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Grand Jury - Witnesses - Witness May Not Refuse to Answer Questions Predicted upon Evidence Obtained from Unlawful Search and Seizure

Terry L. Adkins

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modern Indian problems will the day come when the state courts are asked to enter the arena. Justice demands that remedies be provided where tribal jurisprudence is inadequate and access to state courts is prohibited. But again the Indian citizens hold the key; only when they feel confident that the advantages of state jurisdiction outweigh the disadvantages, will they act.

JOEL JOHNSON

GRAND JURY—WITNESSES—WITNESS MAY NOT REFUSE TO ANSWER QUESTIONS PREDICATED UPON EVIDENCE OBTAINED FROM UNLAWFUL SEARCH AND SEIZURE.

The defendant's place of business was searched by agents of the Federal Bureau of Investigation under a warrant issued in connection with a gambling investigation. The warrant was restricted to the discovery and seizure of bookmaking records and wagering materials. One federal agent, with knowledge of a current federal investigation of loansharking activities, seized suspected loansharking records during the search.

A special grand jury investigating possible loansharking activities subpoened defendant to ask him questions concerning the evidence seized at his place of business. Defendant appeared before the grand jury but refused to testify.[1] After the Government requested transactional immunity for the defendant,[2] the District Court ruled the search and seizure illegal and granted the defendant's motion for suppression and return of the seized evidence.[3] The District Court further ordered that defendant need not answer any of the grand jury's questions concerning the illegally obtained evidence.[4]

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1. The defendant invoked his Fifth Amendment privilege against self-incrimination. United States v. Calandra, 414 U.S. 338, 341 (1974).

2. *Id.* The Government moved for transactional immunity under Section 2514 of Title 18 of the United States Code which, in part, provides:

> No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence . . . against him in any court.

18 U.S.C. § 2514 (1970).

3. In re Calandra, 332 F. Supp. 737, 746 (N.D. Ohio 1971), *aff'd sub nom.* United States v. Calandra, 465 F.2d 1218 (6th Cir. 1972), *rev'd* 414 U.S. 338 (1974). The defendant moved for suppression and return of the evidence under Rule 41(e) of Federal Rules of Criminal Procedure which, in part, provides:

> A person aggrieved by an unlawful search and seizure may move the district court . . . for the return of property. . . . If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial.

FED. R. CRIM. P. 41(e).

4. 332 F. Supp. at 746.

The Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court.[5] On appeal, the Supreme Court *held* that the defendant could not refuse to answer the grand jury's questions although the questions were based on illegally obtained and incompetent evidence. *United States v. Calandra*, 414 U.S. 338 (1974).

Prior to 1914, the general view of the nation's state and federal courts was that all material and relevant evidence is admissible in a criminal case regardless of the manner in which is was obtained.[6] The situation changed in 1914 when the United States Supreme Court concluded that illegally obtained evidence could not be used in a federal criminal prosecution.[7] Thereafter, this rule, commonly known as the "federal rule" or the "exclusionary rule", was uniformly followed in the federal courts.[8] The rule laid down in *Weeks v. United States*[9] was explained further in *Wolf v. Colorado*[10] where the Court concluded that although the Fourth Amendment protection against unreasonable search and seizure was incorporated by the Fourteenth Amendment,[11] state courts were not required to exclude evidence obtained in violation of the Fourth Amendment.[12]

Prior to *Mapp v. Ohio*[13] a number of state courts followed the common law rule that evidence obtained by an unlawful search and seizure was not rendered incompetent or inadmissible because of the wrongful method by which it was obtained.[14] However, a number of state courts also adopted the federal exclusionary rule, holding that evidence obtained by means of an unlawful search and seizure was not admissible against an accused in a criminal prosecution.[15]

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5. 465 F.2d at 1227. The Court of Appeals agreed with the District Court's conclusion that the search of defendant's business and seizure of his property was unlawful. *Id.* at 1226-27 n.5. While not agreeing with this finding, the Government did not request review of this issue nor did it challenge the District Court's order returning the illegally seized property to defendant. 414 U.S. at 342 n.2.

6. *E.g.*, Boyd v. United States, 116 U.S. 616 (1886); 8 WIGMORE, EVIDENCE § 2183 (McNaughton rev. 1961); Wolf, *A Survey of the Expanded Exclusionary Rule*, 32 GEO. WASH. L. REV. 193, 194-206 (1963).

7. Weeks v. United States, 232 U.S. 383, 392 (1914).

8. *See, e.g.*, Kremen v. United States, 353 U.S. 346 (1957); McDonald v. United States, 335 U.S. 451 (1948); Trupiano v. United States, 334 U.S. 699 (1948); Steeber v. United States, 198 F.2d 615 (10th Cir. 1952).

9. 232 U.S. 383 (1914).

10. 338 U.S. 25 (1949).

11. *Id.* at 27-28.

12. *Id.* at 28. The Court in *Wolf* stated that the exclusionary rule was not derived explicitly from the Fourth Amendment and thereby not a fundamental and basic right protected by the Fourteenth Amendment, but was a judicially-created rule of evidence. *Id.* In arriving at this conclusion, the Court adopted the Palko v. Connecticut, 302 U.S. 319 (1937) interpretation of the Fourteenth Amendment. *Id.* at 26. However, *Palko* has since been overruled by Benton v. Maryland, 395 U.S. 784, 794 (1969).

For a general discussion of the exclusionary rule as applied to the states see Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1 (1950); Wolf, *supra* note 6, at 196-206.

13. 367 U.S. 643 (1961).

14. *E.g.*, Banks v. State, 207 Ala. 179, 93 So. 293, *cert. denied*, 260 U.S. 736 (1922); State v. Dillion, 34 N.M. 366, 281 P. 474 (1929); Commonwealth v. Chaitt, 380 Pa. 532, 112 A.2d 379, *cert. denied*, 350 U.S. 829 (1955).

15. *E.g.*, People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955); People v. Albea, 2

In 1961, the Supreme Court, in *Mapp v. Ohio*,[16] overruled *Wolf*[17] and held that as a matter of due process, evidence obtained by a search and seizure in violation of the Fourth Amendment is inadmissible in a state court as it is in a federal court.[18] By excluding illegally obtained evidence, the Court contended that violations of constitutional prohibitions would be reduced.[19] The Court also anticipated that the exclusion of such evidence would prevent judicial participation in illegal government conduct.[20]

The grand jury began as an English institution and was transplanted to this country by the early colonists.[21] Today, the grand jury serves dual functions. First, it investigates crimes and initiates criminal prosecutions against those persons who are believed to have committed crimes.[22] Second, the grand jury operates to protect citizens against unwarranted or malicious prosecutions by insuring that no criminal proceeding will be initiated without a disinterested determination of probable guilt.[23] The traditional view is to allow these grand jury functions to operate free of procedural or evidentiary rules.[24] Due to this long-established view, there is disagree-

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Ill. 2d 317, 118 N.E.2d 277 (1954); People v. Weaver, 241 Mich. 616, 217 N.W. 797 (1928). *See also* Wolf, *supra* note 6; Comment, *The Exclusionary Rule in Context*, 50 N.C.L. REV. 1049 (1972); Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319.

16. 367 U.S. 643 (1961).

17. *See* Wolf v. Colorado, 338 U.S. 25 (1949) and text accompanying note 10, *supra*.

18. *Mapp*, therefore, requires all the states to follow the federal exclusionary rule. The Court reached the conclusion that a state's failure to exclude evidence obtained by an unreasonable search and seizure violated a defendant's rights under the due process clause of the Fourteenth Amendment. 367 U.S. at 660, 665.

19. *Id.* at 656, 657. The Supreme Court has expanded the use of the exclusionary rule to areas other than searches and seizures which violate the Fourth Amendment. The Court enforces an exclusionary rule in state and federal criminal proceedings as to confessions obtained in violation of the Fifth and Sixth Amendments (Miranda v. Arizona, 384 U.S. 436 (1966)), identification testimony obtained in violation of these amendments (Gilbert v. California, 388 U.S. 263 (1967)), and evidence obtained by shocking methods which violate the due process clause (Rochin v. California, 342 U.S. 165 (1952).

20. Mapp v. Ohio, 367 U.S. 643, 660 (1961).

In Terry v. Ohio, 392 U.S. 1 (1968), the Court maintained that "[c]ourts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions." *Id.* at 13.

However, Justice Cardozo stated, in People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926), that the rule permitted "[t]he criminal . . . to go free because the constable had blundered." For alternatives to the exclusionary rule, *see Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 514 (1955).

21. *See* Note, *Indictment Sufficiency*, 70 COLUM. L. REV. 876, 880-84 (1970). *See generally* Kaufman, *The Grand Jury—Its Role and Its Power*, 17 F.R.D. 331 (1955); Note, *Exclusion of Incompetent Evidence From Federal Grand Jury Proceedings*, 72 YALE L.J. 590 (1963); Note, *The Grand Jury, Past and Present: A Survey*, 2 AM. CRIM. L.Q. 119 (1964).

22. *See* Note, *The Grand Jury, Past and Present: A Survey*, 2 AM. CRIM. L.Q. 119 (1964). *See generally* Note, *The Grand Jury as an Investigation Body*, 74 HARV. L. REV. 590 (1961); Morse, *A Survey of the Grand Jury System*, 10 ORE. L. REV. 101 (1931).

23. Orfield, *The Federal Grand Jury*, 22 F.R.D. 343, 394 (1958). *See generally* ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL, (1947) 144-46.

The Supreme Court has suggested that the grand jury "serves the invaluable function . . . of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." Wood v. Georgia, 370 U.S. 375, 390 (1962). *See generally* Hale v. Henkel, 201 U.S. 43, 59 (1906); Note, *Grand Jury: Bulwark of Prosecutorial Immunity?*, 3 LOYOLA U.L.J. (Chicago) 305 (1972).

24. *See* Blair v. United States, 250 U.S. 273, 282 (1919) (holding a witness before a

ment as to the propriety of applying the exclusionary rule in grand jury proceedings.[25]

It is the Supreme Court's extreme reluctance to impose external controls upon grand jury proceedings which prevents the implementation of those evidentiary standards.[26] In *Costello v. United States*,[27] the Court predicted destructive delays in grand jury proceedings if indictments were challenged on the ground that incompetent evidence was presented before the grand jury.[28] On other occasions, the Court has argued that the exclusion of incompetent evidence from a grand jury would be contrary to the public's best interests[29] and would entail opening the hearings thereby sacrificing the secrecy believed essential to grand jury proceedings.[30] The circuit and district courts, in construing Supreme Court decisions[31] as a

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grand jury cannot object to questions on grounds of incompetency or irrelevance); Costello v. United States, 350 U.S. 359, 363-64 (1956) (holding indictments based on hearsay are valid); United States v. Lawn, 355 U.S. 339, 345 (1958) (holding indictments based on information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination are valid). *See generally* Note, *Exclusion of Incompetent Evidence from Federal Grand Jury Proceedings*, 72 YALE L.J. 590 (1963); Silverstein, *Federal Grand Jury Testimony and the Fifth Amendment*, 1968 WASH. U.L.Q. 215, 216.

However, a grand jury's subpoena power is not unlimited. Brown v. United States, 359 U.S. 41, 49 (1959). It may not violate a valid privilege established by the Constitution, statute or common law. United States v. Bryan, 339 U.S. 323 (1950). It may not violate a defendant's Fifth Amendment privilege against self-incrimination unless the witness is granted immunity. Kastigar v. United States, 406 U.S. 441, 462 (1972).

25. *Compare* In Re Fried, 161 F.2d 453 (2d Cir. 1947), *with* Centracchio v. Garrity, 198 F.2d 382 (1st Cir. 1952). In *Fried*, the court concluded that incompetent evidence should be suppressed at the grand jury level so as to fulfill the spirit of our civil liberties. 161 F.2d at 458-60. In *Centracchio*, the court feared that to allow individuals to suppress incompetent evidence would produce a tremendous burden on grand jury proceedings which would not be in the public's best interest. 198 F.2d at 388.

26. *See* United States v. Lawn, 355 U.S. 339, 345 (1958); Costello v. United States, 350 U.S. 359, 363-64 (1956); Blair v. United States, 250 U.S. 273, 282 (1919).

27. 350 U.S. 359 (1956).

28. *Id.* The court said:

> If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits.

Id. But see Costello v. United States, 350 U.S. 359, 364 (1956) where Justice Burton, concurring in Costello, maintained that an indictment should be quashed if the grand jury possessed "no substantial or rationally persuasive evidence upon which to base its indictment." *Id.*

29. United States v. Dionisio, 410 U.S. 1, 17 (1973). "Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *Id.*

30. United States v. Procter & Gamble, 356 U.S. 677, 681 (1958). There are five traditional reasons given in support of the policy of secrecy. The first is to encourage the witness to freely express himself without fear of reprisals from the outside. The second is to prevent perjury by witnesses who conform their testimony to that given earlier. The third is to prevent possible defendants from leaving the jurisdiction. The fourth is to protect those suspected of crime but not indicted from extra-legal sanctions. The fifth is to assure the grand jury freedom from outside interferences. Orfield, *The Federal Grand Jury*, 22 F.R.D. 343, 403 (1958). *But see* Note, *Unconstitutionally Obtained Evidence Before the Grand Jury as a Basis for Dismissing the Indictment*, 27 MD. L. REV. 168, 180 (1967).

31. *E.g.*, Branzenburg v. Hayes, 408 U.S. 665 (1972); Lawn v. United States, 355 U.S. 339 (1958); Costello v. United States, 350 U.S. 359 (1956).

reaffirmation of the propriety of upholding indictments where any of the evidence before the grand jury was competent, have summarily dismissed attacks on grand jury indictments.[32]

There have been two major exceptions to the Supreme Court's reluctance to establish evidentiary standards at the grand jury level. In *Silverthorne Lumber Co. v. United States*,[33] where a grand jury issued subpoenas *duces tecum* to the defendants ordering the production of certain documents previously returned to the defendants after having been unlawfully seized by federal agents, the Court declared the subpoenas invalid because they were based on knowledge gathered from illegally-obtained evidence.[34] In *Gelbard v. United States*,[35] a contempt conviction of a grand jury witness who refused to testify was set aside because the grand jury questions were based upon information obtained from illegal wiretapping and electronic surveillance.[36]

The majority opinion in *Calandra* began by stating that the exclusionary rule is a

> judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.[37]

"The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim,"[38] but "to deter future unlawful

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32. *See* Note, *Unconstitutionally Obtained Evidence Before the Grand Jury as a Basis for Dismissing the Indictment*, 27 MD. L. REV. 168, 174 n.15, 176 nn.30 & 31 (1967). *But see* In Re Grand Jury Proceedings, 450 F.2d 199 (3d Cir. 1971), *cert. denied*, 408 U.S. 922 (1972). The court held in *In Re Grand Jury Proceedings* that a grand jury witness who had been granted immunity may not be held in contempt for refusing to answer questions founded upon information obtained through unlawful electronic surveillance of his conversation. 450 F.2d at 209-10.

33. 251 U.S. 385 (1920).

34. The court in *Silverthorne* stated, "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Id.* at 392; *accord*, In Re Grand Jury Proceedings, 450 F.2d 199, 211-13 (3rd Civ. 1971), *cert. denied*, 408 U.S. 922 (1972). The court in *In Re Grand Jury Proceedings* relied extensively on *Silverthorne* in holding that a witness need not answer grand jury questions founded upon evidence obtained by illegal wiretapping as prohibited by 18 U.S.C. § 2515 (1970).

35. 408 U.S. 41 (1972).

36. In *Gelbard*, the Court construed 18 U.S.C. § 2515 as a means "to ensure that the courts do not become partners to illegal conduct . . ." and "to protect the integrity of court and administrative proceedings." *Id.* at 51; *accord*, In Re Grand Jury Proceedings, 450 F.2d 199, 209-10 (3d Cir. 1971), *cert. denied*, 408 U.S. 922 (1972).

Section 2515 of Title 18 of the United States Code provides:

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

18 U.S.C. § 2515 (1970).

37. 414 U.S. at 348. For discussions concerning whether the exclusionary rule is constitutionally required, see 8 WIGMORE, EVIDENCE § 2184a (1961); Wolf, *supra* note 6.

38. 414 U.S. at 347. The Court stated that the defendant should seek other remedies in redressing the injury to his privacy. The defendant may entertain an action for damages against the agents who conducted the search. (Bivens v. Unknown Agents of F.B.I., 403

police conduct and thereby to effectuate the guarantee of the Fourth Amendment against unreasonable search and seizures."[39] The majority pointedly questioned the utility of the exclusionary rule as a deterrent to unlawful police conduct.[40] Without resolving that issue, the Court observed that the exclusionary rule is not applicable "in all proceedings or against all persons,"[41] but instead is restricted to those areas where its objectives are most efficiently served.[42]

In weighing the exclusionary rule's "potential injury to the historic role and functions of the grand jury against the potential benefits of the rule as applied in this context,"[43] the majority concluded that an extension of the exclusionary rule to grand jury proceedings would be destructive and disruptive.[44] This conclusion, emphasized the majority, does not encourage prosecutors to gain grand jury indictments founded upon illegally obtained evidence.[45]

U.S. 388 (1971)). Defendant may also attempt to have the illegally seized property returned to him and to prevent the property and its fruits from being used as evidence against him in a criminal trial. (Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931)). *Id.* at 354 n.10.

An increasing amount of attention is being paid to the concept of tort remedies for police violations of constitutional rights. It is argued that the availability of tort actions, such as false imprisonment and assault would better act as deterrents to police illegality. For such a process to succeed, however, new ideas must be incorporated into the basic civil action. These new elements are "(1) governmental liability, (2) provision for minimum liquidated damages, and (3) restriction of the clean hands' defenses which prevent most potential plaintiffs from going to court." Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 514 (1955). *See generally* Note, *Section* 1983: *A Civil Remedy for the Protection of Federal Rights*, 39 N.Y.U.L. REV. 839 (1964).

39. 414 U.S. at 347. In Elkins v. United States, 364 U.S. 207 (1960), the Court stated:

> The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.

Id. at 217.

40. 414 U.S. at 347 n.5. "There is some disagreement as to the practical efficacy of the exclusionary rule. . . . We have no occasion in the present case to consider the extent of the rule's efficacy in criminal trials." *Id.* *See* note 21, *supra.*

41. 414 U.S. at 348. The ability to invoke the exclusionary rule is confined to those situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search. *Id.*

42. *Id.* This consideration is contained in the requirement of standing to invoke the exclusionary rule. The standing rule is based on a recognition that the need for deterrence, and hence the rationale for the exclusionary rule, is strongest where the Government's unlawful conduct would cause the imposition of a criminal sanction on the search victim. *See* Brown v. United States, 411 U.S. 223 (1973). *See generally* Comment, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. CHI. L. REV. 342 (1967).

43. 414 U.S. at 349.

44. *Id.*

> The *Calandra* Court stated further:
> Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best. Whatever deterrence of police misconduct may result from the exclusion of illegally-seized evidence from criminal trials, it is unrealistic to assume that application of the rule to grand jury proceedings would significantly further that goal. Such an extension would deter only police investigation consciously directed toward the discovery of evidence solely for use in a grand jury investivation.

Id. at 351. This view, however, appears to ignore the secondary function of the grand jury as protection against tyrannical prosecutions. If this function is valid, then any indictment based on illegal conduct by the government should have no legal effect. To allow the indictment to stand demonstrates either a wilful disregard of an individual's right to be free from arbitrary trial or acknowledges a prosecutor's right to presently initiate proceedings and worry about obtaining the evidence required to convict later. Note, *Unconstitutionally Obtained Evidence Before the Grand Jury as a Basis for Dismissing the Indictment*, 27 MD. L. REV. 168, 178-79 (1967).

45. 414 U.S. at 351. The majority maintained that any "incentive to disregard the re-

The majority also stated that *Silverthorne*[46] does not control this case because the defendants in that case "had previously been indicted by the same grand jury thereby enabling them to invoke the exclusionary rule on the basis of their status as criminal defendants."[47]

The dissent characterized the majority opinion as a "downgrading" of the exclusionary rule.[48] The rule, the dissent argued, is not merely a judicially created remedy, but is inherent in the Fourth Amendment's limitation upon governmental encroachment of individual privacy.[49] The dissent agreed with the majority's argument that the curtailment of unlawful police conduct was anticipated from the application of the exclusionary rule.[50] However, the dissent maintained that the rule's ultimate objective is not its possible deterrent effect, but is instead the avoidance of judicial involvement in official lawlessness.[51] The exclusionary rule, according to the dissent, assures the people that government will not profit from its lawless behavior.[52]

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quirement of the Fourth Amendment solely to obtain an indictment from a grand jury is substantially negated by the inadmissibility of the illegally seized evidence in a subsequent criminal prosecution of the search victim." *Id.*

It would appear, however, that a prosecutor might request an indictment based on illegally obtained evidence with hopes of securing sufficient competent evidence to achieve a conviction by the time the trial occurs.

46. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) and text accompanying note 32, *supra.*

47. 414 U.S. at 352 n.8. In addition, there was a judicial determination that the search and seizure was illegal prior to the issuance of the grand jury subpoenas and the Government's desire to recapture the documents was based on the belief that they might be useful in the criminal prosecution previously authorized by the grand jury. *Id.* at 352-353 n.8.

The Court also distinguished Gelbard v. United States, 408 U.S. 41 (1972) as a decision limited to the interpretation of 18 U.S.C. § 2515 (1970), which was a congressional effort to provide special safeguards against the unique problems presented by abuses of wiretapping and electronic surveillance. *Id.* at 355 n.11. *See* Gelbard v. United States, 408 U.S. 41, 51 (1972); In Re Grand Jury Proceedings, 450 F.2d 199, 209-10 (3d. Cir. 1971) and text accompanying note 32, *supra.*

48. 414 U.S. at 356 (Brennan, J., dissenting).

49. *Id.* at 360. This is explicitly stated in the Supreme Court's decision in Mapp v. Ohio, 367 U.S. 643, 651 (1961).

If the exclusionary rule is a constitutional requirement, then it is arguable that absolutely "no use of illegally obtained evidence is permitted, and, therefore, the courts are not at liberty to decide at what stages of a criminal prosecution such evidence may be utilized by not applying the exclusionary rule." Note, *Unconstitutionally Obtained Evidence Before the Grand Jury as a Basis for Dismissing the Indictment*, 27 MD. L. REV. 168, 179 (1967).

50. 414 U.S. at 356 (Brennan J., dissenting). *See* note 39 and accompanying text, *supra.*

51. 414 U.S. at 356-57 (Brennan J., dissenting).

The Court in *Weeks* stated:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

232 U.S. at 392.

52. 414 U.S. at 357 (Brennan J., dissenting). In considering the confrontation between the desire to detect and apprehend criminals and the idea that government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained, Mr. Justice Holmes concluded, "We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part." Olmstead v. United States, 277 U.S. 438, 470 (1928) (dissenting opinion).

The dissent's basic position was that the decision in *Silverthorne*[53] controlled this case.[54] The majority was criticized for incorrectly distinguishing *Silverthorne* on the basis that there the defendant could invoke the exclusionary rule due to his status as a criminal defendant.[55] The majority's attempt to circumscribe *Silverthorne* by its suggestion to the defendant that his only avenue of redress is tort action for damages[56] caused the dissent to conclude that Government had been given clearance to profit from its lawlessness if it was willing to pay a price.[57]

The *Calandra* Court has decided against the extension of the exclusionary rule to grand jury proceedings by emphasizing its probable marginal deterrence of illegal police conduct. However, the Court's attention has been directed solely towards the inquisitorial function of the grand jury.[58] The Court has ignored the equally valuable function of the grand jury as a protection against prosecutions founded upon personal hatred, maliciousness and political oppression.[59] If this grand jury function is to enjoy judicial support, then it must be concluded that any indictment based on illegal or incompetent evidence will not be given legal effect.[60]

Furthermore, the exclusionary rule should be extended to grand

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53. 251 U.S. 385 (1920) and text accompanying note 32, *supra*.

54. 414 U.S. at 362-63 (1974) (Brennan, J., dissenting). It appeared to the dissent that the majority had overruled *Silverthorne*. However, since *Silverthorne* was decided in 1920, the Court has gradually developed exceptions to the rule laid down in that case. *See* Harris v. New York, 401 U.S. 222 (1971); Lawn v. United States, 355 U.S. 339 (1958); Costello v. United States, 350 U.S. 359 (1956).

55. 414 U.S. at 362 (Brennan, J., dissenting). The dissent maintained that the Court overlooked the possibility that the grand jury's interest in recapturing the original documents might have been directed towards further criminal charges against the Silverthornes. The dissent also pointed out the fact that the majority argued that Silverthorne's claim was not raised for the first time in a pre-indictment motion of a grand jury proceeding, therefore causing no delay. Yet, the majority ignored the issue of grand jury delay in its discussion of the District Court order which removed the illegally obtained evidence from the grand jury. *Id.* at 362-63 n.2.

56. *See* discussion accompanying note 37, *supra*.

57. 414 U.S. at 365 (Brennan, J., dissenting). The dissent also noted the majority's questioning of the exclusionary rule's usefulness and declared its apprehension that the rule may be thrown aside.

> I am left with the uneasy feeling that today's decision may signal that a majority of my colleagues have positioned themselves to reopen the door still further and abandon altogether the exclusionary rule in search-and-seizure cases; for surely they cannot believe that application of the exclusionary rule at trial furthers the goal of deterrence, but that its application in grand jury proceedings will not "significantly" do so. . . . I thus fear that when next we confront a case of a conviction rested on illegally seized evidence, today's decision will be invoked to sustain the conclusion in that case also that "it is unrealistic to assume" that application of the rule at trial would "significantly further" the goal of deterrence. . . .

Id. at 365-66.

58. *See* note 22 and accompanying text, *supra*.

59. In the entire opinion of the Court, the majority makes only one reference to the grand jury's "protection" function. *See* 414 U.S. at 343.

60. It would appear that the decisions in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) and Gelbard v. United States, 408 U.S. 41 (1972) support this point of view.

The "protection" role of the grand jury cannot be furthered if the grand jury is allowed to consider and utilize illegally obtained evidence. It seems probable that prosecutions founded upon personal hatred, maliciousness and political oppression will be easier to initiate where the grand jury is permitted to ignore the competency of the evidence.

jury proceedings because it demonstrates to all that society will attach serious consequences[61] to violations of constitutional rights. In *Calandra*, the Court has approached the point of allowing the Fourth Amendment to become a "dead letter."[62] To counter this movement the exclusionary rule should be applied to grand jury proceedings in order to "make the Fourth Amendment something real."[63] To do otherwise would render constitutional guarantees mere platitudes.

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61. These "serious consequences" include the inability of prosecutors to achieve criminal convictions where the evidence required to convict is illegally obtained. "By demonstrating that society will attach serious consequences to violations of constitutional rights, to exclusionary rule invokes and magnifies the moral and educative force of the law." 414 U.S. at 366 (Brennan, J., dissenting), *quoting* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 756 (1970). *See generally* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972).

62. 414 U.S. at 356 (Brennan, J., dissenting).

63. *Id.* at 361. "A guarantee that does not carry with it the exclusion of evidence obtained by its violation is a chimera." *Id.*