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An Unexcited View of United States v. Calandra

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DISCUSSION OF RECENT DECISIONS

AN UNEXCITED VIEW OF UNITED STATES V. CALANDRA

In a recent decision the United States Supreme Court refused to extend the exclusionary rule to grand jury proceedings. This decision, *United States v. Calandra*,[1] has triggered considerable controversy and confusion. It has been the subject of numerous newspaper articles[2] and a television debate.[3] These media have expressed great concern at the possible ramifications of what they see as a radical departure from the Warren Court's efforts to protect the constitutional rights of criminal defendants.

This discussion will briefly examine the history and function of the grand jury system. Coupled with a look at the aims and applications of the exclusionary rule, the article will provide a less emotional basis for analyzing the decision in *Calandra*.

THE GRAND JURY

The fifth amendment to the United States Constitution provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."[4] The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. Its basic purpose was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. Grand jurors were selected from the body of the people and their work was not hampered by rigid procedural or evidential rules.[5] In fact, grand jurors could act on their own knowledge

1. 94 S. Ct. 613 (1974).

2. Green, *Swinging Pendulum*, The Wall Street Journal, Feb. 14, 1974, at 1, Col. 1; Conheim, *State Rape Case to Test Miranda Ruling*, Detroit Free Press, Mar. 10, 1974, Sec. A, at 3, Col. 1.

3. The Advocates, *Should Illegally Seized Evidence Be Admissible at Trial*, WTTW Chicago, Ill., Mar. 11, 1974.

4. It has been held that "infamous" punishments include confinement at hard labor, United States v. Moreland, 258 U.S. 433 (1922); incarceration in a penitentiary, Mackin v. United States, 117 U.S. 348 (1886); and imprisonment for more than a year, Barkman v. Sanford, 162 F.2d 592 (5th Cir.), *cert. denied*, 332 U.S. 816 (1947). FED. R. CRIM. P. 7(a) has codified these holdings:

> [A]n offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information.

5. As to the development of the grand jury as an institution here and in Eng-

and were free to make their presentments or indictments on such information as they deemed satisfactory.[6]

The grand jury serves two important functions: "to examine into the commission of crimes" and "to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will."[7] In order to adequately discharge these functions, it has been held that a grand jury's investigative power must be broad.[8] Hence, the grand jury's authority to subpoena witnesses is not only historic, but essential to its task.[9] "A grand jury investigation is not fully carried out until *every available clue* has been run down and all witnesses examined in a proper way to find if a crime has been committed."[10] (Emphasis added). The general rule is that all properly subpoenaed witnesses must appear, or be subject to contempt charges.[11] There are virtually no restrictions on the quality of evidence which the grand jurors may use. They have the right to use rumor, hearsay, and even suspicion in initiating an investigation.[12]

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land, *see* Hale v. Henkel, 201 U.S. 43, 59 (1906); Blair v. United States, 250 U.S. 273 (1919); 1 F. POLLOCK AND F. MAITLAND, HISTORY OF ENGLISH LAW 130 (1895); 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 312-23 (1927).

6. 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 323 (1927).

> There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor . . . . Its adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice.

Costello v. United States, 350 U.S. 359, 362 (1956).

7. Hale v. Henkel, 201 U.S. 43, 59 (1906); Wood v. Georgia, 370 U.S. 375, 390 (1962).

8. "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." Blair v. United States, 250 U.S. 273, 282 (1919); *accord*, Branzburg v. Hayes, 408 U.S. 665, 700 (1972); Costello v. United States, 350 U.S. 359, 364 (1956).

9. *Id.* at 281; Blackmer v. United States, 284 U.S. 421, 438 (1932).

10. Branzburg v. Hayes, 408 U.S. 665, 701 (1972), *quoting* United States v. Stone, 429 F.2d 138, 140 (2d Cir. 1970).

11. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665 (1972); Blair v. United States, 250 U.S. 173 (1919); Hale v. Henkel, 201 U.S. 43 (1906); United States v. Hill, 26 F. Cas. 315, 317 (No. 15364) (C.C. Va. 1809); Claiborne v. United States, 77 F.2d 682, 690 (8th Cir. 1935). *See also* Note, *Powers of Federal Grand Juries*, 39 CALIF. L. REV. 573 (1951). The grand jury itself does not possess the authority to subpoena a witness; it is a power that comes from the court under whose supervision the grand jury sits. *See In re* National Window Glass Workers, 287 F. 219, 225 (N.D. Ohio 1922); FED. R. CRIM. P. 17.

12. *See* Costello v. United States, 350 U.S. 359 (1956) (dictum); United States v. McGovern, 1 F. Supp. 568 (S.D.N.Y. 1932). *See generally* L. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 162, 163 (1947); Hale v. Henkel, 201 U.S. 43, 64 (1906). *But cf.* In Petition of McNair, 324 Pa. 48, 62, 187 A. 498, 504-05 (1936) (investigations for speculative purposes should not be tolerated); Comment, *The California Grand Jury—Two Current Problems*, 52 CALIF. L. REV. 116, 119 (1964) (showing of "good cause" considered proper to trigger a grand jury investigation).

Presumably because a grand jury hearing is not considered an adversary proceeding, and there is no adjudication of guilt or innocence, subjects of the hearing are afforded significantly less protection than that provided in trials. They are not accorded the right to counsel.[13] They do not have the right to confront or cross-examine witnesses called against them,[14] the right to testify,[15] the right to sit in the grand jury room as an observer,[16] or even the right to know the charges made against them.[17] The witness is also unable to challenge testimony on the basis of rules of evidence that would prevail at trial since he is excluded from the grand jury hearing room when others are testifying.[18] In addition a witness may not object to the competency or materiality of information sought from him. "The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials."[19]

However, this broad investigatory power is not totally limitless. Although no judge presides to monitor its proceedings, the grand jury is still subject to judicial control.[20] In addition, the Supreme Court has held that the fourth amendment requirement of reasonableness for searches and seizures forbids the compulsory production of books and papers before a grand jury in two types of situations: (1) where the papers and private documents are incriminating to the witness subpoenaed and would, therefore, violate his fourth and fifth amendment rights;[21] and (2) where a grand jury *subpeona duces tecum* is too sweeping in its terms and may constitute an unreasonable search and seizure.[22]

13. *See In re* Black, 47 F.2d 542 (2d Cir. 1931); *accord,* United States v. Scully, 225 F.2d 113, 116 (2d Cir. 1955), *cert. denied,* 350 U.S. 897 (1955); United States v. Blenton, 77 F. Supp. 812 (E.D. Mo. 1948). *Cf. In re* Groban, 352 U.S. 330 (1957).

14. *See, e.g.,* United States v. Scully, 225 F.2d 113 (2d Cir. 1955); Boehm v. United States, 123 F.2d 791, 806 (8th Cir. 1941) (dictum).

15. *See* United States v. Blodgett, 30 F. Cas. 1157, 1158 (No. 18312) (S.D. Ga. 1867).

16. *See* FED. R. CRIM. P. 6 (d).

17. *See In re* Black, 47 F.2d 542 (2d Cir. 1931).

18. *Supra* note 16.

19. United States v. Calandra, 94 S. Ct. 613, 617 (1974).

20. *See generally* Claiborne v. United States, 77 F.2d 682 (8th Cir. 1935) (federal grand jury is subject to the United States District Court's geographic and governmental jurisdictional limits); Levine v. United States, 362 U.S. 610 (1960) (courts may give instructions directing the scope of a grand jury investigation); United States v. Smith, 104 F. Supp. 283 (N.D. Cal. 1952) (the court may refuse to authorize expenses, preventing the grand jury from employing investigators or independent counsel); Application of Texas Co., 27 F. Supp. 847 (E.D. Ill. 1939) (a judge may discipline grand jurors to insure compliance with his orders); *accord, In re* Summerhayes, 70 F. 769 (N.D. Cal. 1895); 18 U.S.C § 101 (1970); *In re* National Window Glass Workers, 287 F. 219 (N.D. Ohio 1922) (judge may discharge a grand jury at any time, with or without reason); *accord,* FED. R. CRIM. P. 6 (g).

21. Boyd v. United States, 116 U.S. 616 (1885).

22. Hale v. Henkel, 201 U.S. 43, 76 (1906).

The grand jury witness' most significant defense during questioning is the fifth amendment privilege against self-incrimination.[23] However, neither the court nor the prosecutor need warn the witness of this privilege[24] and since the witness has no right to counsel while testifying[25] he might not effectively assert his right. This privilege can also be negated by the government's granting of immunity from prosecution to the witness.[26] Although expressly limited to a unique problem area, the misuse of electronic surveillance, Section 2515 of Title III of the Omnibus Crime Control and Safe Streets Act of 1968[27] is the closest thing to an exclusionary rule which has ever been applied to grand juries.[28] And it is important to note that this is not a judicial creation, but an act of the legislature.

THE EXCLUSIONARY RULE

In 1914 the Supreme Court held in *Weeks v. United States* [29] that evidence illegally seized by federal officers in violation of the fourth amendment was not admissible at trial in a federal court. This decision marked the initiation of the exclusionary rule, which makes evidence inadmissible in court if law enforcement officers obtain it by means forbidden by the Constitution, by statute, or by court rules.[30] The Court enforced the exclusionary rule to suppress evidence unlawfully obtained in four major areas: search and seizure,[31] confessions obtained in violation of the fifth and sixth amendments,[32] identification testimony obtained in violation of these amendments,[33] and evidence obtained by methods so "shocking" that its use would violate the due process clause.[34]

23. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665 (1972); Brown v. Walker, 161 U.S. 591 (1911); Counselman v. Hitchcock, 142 U.S. 547 (1892).

24. *See, e.g.*, United States v. Block, 88 F.2d 618 (2d Cir. 1937); Thompson v. United States, 10 F.2d 781 (7th Cir.), *cert. denied*, 270 U.S. 654 (1926).

25. *Supra* note 13.

26. *See, e.g.*, Kastigar v. United States, 406 U.S. 441 (1972). Other testimonial privileges recognized by the federal courts that apply at grand jury proceedings are derived from the common law. *See* Hickman v. Taylor, 329 U.S. 495 (1947) (attorney-client); Blau v. United States, 340 U.S. 332 (1951) (husband-wife); *In re* Verplank Subpoena, 329 F. Supp. 433 (C.D. Cal. 1971) (priest-penitent).

27. 82 Stat. 211, *as amended*, 18 U.S.C. § 2510-20. 18 U.S.C. § 2515 provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, *grand jury*, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof, if the disclosure of that information would be in violation of this chapter. (Emphasis supplied).

28. *See* Gelbard v. United States, 408 U.S. 41 (1971).

29. 232 U.S. 383 (1941).

30. *See generally* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

31. Mapp v. Ohio, 367 U.S. 643 (1961).

32. Miranda v. Arizona, 384 U.S. 436 (1966).

33. Gilbert v. California, 388 U.S. 263 (1967).

34. Rochin v. California, 342 U.S. 165 (1952).

While the definition of the exclusionary rule and its operation is reasonably clear, the purpose of the rule has been the subject of continual judicial controversy. Two theories have been advanced by the Supreme Court to justify the existence of the rule. The reason frequently mentioned in judicial rhetoric is that the rule is based on "the imperative of judicial integrity."[35] This theory maintains that the "tainted" evidence must be excluded so as not to leave the impression that the courts are sanctioning illegal police activities. Though often quoted, the "judicial integrity" theory has never been the critical factor when the Court was deciding when and how to apply or extend the rule.[36] The second, and most often relied on theory, is that the exclusion of evidence unlawfully obtained will *deter* Constitutional violations by government agents. In answer to opponents of the exclusionary rule who argued that it did no one justice to let criminals go free because government officers had also broken the law,[37] the Court stated in *Elkins v. United States*[38] that "[t]he rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[39] The issue of retroactivity casts considerable light on the primary justification for the rule. In *Linkletter v. Walker*[40] the Court refused to apply the exclusionary rule retroactively, stating:

> [A]ll of the cases since *Wolf* requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action . . . . We cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved . . . . The ruptured privacy of the victim's homes and effects cannot be restored. Reparation comes too late.[41]

Deterrence was also the crucial factor in the Court's decisions denying retrospective application of the new rules on interrogation warnings and lineup formalities, outlined in *United States v. Wade*.[42] The Court held that the new requirements were binding only on lineups that occurred after the *Wade*

35. Elkins v. United States, 364 U.S. 206, 222 (1960).

36. This evidentiary rule is unique to American jurisprudence. Although the English and Canadian legal systems are highly regarded, neither has adopted our rule. *See* Martin, *The Exclusionary Rule Under Foreign Law—Canada*, 52 J. CRIM. L.C. & P.S. 271, 272 (1961); Williams, *The Exclusionary Rule Under Foreign Law—England*, 52 J. CRIM. L.C. & P.S. 272 (1961).

37. *See generally* Irvine v. California, 347 U.S. 128 (1954); Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting); Wolf v. Colorado, 338 U.S. 25, 30 (1949).

38. 364 U.S. 206 (1960).

39. *Id.* at 217.

40. 381 U.S. 618 (1965).

41. *Id.* at 636-37.

42. 388 U.S. 218 (1967).

decision.[43] Finally, in an opinion concerning the retroactivity of its decision applying the self-incrimination privilege to the states, the Supreme Court stated that deterrence was the "single and distinct" purpose of the exclusionary rule.[44] "[I]n sum, the rule is a judicially-created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather then a personal constitutional right of the party aggrieved."[45]

Though the effectiveness of the exclusionary rule as a deterrent to unlawful police activity is currently the subject of considerable controversy,[46] it is clear that the rule has not been applied in all situations involving illegally obtained evidence. Instances where the courts have deviated from it primarily involve proceedings either prior or subsequent to trial. In *United States v. Blue*[47] the Supreme Court upheld an indictment despite the fact that the government had presented incriminating evidence obtained in violation of the defendant's fifth amendment rights to the grand jury. The Court said, "Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial."[48] In *Lawn v. United States*[49] the defendants requested a "full-dress" hearing to determine whether illegally seized evidence obtained from them in a 1952 grand jury proceeding, or evidence derived therefrom, was considered by a 1953 grand jury that had returned a present indictment against them. The Supreme Court pointed out that they were "not dealing with the use of incompetent or illegal evidence in a trial on the merits, nor with the rights to . . . suppress the direct or derivative use at the trial of evidence illegally obtained."[50] On this basis the Court denied the defendant's request and upheld the indictment. In *Walder v. United States*[51] the Court held that evidence illegally obtained and suppressed in one trial can nevertheless be used against the defendant from whom it was illegally seized to impeach his perjury in a later trial. Similarly, the Court of Appeals for the Second Circuit has held that it is proper for a trial judge, in deciding upon sentence, to consider evidence

43. Stovall v. Denno, 388 U.S. 293 (1967). "By fixing the effective date in terms of the police conduct rather than in terms of the time at which the trial court took its action in the matter, it would seem that the Court has impliedly rejected the theory of 'judicial integrity' as the basis for the rule and identified its primary purpose as that of controlling police behavior." Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 670 (1970).

44. Tehan v. United States, 382 U.S. 406, 413 (1966). *See also* Kaufman v. United States, 394 U.S. 217 (1969).

45. United States v. Calandra, 94 S. Ct. 613, 620 (1974).

46. *See generally* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting).

47. 384 U.S. 251 (1966).

48. *Id.* at 255.

49. 355 U.S. 339 (1958).

50. *Id.* at 350.

51. 347 U.S. 62 (1954).

excluded from the trial on fourth amendment grounds,[52] and that a parole board may consider evidence at a parole revocation hearing that was seized from a parole violator pursuant to an unlawful search.[53]

There are no cases where the judicially created exclusionary rule has been held applicable as a testimonial privilege for a witness in a grand jury investigation. Calandra sought this extension of the rule.

UNITED STATES V. CALANDRA

Federal agents conducting an investigation of alleged bookmaking activities searched Calandra's place of business, the Royal Machine and Tool Company, armed with a search warrant authorizing the seizure of bookmaking records and gambling paraphernalia. No gambling paraphernalia was discovered during this exploration. However, one of the agents found and seized what he believed to be "loansharking" records. The agent was aware that the United States Attorney's office for the Northern District of Ohio was investigating extortionate credit transactions and had the purported loansharking record seized along with various other items, including books and records of the company, stock certificates and address books.

Several months later a special grand jury was convened in the Northern District of Ohio to investigate possible loansharking activities in violation of federal laws. The grand jury subpoenaed Calandra in order to ask him questions based on the evidence seized during the search of his place of business. Calandra appeared before the grand jury but refused to testify, invoking his fifth amendment privilege against self-incrimination. The Government then requested the district court to grant Calandra transactional immunity.[54] (The offer to grant Calandra immunity was deemed irrelevant by both the circuit court[55] and the Supreme Court[56] and was not discussed by either). Calandra then moved for suppression and return of the seized evidence on the grounds that the affidavit supporting the search warrant was insufficient and that the search exceeded the scope of the warrant. The district court held a hearing at which Calandra stipulated that he would refuse to answer questions based on the seized materials. The court found that the search warrant had been issued without probable cause and that the search had exceeded the scope of the warrant. It, therefore, ordered

52. United States v. Schipani, 435 F.2d 26 (2d Cir. 1970).

53. United States *ex rel* Sperling v. Fitzpatrick, 426 F.2d 1161 (2d Cir. 1970).

54. There are primarily two types of immunity grants: Immunity from conviction based on the use of compelled testimony and evidence derived therefrom ("use and derivative use" immunity) and immunity from prosecution for offenses to which compelled testimony relates ("transactional" immunity). See Kastigar v. United States, 406 U.S. 441, 443 (1972).

55. United States v. Calandra, 465 F.2d 1218, 1221 (6th Cir. 1972).

56. United States v. Calandra, 94 S. Ct. 613, 620, n. 6 (1974). [Hereinafter referred to as Calandra.]

the evidence suppressed and returned to Calandra, and further ordered that Calandra need not answer any of the grand jury's questions based on the suppressed evidence.[57] The court held:

> [D]ue process . . . allows a witness to litigate the question whether the evidence which constitutes the basis for the questions asked of him before the grand jury has been obtained in a way which violates the constitutional protection against unlawful search and seizure.[58]

The Court of Appeals for the Sixth Circuit affirmed, holding that the district court had properly entertained the suppression motion and that the exclusionary rule may be invoked by a witness before the grand jury to bar questioning based on evidence obtained in an unlawful search and seizure.[59]

In reversing the appellate court, Mr. Justice Powell, writing for the majority, weighed the "potential injury to the historic role and functions of the grand jury against the potential benefits of the [exclusionary] rule as applied in this context."[60] The Court was concerned that allowing witnesses to invoke the exclusionary rule before a grand jury would necessitate the holding of suppression hearings to adjudicate "issues hitherto reserved for the trial on the merits and would delay and disrupt grand jury proceedings."[61] It cannot be denied that this would certainly be the result. Since no judge presides at a grand jury hearing, and the grand jury itself is certainly not equipped to decide such issues, any witness challenging the competency or the source of questions asked of him would have to be afforded a preliminary hearing to establish the validity of his refusal to answer. As the Court points out, this argument is adequately illustrated by the present case.

> As of the date of this decision, almost two and one-half years will have elapsed since respondent was summoned to appear and testify before the grand jury. If [Calandra's] testimony was vital to the grand jury's investigation . . . it is possible that this particular investigation has been completely frustrated.[62]

In *United States v. Dionisio*[63] the Court stated that "[a]ny holding that would saddle the grand jury with mini-trials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal law."[64]

In order to justify this interference with the grand jury proceedings, the

57. *In re* Calandra, 332 F. Supp. 737 (N.D. Ohio 1971).
58. *Id.* at 742.
59. United States v. Calandra, 465 F.2d 1218 (6th Cir. 1972).
60. Calandra, *supra* note 56, at 620.
61. *Id.* at 621.
62. *Id.* n. 7.
63. 410 U.S. 1 (1973).
64. *Id.* at 17.

benefits to be derived from the proposed extension of the exclusionary rule must be considered. Following the reasoning in *Elkins v. United States*[65] the Court adhered to the view that the primary purpose of the exclusionary rule "is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable search and seizure."[66] In light of this, the majority reasoned that there was little or no deterrent effect in excluding illegally seized evidence from grand jury proceedings over and above that already achieved through its exclusion at trials. They maintained that this ruling would not serve as an incentive for prosecutors to disregard the fourth amendment solely to obtain indictments because "[f]or the most part, a prosecutor would be unlikely to request an indictment where a conviction could not be obtained."[67]

This conclusion by the Court seems specious at best. It appears to have completely ignored the added burden this will work on the prosecutor's discretion in deciding whether to seek an indictment based on unlawfully seized evidence, knowing full well that this same evidence will be inadmissible at trial. A prosecutor may be pressured to act contrary to the Court's hypothesis for a variety of reasons. Indictments are sometimes sought merely to harass an unpopular defendant, or to embarrass a political opponent, without concern whether a conviction will be forthcoming.[68] Consider the dilemma of a prosecutor who has a suspect in custody accused of a particularly heinous crime which has received considerable notoriety in the public forums. If the government's evidence in the case was gained by unconstitutional means, the prosecutor, despite knowing that conviction of the alleged perpetrator is unlikely or impossible, may be forced by the cries of his constituency to present the "tainted" evidence to the grand jury, obtain an indictment and proceed to trial. While this practice may make him popular, it could prove costly to the criminal justice system in terms of the time and expense wasted in fruitless prosecutions. But the Court, without considering these possibilities, noted that it had no intention of encroaching upon the traditionally broad investigative powers of the grand jury "at the expense of substantially impeding" its role in order to achieve "speculative and undoubtedly minimal" additional deterrent effects.[69]

Calandra further argued that each and every question posed by the grand jury based on the illegally seized loan sharking record constituted a "fresh and independent" intrusion into his privacy.[70] The Court pointed out

65. 364 U.S. 206 (1960).
66. Calandra, *supra* note 56, at 619-20.
67. *Id.* at 621-22.
68. *See* United States v. Mara, 410 U.S. 19 (1973) (Douglas, J., dissenting).
69. Calandra, *supra* note 56, at 622. At this point the dissent argues that the added element of "judicial integrity" should swing the scale towards applying the rule to exclude the evidence. Id. at 626 (dissenting opinion).
70. *Id.* at 622.

that there is no right of privacy before the grand jury, other than the traditionally recognized privileges of confidentiality,[71] and the fifth amendment privilege against compulsory self-incrimination. As was stated in *Blair v. United States*,[72] "the public . . . has a right to every man's evidence." The power to compel testimony and the corresponding duty to testify are recognized in the compulsory process clause of the sixth amendment and every witness privilege is seriously in derogation of this general and fundamental duty.[73] In *Calandra*, the Court reasoned that the unconstitutional invasion of privacy was fully accomplished in the original search and the grand jury questions did not constitute independent governmental invasions of Calandra's

> person, house, papers, or effects, but rather the usual abridgement of personal privacy common to all grand jury questioning . . . . Whether such derivative use of illegally-obtained evidence by a grand jury should be proscribed presents a question not of rights but of remedies.[74]

Calandra, though refusing to extend the exclusionary rule to grand jury proceedings, still leaves the grand jury witness other remedies to redress the injury to his privacy. As the Court pointed out,[75] he may be entitled to maintain an action for damages against the officers who conducted the unlawful search. In *Bivens v. Six Unknown Federal Narcotics Agents*,[76] a remedy in the form of damages was created by the Supreme Court for the benefit of innocent victims of unlawful searches and seizures who never get to trial and, therefore, find no solace in the exclusionary rule. Also, under the ruling in *Go-Bart Importing Co. v. United States*,[77] Calandra may seek the return of his illegally seized property and prevent its use as evidence against him in any subsequent criminal trial.

Both the arguments of Calandra and the dissenting opinion of Justices Brennan, Douglas, and Marshall were based primarily on the Supreme Courts holding in *Silverthorne Lumber Co. v. United States*.[78] In that case

71. *Supra* note 26.
72. 250 U.S. 273, 281 (1919).
73. *See* United States v. Bryan, 339 U.S. 323, 333 (1950); Blackmer v. United States, 284 U.S. 421, 438 (1932); Blair v. United States, 250 U.S. 273 (1919). The Court has recently evidenced its reluctance to create new privileges to withhold evidence in Branzburg v. Hayes, 408 U.S. 665, 690 (1972), where newsmen sought an interpretation of the first amendment to grant them a testimonial privilege before grand juries. This the Court declined to do saying: "We perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the . . . burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial."
74. Calandra, *supra* note 56, at 623.
75. *Id.* n.10.
76. 403 U.S. 388 (1971).
77. 282 U.S. 344 (1931).
78. 251 U.S. 385 (1920).

an indictment by a grand jury having been brought against the Silverthornes, they were arrested and detained in custody for several hours. While they were detained, federal officers, without any authority, went to the office of their company and seized all of the books, papers and documents found there. A district court ordered the return of these documents, but impounded photographs and copies of the originals, that had been made by the district attorney. Subpoenas to produce the originals before the grand jury were then served on the Silverthornes. Their refusal to comply led to a contempt citation. In reversing this judgment, the Court held that the subpoenas demanding the production of the same physical evidence that had been previously illegally seized were invalid because they were based on knowledge obtained unlawfully. Mr. Justice Holmes, writing for the Court, then made the oft quoted statement that the "essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."[79] Since 1920, when *Silverthorne* was decided, the Court has refused to give to these words the broad implication that the dissent urges. In many situations, other than at a criminal trial of the person whose fourth amendment rights had been violated, evidence illegally seized has been used by the government and upheld by the Court.[80] *Silverthorne* is also distinguishable from *Calandra* in several key areas. A primary distinction seems to be that the *Silverthorne* subpoena would have compelled the production of the *same physical* evidence that had been illegally seized from them. This would certainly seem to constitute a separate, independant violation of their fourth amendment rights, but grand jury questions have never been viewed as invasions of privacy proscribed by the Constitution. Calandra was trying to establish a new testimonial privilege, and since the descision in *Silverthorne* concerned itself with the production of physical evidence it had no relevance to his claim.[81]

As the Supreme Court said in *Nardone v. United States*,[82] "[A]ny claim

79. *Id.* at 392.

80. See text following note 46 *supra.*

81. The dissenting opinion's analogy to Gelbard v. United States, 408 U.S. 41 (1972), also seems misplaced. In *Gelbard* a witness was cited for contempt for refusing to answer a grand jury's questions. These questions were based on information gained from his communications alleged to have been unlawfully intercepted through wiretapping and electronic surveillance. The witness raised as his defense the evidentiary prohibition of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, *supra* note 27. The Court held that Section 2515 of this act could be invoked as a defense to such a contempt charge; but this has no application in *Calandra*. The Act of Congress construed in *Gelbard* is expressly and specifically limited to cases of unlawful wiretapping and electronic surveillance. There is no indication in the legislative history behind this Act that Congress intended it to be broadened by judicial implication and extended to cover every type of fourth amendment violation. *See* S. Rep. No. 1097, 90th Cong., 2d Sess. (1968).

82. 308 U.S. 338 (1939).

for the exclusion of evidence . . . must be justified by an overriding public policy expressed in the Constitution or the law of the land."[83] Application of the judicially created exclusionary rule to grand jury questions being totally unprecedented, the Court in *Calandra* held that maintaining the grand jury as an effective instrument for investigating crime was of "overriding" importance. "In the context of a grand jury proceeding, we believe that the damage to that institution from the unprecedented extension of the exclusionary rule . . . outweighs the benefit of any possible incremental deterrent effect."[84]

ANALYSIS

Those who are alarmed at the Calandra opinion, including the authors of the dissent, may be interpreting the decision more broadly than the holding warrants. It is not an encroachment on the existing exclusionary rule. The Court in *Calandra* has engaged in a balancing process weighing the importance of maintaining the grand jury system free from technical encumbrances which could seriously impede its function, and the additional deterrent effect to be gained by extending the rule over and above that already achieved by excluding the evidence at trial. Just as it earlier refused to make the exclusionary rule retrospective[85] or to extend it beyond the actual trial of the victim of the illegal conduct,[86] the Court now declines to broaden the rule to cover grand jury proceedings.

This decision will not significantly alter the situation of one subpoenaed to testify before a grand jury. The fifth amendment privilege against self-incrimination, as well as the other testimonial privileges traditionally recognized by the Supreme Court remain intact. The Court has made no attempt to interfere with their application. Once granted immunity, of course, the witness will have to answer virtually all questions asked of him unless they involve a recognized confidential relationship,[87] or are based on illegal wiretapping or electronic eavesdropping.[88] However, the grant of immunity would preclude the use of this evidence against the witness in any subsequent criminal prosecution. Evidence gained in this manner could be used against other defendants who may be implicated by the witness' testimony, but this does not change the law. Since the Court ruled in *Alderman v. United States*[89] that defendants cannot vicariously assert the constitutional rights of another, evidence illegally seized from one person has been admissible at trial against others whose rights were not violated by the seizure.

83. *Id.* at 340.
84. Calandra, *supra* note 56, at 623.
85. See text following note 40 *supra.*
86. Alderman v. United States, 394 U.S. 165 (1969).
87. *Supra* note 26.
88. *Supra* note 27.
89. 394 U.S. 165 (1969).

Calandra does not aim toward eliminating the exclusionary rule altogether. In fact, the Court reiterates the right of a defendant "in the context of a criminal trial . . . to suppress not only the fruits of an unlawful search and seizure but also any derivative use of that evidence."[90] The decision emphasizes that the rule must be interpreted to prohibit the use of illegally seized evidence and questions based on that evidence at *trial* "if it is to fulfill its function of deterring police misconduct."[91] While noting that there is some disagreement as to the effectiveness of the exclusionary rule, the Court at no time in this opinion discusses the possibility of abandoning the rule.

It would certainly be premature of the Court to summarily dismiss the exclusionary rule at this time. Although the efficacy of the rule in producing its goal of deterring illegal police tactics is questionable, there are no "empirical statistics" to show either its worth or worthlessness.[92] Unquestionably a need exists for some remedy to give force and effect to the constitutional guarantees against unlawful governmental activities. As Chief Justice Burger said in his dissent in *Bivens v. Six Unknown Federal Narcotics Agents*,[93] "[W]ithout some effective sanction, these protections would constitute little more than rhetoric."[94] Allowing the government to use the illgotten evidence at trial certainly will not deter constitutional violations, so if the exclusionary rule is to be limited or eliminated an effective and workable substitute must be found.

Some legal scholars have proposed a statutory substitute for the judicially created exclusionary rule creating a tort remedy to compensate the victim of a fourth amendment violation with money damages.[95] The advantages of the tort remedy are that it will be available to innocent victims and others who never get to trial for a variety of reasons, and it would permit the prosecutor to use evidence that the court feels is otherwise totally reliable. The disadvantages are many. Private damage actions against individual police officers are ineffective because either the officer is unable to pay or the jury is reluctant to return a verdict against him for what they see as "doing his job." As Chief Justice Burger put it, "There is serious doubt . . . that a drug peddler caught packaging his wares will be able to arouse much sympathy in a jury on the ground that the police officer did not announce his identity and purpose fully . . . ."[96] Of course, the victim

90. Calandra, *supra* note 56, at 623.
91. *Id.*
92. See Elkins v. United States, 364 U.S. 206, 218 (1960); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).
93. 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting).
94. *Id.* at 415.
95. *See* Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 422 (1971) (Burger, C.J. dissenting).
96. *Id.* at 421-22.

of the police abuse is precluded from bringing an action against the state or municipality responsible for the injury because of sovereign immunity statutes. Even if federal or state legislation would eliminate these problems,[97] it would appear that the government may violate the constitutional rights of its citizens if it is willing to pay for that violation with the taxpayers' money.[98] Mr. Justice Holmes spoke to this point in his dissent in *Olmstead v. United States*:[99]

> We must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and to that end all available evidence should be used. It also is desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . . We have to choose, and for my part, I think it a less evil that some criminals should escape than that the government should play an ignoble part.[100]

Those who advocate a replacement for the exclusionary rule have ignored the confusion and inconsistency that existed in the state of the law after *Wolf v. Colorado*.[101] When the Court left it up to each state to choose its own remedy for fourth and fifth amendment violations the situation became so intolerable that twelve years later the exclusionary rule was universally applied in *Mapp v. Ohio*.[102] Since illegally seized evidence could not be introduced in federal courts but it could be used in some state courts, it was a common practice for federal officers to turn over such evidence to state prosecutors to "cleanse" the evidence and convict the defendant.[103] The same type of shopping around for the most lenient forum could again

97. Chief Justice Burger would attempt to eliminate these problems with a five part statute:

> (a) a waiver of sovereign immunity as to the illegal acts of law enforcement officials committed in the performance of assigned duties;
>
> (b) the creation of a cause of action for damages sustained by any person aggrieved by conduct of governmental agents in violation of the Fourth Amendment or statutes regulating official conduct;
>
> (c) the creation of a tribunal, quasi-judicial in nature or perhaps patterned after the United States Court of Claims, to adjudicate all claims under the statute;
>
> (d) a provision that this statutory remedy is in lieu of the exclusion of evidence secured for use in criminal cases in violation of the Fourth Amendment; and
>
> (e) a provision directing that no evidence, otherwise admissible, shall be excluded from any criminal proceeding because of violation of the Fourth Amendment. *Id.* at 422-23.

98. This same argument is made by the dissenters in *Calandra*. "[O]fficialdom may profit from its lawlessness if it is willing to pay a price." *Supra* note 56, at 628.

99. 277 U.S. 438 (1928).

100. *Id.* at 470 (Holmes J., dissenting).

101. 338 U.S. 25 (1949). "Fashioning a statutory scheme at least as effective as the exclusionary rule in protecting a citizen against Fourth Amendment violations should not be difficult." 62 ILL. B.J. 468, 470 (1974).

102. 367 U.S. 643 (1961).

103. *Id.*

become popular if Congress and the state legislatures were to draft different versions of exclusionary rule substitutes. Furthermore, the Court would have to determine if each state's proposed remedy was effective to redress the injury to the victim of the police conduct and serves as a deterrent to further abuses. This would be extremely difficult without "empirical statistics," the same problem encountered in evaluating the exclusionary rule today.

Perhaps the problem is that one magic rule will not work in all conceivable situations. These two remedies, the exclusionary rule and a statutory remedy, are not mutually exclusive. As the exclusionary rule only helps criminals who come to trial, and leaves remediless innocent victims, plea bargainers and others who are not tried, Congress and the state legislatures should make it possible for the subjects of constitutional violations to elect their own remedy. Defendants facing trial could choose the suppression of ill-gotten evidence as their remedy, and trial-less victims could opt for a statutory tort remedy with money damages to redress their injury. This system would enable an assessment of the efficacy and deterrence value of the tort remedy without giving the appearance of sanctioning unlawful police activities. Empirical statistics could be gathered without irrevocably abandoning the exclusionary rule.

Whatever the outcome of this debate, the Court would not solve the problem by unilaterally eliminating the rule. Congress and the state legislatures must grapple with these issues and provide a uniform, systematic approach to alleviate these troublesome situations.

CONCLUSION

Confined to its facts, the holding in Calandra does not reach this much broader issue. In deciding against providing a *new* testimonial privilege for grand jury witnesses the Court did not narrow the existing exclusionary rule. The ability of a defendant in a criminal trial to safeguard his constitutional rights is not impeded or altered in any way by this decision.

Although it seems contrary to the fundamental scheme of American justice for the government to profit from its lawlessness by simply paying money damages, it seems equally contrary to impede the practical workings of the grand jury system unnecessarily. *Calandra* does neither, but simply maintains the *status quo*, a result which seems not particularly undesirable when all the factors which must be balanced are considered.

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