became dissatisfied with Fairchild's cooperative efforts.

Sometime in 1981, then-district attorney Bud Holmes called George Phillips. Holmes asked for and received Phillips' consent to present the Drew Fairchild case for indictment by a grand jury in state court. On August 26, 1981, a Forrest County grand jury indicted Drew Fairchild and Robert Watkins for conspiracy to possess and distribute 2,200 pounds of marijuana. On January 12, 1982, Holmes entered into a plea bargain agreement with Drew Fairchild. Holmes agreed to offer Drew the same deal the federal government had offered in return for Drew's trial testimony against LRobert Watkins. On January 12, 1982, Drew Fairchild pled guilty to the charge. On motion by Holmes, the court agreed to defer Drew's sentence until after he testified against Robert Watkins, the pilot of the plane.

Two weeks earlier Watkins had been apprehended in Dallas but was released on an extradition bond and disappeared. During Watkins' absence, Drew Fairchild's sentencing continued to be deferred. Throughout 1982, Drew received six continuances. Watkins remained a fugitive until October 12, 1982, when he was found in Miami, Florida. New extradition proceedings were initiated. Watkins did not return to Hattiesburg, however, until January 26, 1983.

On January 26, new Circuit Judge McKenzie arraigned Watkins and then released him on a $100,000 fugitive bond. The same day the Drew Fairchild case was placed back on the active docket. Robert Watkins was scheduled for trial on November 23, 1983, but he again disappeared. Watkins remains a fugitive as of the date of this writing.

Holmes again postponed the sentencing of Drew Fairchild throughout the 1983 court year, anticipating Fairchild's testimony against Watkins on the 23rd of November. Holmes testified he had never reneged on his plea bargain agreement with Drew's attorney, Bill Porter.

The evidence is abundantly clear that these two sets of events—the Nixon-Fairchild oil transaction and the sentencing delay in the Drew Fairchild drug smuggling case—were running independently and were unrelated to each other. In 1983, however, the FBI began to investigate the possibility of a connection between Wiley Fairchild's oil deal with Judge Nixon and the three-year delay in the sentencing of Drew Fairchild by District Attorney Bud Holmes. The FBI believed the connection lay in the undisputed friendship of Bud Holmes and Judge Walter Nixon.

This lack of any link or causal relationship between the oil transaction and the Drew Fairchild drug smuggling case became appaent in Nixon's trial by the testimony of the five people involved in the oil transaction.[4] Wiley Fiarchild testified that his oil deal with Nixon "didn't have a damn thing to do with Drew's case." Carroll Ingram acknowledged that the thrust of the grand jury was to try to find a connection between the oil deal and the drug smuggling case, but when asked what that connection was, Ingram replied, "There is none." Nixon testified he did not even know Wiley Fairchild had a son the day he made the oil investment with him in February, 1980. Drew Fairchild said he was unaware Walter Nixon had anything to do with his case. Finally, even Skip Jarvis, the FBI informant, admitted on the stand that the corruption case against Nixon would only make sense if the oil transaction had taken place after Drew Fairchild had gotten in trouble with the law.

Nixon's grand jury knew all this. It was clearly established to the grand jury that Drew Fairchild's legal problems occurred after his father had sold the mineral interests to Walter Nixon. It is incredible the grand jury indicted Nixon for receiving an illegal gratuity knowing this fact. No doubt they were acting as "puppets of the prosecutor"; it was probably federal prosecutor Weingarten's will, not the detached judgement of the grand jury, that was responsible for Count I of the indictment.

The trial jury verdict acquitted Nixon of the corruption charge and thereby eliminated the basis for the grand jury investigation of him as the receiver of an illegal gratuity. The verdict indicates that the jury decided the transaction occurred before the drug bust in early 1980 and that the selling of the mineral interests by Wiley Fairchild to Judge Nixon was an ordinary oil investment deal and not a bribe for Wiley's son Drew.

What was established by testimony at the trial and by the admissions of the prosecution during the Nixon trial is astonishing. Only one act of corruption was alleged to have been committed by a public official in southern Mississippi-Nixon's receipt of an illegal gratuity. This also was the act of

corruption focused on by the grand jury throughout the eighteen months of investigation culminating in the indictment of Walter Nixon. It is now uncontested that the oil deal and the handling of Drew's case were totally separate transactions. In addition, as prosecutor Weingarten conceded, these independent transactions were both legal. Walter Nixon's purchase of oil interests from Wiley Fairchild was not an illegal gratuity but an ordinary business investment. Bud Holmes' actions delaying the sentencing portion of Drew Fairchild's drug smuggling case were totally justified under the circumstances of his original plea bargain agreement with Drew Fairchild and the continuing fugitive status of Robert Watkins. In fact, nothing in his actions at any time as D.A. reflected any wrongdoing, Weingarten said.

But if no underlying acts of corruption were committed by Nixon, why has Nixon been indicted and found guilty of federal crimes? This paradox must be investigated. It is proposed that the fundamentally unfair nature of the grand jury system is seminal to resolving this paradox.

Due Process Rights: Police Investigations Versus Grand Jury Investigations

The Constitutional restraints which have been placed on traditional criminal investigation agencies may be the reason the use of investigative grand juries has increased in popularity. For in grand jury proceedings, the target of a grand jury investigation is not afforded the due process rights which a criminal suspect receives at the station house. This is the reason the use of investigative grand juries is such an attractive investigative tool for prosecutors. It can accomplish what other agencies cannot (**United States v. Dionisio,** 1973;47).

The advantages of using the investigative grand jury to probe suspected criminal activity over using traditional law enforcement agencies are many. Investigative grand juries have the aid of subpoena power; the police do not. This tool allows the grand jury to require the presence of the target's possessions (**United States v. Dionisio,** 1973:3). These may be obtained without probable cause which, of course, is necessary if the police wish to accomplish the same thing by using search warrants (**Warden v. Hayden,** 1966).

The police generally warn a subject that he is suspected of committing a crime before interrogating him (**Miranda v. Arizona,** 1966). On the other hand, the grand jury prosecutor need not tell the target he is a target. It is required only that he be told of the general subject matter the grand jury is investigating (**The United States Attorneys Manual,** 1985).

The police need probable cause to arrest, or even to detain, a suspect if statements attained from the suspect during interrogation about his suspected criminal activity are to be accepted in evidence (**Dunaway v. New York,** 1978). The grand jury, on the other hand, can compel a target's appearance by subpoena and elicit testimony without having to demonstrate probable cause or even reasonable suspicion that the target is connected to criminal activity (**United States v. Dionisio,** 1973:9).

In the station house a criminal suspect has the right to be advised that he has the right to consult with an attorney, that he has the right to have his attorney paid for by the state, and that he has the right to have his attorney present during police interrogation (**Miranda v. Arizona,** 1966:473). Also, a lawyer may stop a traditional law enforcement interrogation of his client at will. On the other hand, only about twelve states allow a target's counsel in the grand jury room (**LaFave and Israel,** 1985:123). In federal grand jury proceedings, a witness may consult counsel only be stepping outside of the courtroom to do so (**National Lawyers Guild,** 1985). Most targets, however, are afraid to make such arrangements because they are afraid they will look guilty before a body which might subsequently indict them. Thus, unlike the station house interrogation where defense counsel controls the proceedings, the grand jury prosecutor controls the conduct of defense counsel.

Since all grand jury witnesses are under subpoena, a witness's refusal to cooperate with the investigation subjects him to a possible jail sentence for contempt (**United States v. Dionisio,** 1973:4). At the police station, the same witness could exercise his right to remain silent and then leave the station house with no fear of future jeopardy. The threat of contempt charges is the grand jury's most effective means of pressuring people to talk who ordinarily would not talk to police.

Another way the investigative grand jury secures evidence unobtainable through traditional law enforcement methods is to use the inherently coercive nature of the grand jury proceeding. Although the Supreme Court declared that testifying before a grand jury panel is a procedure not remotely connected to the coerciveness of a police interrogation(**United States v. Mundujano,** 1976), experience proves otherwise. One former prosecutor described the grand jury setting as having the feel of the "star chamber" (Keeney and Walsh, 1978:579). While testifying before a grand jury, a target is faced with the prosecutorial forces of organized society. "In all the United States legal system, no person stands more alone than a witness before a grand jury," says another critic (Keeney and Walsh, 1978:579). In spite of these facts, Miranda warnings need not be read to grand jury targets as they are to suspects during custodial interrogation in the police station. In spite of this, a target witness giving false testimony before the grand jury may be prosecuted for perjury.

Walter Nixon was asked a series of questions during his interview with the FBI. His answers in essence asserted his innocence. Nothing more became of the Nixon-FBI interview. Subsequently, Nixon was asked essentially the same questions before the federal grand jury investigating him. Once again he answered the questions in a way similar to and consistent with his answers to the FBI. Nixon again asserted he was innocent of any public corruption; however, this time his declarations of innocence were to be the basis of three perjury counts in the indictment. Had he been investigated only by the FBI, these charges would never have been litigated. Today they are the exclusive basis of his conviction.

Another distinct advantage grand jury investigations have over traditional law enforcement investigations is that grand jury proceedings are supposed to

be secret (**United States v. Proctor and Gamble Co.,** 1958). Yet it is the non-secrecy aspect of this secrecy that proves to be such an effective investigative tool. The Supreme Court in **Douglas Oil Company v. Petrol Stops Northwest** (1978) declares the objective of grand jury secrecy is to protect the accused, and thus to conceal the fact that he is under investigation. All jurisdictions prohibit disclosure of grand jury proceedings (Fed. R. Crim. p. 6 (e) (5)). Contempt orders are threatened for anyone who violates grand jury secrecy. Yet this still has not prevented leaks to the press (Frankel and Naftalis, 1975). Diligent reporters come to know who has been subpoenaed to appear before investigative grand juries (even though the list of witnesses is sealed): television cameras are often waiting outside court room entrances, and the faces of witnesses often appear on the six o'clock news the same day they are questioned. This non-secrecy-secrecy is particularly damaging in grand jury investigations of public figures. Although the Supreme Court announces that being subpoenaed by a grand jury involves "no stigma whatever," public knowledge that a man has been so subpoenaed could ruin him for life (**United States v. Dionisio,** 1973:47).

Desperately seeking to counteract the non-secrecy-secrecy surrounding the grand jury's investigation of him, Nixon volunteered a statement at the end of his grand jury testimony in an effort to clear his name. The Statement was the basis of the fourth perjury count in the indictment.

Due Process In a Probable Cause Determination: A Preliminary Hearing Versus A Grand Jury Screening.

A citizen suspected of committing a felony has the right to a probable cause hearing to determine his legal liability to prosecution before he may subsequently be tried for said crime in felony court. The American criminal justice system uses two legal procedures-the grand jury and the preliminary hearing-to make the judicial determination of probable cause. In a preliminary hearing an accused is provided with an array of due process rights to insure that his probable cause proceeding is a fundamentally fair one, whereas in a grand jury probable cause proceeding the target is provided with few of such due process rights. This disparity sometimes undermines the fundamental fairness afforded to the grand jury target. Such seems to have been the case with Walter Nixon, Jr.

A defendent in a prdeliminary hearing has the right to a detailed notice of the charges against him; in grand jury proceedings, however, a witness need not be warned even that he is the target of the grand jury investigation, much less be apprized of the crime for which he is being investigated (18 USC 3060). Walter Nixon had no formal notice that he was the target of the grand jury investigation nor was he informed of what he was suspected of doing that was illegal.

An accused is afforded the right to consult with counsel at post-advisory proceeding line-ups (**Kirby v. Illinois,** 1972), at interrogations (**Miranda v. Arizona,** 1966:477), at arraignments (**Hamilton v. Alabama,** 1961), and throughout his preliminary hearing (**Coleman v. Alabama,** 1979:9). The grand jury excludes counsel from its proceedings (**United States v. Manujana,**

1976:581). Nixon was advised that he had the right to consult with his lawyer but his attorney had to sit outside the courtroom while Nixon was interrogated by the prosecutor. As a result, Nixon never once conferred with his counsel during his own testimony.

The accused has the right to be present throughout all the proceedings in a preliminary hearing. He also has the right to confront witnesses against him through the agency of his lawyer's cross-examination. Also, he has the right to present witnesses in his own behalf (Fed. R. Crime. p. 6(2) (d)). Yet a grand jury target does not have the right to be present throughout the proceeding, nor does he have the opportunity to cross-examine witnesses against him (Fed. R. Crime. p. 6(2) (d)) or to present his own witnesses to testify in his behalf (**United States Attorney's Manual,** 1985).

The rules of evidence are generally observed in preliminary hearings (Miller, 1970). However, grand jury indictments may be based on illegally obtained evidence (**Costello v. United States,** 1966). Furthermore, grand jury procedures are not subject to objections that the evidence presented is incompetent or irrelevant (**Blair v. United States,** 1919).

The Fifth Amendment guarantees against self-incrimination are exercised during preliminary hearings. The accused must appear in court, but he does not have to take the witness stand and thereby does not have to answer questions by the prosecution. Thus few are ever prosecuted for perjury at a preliminary hearing. In a grand jury hearing, the target can exercise the right to remain silent but he must personally assert it after every question. However, a target has no right not to be put on the witness stand and questioned. Once the prosecution has subpoenaed a witness (it should be kept in mind that there is no duty for the prosecutor to tell the witness he is a target) the prosecutor has a right to call the witness to the stand and to question him. Also, a grand jury target does not have his attorney nearby to advise him whether or not to respond to a prosecutor's question, the answer to which might potentially be incriminating (**United States v. Dionisio,** 1973:16).

Had Walter Nixon exercised his right to remain silent by not taking the stand (preliminary hearing only) or if counsel had asserted it for him during his grand jury appearance, he would be convicted of no crimes today.

Should an accused receive a favorable judgment from a preliminary hearing judge, the accused will not have to go through such a probable cause procedure again unless the prosecution finds additional evidence to present against him. On the other hand, the grand jury prosecutor has the power to call a second grand jury if he is unsatisfied with the vote of the first one. He has the right to present the same evidence to the second grand jury in hopes of receiving an indictment (**United States v. Thompson,** 1920).

Still, a valid question must be asked: "Why did Nixon lie?" First of all, Nixon was pressured into testifying before the grand jury in order to clear his name due to the massive pretrial publicity about his case. Nixon's two perjury convictions were based on two questions asked him during the grand jury proceeding.[5] Both questions, unfortunately, seem ambiguous.[6] Both questions concerned a conversation Nixon had with the prosecution's chief witness, Bud Holmes, alone, at Holmes' farm house. Nixon believes he

answered questions about the Holmes conversation truthfully, given Nixon's understanding of the meaning of the ambiguous question. Ironically, Holmes (the only other party to the conversation) also believes Nixon answered the questions — for which Nixon was convicted of perjury — truthfully! Holmes stated after trial that had he (Holmes) been cross-examined correctly, then he would have cleared up the ambiguities and Nixon would not have been convicted of perjury.[7]

Whether Nixon is guilty or innocent of the perjury charges is not the policy point of this paper, however. The institutional denial of a citizen's rights which manufactures an unjust verdict is the point. The significance of Nixon's case is that, but for the grand jury press leaks, but for Nixon's lack of notice of the charges he faced before the grand jury, but for the absence of counsel in the grand jury room who could have objected to and demanded clarification of ambiguous questions, Nixon never would have been convicted of perjury in the first place. If Nixon's case had been processed only through an FBI investigation and a preliminary hearing wherein citizens' rights are institutionally honored, rather than through an investigative grand jury where they are not, Nixon would never have been convicted of lying to cover up crimes which he never committed.

The American Grand Jury - Police Considerations

A penetrating question now must be asked: Does the grand jury investigate criminal conduct—or does it in effect manufacture such conduct? When the Public Integrity Division of the Justice Department fails to discover corruption by public officials, or when their investigation is so incompetent that it fails to distinguish between legality and corruption, then is it the grand jury's duty to use its seductive and, by nature, inherently coercive proceedings to lure an innocent federal judge into answering questions under oath, then to play semantic games with those answers, and finally to create a crime of perjury even though no substantive crimes previously existed? This seems to have been the rationale behind which an innocent federal district judge was trapped by the system.

The problem is obvious. Due process rights are remarkably absent in grand jury proceedings. The injustices inherent in such a system can be eradicated only by profound changes. Recognizing this the American Bar Association supports 31 grand jury reform principles, including allowing a lawyer in the grand jury room during the testimony of a client. In 1987 congressional bills also recognized these problems. S. 284 and H.R. 1407 would allow counsel in the grand jury room. H.R. 1407 also would provide for other reforms such as requiring that the target of an investigation be permitted to testify before the grand jury, and precluding prosecution use of evidence seized in violation of the constitutioinal rights of grand jury witnesses. A House Judiciary subcommittee held hearings on H.R. 1407. As of this writing there has been no action in the Senate.

The following policy changes are proposed here: an investigative grand jury target, while being interrogated by a grand jury prosecutor, should receive the same due process rights that he or she would receive during an interrogation

performed by a traditional law enforcement agency. Secondly, whenever a target's actions are being adjudicated for possible indictment by a grand jury, the target should be afforded the same due process rights he or she would have enjoyed had this probable cause determination taken place in a preliminary hearing.

Notes:

1 Although the usual punishment for this kind of conviction in U.S. federal courts for first time offenders is 6 months, Walter Nixon received the maximum 5 years for each of the offenses to run concurrently.

2 Prompting a Justice Department investigation of the government's handling of a bribery conspiracy case against Pennsylvania Treasurer R. Budd Dwyer, who killed himself on television on February 1987, was a suicide note left by Dwyer. "The position of U.S. attorney is one of the most powerful positions in the United States government who abuses his position, uses the position because there is no check or balance for a U.S. Attorney for political gain or uses the position for a personal vendetta against innocent citizens." Dwyer's widow, Joanne, viewed the Justice Department's move as a step toward prohibiting the prosecution of others. "Maybe people will be saved from prosecution like my husband was."

3 The sources of the facts of the proceedings at trial and during the grand jury are twofold — the author's personal notes as they were meticulously cross-referenced with the trial transcript and the transcript itself.

4 The author's role in the Nixon case was totally unexpected. In early January 1986 the news director of WLOX television (the station in Nixon's home town) called and asked the author to be the station's legal commentator during the Nixon trial. During the call it was revealed that the TV station wanted to employ me as a lawyer who was totally neutral, removed and uninvolved with Judge Nixon or the United States Court for the Southern District of Mississippi. I had been reading newspaper accounts about the special grand jury's investigation of Judge Nixon for the preceeding eighteen months. Having decided that the judge probably had corrupted his office, I wondered whether I could, in fact, be totally neutral in reporting the case. However, college educators' salaries being what they are, I agreed to cover the case.

5 The testimony alleged to be false consisted of (i) Nixon's denial that a State prosecutor, Bud Holmes, had discussed "the Drew Fairchild case" with him, and (ii) a statement volunteered at the conclusion of his testimony that he had not talked to anyone to influence the Drew Fairchild Case. The trial evidence established that Nixon had one conversation with Holmes in which

State charges against Drew Fairchild were mentioned, but that he never talked to Holmes about a federal case involving Drew Fairchild which was a primary focus of the grand jury inquiry. If the questions and answers are understood to refer to the federal case against Drew Fairchild — a reasonable construction, given the ambiguity of the questioning and the context of the testimony — then Nixon's answers were absolutely true.

6 **Bronston v. United States,** 409 (U.S. 352 (1973), held that a perjury conviction cannot be based upon misleading testimony that is literally true. The courts rule that "(p)recise questioning is imperative as a predicate for the offense of perjury," holding that "a jury should not be permitted to engage in conjecture whether an unresponsive answer, true and complete on its face, was intended to mislead or divert the examiner" **Id.** at 362, 359. In other words, a perjury conviction may not be based upon a response to an ambiguous question, when the response was literally true under a reasonable understanding of the question. The same policy considerations that controlled **Bronston** apply here to Nixon's case. If witnesses face perjury convictions for misunderstanding ambiguous questions, witnesses will be deterred from coming forward and the judicial system may be impaired, a concern that "is far paramount to that of giving perjury its just deserts" **Bronston,** at 359 (quoting W. Best, Principles of the Law of Evidence 6.06 (C. Chamberlayne ed. 1883)).

7 This admission was made to this author during a taped telephone conversation with Holmes on November 14, 1987.

Bibliography

Allen, F.
1975 The Judicial Quest For Penal Justice: The Warren Court And The Criminal Law Cases. University of Illinois Law Foundation, 518.

Archambeault, W. G.
1987 Testing the Reagan Hypothesis: The case of the federal prosecution of public officials. Paper presented to the 1987 Annual Meeting of the Academy of Criminal Justice Sciences, March 1987.

Frankel and Naffslis
1975 The Grand Jury: An Institution On Trial. New York: McGraw Hill.

Hamilton, F.
1978 Note 7 432 Harvard Criminal Law Reporter 110

Kenney and Walsh
1978 The American Bar Association's grand jury principles: A critique from a federal criminal justice perspective. 14 Idaho Law Review, 5:45.

LaFave and Israel
1985 Criminal Procedure. St. Paul, Minnesota: West.

National Lawyers Guild
1985 Before Federal Grand Juries (3rd ed.). St. Paul, Minnesota: West.

Miller, F.
1970 Prosecution: The Decision To Charge A Suspect With A Crime. New York: Hill and Wang.

Quick, J.
1978 Attitudinal aspects of police compliance with procedure due process. 6 American Journal Of Criminal Law 25.

Thesus, R.
1973 The grand jury: Powers, procedures and problems. 9 Columbia Journal Of Law And Social Problems 681.

Cases Cited:

Blair v. United States, 250 U.S. 273, (1919).
Coleman v. Alabama, 399 U.S. 1, (1979).
Costello v. United States, 350 U.S. 359, (1966).
Dunaway v. New York, 442 U.S. 200, (1978).
Duncan v. Louisiana, 391 U.S. 145, (1968).
Gideon v. Wainwright, 372 U.S. 335, (1963).
Hamilton v. Alabama, 368 U.S. 52, (1961).
In Re Oliver, 33 U.S. 257, (1948).
Kirby v. Illinois, 406 U.S. 682, (1972).
Malloy v. Hogan, 378 U.S. 1, (1964).
Mapp v. Ohio, 367 U.S. 643, (1961).
Miranda v. Arizona, 384 U.S. 436, (1966).
Pointer v. Texas, 380 U.S. 400, (1965).
United States v. Calandra, 414 U.S. 338, (1974).
United States v. Dionisio, 410 U.S. 1, (1973).
United States v. Mandujano, 425 U.S. 564, (1976).
United States v. Proctor and Gamble Co., 356 U.S. 677, (1958).
United States v. Sells Eningeering Inc., 463 U.S. 418, (1983).
United States v. Washington, 431 U.S. 181, (1977).
Warden v. Hayden, 387 U.S. 436, (1966).
Washington v. Texas, 388 U.S. 14, (1967).
Wolf v. Colorado, 338 U.S. 25, (1949).

Government Publications:

Federal Magistrates Act, 18, U.S. Code Sec. 3060.
Federal Rules of Criminal Procedure, Secs. 5, 1(a), 6(d)(2), 6(e)(5).
United States Attorneys Manual, Sec. 9-11.
18 U.S. Code Sec. 6003.