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## Supervision of the Grand Jury: Who Watches the Guardian?

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# SUPERVISION OF THE GRAND JURY: WHO WATCHES THE GUARDIAN?

ANNE BOWEN POULIN\*

## I. INTRODUCTION

The grand jury plays a significant role in the federal criminal justice system. The fifth amendment to the United States Constitution guarantees indictment by grand jury in all felony cases.<sup>1</sup> That guarantee reflects the framers' perception that the grand jury provided protection against improper indictment and acted as a protective buffer between the executive and the individual. Over time, however, the character and significance of the grand jury has changed.<sup>2</sup> The role of the grand jury is neither one-dimensional nor well-defined. It is clear that the grand jury's role has two aspects. The grand jury originally was conceived of as a shield, but now also functions as a sword.<sup>3</sup> The framers of the Bill of Rights envisioned the grand jury's role as a shield against improper in-

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1. Amendment V of the United States Constitution provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ." U.S. CONST. amend. V.

2. See generally M. FRANKEL & G. NAFTALIS, *THE GRAND JURY: AN INSTITUTION ON TRIAL* (1977); Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174 (1973); Johnston, *The Grand Jury-Prosecutorial Abuse of the Indictment Process*, 65 J. CRIM. L. & CRIMINOLOGY 157 (1974); Knudsen, *Pretrial Disclosure of Federal Grand Jury Testimony*, 48 WASH. L. REV. 423 (1973); Shannon, *The Grand Jury: True Tribunal of the People or Administrative Agency of the Prosecutor?*, 2 N.M.L. REV. 141 (1972); Note, *Grand Jury Proceedings: The Prosecutor, the Trial Judge, and Undue Influence*, 39 U. CHI. L. REV. 761 (1972). A thorough discussion of the history of the grand jury is beyond the scope of this Article.

3. See generally I S. BEALE & W. BRYSON, *GRAND JURY LAW AND PRACTICE*, § 1:07 (1986); Deutsch, *The Improper Use of the Federal Grand Jury: An Instrument for the Internment of Political Activists*, 75 J. CRIM. L. & CRIMINOLOGY 1159 (1984); Rodis, *A Lawyer's Guide to Grand Jury Abuse*, 14 CRIM. L. BULL. 123 (1978); Note, *The Exercise of Supervisory Powers to Dismiss a Grand Jury Indictment-A Basis for Curbing Prosecutorial Misconduct*, 45 OHIO ST. L.J. 1077 (1984) [hereinafter Note, *The Exercise of Supervisory Powers*]; Note, *The Grand Jury: Powers, Procedures, and Problems*, 9 COLUM. J.L. & SOC. PROBS. 681 (1973); Comment, *Federal Grand Jury Investigation of Political Dissidents*, 7 HARV. C.R.-C.L. L. REV. 432 (1972); *Powers of Federal Grand Juries*, 4 STAN. L. REV. 68 (1951). See also 7 U.S. DEPT. OF JUSTICE MANUAL (Prentice-Hall) § 9-11.020 (1990) (reflecting dual role).

dictment. Whether it can any longer act effectively as a buffer has been questioned again and again.<sup>4</sup> The grand jury now offers a valuable tool for the investigation of criminal cases. It plays a significant role as the prosecutor's weapon. In fact, the grand jury has been criticized as having become nothing but a powerful and easily abused weapon of the prosecution.<sup>5</sup> Both aspects of the grand jury's role require procedural responses to avoid abuse. As this Article demonstrates, the Supreme Court has done little to address that need.

The modern grand jury is controlled to a large extent by the prosecutor. The prosecutor's special access to the grand jury is a source of tremendous power. That power can easily be subject to abuse. Both commentators and litigators have called attention to misuse of the grand jury.<sup>6</sup> Documented improprieties as well as allegations of abuse in the grand jury occur regularly. The range of abusive behavior is broad. Some types of misconduct undermine the grand jury's function as a shield, risking unwarranted indictment. Some types of misconduct abuse the grand jury's power as a prosecutorial sword.<sup>7</sup> Thus, grand jury abuse

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4. The most comprehensive discussion of this issue is found in Professor Arenella's 1980 article. Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463 (1980).

5. See generally Campbell, *supra* note 2, at 178-79; Deutsch, *supra* note 3; Johnston, *supra* note 2; Note, *supra* note 2, at 1183. But see Sullivan & Nachman, *If It Ain't Broke, Don't Fix It: Why the Grand Jury's Accusatory Function Should Not Be Changed*, 75 J. CRIM. L. & CRIMINOLOGY 1047, 1049 (1984) ("Although overzealous or overreaching federal prosecutors can manipulate the federal grand jury, by and large the Department of Justice has not abused its authority").

6. See generally 2 S. BEALE & W. BRYSON, *supra* note 3, §§ 10:01-17; Deutsch, *supra* note 3; Johnston, *supra* note 2; Rodis, *supra* note 3; Shannon, *supra* note 2; Note, *The Exercise of Supervisory Powers*, *supra* note 3; Note, *supra* note 2.

7. See generally Rodis, *supra* note 3; Vaira, *The Role of the Prosecutor Inside the Grand Jury Room: Where is the Foul Line?*, 75 J. CRIM. L. & CRIMINOLOGY 1129 (1984); Note, *Mechanical Applications of the Harmless Error Rule In Cases of Prosecutorial Grand Jury Misconduct*, 1988 DUKE L.J. 1242, 1265 n.136 (listing abuses).

Misconduct that undermines the shield function includes presenting false or misleading evidence, failing to present exculpatory evidence, and making improper comments to urge the grand jury to indict. Misconduct that abuses the sword function of the grand jury includes using the grand jury to harass witnesses, subjects of grand jury investigation, or associates of those in political disfavor, and using the grand jury to obtain an advantage in civil or criminal litigation.

Interestingly, the risk of harm inflicted through investigation—misuse in the sword capacity—rather than indictment—undermining the shield function—may require the greatest judicial supervision. Many states have eliminated the requirement that criminal prosecution be initiated by indictment rather than information, yet retain the grand jury as an investigative body available to assist the prosecution. This trend reflects a perception that the value of the grand jury as a shield against unwarranted indictment is not great.

Critics of the grand jury have called for its abolition on the ground that it is not an effective shield and that the fiction of a protective grand jury passing on probable cause should not be continued.

threatens not only criminal defendants but also witnesses and unindicted subjects. Without judicial supervision, the prosecutors' sense of appropriate behavior is the only check on such abuse. Ongoing judicial supervision of the grand jury is essential to curtail these abuses as much as possible.

Some lower federal courts have responded to grand jury abuse by invoking their supervisory authority over the grand jury to check and remedy some of the improper prosecutorial conduct.<sup>8</sup> Unfortunately, those courts represent the minority position. The majority of courts have been unreceptive to appeals to their supervisory authority. The courts fear that greater supervision will generate collateral proceedings and provide the opportunity for disruptive delaying tactics. Consequently, they have erected barriers to effective judicial review of claims of abuse. First, the courts have imposed difficult evidentiary burdens on those seeking remedies for grand jury abuse. Second, the courts have limited the remedies for grand jury abuse. Third, the courts have made it difficult to obtain appellate review of lower court rulings on claims of grand jury abuse. Many allegations of abuse of the grand jury therefore receive no serious consideration in the legal system, and prosecutors are given little incentive to avoid abusive practices before the grand jury.

Unfortunately, in three recent decisions, the United States Supreme Court has even further curtailed judicial supervision of the grand jury process. In *United States v. Mechanik*,<sup>9</sup> *Bank of Nova Scotia v. United States*,<sup>10</sup> and *Midland Asphalt Corp. v. United States*,<sup>11</sup> the Court rejected pleas for protection against abuse of the grand jury. The procedural

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Instead, critics argue, the defendant should receive a preliminary hearing, in which the evidence is presented in the defendant's presence and the existence of probable cause is determined by a neutral judicial officer.

Yet the grand jury has been retained for special cases even in jurisdictions where criminal charges are routinely brought by means of information. The grand jury is retained because it offers tremendous investigative advantages to the prosecution; it serves as a powerful prosecutorial sword. This suggests that the greatest risk generated from misconduct lies in the investigative phase of the grand jury, not in its indictment decisions. Identifying and remedying abuse in the investigation, however, can be extremely difficult.

8. For examples of the courts' exercise of supervisory authority, see Arenella, *supra* note 4, at 489, 512-21; Note, *supra* note 7, at 1246; Supreme Court Review, *Supervisory Power Meets the Harmless Error Rule in Federal Grand Jury Proceedings*, 79 J. CRIM. LAW & CRIMINOLOGY 1037, 1041 nn.32-33 (1988); Comment, *Confusion in the Grand Jury: A New Standard for Dismissal Based on Prosecutorial Misconduct*, 55 BROOKLYN L. REV. 249 (1989).

9. 475 U.S. 66 (1986).

10. 487 U.S. 250 (1988).

11. 109 S. Ct. 1494 (1989).

rules prescribed in the three cases impede defendants' access to judicial review of claims of grand jury abuse. These cases also restrict the courts' supervisory authority and the use of dismissal of the indictment as a judicial response to misconduct in the grand jury process.

The first part of this Article reviews prior Supreme Court decisions and analyzes the three recent decisions to determine the precise extent to which they limit judicial supervision of the grand jury. The second part of the Article assesses the utility of the available mechanisms for enforcing procedural protections in the grand jury. This Article identifies the remedies available as enforcement mechanisms in the grand jury and considers the effectiveness of those remedies. The Article then examines whether the grand jury's shield function is still viable.

## II. THE SUPREME COURT AND THE GRAND JURY

The Supreme Court has only rarely turned its attention to matters of grand jury abuse. The Court has examined requests for disclosure of grand jury material and has interpreted the relevant procedural rule. The Court has also entertained a number of claims of privilege raised by witnesses before the grand jury. But prior to its action in *Mechanik*, *Bank of Nova Scotia*, and *Midland Asphalt*, the Court rarely considered the extent of the federal courts' supervisory authority over the grand jury, reviewed any claims of patterns of grand jury abuse, explored the legality of the available remedies for grand jury violations, or considered whether the courts have any role in assuring that a grand jury indictment is not based on unreliable evidence.<sup>12</sup> The Supreme Court simply refused to grant certiorari in cases raising questions of the courts' authority over the grand jury. Consequently, the supervision of the grand jury process was largely carried out by the lower courts, and the law was defined in lower court opinions. Some lower courts, as well as a number of commentators, advocated a stronger supervisory role.<sup>13</sup> In a number of cases, abuse of the grand jury by the prosecutors was acknowledged and remedied.<sup>14</sup>

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12. See generally Note, *The Exercise of Supervisory Powers*, *supra* note 3, at 1084-88 (discussing the Supreme Court's reluctance to sustain challenges to the validity of the indictment).

13. See generally Note, *The Exercise of Supervisory Powers*, *supra* note 3, at 1089-90; Johnston, *supra* note 2, at 162-63; Supreme Court Review, *supra* note 8, at 1041-42; Note, *supra* note 2; Note, *The Grand Jury: Powers, Procedures, and Problems*, *supra* note 3, at 703-04.

14. See, e.g., *Barry v. United States*, 865 F.2d 1317 (D.C. Cir. 1989); *In re Grand Jury Investigation*, 610 F.2d 202 (5th Cir. 1980). See also cases cited *infra* note 45. See generally Comment, *supra* note 8.

### A. *Prior Case Law*

The assertion of supervisory authority by the lower courts occurred against a back-drop of adverse Supreme Court authority. When deciding issues bearing on grand jury procedure, the Court assumed that some level of supervision existed. However, the Court never explicitly authorized supervision of the grand jury. The Court enforced the rules promulgated by Congress to regulate the grand jury, but took a hands-off attitude whenever it was asked to impose supervisory regulation. The Court has consistently declined to approve judicial supervision that might generate collateral proceedings or allow defense manipulation of the process.

The Court has done little to ensure the responsible use of the grand jury as a sword. For example, the Court declined to intervene to protect grand jury witnesses. Grand jury witnesses seeking protection from procedural irregularities before the grand jury received no protection unless the claim rested on a recognized privilege. For example, a witness may raise a claim of privilege to avoid self-incrimination or to shield protected confidences. However, a witness has no standing to challenge the grand jury's authority on other grounds. In *Blair v. United States*,<sup>15</sup> the Court, describing the grand jury as a "grand inquest,"<sup>16</sup> held that a witness subpoenaed before the grand jury had no standing to challenge the investigation. In *United States v. Calandra*,<sup>17</sup> the Court held that the fourth amendment exclusionary rule does not apply in the grand jury. The Court determined that the interference with the grand jury's traditional function was too great and the likely gain in deterrence of fourth amendment violations was too small.<sup>18</sup> Only in *Gelbard v. United States*,<sup>19</sup> did the Court hold that a witness before the grand jury cannot be compelled to answer questions based on information obtained through illegal electronic surveillance or wiretapping. In *Gelbard*, the Court was compelled to its holding by specific statutory authority precluding the use of the results of illegal wiretapping in the grand jury. The Court, therefore, has not recognized broad rights in the grand jury witness, but generally has accorded weight only to specific claims of privilege.

The Court has given even less supervisory attention to the grand jury

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15. 250 U.S. 273 (1919).

16. *Id.* at 282.

17. 414 U.S. 338 (1974).

18. *Id.* at 351-52.

19. 408 U.S. 41 (1972).

in its role as a shield against improper indictment. Defendants seeking relief from alleged improprieties in the indicting grand jury have received little encouragement from the Supreme Court. The leading case is *Costello v. United States*.<sup>20</sup> In *Costello*, the Court refused to invalidate an indictment even though the grand jury relied on hearsay evidence. The Court held that the alleged reliance on hearsay did not support a claim of constitutional violation and, further, the Court declined to exercise its supervisory authority over the grand jury to check the quality of the evidence. The *Costello* Court spoke in broad language. Again, the Court emphasized the freedom of the grand jury to function without impediments. The Court declared, "An indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for trial of the charge on the merits."<sup>21</sup>

### B. Recent Cases

Despite this lack of encouragement from the Supreme Court, a number of lower courts had invoked supervisory authority to inject greater protection from abuse into the grand jury process. In *Mechanik, Bank of Nova Scotia*, and *Midland Asphalt*, however, the Supreme Court clearly advocated severely restricted supervisory authority to remedy violations of grand jury procedure and a limited role for the courts in relation to the grand jury. In these decisions, the Supreme Court addressed the process by which allegations of grand jury abuse would be reviewed and established the standard by which claims of abuse should be gauged. The precise scope of these decisions has yet to be defined. Nevertheless, two aspects of their effect are clear. First, they foreclose, once and for all, any significant judicial oversight of the grand jury's shield function. Second, they remove from the courts' arsenal the most potent remedy for the abusive use of the grand jury as a sword—dismissal of the indictment.

#### I. *United States v. Mechanik*

In *United States v. Mechanik*,<sup>22</sup> the Court held that a violation of Federal Rule of Criminal Procedure 6(d) would not warrant the dismissal of an indictment after a jury returned a guilty verdict because the verdict

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20. 350 U.S. 359 (1956).

21. *Id.* at 363-64.

22. 475 U.S. 66 (1986).

rendered any such error at the grand jury stage harmless.<sup>23</sup> In *Mechanik*, the defendant argued that the presence of an unauthorized person in the grand jury room when two witnesses testified in tandem before the indicting grand jury violated the rule. The violation was arguably not a serious one, but the Court did not assess the seriousness of the alleged violation. Instead, the Court's holding rested on its view of the roles of Rule 6(d) and Rule 52(a). Rule 6(d), in the Court's view, is intended to protect a defendant against having to answer charges unsupported by probable cause.<sup>24</sup> That harm has been avoided if the prosecution has produced the proof beyond a reasonable doubt necessary to obtain a guilty verdict at trial. Further, the Court saw "no reason" not to apply Rule 52(a) to errors allegedly occurring before the grand jury.<sup>25</sup> Rule 52(a) provides that errors not affecting substantial rights shall be disregarded and reflects the appropriate balance between the defendant's interest and society's interest in avoiding the substantial cost of reversal.

*Mechanik* raises several issues. First, it brings into question the role of the grand jury. In *Mechanik*, the Court ascribes to the grand jury and to the rules governing grand jury procedure a more limited role than sometimes has been suggested. The harmless error test established in *Mechanik* focuses only on the grand jury's role in assessing probable cause. It does not reflect the grand jury's broader role of acting as a check on the prosecutor's decision to charge at all or to charge at the level of the proposed indictment, even if supported by probable cause. At least in the context of Rule 6(d), the Court suggests that the grand jury's function is to pass on the sufficiency of the evidence to establish probable cause. In fact, the grand jury has often been ascribed the additional function of acting as a check on the prosecutor's exercise of discretion as well as on the adequacy of the prosecution's evidence.

The additional dimension of the grand jury's role as a shield against unwarranted indictment, wholly disregarded in *Mechanik*, has been recognized by the Court in other cases. In *Vasquez v. Hillery*,<sup>26</sup> for example, the Court based its decision on this broader view of the grand jury's role in the indictment process. In *Vasquez*, the Court stated:

The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the

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23. For a detailed discussion of *Mechanik*, see Note, *supra* note 7.

24. *Mechanik*, 475 U.S. at 70.

25. *Id.* at 71.

26. 474 U.S. 254 (1986).



grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps, most significant of all, a capital offense or a noncapital offense—all on the basis of the same facts. Moreover, “[t]he grand jury is not bound to indict in every case where a conviction can be obtained.”<sup>27</sup>

In *Vasquez*, the Court held that a defendant could obtain dismissal of an indictment on grounds of racial discrimination in the selection of the grand jury even long after a guilty verdict in the case had established proof beyond a reasonable doubt. In *Mechanik*, however, the Court did not evaluate the impact of the alleged violation of grand jury procedure on the discretionary aspects of the process; it deemed the error harmless simply because the prosecution successfully established guilt at trial.

The narrow view of the grand jury’s role espoused in *Mechanik* may merely reflect the Court’s view of Rule 6(d), or it may reflect the Court’s view of the grand jury in its capacity as a shield against improper indictment. The Court stated that Rule 6(d) “protects against the danger that a defendant will be required to defend against a charge for which there is no probable cause to believe him guilty.”<sup>28</sup> If that is indeed the sole purpose of this or any other rule of grand jury procedure, then the intended protection is provided if the defendant is found guilty at trial, regardless of the grand jury’s role. It is more likely, however, that *Mechanik* reflects the Court’s narrow view of the grand jury’s role as a shield against improper indictment and will influence the Court’s assessment of any grand jury abuse that threatens the indictment process.

The Court distinguished *Vasquez* in language that appears to limit it to claims of discrimination in the selection of the members of the grand jury.<sup>29</sup> In addition, although the Court noted that the lower courts had observed that 6(d) was designed to ensure that the grand jurors are not subject to undue influence, the Court did not inquire into any possible undue influence; the guilty verdict had satisfied the requirement of an uninfluenced, probable-cause determination.<sup>30</sup> The Court did not mention, and the Court’s harmless error test leaves no room to consider, the possibility that the grand jury’s role as a shield, described in *Vasquez*, could be undermined or neutralized by the presence of an unauthorized person in the grand jury.

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27. *Id.* at 263 (citation omitted).

28. *Mechanik*, 475 U.S. at 70.

29. *Id.* at 70-71 n.1.

30. See Note, *supra* note 7, at 1248-49.

Second, *Mechanik* raises the question of when a defendant will ever receive adequate judicial review of allegations of grand jury abuse. Justice Marshall, dissenting in *Mechanik*, pointed out the impact of the decision on claimed Rule 6(d) violations. He stated:

There is thus little likelihood that a defendant can raise a substantial claim under Rule 6(d) before his trial begins. After the start of trial, overwork and the press of events may prevent the district judge from disposing of a newly raised Rule 6(d) claim. The most attractive course for the district judge will be to defer a ruling until the close of trial, the course ultimately followed in this case. Indeed, the district judge may not have the opportunity to rule until that time. Under today's decision, however, deferring a meritorious Rule 6(d) claim until the close of trial disposes of it permanently. If the movant is acquitted, then his Rule 6(d) motion is moot; if the movant is convicted, under the majority's reasoning, then any error was harmless.<sup>31</sup>

*Mechanik* makes it unlikely that Rule 6(d) and other similar claims of grand jury abuse will receive serious judicial attention. *Mechanik* necessarily raises the specter that other grand jury violations will be subject to the same harmless error test. The decision therefore forces consideration of the character of other rules of grand jury procedure to determine whether, like Rule 6(d), they serve merely to protect against indictments unsupported by probable cause. Any violation of a rule with such purpose is presumably subject to the *Mechanik* harmless error test.<sup>32</sup>

Thus, *Mechanik* signalled the Court's unwillingness to exert supervisory authority over the grand jury. The harmless error test adopted by the Court potentially relieved the Court of the burden of reviewing any claimed 6(d) violation and invited the prosecution to seek similar exemptions for other types of abuse.

## 2. Bank of Nova Scotia v. United States

In *Bank of Nova Scotia v. United States*,<sup>33</sup> decided two years later, the Court addressed a claim of grand jury abuse raised after indictment but before trial. The Court held that the district court exceeded its supervisory authority when it dismissed the indictment before trial because of grand jury violations.<sup>34</sup> The Court again viewed Rule 52(a) as a source

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31. *Mechanik*, 475 U.S. at 81 (Marshall, J., dissenting).

32. See Note, *supra* note 7, at 1263-64.

33. 487 U.S. 250 (1988). For a detailed account, see Supreme Court Review, *supra* note 8, at 1051-56.

34. *Bank of Nova Scotia*, 487 U.S. at 263-64.

of restriction on the courts' authority to remedy grand jury abuses by dismissing the indictment. Harmless error analysis under Rule 52(a) must precede any dismissal, at least for nonconstitutional error. The harm on which that analysis must focus is the impact on the indictment process. When a motion to dismiss an indictment on grounds of grand jury abuse is filed before trial, the court should ask whether the abuse substantially influenced the grand jury's decision to indict.

In *Bank of Nova Scotia*, the Court considered the numerous allegations of abuse that had persuaded the district court to dismiss the indictment; it concluded that none had substantially affected the grand jury's decision. The defendant had raised violations of Rules 6(c) and 6(e) in addition to 6(d) violations. The Court discarded some of the claimed abuses as incapable of having an impact on the grand jury decision.<sup>35</sup> Without such an impact, dismissal is an improper remedy. The Court noted other remedies that would "allow the court to focus on the culpable individual rather than granting a windfall to the unprejudiced defendant."<sup>36</sup>

The Court emphatically restricted the courts' tools for enforcing rules of grand jury procedure. The Court eliminated use of supervisory power without a harmless error inquiry,<sup>37</sup> thus foreclosing much of what the lower courts had done to remedy grand jury abuse. In addition, although the Court in its final analysis purported to cumulate errors, the core of the Court's analysis took each alleged violation as a free-standing matter, subject to harmless error analysis.

There is another significant aspect of *Bank of Nova Scotia*. The district court found that the IRS agents just prior to indictment gave misleading and inaccurate summaries to the grand jury that prejudiced the defendant.<sup>38</sup> Despite the threat to the grand jury's shield function, the Court held that in the absence of *prosecutorial* misconduct, dismissal was not warranted. In so holding, the Court revitalized *Costello* in full force. *Costello* precludes any challenge to the reliability or competence of the evidence. This emphatic reaffirmance of *Costello*, restricting the authority of the courts to look behind the indictment to ensure that the grand jury had appropriate information on which to base its decision to indict, blocks challenges based on the evidence presented to which some lower

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35. *Id.* at 259-60.

36. *Id.* at 263.

37. See Supreme Court Review, *supra* note 8, at 1037.

38. *Bank of Nova Scotia*, 487 U.S. at 260.

courts have been receptive. Such a challenge will be entertained only if the defendant alleges and proves actual prosecutorial misconduct.

Unlike *Mechanik*, *Bank of Nova Scotia* did not foreclose review of the claim of grand jury abuse. Although the Court held that pretrial motions to dismiss on nonconstitutional grounds must also be subject to harmless error analysis, the determination of harmlessness is not a foregone conclusion. The test adopted by the *Nova Scotia* Court focuses on the impact of the misconduct on the grand jury's decision to indict. The defendant who seeks dismissal of the indictment before trial on grounds of violations of grand jury procedure must establish that the violation substantially affected the grand jury's decision to indict, or that there is grave doubt that the decision to indict was free from the substantial influence of the violation.<sup>39</sup> This requirement poses a very difficult task for the defendant.<sup>40</sup>

The Court phrased the relevant pretrial harmless error test in terms of whether the error substantially influenced the grand jury's decision to indict, but it did not discuss the nature of the influence that would render an error harmful. The *Bank of Nova Scotia* Court easily concluded that none of the alleged errors could have influenced the grand jury in that case.<sup>41</sup> The Court distinguished the categories of grand jury abuse—those abuses which might influence the indictment process and therefore warrant dismissal, and those abuses which did not affect the grand jury's shield function and should therefore be remedied in some other way, if at all.

Thus, *Bank of Nova Scotia* provides a defendant recourse before trial, although it is difficult to obtain, whereas *Mechanik* eliminates relief after a guilty trial verdict, at least for some types of violations. Therefore, in combination, *Bank of Nova Scotia* and *Mechanik* give defendants a strong incentive to pursue pretrial review of all claims of grand jury abuse.

### 3. Midland Asphalt Corp. v. United States

In *Midland Asphalt Corp. v. United States*,<sup>42</sup> the Court restricted access to appellate review of grand jury matters, rejecting defense arguments for pretrial review of grand jury abuse. The Court held that a

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39. *Id.* at 256 (citing *United States v. Mechanik*, 475 U.S. 66, 78 (1986)).

40. See generally *Supreme Court Review*, *supra* note 8, at 1056-62.

41. *Bank of Nova Scotia*, 487 U.S. at 259-60.

42. 109 S. Ct. 1494 (1989).

defendant could not appeal the trial court's denial of a motion to dismiss the indictment on grounds of violations of Rule 6(e).<sup>43</sup> In the Court's view, the defendant's rights protected by that rule would be adequately served by post-trial review, even though post-trial review might be foreclosed by *Mechanik*. The Court declined to decide whether *Mechanik* applies to Rule 6(e) violations as well as to Rule 6(d) violations, or to define the purpose of Rule 6(e) protection. The Court instead couched its opinion in alternative language. If *Mechanik* does not govern, the Court noted, then the defendant will be able to obtain appellate review after the trial. On the other hand, if *Mechanik* does govern, the Court indicated that, "it will be because the purpose of [Rule 6(e)] is the same as the purpose of Rule 6(d), namely, to 'protec[t] against the danger that a defendant will be required to defend against a charge for which there is no probable cause to believe him guilty.'"<sup>44</sup> Thus, violations of Rule 6(e), like violations of 6(d), are not immediately appealable before trial. The Court, however, has yet to determine whether there can be meaningful review of those violations after trial.

It is clear that these three decisions restrict both judicial supervision of the grand jury process and judicial control of grand jury abuse. The extent of the restriction is not yet clear. The Court in these three cases confronted only one remedy for alleged abuse—dismissal of an indictment—and only a few types of grand jury abuse which courts have been asked to remedy or prevent. The significance of these decisions on the ability of the courts to provide adequate remedies for grand jury abuse and to supervise the grand jury effectively is the primary subject of this Article.

### III. THE TOOLS OF SUPERVISION

Supervision of the grand jury can be effected at both the district court and appellate court levels. The district court receives the initial complaints of grand jury abuse and must address the merits of the complaint and assess the availability of an appropriate remedy. A number of district courts, close to the actual misconduct before the grand jury, have reacted strongly to the government's misbehavior.<sup>45</sup> Whether the district

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43. *Id.* at 1498.

44. *Id.* (citing *Mechanik v. United States*, 475 U.S. 66, 70 (1986)).

45. Many district courts have invoked their supervisory powers to dismiss indictments based upon prosecutorial misconduct. See *United States v. Williams*, 899 F.2d 898 (10th Cir. 1990) (dismissing indictment due to government's failure to disclose exculpatory evidence); *United States v.*

courts have any means of expressing a strong negative reaction depends on how drastically the Supreme Court curtails the supervisory authority and remedial responses of the lower courts.<sup>46</sup> The appellate level is the second level at which supervisory authority is exercised. After the trial court has responded to the complaint, the losing party will often seek review of the decision. Appellate oversight of the grand jury process is also an important factor in determining the effectiveness of the district courts' supervision of the grand jury.<sup>47</sup>

### A. Primary Enforcement Mechanisms

The three decisions discussed above have made it harder for a defendant to obtain review of certain alleged grand jury violations by challeng-

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Talbot, 825 F.2d 991 (6th Cir. 1987) (citing cases in which courts dismissed indictments under supervisory powers or on fifth amendment due process grounds), *cert. denied*, 484 U.S. 1042 (1988); United States v. Samango, 607 F.2d 877 (9th Cir. 1979) (dismissing indictment due to numerous errors in prosecution's presentation of evidence to the grand jury which strayed beyond permissible bounds); United States v. Shuck, 705 F. Supp. 1177 (N.D. W. Va. 1989) (vacating conviction when government tainted the grand jury process by enticing defendant's declarations before the grand jury in violation of his fifth amendment rights), *rev'd*, 895 F.2d 962 (4th Cir. 1990); United States v. Kilpatrick, 594 F. Supp. 1324 (D. Colo. 1984) (dismissing indictment under totality of the circumstances test, due to cumulative violations of Rule 6(d), Rule 6(e), several witness immunity statutes, both the fifth and sixth amendments, and presentation of misinformation to the grand jury), *rev'd*, 821 F.2d 1456 (10th Cir. 1987), *aff'd sub nom.* Bank of Nova Scotia v. United States, 487 U.S. 250 (1988); United States v. Anderson, 577 F. Supp. 223 (D. Wyo. 1983) (dismissing indictment because government violated Rule 6(e) secrecy requirement and presented improper testimony concerning defendant's legal strategies), *rev'd*, 778 F.2d 602 (10th Cir. 1985); United States v. McKenzie, 524 F. Supp. 186 (E.D. La. 1981) (dismissing indictment when government put undue pressure on grand jury to indict policeman accused of murder), *vacated*, 678 F.2d 629 (5th Cir.), *reh'g denied*, 685 F.2d 1386 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982); United States v. Gold, 470 F. Supp. 1336 (N.D. Ill. 1979) (dismissing indictment when prosecutor, who withheld evidence from the grand jury, displayed conflict of interest by acting as both prosecutor and witness, and thereby intruded upon the grand jury secrecy requirements); United States v. Asdrubal-Herrera, 470 F. Supp. 939 (N.D. Ill. 1979) (dismissing indictment where government negligently drafted complaint charging defendant with wrong offense and government did not correct the error before the grand jury); United States v. Phillips Petroleum Co., 435 F. Supp. 610 (N.D. Okla. 1977) (dismissing indictment due to government's withholding of exculpatory testimony); United States v. Braniff Airways, Inc., 428 F. Supp. 579 (W.D. Tex. 1977) (dismissing indictment due to failure of prosecution to present both complete record of prior grand jury proceedings and statutory provision exempting airlines from antitrust laws); United States v. DeMarco, 401 F. Supp. 505 (C.D. Cal. 1975) (dismissing indictment where prosecution failed to disclose to grand jury that defendant had colorable claim that charges against him could have been brought as a product of improper motive and threats), *aff'd*, 550 F.2d 1224 (9th Cir.), *cert. denied*, 434 U.S. 827 (1977). See generally Note, *The Exercise of Supervisory Powers*, *supra* note 3 (discussing lower court views on the use of supervisory power).

46. Section II-A of this Article will discuss some of the enforcement mechanisms available to the district courts.

47. Access to appellate review is discussed in Section II-B.

ing the indictment. Nevertheless, those decisions did not address all the types of violations and all the potential remedies for grand jury abuse. Supervision of the grand jury remains necessary to curb its potential abuse.<sup>48</sup> It is therefore a good time to take stock and assess the extent of authority remaining in the federal courts to protect against grand jury abuse. This section of the Article identifies and discusses enforcement mechanisms that could be employed to ensure adherence to grand jury procedure and limit abuses. The focus will be on four types of enforcement mechanisms: dismissing an indictment, sanctioning the prosecutor, suppressing evidence obtained through grand jury abuse, and remedying ongoing abuse of the grand jury. While there are other enforcement mechanisms sometimes sought and sometimes employed, they will only briefly be mentioned.

To determine the effectiveness of a given remedy as a means of curbing a given abuse, three questions must be addressed. First, is the remedy likely to be invoked? This likelihood turns on several factors: whether a party will learn of the abuse in time to seek the remedy; how difficult it is to obtain the remedy after the abuse is discovered; and whether the benefit of the remedy is sufficient to warrant the cost of pursuing the remedy.

Second, does the remedy address the abuse in question? If the remedy is too narrow, it will be an ineffective control. On the other hand, if the remedy is too broad, it will have more impact but may exceed the court's authority.

Third, is the remedy calculated to dissuade the prosecutor from further similar abusive conduct? Although deterrence may not be the appropriate goal of remedial action, it is certainly a necessary side-effect if grand jury supervision is to be effective. A remedy that is too slight or too difficult to obtain will not be an effective supervisory tool.

### *1. Dismissing the Indictment*

The most common and most effective mechanism for enforcing grand jury procedure is to dismiss any indictment obtained through a grand jury process tainted by abuse. If the alleged grand jury abuse compromises the grand jury's ability to act as a shield, dismissal is the appro-

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48. See generally Note, *The Exercise of Supervisory Powers*, *supra* note 3 (advocating use of supervisory powers to dismiss indictments even when misconduct does not prejudice grand jury's decision to indict and provides framework for establishing a workable standard of application that identifies when dismissal is warranted); Fine, *supra* note 3.

priate remedy.<sup>49</sup> In addition, if the prosecution has abused the grand jury by employing its power as a prosecutorial sword, dismissing any indictment resulting from the abusive investigation is a desirable remedy and offers a means of addressing the abuse without relying on collateral proceedings that disrupt the criminal process.

The incentive to pursue dismissal is tremendous. The benefit to the defendant is obvious; the defendant's greatest desire is to avoid prosecution. Moreover, the defendant may not learn of the abuse in time to benefit from the earlier, more limited and more focused remedies. Often the defendant first learns of grand jury abuses only after indictment, through pretrial discovery or through the disclosure that accompanies the trial. Thus, dismissal is a remedy likely to be invoked. Dismissal also offers the greatest opportunity to deter prosecutorial misconduct because the price paid by the prosecution is so great. If granted with any regularity, dismissal could prompt the government to avoid misconduct.<sup>50</sup>

However, dismissal has never been an easily obtained remedy and is now unlikely to be a realistic enforcement mechanism for addressing grand jury abuse.<sup>51</sup> The message of the recent Supreme Court decisions is that dismissal will be an even more difficult remedy to obtain in the future.

The problem with dismissal is its apparent overbreadth. In *Mechanik*, the Court defined the role of the grand jury as passing on probable cause. The role of the grand jury has sometimes been viewed as broader, entailing a responsibility to check the prosecutor's exercise of discretion as well as the probable cause function. Regardless of which view of the grand

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49. In *United States v. Roth*, 777 F.2d 1200, 1202 (7th Cir. 1985), Judge Posner, writing for the majority, stated that "[g]iven the absolute immunity of prosecutors from civil damage suits, it is hard to imagine what the legal sanction for this misconduct would be unless it were dismissal of the indictment - after trial and conviction if need be, that is, if the fraud was not discovered earlier." However, the court also provided three arguments against the imposition of dismissal as the appropriate sanction. First, if the prosecutor's case is, in actuality, completely phony, the defendant will not be convicted, and the prosecutor will have wasted valuable time in seeking the indictment. Second, an indictment based upon perjury or inaccurate evidence is harmless if the defendant is convicted on other sufficient evidence. Third, providing the defendant with the option to challenge his conviction based upon inadequate evidence presented to the grand jury would further complicate already complex criminal proceedings. *Id.* at 1202-03.

50. See *United States v. Serubo*, 604 F.2d 807, 818 (3d Cir. 1979) ("[T]he prospect of cases lost because of attorney misconduct is likely to produce a sharp improvement in the procedures adopted by the United States Attorneys to control attorney conduct before the grand jury.").

51. See generally, Note, *supra* note 7.



jury's role is espoused, however, dismissing an indictment is often an overly drastic remedy for grand jury abuse. For many abuses, dismissing the indictment goes beyond addressing the wrong and, in the words of the Court, acts as a windfall to the defendant.<sup>52</sup> If used to remedy a violation that undermined the grand jury's shield function, but did not prejudice the decision to indict, dismissal acts as a prophylactic measure designed to deter further abuses.<sup>53</sup> Similarly, dismissal acts as a prophylactic if it is used to remedy an abuse of the grand jury's sword function. Commentators have questioned the courts' authority to order remedies to achieve a deterrent effect,<sup>54</sup> and the current Supreme Court is hostile to prophylactic remedies and the exercise of supervisory authority to achieve a deterrent effect.<sup>55</sup>

The Court's decisions concerning the grand jury reflect that hostility.

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52. *Bank of Nova Scotia*, 487 U.S. 250, 263 (1988).

53. See *United States v. Page*, 808 F.2d 723, 726-27 (10th Cir.) ("Dismissal of an indictment after a conviction is essentially a prophylactic measure, designed more to deter prosecutorial misconduct before the grand jury than to protect a particular defendant's rights."), *cert. denied*, 482 U.S. 918 (1987).

54. There is controversy among legal commentators concerning the scope of the courts' supervisory power. See generally Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1434-35 (1984) (current use of federal supervisory power is over-broad, and "the concept of supervisory power should be abandoned in favor of identifying more specifically the constitutional or statutory power being employed."); Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 Nw. U.L. REV. 100 (1985) (discussing the use of supervisory power as a prophylactic remedy); Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 53 (1985) (judicially created remedies are appropriate only when "necessary in order to preserve a specifically intended federal right.").

55. Outside the grand jury context, the Court has expressed hostility and skepticism to prophylactic remedies. See, e.g., *Oregon v. Elstad*, 470 U.S. 298 (1985) (suppression of evidence obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), is not constitutionally compelled); *United States v. Leon*, 468 U.S. 897 (1984) (suppression of evidence obtained in violation of fourth amendment is not constitutionally compelled); *Hobby v. United States*, 468 U.S. 339 (1984) (even though discriminatory selection of grand jury foremen violated the Constitution, reversing petitioner's conviction was inappropriate remedy since grand jury foremen play a minor role in prosecution); *United States v. Hasting*, 461 U.S. 499 (1983) (reversals of convictions under court's supervisory power must be approached with some caution even in light of prosecutorial misconduct, and harmless error doctrine may not be avoided by an assertion of supervisory power to justify such a reversal); *United States v. Payner*, 447 U.S. 727 (1980) (illegal search of a third party's briefcase uncovered federal income tax violations for which the defendant was convicted; held supervisory power does not authorize a federal court to exclude evidence that did not violate defendant's fourth amendment rights due to lack of standing); *United States v. Chanen*, 549 F.2d 1306 (9th Cir.) (district court exceeded authority in dismissing indictment where grand jury heard transcripts of prior grand jury testimony containing inconsistencies, prosecution advised grand jury that inconsistencies in witness' testimony existed, and the testimony in the transcript included confessions of submitting false affidavits), *cert. denied*, 434 U.S. 825 (1977).

In *Bank of Nova Scotia*, the Court implemented a restrictive view of the courts' supervisory authority. The Court turned to Rule 52(a) of the Federal Rules of Criminal Procedure;<sup>56</sup> Rule 52(a) expresses Congress' intent that every violation not become grounds for relief.<sup>57</sup> The Court held that, because the basis of the courts' authority to supervise the grand jury is not clearly defined, that authority is subordinate to the congressional authority expressed in Rule 52(a).<sup>58</sup> As a consequence, the Court curtailed the availability of dismissal as a tool of supervision. The Court restricted dismissal to cases in which the defendant can establish that some procedural violation impaired the grand jury's shield function, and that the impairment was not harmless error. The defendant must identify and prove corruption of the indictment decision and that such corruption arose from the procedural violation.<sup>59</sup>

The Court's approach eliminates dismissal as a remedy for many violations of procedural rules intended to protect against abusive use of the grand jury's investigative sword. Rules regulating the grand jury's use as a sword generally do not address the indictment decision. Such rules are intended to prevent use of the grand jury for purposes other than to secure an indictment or to ensure that the witnesses who appear before the grand jury are not treated abusively. In some cases, of course, the party aggrieved by such a violation is not indicted and therefore would have to seek an alternative remedy to dismissal. Even an indicted defendant who can point to prosecutorial abuse in the indicting grand jury, however, may discover that the violation does not warrant dismissal under the *Bank of Nova Scotia* test. Violation of a rule addressed primarily to the sword aspect of the grand jury is unlikely to undermine the indictment decision and therefore warrant dismissal under the *Bank of Nova Scotia* test. In *Bank of Nova Scotia*, the Court summarily rejected three of the defendants' allegations of abuse—gathering evidence for civil audit, breaching the secrecy of the grand jury, and imposing improper secrecy obligations on grand jury witnesses—because “these alleged breaches could not have affected the charging decision.”<sup>60</sup>

Some types of abuse, such as abusive questioning, generally represent a misuse of the grand jury in its capacity as a sword but may in an extreme

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56. FED. R. CRIM. P. 52(a).

57. See Supreme Court Review, *supra* note 8, at 1059.

58. *Bank of Nova Scotia*, 487 U.S. at 254-55.

59. See generally Supreme Court Review, *supra* note 8; Note, *supra* note 7.

60. *Bank of Nova Scotia*, 487 U.S. at 259-60.

case undermine its function as a shield. Some courts have responded angrily to transcripts recording abusive questioning before the grand jury,<sup>61</sup> and might be persuaded that the grand jury did not retain its independent judgment, but was unduly influenced or prejudiced by the improper questioning. However, even clearly abusive questioning may appear inconsequential when reviewed on a cold record in the context of a lengthy grand jury investigation.

The defendant complaining before trial of a violation of a rule addressed to the grand jury's shield function may seek relief under *Bank of Nova Scotia*, but will face a difficult task. The defendant must demonstrate that the violation substantially influenced the grand jury's decision to indict or that there is grave doubt that the decision was free from such influence. Unfortunately, the Court has not addressed how this showing might be made. In fact, *Bank of Nova Scotia* creates an apparent inconsistency. The Court held that presentation of unreliable evidence was not a basis on which to challenge the indictment. That holding reflects the Court's reluctance to require lower courts to examine the evidence presented to the grand jury.

The *Bank of Nova Scotia* Court did not address the extent to which its harmless error test requires the court to scrutinize the grand jury's basis for the indictment. Nor did the Court suggest how to evaluate the impact of procedural violations on a grand jury process tainted by inaccurate evidence. Thus, courts must reconcile the standard of prejudice, which requires the court to examine the influences, including the evidence presented, that led the grand jury to indict, as well as the refusal to entertain a challenge to an indictment based on the evidence presented. Once error is established, the only way to determine prejudice as defined by the Court is to examine the evidence presented to the grand jury and determine whether the jury would have indicted even in the absence of improper conduct by the prosecutor. If the grand jury was exposed to abusive conduct by the prosecutor and indicted without substantial persuasive evidence, the likelihood of a causal connection seems significant; the prejudice standard should be held to have been satisfied.

Although this course of analysis does not lead to dismissal of the indictment purely on the basis of the quality and quantity of evidence presented to the indicting grand jury, it does make quality and quantity

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61. See, e.g., *United States v. Pacheco-Ortiz*, 889 F.2d 301 (1st Cir. 1989); *United States v. Serubo*, 604 F.2d 807 (3d Cir. 1979); *United States v. Shuck*, 705 F. Supp. 1177 (N.D. W. Va. 1989).

of evidence a significant factor in determining whether a defendant is entitled to relief on the basis of violation of grand jury procedures. In *Bank of Nova Scotia*, the Court noted that the instances of misconduct “occurred as isolated episodes in the course of a 20-month investigation, an investigation involving dozens of witnesses and thousands of documents.”<sup>62</sup> The Court continued: “In view of this context, those violations that did occur do not, even when considered cumulatively, raise a substantial question, much less a grave doubt, as to whether they had a substantial effect on the grand jury’s decision.”<sup>63</sup> Thus, the Court glanced at the quantity of evidence presented on its way to concluding there was no prejudice. In other cases, however, the court assessing prejudice is likely to find itself scrutinizing the evidence presented in the grand jury investigation.

The criteria for obtaining dismissal on grounds of grand jury abuse are now extremely difficult to satisfy.<sup>64</sup> The purpose of the rule that is violated will govern whether dismissal will be considered as a remedy; however, the purpose can be difficult to ascertain. Even if dismissal is theoretically available to remedy a particular abuse, it is very difficult to demonstrate prejudice. Consequently, the other potential means of addressing grand jury abuse have acquired greater significance.

## 2. *Sanctioning the Prosecutor*

One approach to enforcement of grand jury rules is to impose a sanction directly upon the individual prosecutor. In *Bank of Nova Scotia* the Court suggested that sanctions imposed on the prosecutor would be more

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62. 487 U.S. at 263.

63. *Id.*

64. *See, e.g.,* *United States v. Larrazolo*, 869 F.2d 1354 (9th Cir. 1989) (dismissal of grand jury indictment is appropriate only upon a showing of flagrant prosecutorial misconduct that sufficiently infringes upon the independent judgment of the grand jury and prejudices the defendant); *See also* *United States v. Roth*, 777 F.2d 1200 (7th Cir. 1985) (to obtain dismissal, defendant must prove not only that the prosecutor had knowledge of the inaccurate evidence, but also that the indictment would not have issued without reliance upon that inaccurate evidence). *But see* *United States v. Williams*, 899 F.2d 898 (10th Cir. 1990) (government’s withholding of substantial exculpatory information from the grand jury prejudiced the defendant and warranted dismissal of the indictment). *See generally* Comment, *supra* note 8. “Because the deliberations and vote of the grand jurors are insulated from any type of disclosure, it never will be possible to determine what actually has influenced the grand jury’s decision.” *Id.* at 285. Both applying and satisfying the test is difficult. “[A]s a result of the Court’s holding that a guilty verdict renders prosecutorial errors harmless, *Mechanik* gives prosecutors essentially free reign to act with impunity. Depending on when errors are discovered, the grand jury can be manipulated, controlled and even abused by the prosecutor.” *Id.* at 288-89.

appropriate for some of the abuses of which the defendant complained than dismissal of the indictment. Specifically, the Court stated:

Errors of the kind alleged in these cases can be remedied adequately by means other than dismissal. For example, a knowing violation of Rule 6 may be punished as a contempt of court. . . . In addition, the court may direct a prosecutor to show cause why he should not be disciplined and request the bar or the Department of Justice to initiate disciplinary proceedings against him. The court may also chastise the prosecutor in a published opinion.<sup>65</sup>

Unfortunately, imposing sanctions on the prosecutor is a remedy of limited effectiveness. In *United States v. Serubo*,<sup>66</sup> the court lamented the lack of response to judicial efforts to curtail prosecutorial misconduct and expressed skepticism about the hope of using this mechanism to curtail abuse in the grand jury. The court stated:

Certainly the constant flow of cases to this court involving prosecutorial misconduct before petit juries demonstrates that judicial "tongue clicking" and adjurations as to the "better practice" are likely to have little impact on the problem. And while professional disciplinary sanctions may be available, criminal defendants are unlikely to be in a position to initiate such proceedings, or to see that they are pressed to a successful conclusion.<sup>67</sup>

Although courts refer to sanctions as a mechanism for enforcing grand jury procedural rules, the decisions do not reflect actual use of such sanctions.<sup>68</sup> In addition, there is little reason to believe that the government has employed sanctions to discourage improper behavior by prosecutors.<sup>69</sup> The Court's refusal to permit use of dismissal to remedy many

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65. *Bank of Nova Scotia*, 487 U.S. at 263 (citation omitted). See also *United States v. Dozier*, 672 F.2d 531 (5th Cir.) (rejecting defendants' requests for dismissal and stating that contempt is the appropriate remedy), *cert. denied*, 459 U.S. 943 (1982); *United States v. Dunham Concrete Prods., Inc.*, 475 F.2d 1241 (5th Cir.) (same), *cert. denied*, 414 U.S. 832 (1973).

66. 604 F.2d 807 (3d Cir. 1979).

67. *Id.* at 817-18 (citations omitted). See also *United States v. Pacheco-Ortiz*, 889 F.2d 301, 310 (1st Cir. 1989) (the court expressed concern that the prosecutor had not heeded the prior judicial pronouncements condemning the offending practice and stated that stronger measures might be taken).

68. See Note, *supra* note 7, at 1270 n.166.

69. The Annual Reports to the Attorney General from the Office of Professional Responsibility for the years 1983-86 reveal almost no disciplinary action based on misuse of the grand jury. The Office of Professional Responsibility does report one contempt proceeding against a United States Attorney who violated Rule 6(e) by leaking information to a friend who was charged in a sealed indictment. The motivation to use its authority to seek contempt sanctions when a breach of grand jury secrecy threatens law enforcement interests is obviously stronger than the motivation to use it when the violation threatens only the interests of the subjects or witnesses.

In addition to judicial decisions and the Rules of Criminal Procedure, the Department of Justice

abuses, however, makes this route extremely important.

Unfortunately, several factors limit the effectiveness of sanctions. First, the victim may have minimal incentive to invoke the sanction. The criminal investigation will continue despite the sanction, and the harm to the victim and the victim's reputation and relationships will not be addressed by sanctioning the prosecutor. In addition, the remedy may be difficult to invoke. The victim of a grand jury violation may not be in a position to initiate proceedings to impose sanctions on the prosecution.

The available information suggests that contempt and disciplinary actions are used rarely, if at all, to punish violations of grand jury procedure. The subject of a grand jury investigation has rarely sought contempt sanctions against those conducting the investigation. Rule 6(e) was amended in 1977 to provide: "A knowing violation of Rule 6 may be punished as a contempt of court."<sup>70</sup> Nevertheless, the judges considering the question do not uniformly agree that the subject of the grand jury investigation can pursue civil contempt; some judges regard the rule as permitting the imposition of criminal contempt.<sup>71</sup> If the contempt is criminal rather than civil, the aggrieved private party cannot initiate the contempt action but can only appeal to the prosecutor or the court to initiate the proceeding.<sup>72</sup> Certainly, a private party cannot initiate disciplinary proceedings within the government. Moreover, the government has demonstrated little inclination to invoke its authority to sanction grand jury abuse. Despite repeated allegations of abuse, no cases involving contempt proceedings initiated by the government have been reported.

Second, even when sanctions against the prosecutor are pursued, they may not represent an effective remedy, because such sanctions only reach a narrow sub-group of abuses. For example, to obtain sanctions for a violation of Rule 6(e), the victim must first establish that the secrecy of

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Manual also governs prosecutorial behavior. Deviations from the regulations in the Manual could support disciplinary action, but do not appear to have been used in that way. In *Pacheco-Ortiz*, 889 F.2d 301, 311 (1st Cir. 1989), the court predicted that future deviations from the procedure prescribed by the Department of Justice might be referred to the Office of Professional Responsibility and that the response of that office would then be monitored. See also *United States v. Helmsley*, 866 F.2d 19, 22 (2d Cir. 1988) (alluding to an investigation of secrecy violations being undertaken by the Department of Justice).

70. FED. R. CRIM. P. 6(e)(2).

71. See, e.g., *Barry v. United States*, 865 F.2d 1317 (D.C. Cir. 1989); *In re Grand Jury Investigation*, 610 F.2d 202 (5th Cir. 1980) (Kravitch, J., dissenting). Resolving this debate is beyond the scope of this article.

72. See generally 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE §§ 701-711 (1982).

the grand jury has been breached. Often, the complaint is prompted by newspaper or magazine articles reflecting knowledge of information before the grand jury. The articles themselves, reflecting information gathered in the grand jury, may suffice to establish a prima facie case, requiring the government to respond and establish that it is not responsible for the apparent leak.<sup>73</sup> However, not all courts have held that news reports reflecting information before the grand jury provide sufficient evidence of a leak to force the government to respond.<sup>74</sup> Thus, in many instances a breach of secrecy will not result in sanctions because the victim cannot establish a government-created leak.

Victims seeking punitive sanctions face similar evidentiary problems. Punitive sanctions will be imposed only when the prosecutor responsible for the abuse can be identified<sup>75</sup> and the abuse is shown to be intentional.<sup>76</sup> Not only is identification of the abuser difficult, but there is no reason to believe that most violations are intentional. Violations are more likely to be the result of poorly trained or overzealous prosecutors than bad faith.<sup>77</sup> Consequently, even when there has been serious grand

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73. See, e.g., *Barry v. United States*, 865 F.2d 1317 (D.C. Cir. 1989); *In re Grand Jury Investigation*, 610 F.2d 202 (5th Cir. 1980).

74. See, e.g., *In re Special April 1977 Grand Jury*, 587 F.2d 889 (7th Cir. 1978).

75. See *In re Grand Jury Proceedings (Johanson)*, 632 F.2d 1033 (3d Cir. 1980) (illustrating difficulty of determining identity of those who released confidential grand jury information).

76. See *United States v. United Mine Workers of America*, 330 U.S. 258 (1947) (willful disobedience of a valid injunction constitutes contempt of court); *United States v. Smith*, 815 F.2d 24, 25-26 (6th Cir. 1987) (ordinarily, willfulness is required mental state for contempt unless the charge is brought under a statute or rule which specifies a different mental state such as knowledge); *Vaughn v. City of Flint*, 752 F.2d 1160, 1169 (6th Cir. 1985) (requiring willful disobedience to be proven beyond a doubt and defining willfulness as "deliberate or intended violation, as distinguished from an accidental, inadvertent or negligent violation") (quoting *TWM Mfg. Co. v. Dura Corp.* 722 F.2d 1261, 1272 (6th Cir. 1983)); *United States v. Howard*, 569 F.2d 1331, 1336 (5th Cir. 1978) (knowing violation of Rule 6(e)(2) secrecy requirement held to constitute criminal contempt), *cert. denied*, 439 U.S. 834 (1978); *In re Allis*, 531 F.2d 1391 (9th Cir. 1976) (contempt requires a willful disregard or disobedience of public authority), *cert. denied*, 429 U.S. 900 (1976). See generally 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 702 (1982).

77. The Department of Justice Manual includes a number of provisions giving general and, in some instances, specific guidance concerning grand jury procedure. The majority of provisions provide only general guidance. See, e.g., 7 U.S. DEPT. OF JUSTICE MANUAL § 9-11.120 (1990) (generally defines role of prosecutor); *Id.* at § 9-11.140 (general guideline on limits of grand jury subpoenas); *Id.* at § 9-11.153 (general guideline on notification of targets); *Id.* at § 9-11.154 (general guideline on when witness may be compelled despite claims of fifth amendment privilege); *Id.* at § 9-11.232 (general guideline on use of hearsay evidence); *Id.* at § 9-11.233 (general guideline on presentation of exculpatory evidence). Some, however, provide more specific guidance. See, e.g., *id.* at § 9-11.150 (guidance on advising witness of rights). That the reported abuses generally reflect deviations from the Justice Department guidelines suggests inadequate training and internal supervision.

jury misconduct, sanctions against the prosecutor may be inappropriate, and even when sanctions would be appropriate, the evidentiary hurdles may be insurmountable.

Third, the sanctions will have limited deterrent effect. They act only on the individual offender and are unlikely to exert institutional pressure sufficient to prevent future misconduct by other prosecutors. The expectation that sanctions imposed on peers will deter other prosecutors from misconduct is overly optimistic. It is safe to assume that much abuse goes undisclosed, and even when it is disclosed, sanctions are rarely imposed. It appears that the institutional pressure flowing from the greater scrutiny applied to the grand jury process in the last two decades has done little to improve training programs that might prevent improper behavior. It is unrealistic to expect a remedy with such limited institutional impact to accomplish what more drastic remedies have not.

Timing may also diminish the effectiveness of sanctions against the prosecutor. Misconduct frequently first comes to light during the process of post-indictment discovery or at trial.<sup>78</sup> At that juncture, unless the misconduct also gives the defendant a viable argument for dismissal of the indictment, the defendant has diminished incentive to call the court's attention to the misconduct. The remaining incentive is the defendant's ability to adopt a position that may be used to his advantage in bargaining with the prosecution. If the defendant is not prompted by such a motive, the situation may be overlooked entirely unless a vigilant trial judge obtains access to grand jury transcripts reflecting the abusive behavior. Furthermore, due to the length of many investigations and the delay between indictment and trial, the prosecutor may have left the

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78. See, e.g., *United States v. Mechanik*, 475 U.S. 66, 68 (1986) (before trial, the government represented that there had been no unauthorized presence in the grand jury room); *Costello v. United States*, 350 U.S. 359 (1956) (defendant first developed a record of the grand jury process at trial). Most of the grand jury transcripts the defense receives will be provided only as required by 18 U.S.C. § 3500 at the beginning of trial or as trial proceeds. Federal Rule of Criminal Procedure 16 may require the prosecution to provide some grand jury information before trial. For example, if the defendant has testified or provided handwriting or fingerprints, Rule 16 would require pretrial disclosure. In addition, some grand jury information must be turned over to the defense because it is exculpatory, and the prosecution is therefore obligated to provide it to the defendant in a timely manner. See, e.g., *United States v. Serubo*, 604 F.2d 807 (3d Cir. 1979). Of course, some grand jury information will never be given to the defense because it is not regarded as exculpatory by the prosecution, does not fall within Rule 16 discovery, or is not covered by section 3500 because the grand jury witness never testified at trial. The defendant can obtain access to such information only by satisfying the requirement of particularized need established by Rule 6(e). See also 2 S. BEALE & W. BRYSON, *supra* note 3, at § 7:11 (discussing difficulty of making showing necessary to gain access to grand jury material).



prosecutor's office by the time the misconduct comes to light, reducing even further the sanction's institutional impact.

### 3. *Suppressing Evidence*

Another remedial approach is to prevent the government from using the improperly obtained or tainted evidence. In both civil and criminal prosecutions, courts have the authority to suppress evidence obtained through abuse of the grand jury process.<sup>79</sup> The remedy has theoretical appeal, but realistically, its possibilities are limited.

In theory, the remedy of suppression corresponds exactly to the wrong. There is a strong incentive to pursue the remedy; the party moving to suppress stands to gain a specific litigation advantage if successful. Further, the prosecutor will be discouraged from misusing the grand jury to gain an advantage if there is a realistic possibility that the advantage will be removed through a suppression order. For example, if a prosecutor improperly employs the grand jury to investigate an indicted criminal case, the gravamen of the offense is that the powers of the grand jury are being employed to obtain evidence for use in another setting, one in which the extraordinary powers of the grand jury are not available. Suppressing the improperly obtained evidence should adequately address the abuse of the grand jury. Similarly, if the prosecution improperly questions a witness before the grand jury, suppressing the grand jury testimony directly addresses at least one aspect of that abuse.

Several factors, however, limit the effectiveness of this enforcement mechanism. First, the remedy is inappropriate for many types of abuse. Suppression is a suitable remedy for abuses such as improper use of the grand jury to develop a civil case or to investigate an indicted criminal case or improper questioning before the grand jury. Some abuses, such as secrecy violations and failures to present exculpatory evidence, may cause harm and may undermine the shield function of the grand jury, but do not yield evidence. Therefore, suppression does not address the abuse directly.

Second, in the instances in which it is appropriate, suppression is difficult to obtain. The standards are set so high that the defendant will rarely be able to make the requisite showing.<sup>80</sup> Indeed, the standards are

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79. See *United States v. Coughlan*, 842 F.2d 737, 740 (4th Cir. 1988) (remanding for further consideration and acknowledging that suppression could be the appropriate remedy).

80. For example, to determine whether a grand jury is improperly employed to investigate an already indicted criminal case, the court must assess the dominant purpose of the grand jury's inves-

so stringent that the prosecution has little reason to be concerned. The aggrieved party will only rarely be able to meet its burden and the remedy will rarely be imposed. In addition, the court may forego the sanction out of fear that imposing the sanction will free a guilty defendant.<sup>81</sup>

Third, invoking the remedy may have no significant negative impact on the prosecution's case. Adhering to the narrow remedial approach of *Bank of Nova Scotia*, the court may suppress only the evidence obtained through the abuse. Thus, despite the imposition of such a remedy, the prosecution may still have sufficient other evidence to prosecute successfully. This possibility further diminishes the prophylactic impact of suppression as a remedy for grand jury abuse.

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tigation. Unless it is clear that the prosecution can claim no further relevant investigation, the court is unlikely to identify an impermissible purpose. Frequently, the complaining defendant is hampered by a lack of evidence and the reluctance of the court to expose the investigation to scrutiny by the defense. The defense claim may be answered to the court's satisfaction by government affidavits or the defendant may receive only *in camera* review of related materials, foreclosing informed defense argument concerning the actual course and purpose of the ongoing investigation. See generally *In re Grand Jury Proceedings* (Ferrandez Diamante), 814 F.2d 61 (1st Cir. 1987); *United States v. Zarattini*, 552 F.2d 753 (7th Cir.), cert. denied, 431 U.S. 942 (1977); *United States v. Woods*, 544 F.2d 242 (6th Cir. 1976), cert. denied, 429 U.S. 1062 (1977); *United States v. Doe* (Ellsberg), 455 F.2d 1270 (1st Cir. 1972); *In re Grand Jury Investigation* (General Motors Corp.), 32 F.R.D. 175 (S.D.N.Y.), cert. denied, 375 U.S. 902 (1963). But see *United States v. Doss*, 563 F.2d 265 (6th Cir. 1977); *United States v. Kovalski*, 406 F. Supp. 267 (E.D. Mich. 1976). See also 2 S. BEALE & W. BRYSON, *supra* note 3, at § 10:15. Of course, return of an indictment by the challenged grand jury will defeat the defendant's claim of improper use. See *United States v. Scott*, 784 F.2d 787 (7th Cir.), cert. denied, 476 U.S. 1145 (1986).

A claim that the prosecution improperly used the grand jury to develop a civil case is likewise difficult to establish. In some cases, the prosecutor overseeing the grand jury inquiry will have a conflict of interest because of involvement as a party in a related civil matter. In such a case, the risk of information flowing from the criminal investigation to the party in the civil suit may warrant an order disqualifying the prosecutor from participation in the grand jury process. Cf. *In re Grand Jury Subpoena*, 873 F.2d 170 (7th Cir. 1989). Normally, however, the courts accept that a proper criminal investigation may also uncover civil violations. The failure of the grand jury to return an indictment does not establish that it was misused for solely civil investigation. See *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958). Attorneys investigating the case in the grand jury are free to work on the civil investigation as well. See *United States v. John Doe, Inc.*, 481 U.S. 102 (1987). Government affidavits may respond adequately to the claim of misuse; the complaining party may not receive access to the grand jury materials. See *In re Grand Jury Proceedings* (Miller Brew. Co.), 687 F.2d 1079 (7th Cir. 1982). Relief is likely to be available only in a case such as *United States v. Doe*, 341 F. Supp. 1350 (S.D.N.Y. 1972). In *Doe*, the prosecution listed discovery of civil violations and liabilities in a request that IRS agents be given access to evidence to be gathered in an ongoing investigation. That expression of intended civil use persuaded the court to deny the government's request. See generally 2 S. BEALE & W. BRYSON, *supra* note 3, at §§ 8:01-8:11.

81. See *United States v. Pacheco-Ortiz*, 889 F.2d 301, 309 (1st Cir. 1989); *United States v. Jacobs*, 547 F.2d 772, 775 (2d Cir. 1976), cert. granted, 431 U.S. 937 (1977), cert. dismissed, 436 U.S. 31 (1978).

#### 4. *Remedying Ongoing Abuses*

If an aggrieved party can identify an ongoing abuse of the grand jury and make a showing sufficient to satisfy the court that the abuse is real, the party may be able to obtain immediate relief from the abuse.<sup>82</sup> For example, the court may enjoin the abusive conduct or may excuse the witness from compliance with the grand jury request. Effective and prompt action to address ongoing grand jury abuse is essential to supervise the grand jury's role as the prosecutor's sword and may also enhance its effectiveness as a shield. Courts may tailor an equitable remedy addressed to an ongoing problem to fit the situation. The abuse can be addressed without generating a windfall for the complaining party. Such remedies also offer a means for bringing to light abuses in grand jury investigations that never culminate in indictment.

Two major barriers, however, diminish the effectiveness of these remedies as mechanisms for supervising the grand jury. First, detection of abuse in time to seek immediate judicial action is difficult. In many cases, abuse is first detected at trial. Even when abuse is suspected earlier in the process, it is usually difficult to document. The decided cases illustrate both the difficulty of establishing the prima facie case that entitles the party to an evidentiary hearing<sup>83</sup> and the ease with which government affidavits asserting lack of abuse can refute such allegations.<sup>84</sup>

Second, access to the remedies that address ongoing abuses is limited. The party asking the court to remedy an ongoing abuse of the grand jury is generally asking the court to intrude to some degree into the investigation. As a number of cases demonstrate, the courts are extremely reluctant to intrude into the operation of the grand jury to the extent required to identify and remedy alleged abuses while the investigation is ongoing.<sup>85</sup>

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82. See, e.g., *Barry v. United States*, 865 F.2d 1317 (D.C. Cir. 1989); *Beverly v. United States*, 468 F.2d 732 (5th Cir. 1972); *In re Grand Jury 89-2*, 728 F. Supp. 1269 (E.D. Va. 1990). Cf. *In re Grand Jury Subpoena*, 873 F.2d 170 (7th Cir. 1989).

83. *In re Special April 1977 Grand Jury*, 587 F.2d 889 (7th Cir. 1978); *Beverly*, 468 F.2d 732. See also *Barry*, 865 F.2d at 1321 (petitioner entitled to evidentiary hearing); *United States v. Eisenberg*, 711 F.2d 959 (11th Cir. 1983) (target's remedies to be restricted despite prima facie showing of grand jury abuse).

84. *In re Grand Jury Investigation*, 610 F.2d 202 (5th Cir. 1980); *Universal Mfg. Co. v. United States*, 508 F.2d 684 (8th Cir. 1975). See also *Beverly*, 468 F.2d 732.

85. See, e.g., *United States v. Eisenberg*, 711 F.2d 959 (11th Cir. 1983); *In re Archuletta*, 432 F. Supp. 583 (S.D.N.Y. 1977); See also *Barry*, 865 F.2d at 1323 (expressing concern that remedies ordered on remand not interfere with grand jury); *In re Grand Jury Investigation*, 610 F.2d at 219 (same).

Despite these problems, it is worth examining equitable remedies addressed to ongoing abuses. When available, they offer an unusually satisfactory mechanism for supervising the grand jury. In addition, because the Supreme Court has limited the authority of the lower courts to address grand jury abuse through other remedies, equitable responses to ongoing problems have acquired greater significance and should be considered seriously whenever a party can identify an abuse. If a party requests an equitable remedy, a court can no longer respond that the party has an adequate remedy at law, namely the option of moving to dismiss the indictment if one is returned.<sup>86</sup> Equitable intervention in the grand jury process may offer the only opportunity to address abusive grand jury practices.

*a. Permitting the Witness to Resist the Compulsion of the Grand Jury*

One remedy addressed to an immediate threat of abuse is to permit the witness to resist the compulsion of the grand jury. A grand jury witness has traditionally had one clear route to judicial review of grand jury action that threatens the witness' rights—to refuse to comply with the order of the grand jury and to raise the legal claim as a defense when the prosecutor seeks to invoke the court's contempt authority to compel compliance. Not only will the witness be able to bring a legal claim before the court in this manner, but the witness who does not prevail will also be able to appeal the rejection of the legal claim if the witness persists in refusing to comply and is held in contempt. The rights most often asserted successfully in the grand jury—the fifth amendment privilege against self-incrimination and evidentiary privileges—are normally raised in this manner. The claim of privilege is easily raised, readily addressed by the court, subject to appellate review, and completely prohibits further grand jury inquiry into the privileged matter. Consequently, this enforcement mechanism has been a powerful tool for restraining the grand jury from probing into confidential or otherwise privileged matters.

However, not all improper questioning falls within the prohibition of a constitutional or an evidentiary privilege. Prosecutors sometimes indulge in questioning that improperly harasses or degrades the witness or

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86. See *Blalock v. United States*, 844 F.2d 1546, 1549-50 (11th Cir. 1988) (rejecting a request for injunctive relief against grand jury abuse in part on the basis that an adequate remedy was available at law).

is designed to inflame or prejudice the grand jurors. Resisting the compulsion of the grand jury may not address abusive questioning of this type. The harm to the witness lies in the embarrassment or humiliation inflicted by the questions. Therefore, the witness may not bother to complain about the abuse; the witness may not want to devote the time and money necessary to go before the court to get review of a legal claim through the vehicle of noncompliance. Furthermore, if the witness declines to answer in the grand jury, the prosecutor may not bring the matter before the court to compel compliance.

Abusive questioning of this type is not designed to advance the investigation by eliciting information; it may simply represent an outburst of the prosecutor's temper or may be designed to prejudice the grand jury and to harass the witness. The prosecutor can accomplish all of these objectives even if the witness merely endures the questioning without answering the questions. Some damage will result, yet the matter may never be brought before the court.

The courts offer little incentive for the witness with the unconventional claim to seek protection from grand jury abuse. When witnesses have appealed to the courts for permission not to cooperate with the grand jury on grounds other than privilege, the courts have given the mechanism little effect as a means of supervising the grand jury. Even if the witness identifies an abuse, the remedy is usually unattainable. In *Blair v. United States*,<sup>87</sup> the Court foreclosed grand jury witnesses from raising most challenges other than claims of privilege. *Blair* established that a mere witness has no standing to question the grand jury's investigation; the grand jury must be free from such interference. The Court emphasized the public duty to provide information when called by the grand jury. The Court noted:

The duty, so onerous at times, yet so necessary to the administration of justice according to the forms and modes established in our system of government is subject to mitigation in exceptional circumstances; there is a constitutional exemption from being compelled in any criminal case to be a witness against oneself, entitling the witness to be excused from answering anything that will tend to incriminate him; some confidential matters are shielded from considerations of policy, and perhaps in other cases for special reasons a witness may be excused from telling all that he knows.<sup>88</sup>

The Supreme Court has not been receptive to witnesses' efforts to resist

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87. 250 U.S. 273 (1919).

88. *Id.* at 281 (citations omitted).

the compulsion of the grand jury on the basis of a claim of threatened abuse rather than a specific claim of privilege. In *United States v. Calandra*,<sup>89</sup> the Court rejected the argument that the fourth amendment exclusionary rule should operate to protect a grand jury witness from being compelled to answer questions based on illegally seized evidence. In *Branzburg v. Hayes*,<sup>90</sup> the Court held that the potential threat to a news reporter's access to confidential sources is inadequate to overcome the reporter's obligation to respond to the grand jury's subpoena and provide the requested information.

In most cases, witnesses have been forced to cooperate with the grand jury despite allegations of unauthorized disclosure under Rule 6(e) or other violations.<sup>91</sup> In some cases, however, the aggrieved party has prevailed. In *In re Kiefaber*,<sup>92</sup> the Ninth Circuit upheld the district court's order quashing subpoenas that it concluded had been issued to assist the prosecution to violate Rule 6(e). In *In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985*,<sup>93</sup> the court ordered that a grand jury subpoena addressed to an indicted defendant's lawyer be quashed. The cir-

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89. 414 U.S. 338 (1974).

90. 408 U.S. 665 (1972). See generally Deusch, *supra* note 3 (political right of silence exists based upon freedom of association which should prevent government from compelling cooperation with grand jury in investigations involving political beliefs and associations); Weisman and Postal, *The Grand Jury: The First Amendment as a Restraint on the Grand Jury Process*, 10 AM. CRIM. L. REV. 671 (1972) (discussing the relationship between the first amendment and the grand jury).

91. See, e.g., *In re Sinadinos*, 760 F.2d 167, 172-73 (7th Cir. 1985) (immunized witness could not refuse to testify on ground that memory of events was unclear and therefore he might be exposed to prosecution for perjury); *In re Crededio*, 759 F.2d 589, 593 (7th Cir. 1985) (assertions of grand jury leaks were mere speculation and did not warrant contemnor's release even though contemnor feared for his life if he testified); *United States v. (Under Seal)*, 714 F.2d 347, 350-51 (4th Cir. 1983) (motion to quash subpoena denied even though possibility existed that prosecutor might use subpoena to coerce plea bargain against relative of the witness by threatening harm to witness if he did not testify against his relative); *In re Grand Jury Proceedings (Burns)*, 652 F.2d 413 (5th Cir. 1981) (fear for safety of family and self is not a basis for refusing to provide grand jury testimony under grant of immunity); *United States v. Zappola*, 646 F.2d 48 (2d Cir. 1981) (government informant could not invoke self-incrimination privilege as grounds to refuse to testify since he did not have legitimate fear of prosecution due to limited scope of questions concerning his undercover duties); *In re Grand Jury Proceedings (Gravel)*, 605 F.2d 750 (5th Cir. 1979) (defendant could not invoke defense of duress to avoid testifying where government had offered him protection from the threats and he declined to accept); *In re Grand Jury Investigation (Braun)*, 600 F.2d 420, 428 (3d Cir. 1979) (court reluctant to conclude that confinement for contempt has lost its coercive effect after time period short of the 18-month statutory limit); *In re Archuleta*, 432 F. Supp. 583, 583 (S.D.N.Y. 1977) (alleged leaking of grand jury information by law enforcement authorities did not warrant quashing of subpoena). See also *United States v. Calandra*, 414 U.S. 338 (1974); *Branzburg v. Hayes*, 408 U.S. 665 (1972). See generally Comment *supra* note 3.

92. 774 F.2d 969 (9th Cir. 1985).

93. 767 F.2d 26 (2d Cir. 1985).

cumstances in which the subpoena was issued convinced the court that the prosecution improperly employed the grand jury to prepare an already indicted case for trial.<sup>94</sup>

Generally, however, this common and effective means of curbing the grand jury's inclination to probe into unpermitted areas is not available as a tool for checking grand jury abuse.

*b. Equitable Relief*

Courts may employ their flexible equitable authority to address ongoing grand jury abuse. When a problem is raised and substantiated, the court may be able to craft a remedy tailored to the problem. Some parties have raised aggressive and creative arguments for remedies of ongoing abuses. Some requests, such as the plea to terminate the investigation, are so intrusive that no court would grant them.<sup>95</sup> Courts may grant many other equitable remedies, however, without unduly disrupting the grand jury. The court may give the grand jury instructions to counteract the abuse or may direct the prosecutors to instruct the grand jury.<sup>96</sup> The court may, short of imposing the sanction of contempt, enjoin improper conduct or at least remind those working with the grand jury of their obligations.<sup>97</sup> The court may also order the prose-

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94. It is worth noting that on February 12, 1990, the A.B.A. House of Delegates adopted an amendment to Rule 3.8 of the Model Rules of Professional Responsibility which would eliminate the problem in *Simels*. It provides that the prosecution should not subpoena a lawyer in a grand jury proceeding unless:

- (1) the prosecutor reasonably believes:
  - (i) the information sought is not protected from disclosure by an applicable privilege;
  - (ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution;
  - (iii) there is no other feasible alternative to obtain the information; and
- (2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding.

MODEL RULE OF PROFESSIONAL CONDUCT Rule 3.8(f), reprinted in S. GILLERS & R. SIMON, JR., REGULATION OF LAWYERS 148-49 (1990).

95. See, e.g., *In re Special April 1977 Grand Jury*, 587 F.2d 889 (7th Cir. 1978). See also *United States v. Eisenberg*, 711 F.2d 959 (11th Cir. 1983).

96. See, e.g., *United States v. Eisenberg*, 711 F.2d at 962 (request to have prosecutors instruct grand jurors to disregard publicity); *In re Grand Jury Investigation*, 610 F.2d 202, 209 (5th Cir. 1980) (instruction to prosecutor to caution grand jurors not to disclose information; also, request to instruct grand jurors to disregard publicity).

97. See, e.g., *United States v. Pacheco-Ortiz*, 889 F.2d 301, 311 (1st Cir. 1989) (court warned prosecutors that it expected them to comply with Department of Justice policy requiring that a target of the grand jury investigation be warned before testifying before the grand jury; court also said that future violations of the policy would be referred to the Department of Justice for disciplinary action); *In re Grand Jury Investigation*, 610 F.2d at 210 (when defendant first raised the claim

cution to present identified evidence to the grand jury, an equitable remedy appropriate when the complaint is the failure to provide exculpatory evidence to the grand jury.<sup>98</sup> If the prosecutor has a conflict of interest, the court can disqualify that prosecutor from participating in the grand jury investigation.<sup>99</sup>

Although generally skeptical of remedies that intrude too much into the grand jury's investigation, not all courts have foreclosed the possibility of equitable relief.<sup>100</sup> In cases in which grand jury abuse is identified early in the process, courts should recognize that, in most instances, relief will be unavailable later on, and therefore they must invoke their equitable authority to address the problem at an early stage. Even a limited judicial response to a claim of abuse may prompt prosecutorial compliance with the rules.

### B. Appellate Review

Appellate review is crucial to supervision for two reasons.<sup>101</sup> First,

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that grand jury secrecy had been breached, the court "reiterated its intent to enforce the provisions of Rule 6(e) and suggested that the Justice Department attorneys again inform their superiors that they should maintain the confidentiality of the material presented to the grand jury. . . .")

98. See, e.g., *In re Application of Wood*, 833 F.2d 113 (8th Cir. 1987); *O'Bryan v. Chandler*, 352 F.2d 987 (10th Cir. 1965), cert. denied, 384 U.S. 926 (1966); *In re Grand Jury 89-2*, 728 F. Supp. 1269 (E.D. Va. 1990).

99. Cf. *In re Grand Jury Subpoena*, 873 F.2d 170 (7th Cir. 1989); *United States v. Braniff Airways, Inc.*, 428 F. Supp. 579 (W.D. Tex. 1977).

100. See *Barry v. United States*, 865 F.2d 1317 (D.C. Cir. 1989); *In re Grand Jury Investigation*, 610 F.2d 202 (5th Cir. 1980).

101. Appellate review is important to the criminal process. The appellate courts are obligated to "judicially supervise the administration of criminal justice in the federal courts which implies the duty of establishing and maintaining civilized standards of procedure." Supreme Court Review, *supra* note 8, at 1038 (citing *McNabb v. United States*, 318 U.S. 332, 340 (1942)). In addition, thorough appellate review of the application of supervisory power and the harmless error doctrine is imperative in order to "achieve a balance between judicial efficiency and judicial integrity." *Id.* at 1063. Judicial review is both necessary and beneficial for furthering the aims of democracy and, according to Judge Learned Hand, must be inferred from the Constitution. Johnson, *Two Hundred Years of Judicial Review: Delivering the Promise of America*, 9 GEO. MASON U.L. REV. 223, 225-30 (1987) (citation omitted).

Regarding the application of judicial review to the grand jury, "[t]he use of self-restraint, the existence of higher court review, and a defined standard of application will ensure the independence of the grand jury and the prosecutor." Note, *The Exercise of Supervisory Powers*, *supra* note 3, at 1097. The Supreme Court has utilized its supervisory power to safeguard the criminal process in the lower courts in order to "promote the search for the truth, to protect the integrity of the courts, to remedy violations of individual rights, and to impose sanctions against governmental misconduct." Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1455 (1984).



appellate review encourages the district court to take its supervisory responsibility seriously. Any attempt to invoke protection against grand jury abuse disrupts the process, inconveniences the prosecutor, and places the district court in the uncomfortable position of determining whether to permit the petitioner to pursue the claim in the face of prosecutorial assertions that the requested relief would unduly disrupt the grand jury. In light of these difficulties, district courts may be inclined, if possible, to slough off claims of grand jury abuse. Whether the lower courts can avoid scrutiny of claims of grand jury abuse depends in large part on whether the petitioner will have a forum in which to challenge the district court's response to the claim. Procedural protections in the grand jury will be more meaningful if they benefit from the watchful eye of the appellate court.<sup>102</sup>

Second, the appellate courts define the law by which the district courts are bound. If meaningful appellate review is unavailable, the protections are unlikely to be defined or enforced uniformly.<sup>103</sup> The lower courts can therefore identify violations or reject allegations of violations without the accountability that attends appellate review. Thus, the prosecution will receive less guidance concerning what conduct is unacceptable in the grand jury. If the appellate courts do not have to address claims of grand jury abuse, and if the lower courts can dispose of such allegations on the ground that, regardless of whether the behavior was improper, it clearly did not have the required impact on the grand jury, then the courts are likely to bypass consideration of the propriety of specific alleged misconduct. Even when remedies are hard to obtain, an opinion condemning the prosecutor's behavior in the grand jury can act as a caution to other prosecutors and will define the standards of conduct to which they should aspire. If appellate review is unavailable, the lower courts are less likely to give this guidance. Behavior in the grand jury will depend on the prosecution's sense of the appropriate procedural rules. Thus, the

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102. Note, *Appealability of Orders Relating to Ongoing Grand Jury Proceedings: In re April 1977 Grand Jury Subpoenas*, 92 HARV. L. REV. 931 (1979).

103. For example, courts continue to treat failure to present material, exculpatory evidence to the grand jury as an abuse warranting remedy. The Supreme Court has never addressed this issue, and it is not entirely clear that failure to present exculpatory evidence is an abuse.

Another unresolved question concerns the use of immunity. In *Bank of Nova Scotia v. United States*, the Court did not review claims that the prosecution had violated Rule 6 and had improperly granted "pocket immunity." Because the alleged errors did not affect the decision of the grand jury to indict, the Court did not address whether the prosecution had engaged in improper practices. 487 U.S. 250, 261-62 (1988).

Court's restriction of appellate review further diminishes the possibility of meaningful supervision.

There are three potential avenues to judicial review of a district court's ruling: a writ of mandamus, interlocutory appeal, and post-conviction review. Mandamus has always been difficult to obtain. *Mechanik* and *Midland Asphalt* enhance barriers to interlocutory appeal and post-conviction review for many complaints of grand jury abuse. Generally, claims that bear on the screening function of the grand jury will now receive appellate review only if the government appeals the dismissal of an indictment. Thus, the government will control which questions of misconduct are presented to the appellate courts, and therefore, avoid negative appellate precedent condemning certain conduct as improper.

The writ of mandamus has been defined as a drastic remedy that should be invoked only in extraordinary circumstances.<sup>104</sup> Mandamus review is sometimes available in criminal proceedings. However, due to the final judgment rule and the general prohibition against piecemeal appeals, it is doubtful that a court will issue the writ to correct improprieties in grand jury proceedings.<sup>105</sup> Courts have denied requests for mandamus review of grand jury proceedings in the overwhelming majority of cases. Many of these cases involve orders denying motions to quash grand jury subpoenas,<sup>106</sup> in which the petitioner has access to the normal remedy of contempt and appeal. In the few cases in which a mandamus has been issued in the context of grand jury proceedings, the court found extraordinary circumstances to exist; either the petitioner was without a remedy or the lower court had abused its discretion.<sup>107</sup>

Interlocutory appeals are disfavored in all contexts. Not surprisingly, the courts discourage interlocutory appeals from rulings on grand jury

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104. *Kerr v. United States District Court*, 426 U.S. 394 (1976).

105. *See Will v. United States*, 389 U.S. 90, 96 (1967) (general policy against piecemeal appeals takes on added weight in a criminal case, and the writ may never be employed as a substitute for appeal in derogation of this policy). *See also Cobbleddick v. United States*, 309 U.S. 323 (1940) (no less important to safeguard against undue interruption of grand jury inquiry than trial after indictment).

106. *See* WRIGHT, MILLER, COOPER & GRESSMAN, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* 263-64 (1976).

107. *See, e.g., In re Oswald*, 607 F.2d 645 (5th Cir. 1979) (extraordinary circumstances found to exist where the district court had authorized federal agents to seize petitioner's documents before he would have the chance to assert a fifth amendment privilege claim by the normal route of contempt and appeal); *In re Weiss*, 596 F.2d 1185, 1186 (4th Cir. 1979) (mandamus review is appropriate way to challenge alleged errors or abuses of discretion on the part of district judges in dealing with grand jury investigations).

matters.<sup>108</sup> In *Midland Asphalt*, the Court defined the limited class of orders which are appealable as final collateral orders. To fall within the class, an order must satisfy three criteria: It must “conclusively determine the disputed question”; it must “resolve an important issue completely separate from the merits of the action”; and it must be “effectively unreviewable on appeal from a final judgment.”<sup>109</sup>

The one type of grand jury matter traditionally subject to interlocutory appeal is the entry of a contempt order against a witness who has refused to provide information to the grand jury. Thus, lower court rulings on claims of privilege have generally been subject to prompt appellate review. The witness’ claim of privilege is separate from the merits of the grand jury investigation.

Courts have traditionally relegated other types of grand jury abuse to post-conviction review. In the courts’ view, the trial will not harm the defendant’s protected interests, so society’s interest should not suffer the delay of interlocutory appeal. *Mechanik*, however, eliminated post-conviction review for at least some claims of grand jury abuse; the guilty verdict rendered the grand jury error harmless and, consequently, nonreviewable.<sup>110</sup> Defendants responded to *Mechanik* by pressing for interlocutory review of rulings on grand jury abuse. Defendants argued that the harmless error rule of *Mechanik* makes post-conviction review meaningless and that, therefore, the defendant should be entitled immediately to appeal an adverse ruling.

In *Midland Asphalt*, the Court rejected that argument. Without defining the character of the alleged violation in *Midland Asphalt*—a breach of rule 6(e) secrecy—the Court held that, unless the rule violated was so basic that it gave the defendant a “right not to be tried,” appeal was

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108. See also *United States v. Poindexter*, 859 F.2d 216 (D.C. Cir. 1988), cert. denied, 109 S. Ct. 1638 (1989). See generally Note, *supra* note 102; Note, *In Re April 1977 Grand Jury Subpoenas: Appealability of Orders Denying Disqualification of Grand Jury Prosecutors*, 65 VA. L. REV. 573 (1979).

109. *Midland Asphalt*, 109 S. Ct. at 1497 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

110. *Mechanik*, 475 U.S. at 73.

In *United States v. Fountain*, 840 F.2d 509, 514 (7th Cir.), cert. denied, 109 S. Ct. 533 (1988), the court remarked concerning *Mechanik* :

So it would be silly to reverse a conviction on the ground that the evidence before the grand jury was insufficient. We know that this defendant is not a member of the class that is harmed by sloppy or overbearing conduct before the grand jury. We know that he could be reindicted in a trice (using the record of the trial as a basis), and would be tried anew in the same fashion.

inappropriate.<sup>111</sup> The Court pointed out that if the violation was not subject to the *Mechanik* rule, post-conviction review would be available. If the violation was subject to the *Mechanik* rule, it was because the purpose of the rule allegedly violated is to avoid indictment in the absence of probable cause, and therefore, the matter is not adequately separate from the merits of the action.<sup>112</sup>

Through its rulings in *Mechanik* and *Midland Asphalt*, the Court has broken grand jury rules into three categories for purposes of determining access to interlocutory appeal: 1) rules that protect against indictment in the absence of probable cause—the *Mechanik* rule; 2) rules which are so fundamental that the defendant has a right not to be tried; and 3) rules that are not so fundamental as to raise a right not to be tried, but which serve some purpose other than the protection against indictment in the absence of probable cause.<sup>113</sup> Only violations of the small category of fundamental rules will be subject to interlocutory appeal.<sup>114</sup> When *Mechanik* applies, interlocutory appeal is not allowed. When a rule falls in the third category, the defendant is not entitled to dismissal of the indictment, and therefore, interlocutory appeal during the criminal process is not an issue. The allegation of abuse should be addressed in a separate proceeding that may generate an appealable order.

The assumption that grand jury violations could be raised after conviction underlies many of the decisions barring interlocutory appeal of rulings on grand jury matters. That assumption can no longer be regarded as valid in light of the Court's recent decisions.<sup>115</sup> Whether *Mechanik* and *Midland Asphalt* foreclose review of violations of other rules of grand jury procedure depends on how the Court defines the purposes of

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111. *Midland Asphalt*, 109 S. Ct. at 1499.

112. *Midland Asphalt*, 109 S. Ct. at 1498. See also *United States v. Sherlock*, 887 F.2d 971 (9th Cir. 1989); *United States v. Moreno-Green*, 881 F.2d 680 (9th Cir. 1989) (applying the same alternative reasoning to reject interlocutory appeal of claims of grand jury abuse).

113. In *United States v. Howard*, 867 F.2d 548 (9th Cir. 1989), defendant's claim that she was the victim of a "perjury trap" challenged the validity of the criminal action itself rather than merely alleging prosecutorial misconduct in the indictment process. The court compared the violation of the rights asserted by the defendant with violations of vindictive or selective prosecution. *Id.* at 552. Since the claim raises issues of fundamental fairness, the *Mechanik* harmless error rule will not bar post-conviction review of defendant's claim. *Id.* The court held that the trial court's rejection of the claim that a "perjury trap" induced defendant to make false statements before the grand jury is not subject to interlocutory appeal.

114. See *United States v. Sherlock*, 887 F.2d at 973; *United States v. Moreno-Green*, 881 F.2d at 684; *United States v. Larrazolo*, 869 F.2d 1354 (9th Cir. 1989); Comment, *supra* note 8, at 280-83 (discussing which violations might be deemed fundamental).

115. See *Midland Asphalt*, 109 S. Ct. at 1494.

those rules.<sup>116</sup> The holding in *Mechanik* rested on the Court's assessment that Rule 6(d) "protects against the danger that a defendant will be required to defend against a charge for which there is no probable cause to believe him guilty."<sup>117</sup> If other protections at the grand jury stage are similarly perceived as enhancing the grand jury's shield function, but only as protection against indictment on insufficient evidence, then post-indictment review of those violations will likewise be foreclosed.

A number of lower courts have evaluated other grand jury errors to determine whether the harmless error rule of *Mechanik* applies.<sup>118</sup> Some courts have applied a narrow interpretation of *Mechanik* and have viewed other grand jury violations as significantly different from the technical violation of Rule 6(d) raised in *Mechanik*. As a result, these courts have held that the other significantly different violations may not be washed away by a guilty verdict returned by a petit jury.<sup>119</sup> Other courts have read *Mechanik* more broadly.<sup>120</sup>

In light of *Midland Asphalt*<sup>121</sup> and *Bank of Nova Scotia*, however, much of the lower courts' discussion is misdirected. The Court has made

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116. See generally Note, *supra* note 7, at 1268-69.

117. *Mechanik*, 475 U.S. at 70.

118. See *infra* notes 119-120. Most of the courts considered the question before the Supreme Court's decision in *Midland Asphalt* in an attempt to determine the impact of *Mechanik* on the defendant's right to interlocutory appeal.

119. See, e.g., *United States v. Kramer*, 864 F.2d 99, 101 (11th Cir. 1988) (post-conviction review of motion to quash subpoenas duces tecum due to alleged prosecutorial abuse not precluded by *Mechanik*); *United States v. Poindexter*, 859 F.2d 216, 219-22 (D.C. Cir. 1988) (*Mechanik* would not foreclose post-conviction review of alleged Rule 6(e) secrecy violation); *United States v. Johns*, 858 F.2d 154 (2d Cir. 1988) (post-conviction review of claims of failure to present exculpatory evidence and Rule 6(e) violations available); *United States v. Larouche Campaign*, 829 F.2d 250 (1st Cir. 1987) (post-conviction review available for alleged abuse of grand jury to investigate a pending indictment, Rule 6(e) violations, and other persistent and pervasive patterns of grand jury abuse); *United States v. Taylor*, 798 F.2d 1337 (10th Cir. 1986) (distinction between a right not to stand accused except upon a finding of probable cause and a broader right to fundamental fairness throughout the criminal process suggests that *Mechanik* does not preclude post-conviction review for alleged prosecutorial misconduct before the grand jury).

120. See, e.g., *United States v. Hefner*, 842 F.2d 731, 733 (4th Cir.) (harmless error applies when grand jury foreman was not qualified to serve), *cert. denied*, 488 U.S. 868 (1988); *United States v. Fountain*, 840 F.2d 509 (7th Cir. 1988) (people harmed by grand jury abuse are the innocent; therefore, once a person is convicted, courts can be confident that a full presentation to the grand jury would have resulted in a valid indictment); *United States v. McKie*, 831 F.2d 819 (8th Cir. 1987) (harmless error rule applies to prosecutorial misconduct such as improper statements made to the grand jury); *United States v. Dederich*, 825 F.2d 1317 (9th Cir. 1987) (harmless error applies to prosecutorial misconduct such as harassing witnesses, presenting irrelevant and false, prejudicial evidence, and abusing the grand jury's subpoena authority).

121. *Midland Asphalt*, 109 S. Ct. at 1498.

it clear that if the rule violated is directed at something other than the shield function of the grand jury, the matter is collateral to the criminal trial; dismissal is not an appropriate remedy, and the defendant can be required to stand trial and seek relief from the grand jury abuse outside that context. The question of appeal after conviction is significant only when dismissal might be an appropriate remedy. Dismissal is an appropriate remedy only for two categories of grand jury violations—violations of rules designed to protect against indictment when there is no probable cause, and violations of fundamental rules.<sup>122</sup> The former are almost certainly subject to the harmless error rule. The latter are not, but the Court's definition of fundamental protection in this context seems extremely narrow.

Thus, appellate review of claims of grand jury abuse is severely restricted. Appellate review of claimed violations of rules designed to preserve the shield function of the grand jury is now generally unavailable. Denials of equitable relief should be reviewable as collateral orders, although it is highly doubtful that an aggrieved party would be able to obtain appellate review of a decision not to sanction a prosecutor for grand jury abuse. Of course, a denial of a motion to suppress would be appealable only after the verdict in the case, at which point the significance of the evidence admitted would be evaluated to determine whether the error, if any, was harmful.

#### IV. THE DEMISE OF THE SHIELD FUNCTION

Can it any longer be claimed that the grand jury functions as a shield against improper indictment? The answer is clearly "no." The Court has ruled out any meaningful protection against indictment on the basis of unreliable, even false, evidence. A grand jury may indict on evidence that is incomplete, inaccurate, or misleading. The presentation of unreliable evidence would seem as great a threat as any to the grand jury's ability to shield against unwarranted indictments. Nevertheless, the weight of precedent has always run against protecting defendants from the presentation of unreliable evidence. While some lower courts have exercised their supervisory authority to dismiss indictments because the prosecution presented false testimony, misleading evidence, or deceptive hearsay evidence, the majority of courts have consistently declined to

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122. *Bank of Nova Scotia*, 487 U.S. at 256-57.

exercise supervisory authority in that manner.<sup>123</sup>

Despite most courts' reticence to exercise their authority to protect against unreliable evidence, the practice was common enough that prosecutors had an incentive to be cautious in their choice and presentation of evidence. In *Bank of Nova Scotia*, however, the Court made it clear that dismissal of the indictment is not an appropriate response to the mere presentation of inaccurate evidence, even though that presentation prejudiced the defendant. *Bank of Nova Scotia* thus eliminates any remedy for the presentation of inaccurate evidence and forecloses the exercise of supervisory authority to curtail the grand jury's reliance on unreliable evidence.

In *Bank of Nova Scotia*, the Court recognized its traditional unwillingness to evaluate the adequacy of the evidence on which the grand jury based the decision to indict and took that unwillingness one step further. In so doing, the Court relied on *Costello v. United States*.<sup>124</sup> In *Costello*, the defendant moved to dismiss the indictment because the grand jury had heard only hearsay evidence. The defendant argued unsuccessfully that the indictment did not provide the protection guaranteed by the fifth amendment.

The significance of the *Costello* decision was not clear. The prosecution presented hearsay as the only feasible means of establishing a tax violation through a net worth theory, but the evidence presented was substantial and reliable. Yet the *Costello* Court expressed its holding in language beyond that called for by the defendant's argument or the facts of the case. The Court stated: "An indictment returned by a legally constituted and unbiased grand jury, . . . if valid on its face, is enough to call for trial of the charge on the merits."<sup>125</sup> The Court declined to adopt the standard advanced by Justice Burton, who argued that an indictment should be quashed "if it is shown that the grand jury had before it no substantial or rationally persuasive evidence . . . ."<sup>126</sup> The Court, in *Costello*, sought to avoid the prospect of a pretrial hearing on the sufficiency of the evidence to support the indictment in every case. Unfortunately, the Court's language is broad enough to foreclose all challenges based on the quantity or quality of the evidence presented.

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123. The best solution to this problem would undoubtedly be legislative action. See Arenella, *supra* note 4. Unfortunately, legislative measures have not been forthcoming.

124. 350 U.S. 359 (1956).

125. *Id.* at 363.

126. *Id.* at 364.

The *Costello* Court's refusal to consider any challenge to the evidence underlying an indictment received criticism from both courts and commentators. Although some courts adhered to the full import of the decision's language,<sup>127</sup> others avoided *Costello*, distinguishing it on its facts from cases in which the evidence before the grand jury was inaccurate or unreliable.<sup>128</sup> Because the holding in *Costello* was narrow, these courts invoked their supervisory authority or the constitutional protection of the defendant from trial without indictment to dismiss indictments based on unreliable, false, or misleading evidence.

In *Bank of Nova Scotia*, the Court eliminated the arguments that had led courts to protect against unreliable evidence in the grand jury. The Court squelched the speculation that *Costello* was no longer good law and continued beyond the narrow holding of *Costello*. The Court held that even a showing that the defendant was prejudiced by the govern-

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127. See *United States v. Adamo*, 742 F.2d 927 (6th Cir. 1984) (indictment which is valid on its face and returned by unbiased jury would not be dismissed even in light of government's withholding of exculpatory evidence and its use of perjured testimony), *cert. denied*, 469 U.S. 1193 (1985); *United States v. Schlesinger*, 598 F.2d 722 (2d Cir.) (superseding indictment valid on its face so court cannot consider the adequacy of the evidence supporting it even though prosecution's summary of prior grand jury testimony was hearsay), *cert. denied*, 444 U.S. 880 (1979); *United States v. Ruyle*, 524 F.2d 1133 (6th Cir. 1975) (withholding exculpatory evidence from grand jury is not grounds for dismissing indictment), *cert. denied*, 425 U.S. 934 (1976); *United States v. Kysar*, 459 F.2d 422 (10th Cir. 1972) (court cannot look behind an indictment which is valid upon its face to determine whether it is based on adequate evidence); *United States v. Kozerski*, 518 F. Supp. 1082 (D.N.H. 1981) (indictment based upon hearsay testimony is not invalid), *cert. denied*, 469 U.S. 842 (1984); *United States v. Reilly*, 456 F. Supp. 211 (E.D. Pa. 1978) (indictment based upon hearsay evidence is not invalid), *cert. denied*, 444 U.S. 903 (1979). The Supreme Court reaffirmed the *Costello* holding in recent decisions prior to *Bank of Nova Scotia*. See *United States v. Calandra*, 414 U.S. 338 (1974); *United States v. Blue*, 384 U.S. 251 (1966); *Lawn v. United States*, 355 U.S. 339 (1958).

128. See *United States v. Udziela*, 671 F.2d 995 (7th Cir. 1982) (when perjured testimony is discovered before trial, government has option of withdrawing the tainted indictment and seeking a new one based upon untainted evidence, or, in the alternative, an *in camera* judicial hearing to determine sufficiency of the other evidence will be held); *United States v. Samango*, 607 F.2d 877 (9th Cir. 1979) (dismissing indictment due to intentional suppression of favorable testimony); *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974) (reversing conviction due to the denial of due process when government allowed defendant to stand trial on indictment which it knew was based in part upon perjured testimony); *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972) (dismissing indictment when the two witnesses who were in best position to inform grand jury of what occurred prior and subsequent to arrest were not called before grand jury and sole witness was police officer who had limited personal knowledge of events and grand jury was not informed of this lack of personal knowledge); *United States v. Arcuri*, 405 F.2d 691 (2d Cir. 1968) (indictment based solely upon hearsay would not be set aside because defendants were not prejudiced; it was inconceivable that grand jury would have refused to indict based upon the other evidence presented); *Jones v. United States*, 342 F.2d 863 (D.C. Cir. 1964) (remanding case to district court to determine if untainted evidence, other than illegally obtained confessions, supported the grand jury's indictment).



ment's inaccurate and misleading summaries presented immediately prior to the grand jury's deliberation and vote did not warrant dismissal, absent at least a showing of knowing prosecutorial misconduct.<sup>129</sup> *Bank of Nova Scotia* thus substantially curtailed the authority—never clear, but relied upon by some lower courts—to exercise supervisory authority to control the quality of the evidence on which grand juries indict.

*Bank of Nova Scotia* leaves open one avenue of attack. Different concerns, which are taken more seriously by the Court, are brought into play if prosecutors intentionally mislead the grand jury. In *Bank of Nova Scotia*, the Court noted that the record did not support a finding that the prosecutors knew the evidence was false or caused the agents to present false evidence.<sup>130</sup> Thus, a defendant whose indictment is based on false or misleading information presented to the grand jury may be able to obtain relief if the defendant can demonstrate that the prosecutors had knowledge of the false or misleading information. That avenue is narrow, however. In *Bank of Nova Scotia*, the district court found that, “[u]nbeknown to the grand jurors, the government attorneys contemporaneously entertained serious doubts as to the accuracy of certain critical ‘facts’ contained in the summaries.”<sup>131</sup> Doubts, the Supreme Court held, are not enough; the defendant must establish knowledge. This evidentiary hurdle is substantial.<sup>132</sup>

Furthermore, even the defendant who proves knowing presentation of false evidence may not be able to persuade the court to dismiss the indictment. The defendant may have to persuade the court that the false evidence meets some standard of materiality. An argument could be made that knowingly misleading the grand jury is misconduct so serious that the indictment should be dismissed, even in the absence of prejudice, to protect the criminal justice process. However, the Court has been unresponsive to that argument in the trial setting. In a criminal trial, knowing presentation of false testimony is not automatically a basis for reversal of the conviction obtained.<sup>133</sup> The Court has held that due process mandates a new trial if the false testimony could “in any reasonable likelihood have affected the judgment of the jury.”<sup>134</sup> The standard fa-

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129. *Bank of Nova Scotia*, 487 U.S. at 260.

130. *Id.* at 261.

131. *United States v. Kilpatrick*, 594 F. Supp. 1324, 1340 (D. Colo. 1984), *rev'd*, 821 F.2d 1456 (10th Cir. 1987), *aff'd sub nom. Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988).

132. *See, e.g., United States v. Spillone*, 879 F.2d 514 (9th Cir. 1989).

133. *See United States v. Bagley*, 473 U.S. 667 (1985).

134. *Id.* at 677 (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972)).

vors a new trial because the knowing use of perjured testimony involves both prosecutorial misconduct and the corruption of the truth-seeking function of the trial process.

In its opinions addressing the appropriate response to the withholding of exculpatory information, the Court's primary emphasis has been on the truth-seeking aspect of the trial and the fact-finding fairness of the proceeding, not on the deterrence of prosecutorial misconduct or the proceeding's procedural fairness.<sup>135</sup> The Court may be expected to adopt a similar approach to the presentation of false information to the grand jury. It seems unlikely that the Court will treat knowing presentation of inaccurate evidence as *per se* grounds for dismissal of an indictment. Rather, the Court is more likely to demand a finding of prejudice to the defendant.

In *Bank of Nova Scotia*, the Court defined the prejudice a defendant must demonstrate to obtain dismissal of an indictment on grounds of nonconstitutional error. The defendant must show that the error was a substantial influence on the grand jury's decision to indict.<sup>136</sup> Thus, the defendant seeking pretrial relief from grand jury error bears the burden of establishing the impact of the error on the grand jury's process. Relying on the analogy to the exculpatory evidence decisions, the Court should dismiss an indictment if the defendant establishes knowing presentation of false evidence by the prosecutor and establishes a reasonable likelihood the false or misleading evidence influenced the grand jury's decision to indict.<sup>137</sup> The knowing presentation of false evidence is prosecutorial misconduct that threatens the independence of the grand jury, arguably violating the defendant's right to indictment by a grand jury under the fifth amendment. As in the criminal trial, the conduct should be treated as constitutional error if the defendant can show it is reasonably likely that the false evidence had an impact on the process. If

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135. See *United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Agurs*, 427 U.S. 97 (1976). There are two positions concerning the prosecutor's duty to reveal exculpatory evidence. See *United States v. Page*, 808 F.2d 723 (10th Cir. 1987) (when substantial exculpatory evidence is discovered during investigation, prosecutor has duty to reveal it to grand jury). *But see* *United States v. Adamo*, 742 F.2d 927, 937-38 (6th Cir. 1984) (no duty to reveal exculpatory evidence discovered during investigation), *cert. denied*, 469 U.S. 1193 (1985).

136. *Bank of Nova Scotia*, 487 U.S. at 259.

137. See *United States v. Page*, 808 F.2d 723 (10th Cir. 1987) (indictment may be dismissed only if the prosecutorial misconduct is so flagrant that it significantly infringes on the grand jury's independence).

the defendant can establish prejudice in this way, the indictment should be dismissed.

There may be an additional barrier to relief based on the prosecutor's knowing presentation of false or misleading evidence to the grand jury. If the defendant is convicted at trial, the Court may view the error as harmless. In both *Mechanik*<sup>138</sup> and *Midland*,<sup>139</sup> the Court held that a violation of a grand jury rule designed to protect against improper indictment would be harmless if the defendant was convicted on sufficient evidence at trial. On the other hand, the Court has held that constitutional error in the selection of the grand jury is not harmless. While the Court has had no occasion to consider whether *Mechanik's* harmless error rule applies to other constitutional errors in the grand jury process, there is no reason to doubt that the violation would be deemed harmless if viewed after conviction at trial.

In the decisions concerning exculpatory evidence and false testimony at trial, the Court has declined to link the relief awarded to the wrongfulness of the prosecutor's conduct. Instead, the Court has held that, regardless of how wrongful the prosecution's conduct, the defendant establishes a constitutional violation only by demonstrating the likelihood that the wrong affected the accuracy of the fact-finding process to the defendant's detriment. If false or misleading testimony is presented to the grand jury, but is not presented at trial, and the evidence presented at trial is sufficient to support the conviction, the accuracy of the trial as a fact-finding process is untainted by the grand jury violation. Thus, there is no on-going harm to the defendant that warrants relief.

If, indeed, the Court applies this harmless error analysis to constitutional grand jury violations, the defendant faces a practical problem that renders supervision of the grand jury through this avenue almost meaningless. The defendant will rarely be able to establish the grand jury violation until after the trial has commenced. Often, the defendant has no way to discover the presentation of false or misleading evidence until the mid-trial discovery of witness' transcripts is disclosed under 18 U.S.C. § 3500.<sup>140</sup>

A pretrial order to turn over all transcripts of proceedings before the grand jury, such as that in *Bank of Nova Scotia*, is extremely unusual. More typically, before the trial stage, the defense has very little informa-

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138. *Mechanik*, 475 U.S. at 70-71.

139. *Midland Asphalt*, 109 S. Ct. at 1498.

140. 18 U.S.C. § 3500 (1985).

tion regarding the grand jury proceedings. Witnesses friendly to the defense may provide information, but usually know only what happened during their grand jury appearances. Otherwise, the defense receives only what the government is willing to provide; grand jury transcripts are not included in the items that must be disclosed in pretrial discovery. The defense gains access only to the grand jury transcripts during trial, but only for those witnesses who testify at the trial.<sup>141</sup>

Thus, the defendant is unlikely to have the basis for a pretrial motion to dismiss on the ground that the prosecutor intentionally misled the grand jury. The first opportunity to move for dismissal will be midtrial, at which time it is likely to be deferred until post-trial. At that point, the motion is irrelevant. A conviction renders the error harmless; an acquittal moots the question. Only a mistrial or a successful motion for a new trial would leave the case in a posture that would warrant a motion to dismiss based on the evidence of misconduct revealed at trial.

What this analysis suggests is that the Court is doing more than merely turning its back on problems of unreliable evidence upon which an indictment is based. The Court is also establishing a framework within which serious misconduct by the prosecutor in the grand jury—the knowing presentation of false or misleading evidence—is likely to go unredressed. The Court's approach to unreliable evidence precludes exercise of the supervisory authority to ensure that the grand jury responsibly executes its shield function.

## V. CONCLUSION

The United States Supreme Court has conveyed the message that efforts to supervise the grand jury are not welcome. It has placed the strongest sanctions for abuse off limits and has directed the lower courts to restrict their exercise of supervisory authority. The courts and legislature must explore options for exerting supervision over the grand jury. If the enforceable rules do not assure its function as a shield, then its constitutional footing must be questioned. If it can be abused with impunity as a sword, it represents an intolerable hazard. Little can be done at this stage to give substance to the grand jury's shield role, but the courts and legislature must restrict its potential for abuse as the prosecutor's sword.

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141. The prosecution ordinarily has no obligation to disclose the grand jury transcript of a witness who does not appear at trial. *See* 18 U.S.C. § 3500. In fact, the defense may not even get the entire grand jury testimony of a witness who does testify at trial. *See, e.g.,* *United States v. Kouba*, 632 F. Supp. 937 (D.N.D. 1986).

