University of Dayton Law Review

Volume 19 | Number 2 Article 8

1-1-1994

A Proposal to Prevent Unlawful Bodily Intrusion in the Context of a Grand Jury Subpoena Duces Tecum

Rosemary Elizabeth-Anne Smith
University of Dayton

COMMENTS

A PROPOSAL TO PREVENT UNLAWFUL BODILY INTRUSION IN THE CONTEXT OF A GRAND JURY SUBPOENA DUCES TECUM

I. INTRODUCTION

The Fourth Amendment to the United States Constitution guarantees "the right of the people to be secure in their person . . . against unreasonable [government] searches and seizures."[1] To safeguard this right, courts historically required the government to possess probable cause[2] when it sought to obtain physical evidence such as blood or hair samples.[3] In recent years, federal prosecutors have used the grand jury

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1. U.S. CONST. amend. IV. The Fourth Amendment provides in full:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

2. Generally, probable cause exists when the facts and circumstances are "sufficient to warrant a prudent man in [the] belie[f]" that either a crime has been or will be committed or evidence of a crime will be found in the area to be searched. Beck v. Ohio, 379 U.S. 89, 91 (1964); *see also* United States v. Davis, 458 F.2d 819, 821 (D.C. Cir. 1972) (totality of circumstances "judged in light of officer's experience" establish reasonable basis for belief crime was committed); see *infra* notes 98-102 and accompanying text for a discussion of probable cause in relation to a Fourth Amendment analysis.

3. Cupp v. Murphy, 412 U.S. 291, 295-96 (1973) (taking of fingernail scraping held permissible given existence of probable cause and exception to warrant requirement); Schmerber v. California, 384 U.S. 757, 771 (1966) (blood test permissible given existence of probable cause and exigent circumstances); United States v. Smith, 470 F.2d 377, 380 (D.C. Cir. 1972) (penile swab permissible given existence of probable cause); Brent v. White, 398 F.2d 503, 505 (5th Cir. 1968) (penile tissue scraping permissible given existence of probable cause and exception to warrant requirement), *cert. denied*, 393 U.S. 1123 (1969); United States *ex rel* Parson v. Anderson, 354 F. Supp. 1060, 1087 (D. Del. 1972) (permissible to take pubic hair given existence of probable cause); *see also* Note, *Detention to Obtain Physical Evidence Without Probable Cause: Proposed Rule 41.1 of the Federal Rules of Criminal Procedure*, 72 COLUM. L. REV. 712, 712 (1972) [hereinafter Note, *Proposed Rule 41.1*]. For a further discussion of bodily intrusions and the Fourth Amendment see *infra* text accompanying notes 138-93.

subpoena duces tecum[4] to circumvent the probable cause requirement for searches for physical evidence.[5] A prosecutor's use of the grand jury *subpoena duces tecum* does not necessarily constitute a Fourth Amendment violation.[6] A Fourth Amendment violation does exist, however, where a prosecutor attempts to unreasonably intrude[7] on an individual's interest in personal security, human dignity, or privacy.[8]

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4. A *subpoena duces tecum* commands an individual to produce documents or other things in his possession to the court. *See* FED. R. CRIM. P. 17(c); FED. R. CIV. P. 45; 5 JONES ON EVIDENCE: CIVIL AND CRIMINAL § 23:9 (Spencer A. Gard ed., 6th ed. 1972); *see also* BLACK'S LAW DICTIONARY 1426 (6th ed. 1990).

5. *See, e.g., In re* Grand Jury Subpoena v. (Under Seal), No. 86-5134, 1987 WL 37526 (4th Cir. May 21, 1987); *In re* Grand Jury Proceedings (TS), 816 F. Supp. 1196 (W.D. Ky. 1993); *see also* Note, *United States v. Dionisio: The Grand Jury and the Fourth Amendment*, 73 COLUM. L. REV. 1145, 1145 (1973) [hereinafter Note, *United States v. Dionisio*]. It is important to note that the problem this article discusses is also prevalent at the state level. *See, e.g.*, Milliman v. Minnesota, 774 F.2d 247 (8th Cir. 1985) (court unwilling to define interest protected by Fourth Amendment); Henry v. Ryan, 775 F. Supp. 247 (N.D. Ill. 1991) (citizen brings a § 1983 claim for violation of civil rights). This article is limited, however, to the problem as it exists on the federal level.

6. Federal Rule of Criminal Procedure 17(c) clearly permits the use of the *subpoena duces tecum*. This rule provides:

> (c) FOR PRODUCTION OF DOCUMENTARY EVIDENCE AND OF OBJECTS. A subpoena may also command the person to whom it is directed to produce books, papers, documents or other objects designated therein. The court on motion may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered into evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

FED. R. CRIM. P. 17(c); *see also In re* Grand Jury Subpoena (Battle), 748 F.2d 327, 330 (6th Cir. 1984) (recognizing that grand jury *subpoenas duces tecum* are constitutional).

7. If a prosecutor intentionally violates an individual's Fourth Amendment rights, it is likely the indictment will be dismissed for prosecutorial misconduct and the prosecutor may be subject to charges arising from violations of the governing Code of Professional Responsibility. *See* United States v. Hastings, 461 U.S. 499, 505 (1983) (dismissal appropriate remedy for violation of recognized rights); *see also* Lisa H. Wallach, *Prosecutorial Misconduct in the Grand Jury: Dismissal of Indictment Pursuant to the Federal Supervisory Power*, 56 FORDHAM L. REV. 129, 136-37 (1987).

8. Miller v. United States, 425 U.S. 435, 442-43 (1976) (possible Fourth Amendment violation where privacy interest intruded upon); Cupp v. Murphy, 412 U.S. 291, 294-95 (1973) (Fourth Amendment violation where personal security intruded upon); United States v. Dionisio, 410 U.S. 1, 14-15 (1973) (possible Fourth Amendment violation where privacy and personal security intruded upon); United States v. Mara, 410 U.S. 19, 21-23 (1973) (possible Fourth Amendment violation where privacy and personal security intruded upon); Davis v. Mississippi, 394 U.S. 721, 727-28 (1969) (possible Fourth Amendment violation where privacy and personal security intruded upon); Terry v. Ohio, 392 U.S. 1, 16-20 (1967) (possible Fourth Amendment violation where privacy and personal security intruded upon); Katz v. United States, 389 U.S. 347, 353 (1967) (possible Fourth Amendment violation where privacy intruded upon); *In re* Grand Jury Proceedings (Mills), 686 F.2d 135, 137-38 (3d Cir.) (possible Fourth Amendment violation where personal security intruded upon), *cert. denied*, 459 U.S. 1020 (1982); United States v. Wier, 657 F.2d 1005, 1007 (8th Cir. 1981) (possible Fourth Amendment violation where personal security and human dignity intruded).

Under the existing system, prosecutors retain almost complete control over the grand jury process.[9] Prosecutors generally have complete discretion over what evidence the grand jury considers.[10] In addition, prosecutors have full control over the grand jury's subpoena power.[11] One court stated that grand jury subpoenas are "almost universally [recognized as] instrumentalities of the United States Attorney's Office or of some other . . . prosecutorial department of the executive branch."[12]

Theoretically, the Constitution and the courts serve as a restraint on both the prosecutor and the grand jury. Presently, however, the courts are hesitant to restrain the grand jury. This is a result of the important investigatory function which the grand jury performs and is also a result of a fear of invading upon the executive branch's power to enforce the criminal laws of the United States.[13] The courts' hesitancy to restrict the power of grand juries enables some prosecutors to use the grand jury *subpoena duces tecum* to unreasonably intrude upon an individual's interest in personal security, human dignity, and privacy.[14]

Given the hesitancy of the courts to provide Fourth Amendment protection, it is incumbent upon Congress to protect the individual's interest in personal security, human dignity, and privacy. Congressional amendment of Federal Rule of Criminal Procedure 17(c)[15] is the best

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9. United States v. Santucci, 674 F.2d 624, 632 (7th Cir. 1982) (U.S. Attorney allowed considerable leeway), *cert. denied*, 459 U.S. 1109 (1983); *In re* Grand Jury Investigation (McLean), 565 F.2d 318, 320-21 (5th Cir. 1977) (prosecutor not required to tell court or grand jury reason for requesting information); *see generally* DEBORAH DAY EMERSON, GRAND JURY REFORM: A REVIEW OF KEY ISSUES (1983).

10. *Santucci*, 674 F.2d at 627-31 (prosecutor can issue subpoena without telling grand jury); United States v. Channen, 549 F.2d 1306, 1312 (9th Cir.) (U.S. Attorney's office has considerable latitude in issuing subpoenas), *cert. denied*, 434 U.S. 825 (1977).

11. *See* Doe v. DiGenova, 779 F.2d 74, 80 (D.C. Cir. 1985); *see also* JAMES EISENSTIEN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 182 (1978) (expressing U.S. Attorney's view that the grand jury is a product of the prosecutor).

12. *In re* Grand Jury Proceedings (Schofield), 486 F.2d 85, 90 (3d Cir. 1973).

13. *See* United States v. Dionisio, 410 U.S. 1, 16-18 (1973) (grand jury serves important investigatory function); *Channen*, 549 F.2d at 1313 (court's supervisory powers may not be exercised in a manner encroaching on the other branch's power); *Schofield*, 486 F.2d at 90 (grand jury is prosecutorial and investigatory arm of the executive branch); United States v. (Under Seal), 714 F.2d 347, 350 (4th Cir. 1983) (important grand jury function proscribes court intervention). Federal Rule of Criminal Procedure 17(c) grants courts discretion in determining whether to quash the subpoena. *See* United States v. Nixon, 418 U.S. 683, 702 (1974) (17(c) motion in judge's discretion); *In re* Irving, 600 F.2d 1027, 1034 (2d Cir. 1979) (17(c) motion in judge's discretion); United States v. Berrios, 501 F.2d 1207, 1212 (2d Cir. 1974) (17(c) motion in judge's discretion).

14. *See, e.g., Under Seal*, No. 86-5134 (taking of blood sample is a permissible intrusion into personal security); Henry v. Ryan, 775 F. Supp. 247 (N.D. Ill. 1991) (taking of hair and saliva samples may be permissible).

15. See *supra* note 6 for text of Criminal Rule 17(c).

means of achieving this objective. Substantively, the scope of Criminal Rule 17(c) should be expanded to include all nontestimonial evidence. In addition, the government must be required to prove the reasonableness of the subpoena *in camera*[16] when the subpoenaed party establishes that the subpoena implicates his interest in personal security, human dignity, or privacy. The amendment of Criminal Rule 17(c) in this manner would protect an individual's Fourth Amendment rights while maintaining both the secrecy and efficiency of the grand jury. In addition, Criminal Rule 17(c) as proposed would provide courts with guidance as to the proper balance of involvement between the executive and judicial branches of government in the grand jury context.

Part II of this Comment reviews the grand jury system,[17] the analytical framework of the Fourth Amendment,[18] and the Fourth Amendment's application to bodily intrusions in two United States Supreme Court cases.[19] Part III distinguishes between constitutional and unconstitutional uses of the grand jury *subpoena duces tecum* to obtain physical evidence.[20] Part III then proposes an amendment to Federal Rule of Criminal Procedure 17(c)[21] which is designed to protect individual Fourth Amendment rights while upholding the secrecy and efficiency of the grand jury process.[22] This Comment concludes in Part IV by recommending adoption of the proposed amendment.

II. BACKGROUND

The Fourth Amendment and the grand jury perform similar functions in the American legal system. Both seek to protect individuals from arbitrary and unreasonable government conduct. For instance, the grand jury is intended to prevent the government from arbitrarily and maliciously prosecuting individual citizens.[23] Similarly, the Fourth

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16. *In camera* review refers to a judicial proceeding in which the trial judge is permitted "to examine evidence in a manner . . . [which] protect[s] the confidences" of all parties. State v. Warren, 746 P.2d 711, 714 (Or. 1987). *In camera* review often takes many forms. *Id.* In some instances, *in camera* review simply refers to a hearing in which all spectators are excluded from the courtroom. *See* BLACK'S LAW DICTIONARY 760 (6th ed. 1990). Other times, *in camera* review requires the trial judge to privately review the evidence or confidential files in the absence of the parties and their attorneys. *Warren*, 746 P.2d at 714. The demands of *in camera* review vary depending on the statute authorizing the review. *Id.*

17. *See infra* notes 27-51 and accompanying text.

18. *See infra* notes 52-137 and accompanying text.

19. *See infra* notes 138-93 and accompanying text.

20. *See infra* notes 202-316 and accompanying text.

21. *See infra* text accompanying notes 317-18.

22. *See infra* notes 320-33 and accompanying text.

23. Stirone v. United States, 361 U.S. 212, 218 n.3 (1960). The grand jury in fact performs two important functions in the American legal system. *See* United States v. Calandra, 414 U.S. 338, 343 (1974); Branzburg v. Hayes, 408 U.S. 665, 687 (1972); Wallach, *supra* note 7, at 131-33. The grand jury acts as both the investigatory sword of the State and as a shield against

Amendment is designed to prevent the government from unreasonably intruding upon an individual's interests in personal security, human dignity and privacy.[24] *Winston v. Lee*[25] and *Schmerber v. California*[26] are indicative of the Supreme Court's concern that the government should not violate an individual's interest in bodily integrity, personal security, human dignity, and privacy. These cases illustrate the proper process for applying the Fourth Amendment to bodily intrusion cases.

A. The Grand Jury System

The grand jury system has evolved over time to perform two important functions.[27] First, the grand jury serves as an investigatory

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arbitrary and malicious government prosecution. *Calandra*, 414 U.S. at 343. For a thorough discussion of these two purposes, see *infra* notes 27-30 and accompanying text.

24. *See* United States v. Chadwick, 433 U.S. 1, 9 (1977) (Fourth Amendment protects privacy interest); Terry v. Ohio, 392 U.S. 1, 22 (1968) (human dignity protected by Fourth Amendment); *see also* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.1(b) (1987); James J. Tomkovicz, *Beyond Secrecy for Secrecy's Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province*, 36 HASTINGS L.J. 645, 661-63 (1985).

25. 470 U.S. 753 (1985).

26. 384 U.S. 757 (1966).

27. *See Calandra*, 414 U.S. at 343; *Branzburg*, 408 U.S. at 686-87; Wallach, *supra* note 7, at 131-33.

Historically, the first grand juries were a result of King Henry II's attempt to centralize his control over the English kingdom during the twelfth century. LEROY D. CLARK, THE GRAND JURY 8 (1975); MARVIN E. FRANKEL & GARY P. NAFTALIS, THE GRAND JURY: AN INSTITUTION ON TRIAL 6 (1977); RICHARD D. YOUNGER, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941, 1 (1963); Wallach, *supra* note 7, at 131. Thus, the first grand juries were extremely loyal and subservient to the king. *See* FRANKEL & NAFTALIS, *supra*, at 7. Often the grand jury was "a weapon for the monarch [in] enforcing his law." *Id.* It is during this era that the grand jury developed its reputation as the investigatory sword of the State. *See* CLARK, *supra*, at 9. The investigatory means available to the first grand juries included: their intimate knowledge of the community; their ability to question both witnesses and members of the community; and their ability to compel the production of evidence. Roger T. Brice, Comment, *Grand Jury Proceedings: The Prosecutor, The Trial Judge and Undue Influence*, 39 U. CHI. L. REV. 761, 764 (1972). Using the information gathered through the above means, early grand juries passed an individual on for trial. CLARK, *supra*, at 8. Individuals placed on for trial were most often found guilty of the crimes of which they were accused and subsequently executed. *Id.* at 9.

The grand jury's function began to change from a sword of the state to a "shield . . . against oppressive prosecution." *See* FRANKEL & NAFTALIS, *supra*, at 9. Increasingly, grand juries were reluctant to rubber stamp the monarch's desires. YOUNGER, *supra*, at 2. In two notable cases, the grand jury refused to indict individuals the king wanted prosecuted for the high crime of treason. These cases involved Anthony, Earl of Shaflesburg, and Stephen Colledge. FRANKEL & NAFTALIS, *supra*, at 9. Both men were vocal opponents of King Charles II. *Id.* The king attempted to obtain an indictment against Anthony and Colledge for treason. *Id.* The grand jury in the absence of the king and royal prosecutors heard the evidence and refused to indict. *Id.* Upon the grand jury's refusal to indict, the king presented the evidence to another grand jury in a town more friendly to his position. *Id.* Subsequently, an indictment was handed down. *Id.* Both men were tried and executed. *Id.; see also* CLARK, *supra*, at 2. The grand jury's refusal to indict in these cases is often "mark[ed as] the grand jury's initial assertion of its role as a shield . . . against oppressive prosecution." *See* FRANKEL & NAFTALIS, *supra*, at 9.

body empowered to charge individuals and entities with the commission of a crime.[28] Second, the grand jury serves as a shield for "the innocent against hasty, malicious and oppressive prosecution."[29] Because the grand jury performs these functions, courts afford the grand jury broad investigatory power and permit prosecutors to exercise enhanced control over the grand jury process.[30]

Presently, the prosecutor has complete control over the evidence presented to the grand jury.[31] In addition, the prosecutor is under no duty to reveal exculpatory evidence.[32] The prosecutor may compel individuals to testify or produce evidence through the grand jury's sub-

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Two main factors enhanced the grand jury's ability to act as a shield. *See id.* First, grand juries were increasingly allowed to question witnesses in the absence of the king or his representative. *See id.* at 10. Second, judges were no longer cross-examining jurors about their findings. *See id.* Thus, grand juries had more power and could more freely exercise their dominion. *See id.* Also contributing to the grand jury's assertion of power was "the failure of trial juries to protect the accused . . . . [T]he crown was [now] empowered to fine and imprison jurors who had the temerity to say not guilty." *See id.*

It was with this shielding purpose in mind that the Founding Fathers established the grand jury system in the United States. See CLARK, *supra*, at 19. For much of this Nation's history, the grand jury process remained much the same as it was in the late seventeenth and eighteenth centuries in England. *See* YOUNGER, *supra*, at 246. With the increased urbanization and modernization of American society, however, grand jurors failed to possess an understanding of community activity, formerly possessed by pre-urban grand jurors. *See* YOUNGER, *supra*, at 246. One commentator stated:

> In a busy, densely populated, elaborately organized society - where crime is rife, criminals are tough, many wrongs are mysterious and concealed from laymen - law enforcement is inescapably for professionals. The very notion of the grand jury as beneficent for a free society would be subverted by a band of amateurs engaged in sleuthing, summoning, indicting or not indicting as their "independent" and untutored judgment might dictate.

FRANKEL & NAFTALIS, *supra*, at 22-23. Out of necessity, grand jurors began to rely on the prosecutor to gather relevant facts. *See id.* Thus, "the modern grand jury [is] generally [a] more passive instrument than its precursors" with the prosecutor greatly controlling not only the process but the scope of the investigation. Brice, *supra*, at 764.

28. United States v. R. Enter., Inc., 498 U.S. 292, 297 (1991); *see also Calandra*, 414 U.S. at 343 (grand jury functions to determine if probable cause exists); Costello v. United States, 350 U.S. 359, 362 (1956) (grand jury functions to bring criminal charges); Blair v. United States, 250 U.S. 273, 282 (1919) (grand jury functions as a grand inquest); YOUNGER, *supra* note 27, at 1.

29. Wood v. Georgia, 370 U.S. 375, 390 (1962); *see also Calandra*, 414 U.S. at 343 (grand jury protection against unfounded criminal prosecutions); *Branzburg*, 408 U.S. at 687 n.23 (protection against unfounded criminal prosecutions); CLARK, *supra* note 27, at 11-12; FRANKEL & NAFTALIS, *supra* note 27, at 9; Wallach, *supra* note 7, at 131.

30. *R. Enter., Inc.*, 498 U.S. at 297 ("[a]s a necessary consequence of its investigatory function, the grand jury paints with a broad brush"); *see also Calandra*, 414 U.S. at 343 (grand jury has broad power because of its "special role in ensuring fair and effective law enforcement"); *Blair*, 250 U.S. at 282 ("[i]t is a grand inquest . . . the scope of whose inquiries is not to be limited narrowly by questions of propriety"); Note, *United States v. Dionisio*, *supra* note 5, at 1145-46.

31. United States v. Channen, 546 F.2d 1306, 1312; *see also* Note, *The Grand Jury as an Investigatory Body*, 74 HARV. L. REV. 590, 596 (1961).

32. United States v. Williams, 112 S. Ct. 1735, 1740 (interim ed. 1992).

poena power.[33] Once issued, a subpoena carries the force and effect of law, and an individual who refuses to comply may be subject to contempt sanctions.[34] A subpoenaed party, however, has two methods by which to challenge the subpoena before it is judicially enforced. First, Federal Rule of Criminal Procedure 17(c) provides that a subpoenaed party may move to quash the subpoena on the grounds that it is unreasonable or oppressive.[35] Second, the individual may challenge the subpoena on the grounds that it is violative of his Fourth Amendment rights.[36]

The subpoenaed party usually begins a 17(c) challenge immediately after the subpoena is served. At this time, the subpoenaed party's foremost concern is satisfying his burden of proving that the subpoena is unreasonable or oppressive.[37] To satisfy this burden, the subpoenaed party must demonstrate that the evidence sought is clearly irrelevant to the case or that the request is overly broad or indefinite.[38] Grand jury action, however, is usually presumed to be reasonable.[39] Two factors give rise to this presumption. First, the grand jury is an arm of the court, and courts generally presume that their own actions are reasona-

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33. Doe v. DiGenova, 779 F.2d 74, 80 (D.C. Cir. 1985) (U.S. Attorney may issue subpoena); United States v. Santucci, 674 F.2d 624, 627 (7th Cir. 1982) (U.S. Attorney may issue subpoena without prior authorization), *cert. denied*, 459 U.S. 1109 (1983); *In re* Grand Jury Proceedings (Schofield), 486 F.2d 85, 90 (3d Cir. 1973) ("[subpoena] is issued pro forma and in blank to anyone requesting [it]"); *see* EISENSTEIN, *supra* note 11, at 182; FRANKEL & NAFTALIS, *supra* note 27, at 21; *see generally* EMERSON, *supra* note 9. Although the prosecutor and the grand jury may issue a subpoena, the grand jury itself does not have the power to enforce its order and compel an individual to appear. *Williams*, 112 S. Ct. at 1743. The grand jury must rely on the court to enforce its order and, therefore, the power to compel appearance derives from the court and the grand jury's status as an appendage of the court. *See* Brown v. United States, 359 U.S. 41, 49 (1959); *see also* FRANKEL & NAFTALIS, *supra* note 27, at 22-23.

34. *See* Levine v. United States, 362 U.S. 610, 617 (1960) (contempt appropriate for noncomplying witness); Baylson v. Disciplinary Bd. of Supreme Ct. of Pa., 975 F.2d 102, 106 (3d Cir. 1992) (17(g) contempt is a method to enforce compliance), *cert. denied*, 113 S. Ct. 1578 (interim ed. 1993).

35. FED. R. CRIM. P. 17(c) (1988). See *supra* note 6 for the text of this rule.

36. United States v. Calandra, 414 U.S. 338, 346 (1974) (Fourth Amendment challenge is permissible where grand jury invades legitimate Fourth Amendment interest); United States v. Dionisio, 410 U.S. 1, 11 (1973) (Fourth Amendment restraint on grand jury); Hale v. Henkel, 201 U.S. 43, 76 (1906) (individual can bring challenge to subpoena).

37. United States v. R. Enter., Inc., 498 U.S. 292, 301 (1991) (burden of showing unreasonableness is on subpoenaed party); United States v. Susskind, 965 F.2d 80, 86 (6th Cir. 1992) (subpoenaed party must show subpoena to be overbroad); *see also* FRANKEL & NAFTALIS, *supra* note 27, at 20-21.

38. *R. Enter., Inc.*, 498 U.S. at 296; United States v. Komisaruk, 885 F.2d 490, 495 (9th Cir. 1989) (party required to show information sought is immaterial or irrelevant); Miller v. United States, 425 U.S. 435 (1976); *see also* FRANKEL & NAFTALIS, *supra* note 27, at 21.

39. FRANKEL & NAFTALIS, *supra* note 27, at 21.

ble.[40] Second, courts believe that grand juries must be afforded wide latitude if they are to fulfill their investigatory function.[41] The reasonableness presumption, therefore, makes it difficult for an individual to satisfy the requisite burdens of 17(c).[42]

Similarly, Fourth Amendment challenges to grand jury *subpoenas duces tecum* are rarely successful.[43] Although an individual may have a reasonable expectation of privacy[44] in the physical evidence sought, the same presumption of reasonableness which arises in 17(c) motions also arises in Fourth Amendment challenges to the grand jury activities.[45] Thus, courts are hesitant to find a grand jury *subpoena duces tecum* unreasonable and violative of the Fourth Amendment.[46]

A subpoenaed individual, therefore, is left with two options: compliance or continued noncompliance. If the individual complies, he is deemed to have consented and is barred from bringing a later Fourth Amendment or 17(c) challenge to the subpoena. If the subpoenaed party continues in his refusal to comply, the prosecutor will move for a hearing to have the individual show cause as to why he should not be held in contempt.[47] At a hearing to show cause, an individual may bring either a 17(c) or a Fourth Amendment challenge.[48] If the individual is still unable to show cause, the judge may hold the subpoenaed party in contempt.[49] If the court holds the individual in contempt, the court's contempt order is a final appealable order from which the indi-

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40. *See* United States v. Mechanik, 475 U.S. 66, 75 (1986) (O'Connor, J., concurring) (grand jury proceedings presumed to be reasonable).

41. *R. Enter., Inc.*, 498 U.S. at 297.

42. *See* FRANKEL & NAFTALIS, *supra* note 27, at 20-21. See *supra* notes 37-39 and accompanying text for a discussion of the burden on the subpoenaed party.

43. *See, e.g.*, United States v. Calandra, 414 U.S. 338 (1974) (individual brings Fourth Amendment challenge and fails); United States v. Mara, 410 U.S. 19 (1973) (individual brings Fourth Amendment challenge and fails); United States v. Dionisio, 410 U.S. 1 (1973) (individual brings Fourth Amendment challenge and fails); Henry v. Ryan, 775 F. Supp. 247, 248 (N.D. Ill. 1991) (individual brings Fourth Amendment challenge and fails).

44. See *infra* notes 64-95 and accompanying text for a discussion of privacy.

45. *See, e.g., R. Enter., Inc.*, 498 U.S. at 296 (grand jury given wide latitude); United States v. Mechanik, 475 U.S. 66, 73-74 (1986) (grand jury given wide latitude).

46. United States v. Susskind, 965 F.2d 80, 86 (6th Cir. 1992).

47. *See, e.g.*, Wolston v. Readers Digest Ass'n, Inc., 443 U.S. 157, 161-63 (1979) (noncomplying party subject to contempt hearing); *Susskind*, 965 F.2d at 86-87 (noncomplying party subject to show cause hearing).

48. *See* Grand Jury Proceedings (Teegardin & Tope), 443 F. Supp. at 1273, 1273-75 (D. S.D. 1978), 443 F. Supp. at 1273-75. Generally, this is not an option; the subpoenaed party has already brought these challenges on which the court has adversely ruled. Further pursuit of these challenges would be futile.

49. *See* FED. R. CRIM. P. 17(g); Branzburg v. Hayes, 408 U.S. 665, 676 (1972) (contempt proper for noncompliance with subpoena); North v. Walsh, 881 F.2d 1088, 1090 (D.C. Cir. 1989) (contempt proper for noncompliance with subpoena); *Teegardin*, 443 F. Supp. at 1276 (contempt appropriate for noncompliance with subpoena).

a seizure of one's person, some form of government conduct which interferes with the individual's interest in personal security or human dignity must be present.[68]

The definition of what conduct constitutes a search, however, is less clear than that of seizure.[69] The Supreme Court's decision in *Katz v. United States*[70] established the standard for determining what conduct constitutes a search.[71] The *Katz* Court ruled that a search occurs when the "privacy upon which . . . [an individual] justifiably relie[s]" is intruded upon.[72] In addition, the *Katz* Court concluded that "the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures . . . ."[73]

Although the majority in *Katz* did little to define the words "justifiably relied,"[74] Justice Harlan's concurrence in *Katz* provides a basis for understanding this phrase by establishing a two-part test.[75] First, the individual must "have exhibited an actual (subjective) expectation of privacy."[76] Second, "the interest [must] be one that society is prepared to recognize as 'reasonable.' "[77]

In determining whether the individual had a subjective expectation of privacy, courts seek to determine if the interest intruded upon was exposed to the public.[78] The court asks whether the interest is normally exposed or whether the individual's actions exposed the item to public view.[79] An attempt by the individual to shield an otherwise exposed

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68. *See* United States v. Mara, 410 U.S. 19, 42-44 (1973) (Marshall, J., dissenting) (seizures involve intrusions into personal security); *Terry*, 392 U.S. at 17 (seizures involve varied levels of intrusion into dignity and personal security).

69. *See* 1 LAFAVE, *supra* note 24, § 2.1(a); Tomkovicz, *supra* note 24, at 645-48.

70. 389 U.S. 347 (1967).

71. *Id.; see also* Smith v. Maryland, 442 U.S. 735, 740 (1979) (adopting *Katz* as standard); United States v. Broadhurst, 805 F.2d 849, 853 (9th Cir. 1986) (*Katz* established standard for search); *see also* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 358 (1974); Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U. L. REV. 968, 968 (1968); Tomkovicz, *supra* note 24, at 648.

72. *Katz*, 389 U.S. at 353.

73. *Id.*

74. *See* 1 LAFAVE, *supra* note 24, § 2.1(b); Amsterdam, *supra* note 71, at 385.

75. *See, e.g.*, Minnesota v. Olson, 495 U.S. 91, 95 (1990) (applying Justice Harlan's two-part test); California v. Ciraolo, 476 U.S. 207, 211 (1986) (applying Justice Harlan's two-part test); Wabun-Inini v. Sessions, 900 F.2d 1234, 1239 (8th Cir. 1990) (applying Justice Harlan's two-part test).

76. *Katz*, 389 U.S. at 361.

77. *Id.*

78. *See* 1 LAFAVE, *supra* note 24, § 2.1(c).

79. *See, e.g.*, Florida v. Riley, 488 U.S. 445, 449 (1989) (item exposed, no Fourth Amendment protection); California v. Greenwood, 486 U.S. 35, 40 (1988) (garbage exposed, no actual expectation of privacy); Dow Chem. Co. v. United States, 476 U.S. 227, 236 (1984) (no attempt to cover area, no Fourth Amendment protection); United States v. Dionisio, 410 U.S. 1, 12 (1973)

area from view may suggest that the individual possessed a subjective expectation of privacy in that area.[80] In such a case, the individual has satisfied the requirement of an actual expectation of privacy.[81]

If the individual has a subjective expectation of privacy, the individual's privacy interest must also be one which society is willing to recognize as reasonable.[82] As Justice Harlan's dissent in *United States v. White*[83] points out, protection of an individual's privacy interest generally requires an assessment of the nature of the intrusion and of "the impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement."[84] An intrusion which "significantly jeopardizes [an individual's] sense of security"[85] constitutes a search because society perceives the personal security of its members as a higher ideal than the need for law enforcement.[86]

In *Oliver v. United States*,[87] the Supreme Court recognized that the definition of the phrase "sense of security" is illusory.[88] The Court stated that what is reasonable derives from "our societal understanding" of privacy.[89] Thus, the courts look to the "custom and the sensibilities of the populace" in determining the reasonableness of the privacy interest.[90] The determination of reasonableness, therefore, requires the

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(voice exposed, no Fourth Amendment protection). For example, the color of one's hair or the features of one's face are exposed to the public and are, therefore, unprotected by the Fourth Amendment. *See Dionisio*, 410 U.S. at 14.

80. *See* California v. Ciraolo, 476 U.S. 207, 210 (1986) (ten foot fence indicative of a subjective expectation of privacy). As one commentator has stated, the individual's "conduct [must] have demonstrated an intention to keep activities and things . . . private, and that he did not knowingly expose them to the open view of the public." Eric Dean Bender, *The Fourth Amendment in the Age of Aerial Surveillance: Curtains for the Curtilage?*, 60 N.Y.U. L. REV. 725, 754 (1985).

81. *See* 1 LAFAVE, *supra* note 24, § 2.1(c).

82. *See* Oliver v. United States, 466 U.S. 170, 177-78 (1984) (expectation must be one society is willing to consider reasonable); Smith v. Maryland, 442 U.S. 735, 740-41 (1979) (expectation must be one society is willing to recognize as reasonable); Katz v. United States, 389 U.S. 347, 353 (1967) (expectation must be one society is willing to recognize as reasonable).

83. 401 U.S. 745 (1971).

84. *Id.* at 786 (Harlan, J., dissenting).

85. *Id.* (Harlan, J., dissenting).

86. This is not to say that the need for law enforcement is not a substantial interest but rather where the intrusion into personal security is so great that it offends societal decencies, society must step in to prevent such an intrusion. *See* 1 LAFAVE, *supra* note 24, § 2.1(d); *see also* text accompanying *infra* notes 87-92.

87. 466 U.S. 170 (1984).

88. *See id.* at 177; *see also* 1 LAFAVE, *supra* note 24, § 2.1(d).

89. *Oliver*, 466 U.S. at 177; *see also* Hyman Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 36 (1967).

90. 1 LAFAVE, *supra* note 24, § 2.1(d); *see also* United States v. Vilhotti, 323 F. Supp. 425, 431-32 (S.D.N.Y. 1971) (contemporary norms of social conduct are integral to reasonable privacy analysis).

judiciary to assess society's standards.[91] Because this analysis will inevitably be influenced by the subjective perceptions of individual judges, Fourth Amendment jurisprudence regarding what constitutes a search remains unpredictable.[92]

Once a trial court has made a determination that the challenged government conduct involves an individual's sense of security, the court must determine if the questioned conduct will force the individual to sacrifice too much of his freedom in order to protect his privacy.[93] As one commentator posed the question, the court must determine:

> whether the practice, if not subjected to Fourth Amendment restraints, would be intolerable because it would either encroach too much upon the 'sense of security' or impose unreasonable burdens upon those who wish[ed] to maintain that security.[94]

If the government's conduct requires an individual to give up significant freedom, the challenged government conduct constitutes a search and is subject to Fourth Amendment restraint.[95]

2. Prong Two: Is the Conduct Reasonable?

Once a court characterizes the government's conduct as a search or a seizure, a court must then determine the reasonableness of the government's conduct.[96] Essentially there are three methods for evaluating the reasonableness of the government's conduct. First, a court looks for the presence of a warrant authorizing the government's actions.[97] If a warrant exists, the search or seizure is presumptively reasonable.[98] Second, if the government establishes that it possessed probable cause and circumstances made it impracticable to obtain a

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91. *See* 1 LAFAVE, *supra* note 24, § 2.1(d).

92. *See* Amsterdam, *supra* note 71, at 403.

93. *See* 1 LAFAVE, *supra* note 24, § 2.1(d); Amsterdam, *supra* note 71, at 402.

94. 1 LAFAVE, *supra* note 24, § 2.1(d).

95. *See* United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting); *see also* Amsterdam, *supra* note 71, at 403.

96. Terry v. Ohio, 392 U.S. 1, 19-20 (1968).

97. *Id.* at 20; *see also* Katz v. United States, 389 U.S. 347 (1967); Beck v. Ohio, 379 U.S. 89 (1964); Chapman v. United States, 365 U.S. 610 (1961).

98. *See, e.g.*, Payton v. New York, 445 U.S. 573, 586 (1980) (absent warrant, government conduct unreasonable); Vale v. Louisiana, 399 U.S. 30, 35 (1970) (absent warrant and exigent circumstances, government conduct unreasonable); See v. City of Seattle, 387 U.S. 541, 545 (1967) (absent warrant, searches unreasonable); United States v. Ventresca, 380 U.S. 102, 106 (1965) (search pursuant to warrant preferred); Johnson v. United States, 333 U.S. 10, 13-14 (1948) (searches pursuant to warrant preferred); *see also* Robert M. Bloom, *The Supreme Court and Its Purported Preference for Search*, 50 TENN. L. REV. 231, 270 (1983) (recognizing searches with warrant are presumptively reasonable and trend toward the expansion of reasonable searches in the absence of warrant).

warrant, a court will find the government's actions reasonable.[99] Third, a court may balance the interests of both the individual and society.[100] Under this approach, a court will permit a minor intrusion on less than probable cause if the government has some level of individualized suspicion and there are substantial law enforcement interests which counterbalance the minor intrusion.[101]

The first method of determining whether the government's conduct was reasonable is to ascertain whether the government complied with the warrant requirement of the Fourth Amendment. Generally, if the government acts pursuant to a warrant, the courts will presume the government's conduct reasonable.[102] This presumption derives from the fact that a "neutral and detached magistrate" made a determination that probable cause existed.[103] The existence of a magistrate acts as a procedural mechanism which prevents government actors "engaged in the often competitive enterprise of ferreting out crime" from violating an individual's rights.[104]

In *Johnson v. United States*, the Supreme Court addressed the necessity of obtaining a warrant.[105] If law enforcement officials were permitted access to an individual's home without a warrant, society's interest "in reasonable security and freedom from surveillance" would be jeopardized.[106] Thus, the Supreme Court concluded that, as a rule, determining the moment "[w]hen the right of privacy must . . . yield to the right of search, is . . . to be decided by the [judicial] officer, not by

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99. *See, e.g.*, Minnesota v. Olson, 495 U.S. 91, 100 (1990) (exigent circumstances and probable cause make search reasonable); *Vale*, 399 U.S. at 35 (absence of exigent circumstances and probable cause make search unreasonable); United States v. Richard, 994 F.2d 244, 246 (5th Cir. 1993) (absent warrant and exigent circumstances, search unreasonable).

100. *Terry*, 392 U.S. at 20-21 (need for officer safety counterbalances minor intrusion); Camara v. Municipal Court, 387 U.S. 523, 534-37 (1967) (required to balance government interest against the intrusion).

101. *See, e.g.*, United States v. De Hernandez, 473 U.S. 531, 543 (1985) (brief detention at border a minor and reasonable intrusion); *Terry*, 392 U.S. at 21-30 (stop and frisk a reasonable and minor intrusion); United States v. King, 990 F.2d 1552, 1556 (10th Cir. 1993) (brief investigatory stops reasonable).

102. *See Ventresca*, 380 U.S. at 106; *see also* 2 LAFAVE, *supra* note 24, § 4.1(a). The validity of the warrant is irrelevant where the well-trained reasonable officer believes he is executing a valid warrant; *see also* United States v. Leon, 468 U.S. 897, 921 (1984); Massachusetts v. Shepard, 468 U.S. 981, 987-88 (1984); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 249 (1991).

103. *Terry*, 392 U.S. at 19; *see also* Johnson v. United States, 333 U.S. 10, 14 (1948); United States v. Leftkowitz, 285 U.S. 452, 464 (1932).

104. *Johnson*, 333 U.S. at 14 (citing *Leftkowitz*, 285 U.S. at 464); *see also* 2 LAFAVE, *supra* note 24, § 4.1 (warrant preferred).

105. 333 U.S. 10 (1948).

106. *Id.* at 14.

a policeman or government enforcement agent."[107] The reviewing court generally assumes that the magistrate was satisfied that probable cause was present when the warrant was issued.[108]

The second method of analyzing the reasonableness of government conduct is to evaluate whether the government possessed probable cause and whether circumstances existed which made obtaining a warrant impracticable.[109] The Supreme Court ruled that probable cause to seize a person exists when the government has "reasonable grounds to believe" that the person committed a felony.[110] Probable cause for a search exists when the facts and circumstances known at the time of the search are sufficient to warrant a person of reasonable caution to believe that seizable evidence will be found in the place to be searched.[111]

If a court makes a determination that the government possessed probable cause and circumstances exist which make it impracticable to obtain a warrant, the court will consider the government's conduct reasonable.[112] The Supreme Court has recognized that exigent circum-

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107. *Id.* The Court in *Leftkowitz*, 285 U.S. 452, also raised similar concerns. The *Johnson* Court quoted the following reasoning of *Leftkowitz*:

> [T]he informed and deliberate determination of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried actions of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search or seizure than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of a crime.

Johnson, 333 U.S. at 14 n.3 (quoting *Leftkowitz*, 285 U.S. at 464).

108. *See* Massachusetts v. Upton, 466 U.S. 727, 728 (1984) (magistrate's action upheld unless substantial evidence does not support finding); United States v. O'Neil, No. 91-1679, 1992 U.S. App. LEXIS 15130 (6th Cir. June 23, 1992) (standard of review for warrants is lenient), *cert. denied*, 113 S. Ct. 629 (1992); United States v. Ross, 900 F.2d 260, 260 (6th Cir. 1990) (standard asks whether magistrate abused discretion).

109. *See, e.g.*, Payton v. United States, 445 U.S. 573 (1980); *see also* 1 LAFAVE, *supra* note 24, § 3.1(a).

110. *See* Draper v. United States, 358 U.S. 307, 312-13 (1959); *see also* 1 LAFAVE, *supra* note 24, § 3.1(b); Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 687 (1961). As stated in note 64, *supra*, this article is confined to searches and seizures of the individual. Probable cause to seize property exists, however, where the property is contraband or is used or intended to be used or to facilitate unlawful activity. United States v. Johns, 469 U.S. 478, 487 (1983) (contraband seizable); Coolidge v. New Hampshire, 403 U.S. 443, 464 (1971) (instrumentality of crime and evidence seizable).

111. *See* United States v. Moore, 790 F.2d 13, 15 (1st Cir. 1986); *see also* 1 LAFAVE, *supra* note 24, § 3.1(b).

112. Minnesota v. Olson, 495 U.S. 91 (1990) (risk of flight makes it impracticable to obtain warrant); New York v. Belton, 453 U.S. 454 (1981) (need to protect officer makes it impracticable to obtain warrant); Cupp v. Murphy, 412 U.S. 291 (1973) (exigent circumstances make it impracticable to obtain warrant); Carroll v. United States, 267 U.S. 132, 162 (1925) (destruction or movement of evidence possible when in car); *see also* 2 LAFAVE, *supra* note 24, § 4.1(a); Amsterdam, *supra* note 71, at 359.

stances,[113] risk of flight,[114] and search incident to a lawful arrest[115] are among the class of circumstances which make obtaining a warrant impracticable.[116] These classes of circumstances possess a sense of immediacy.[117] If the search is not executed immediately, the possibility that evidence of a crime will disappear,[118] or that third parties or law enforcement officials may be injured, "justifies" the search.[119] In these situations, a court will likely find the government's conduct reasonable.[120]

The third method for evaluating the reasonableness of the government's conduct is a balancing test which weighs the interest of society against the individual's interests in privacy and dignity.[121] Courts generally utilize this balancing test when the government lacks probable cause.[122] If the government possesses individualized suspicion, the intrusion into a protected Fourth Amendment interest is minor, and there exist substantial law enforcement interests,[123] a court will find the gov-

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113. *See, e.g., Cupp*, 412 U.S. 291 (destruction of evidence constitutes exigent circumstances); Schmerber v. California, 384 U.S. 757 (1966) (destruction of evidence constitutes exigent circumstances).

114. *See, e.g., Olson*, 495 U.S. 91 (risk of criminal flight makes obtaining a warrant impracticable); Welsh v. Wisconsin, 446 U.S. 740 (1980) (hot pursuit makes it impracticable to obtain warrant); Warden v. Hayden, 387 U.S. 294 (1967) (hot pursuit makes it impracticable to obtain warrant).

115. *See, e.g.*, New York v. Belton, 453 U.S. 454 (1981) (search needed to protect officer); United States v. Robinson, 414 U.S. 218 (1973) (need to protect officer makes obtaining warrant impracticable); Chimel v. California, 395 U.S. 752 (1969) (need to protect officer makes obtaining warrant impracticable).

116. DRESSLER, *supra* note 102, at 125.

117. *See* 1 LAFAVE, *supra* note 24, § 3.6.

118. *See Olson*, 495 U.S. at 96.

119. *See, e.g.*, Maryland v. Buie, 494 U.S. 325 (1990).

120. DRESSLER, *supra* note 102, at 137.

121. *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968).

122. *Id.* at 17. *But see* Winston v. Lee, 470 U.S. 753 (1985) (applied balancing test even in presence of probable cause).

123. In some circumstances, where the government possesses a special need beyond the normal need for law enforcement, courts have dispensed with the probable cause and individualized suspicion requirements because the government interest is perceived as compelling. *See, e.g.*, Skinner v. Railway Labor Exec. Ass'n, 489 U.S. 602 (1989). In *Skinner*, the Supreme Court of the United States was presented with a Fourth Amendment challenge against a Federal Railroad Administration (FRA) regulation which authorized private railroad companies to administer blood, breath, and urine tests under limited circumstances. *Id.* at 612. The Court held that the procurement and chemical analysis of the blood and other physical samples constituted searches for Fourth Amendment purposes. *Id.* at 616. "[P]enetrating beneath the skin infringes on an expectation that society is prepared to recognize as reasonable" because it may reveal medical information not previously known to others such as "whether [the individual] is epileptic, pregnant or diabetic." *Id.* at 617. Therefore, the Fourth Amendment applied to the challenged government conduct. *Id.* The Court recognized that in most cases, the Fourth Amendment generally requires a warrant before the government may conduct a search. *Id.* The Court stated, however, that where " 'special needs, beyond the normal need for law enforcement' " exist, the government may dispense with the warrant, probable cause, and individualized suspicion requirements. *Id.* at 619. The

ernment's conduct reasonable.[124]

In establishing the existence of individualized suspicion, the government "must be able to point to specific and articulable facts which taken together with rational inferences from those facts reasonably warrant the intrusion."[125] If the government can point to "specific and articulable facts," the court must then balance the nature of the intrusion against the state's interest in law enforcement.[126] A significant governmental intrusion into an individual's Fourth Amendment rights will not be upheld unless highly substantial government interests counterbalance the intrusion.[127]

In *Terry v. Ohio*, the Supreme Court held that a brief investigatory stop constitutes only a minor intrusion into protected Fourth Amendment interests.[128] The *Terry* Court ruled that when government officials temporarily stop or seize a person based on individualized suspicion, the government's conduct is reasonable if the safety of the officer or a third party is jeopardized in any way.[129] The Court determined that the officer's conduct only minimally infringed upon the individual's interests in human dignity and autonomy.[130] Moreover, the state's interest in protecting the safety of law enforcement officials and

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Court cautioned, however, that although a court may find circumstances which qualify as "special needs," it must still balance the government's interests against the individual's privacy "to assess the practicality of the warrant and probable cause requirements in a particular context." *Id.* (citations omitted).

Applying these principles to the facts before it, the Supreme Court ruled that the Fourth Amendment did not require the railroad companies to obtain a warrant or possess probable cause. *Id.* at 621. The Court reasoned that requiring a warrant or probable cause would frustrate the government's purpose in testing. *Id.* at 623. The blood test was designed to have a deterrent effect on the use of alcohol and drugs by railroad employees. *Id.* at 629. The Court concluded that if a warrant or probable cause were required, railroad companies could not test. *Id.* Thus, railroad employees would be more likely to continue their use/abuse of alcohol and drugs without fear of being caught, jeopardizing the safety of their passengers, co-workers, and themselves. *Id.* at 630. The *Skinner* Court, therefore, ruled probable cause or a warrant was not practical or required by the Fourth Amendment. *Id.* at 633-34.

124. *Terry*, 392 U.S. at 20.

125. *Id.* at 21.

126. *Id.*; *see also* 3 LAFAVE, *supra* note 24, § 3.6.

127. *Terry*, 392 U.S. at 22.

128. *Id.*

129. *Id.* at 24. The *Terry* Court reasoned that:

> we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual . . . he is investigating . . . is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures . . . to neutralize the threat of physical harm.

Id.

130. *Id.* at 30.

third parties counterbalanced the minimal intrusion.[131] The *Terry* Court, therefore, found the challenged government seizure reasonable.[132]

Courts, therefore, have three tests for evaluating the reasonableness of the government's conduct in the Fourth Amendment context.[133] The choice of the applicable test depends on the facts and circumstances surrounding each case.[134] Thus, once the court categorizes the government's conduct as a search or seizure, it must evaluate the facts and circumstances of each case to determine which of the three methods it must apply.[135] After the court determines which test it should apply, it applies that test to the challenged government conduct.[136] If the conduct satisfies the requirements of the test, the court will find the challenged action reasonable and non-violative of the Fourth Amendment.[137]

C. *Bodily Intrusions and the Fourth Amendment*

The Fourth Amendment guarantees all persons the right to be secure in their persons against unreasonable government searches and seizures.[138] In two seminal cases, the United States Supreme Court ruled that, prior to any attempt to intrude upon the physical integrity of an individual, the government must possess probable cause.[139] In addition, the government must obtain a search warrant, or circumstances must exist which make it impracticable to obtain a warrant, before the court will deem the government's conduct reasonable.[140] In *Schmerber v. California*[141] *and Winston v. Lee,*[142] the issues before the United States Supreme Court were whether an intrusion beneath the skin's surface constituted a search and also whether the government's conduct in ordering such an intrusion was reasonable.[143]

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131. *Id.*
132. *Id.* at 31.
133. *See generally*, DRESSLER, *supra* note 102, at 125; LAFAVE, *supra* note 24.
134. DRESSLER, *supra* note 102, at 125.
135. DRESSLER, *supra* note 102, at 126.
136. DRESSLER, *supra* note 102, at 125.
137. DRESSLER, *supra* note 102, at 125; *see also* Terry v. Ohio, 392 U.S. 1 (1968).
138. U.S. CONST. amend IV.
139. Winston v. Lee, 470 U.S. 753 (1985); Schmerber v. California, 384 U.S. 757 (1966); *see also* Note, *United States v. Dionisio, supra* note 5, at 1462; Note, *Proposed Rule 41.1, supra* note 3, at 712; Michael G. Rogers, *Bodily Intrusion in Search of Evidence: A Study in Fourth Amendment Decisionmaking*, 62 IND. L. REV. 1181, 1196 (1987).
140. Skinner v. Railway Labor Exec. Ass'n., 489 U.S. 602 (1989); Winston v. Lee, 470 U.S. 753 (1985); *Schmerber*, 384 U.S. 757.
141. 384 U.S. 757 (1966).
142. 470 U.S. 753 (1985).
143. *Id.* at 758; *Schmerber*, 384 U.S. at 766-67.

1. Schmerber v. California

Schmerber v. California was the Court's first application of the Fourth Amendment to government compelled bodily intrusions.[144] The Petitioner, John Schmerber, appealed his conviction for driving "while

144. *Schmerber*, 384 U.S. 757. Prior to 1966, government conduct which invaded the sanctity of the individual's physical being was evaluated on Fourteenth Amendment Due Process Clause grounds. *Schmerber*, 384 U.S. at 759; *see, e.g.*, Breithaupt v. Abram, 352 U.S. 432 (1957); Rochin v. California, 342 U.S. 165 (1952). In *Rochin*, the Defendant attempted to suppress evidence of two capsules forcibly extracted from his stomach. *Id.* at 167. Law enforcement officials entered Rochin's home without a warrant. *Id.*

The Supreme Court of the United States was unable to evaluate *Rochin* on Fourth Amendment grounds, because the Fourth Amendment was not yet applicable to the States. *See Schmerber*, 384 U.S. at 766; *see also* Wolf v. Colorado, 338 U.S. 25, 28 (1965). Thus, the Court was forced to rely on the Fourteenth Amendment Due Process Clause, which provides that no state "shall . . . deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV. The *Rochin* Court ruled that the Fourteenth Amendment acts as a restraint on the states where their actions " 'offend those cannons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.' " 342 U.S. at 169 (quoting Malinski v. New York, 324 U.S. 401, 416-17 (1948)). In evaluating whether the state's actions offend those ideas considered fundamental "in the concept of ordered liberty," *id.* at 169 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1945)), the *Rochin* Court ruled that it must balance the need for "both continuity and . . . change in a progressive society." *Id.* at 172. This requires the Court to make "an evaluation based on a disinterested inquiry." *Id.* This inquiry is "pursued in the interest of science, on a balanced order of facts . . . [and] on the detached consideration of conflicting claims." *Id.* (citing Hudson Cty. Water Co. v. McCarter, 209 U.S. 349, 355 (1938)).

In applying these principles to the case before it, the *Rochin* Court concluded that the State's conduct "shock[ed] the conscience." *Id.* The Court reasoned that forcibly removing the contents of Rochin's stomach, the struggle to open his mouth and the illegal invasion of privacy, would "offend even the hardest of sensibilities . . . ." *Id.* at 173. Thus, the Court reversed Rochin's conviction. *Id.* at 174.

Five years after *Rochin*, the Court was again presented with a bodily intrusion case. Breithaupt v. Abram, 352 U.S. 432 (1957). In *Breithaupt*, the Petitioner had been involved in an auto accident. *Id.* at 433. The officer investigating the accident found an empty pint whiskey bottle in the Petitioner's glove compartment. *Id.* at 433. Unconscious, the Petitioner was taken to the hospital where the smell of alcohol was detected on his breath. *Id.* The patrolmen then ordered a blood test. *Id.* The blood test revealed Breithaupt had a blood alcohol content of 0.17%. *Id.* These results were admitted into evidence at trial and Breithaupt was subsequently convicted. *Id.*

Breithaupt appealed asserting that *Rochin* demanded his conviction be overturned. *Id.* at 434-35. The Court distinguished Breithaupt's claim from *Rochin* on the ground that none of the "brutal" and "offensive" circumstances found in *Rochin* were present in *Breithaupt*. *Id.* at 435. The Court determined that no force was used in extracting the blood sample as compared with the forcible struggle in *Rochin*. *Id.* at 435. Moreover, the Court reasoned that a simple blood test differs greatly from the invasive procedure performed in *Rochin*. *Id.* at 436. The Court stated that "blood test[s] ha[ve] become routine in our everyday life." *Id.* In no way could such a routine occurrence offend one's sense of justice. *Id.*

In addition, the Court incorporated the *Rochin* Court's concern for the needs of a changing progressive society with the need for continuity. *See id.* at 439. The *Breithaupt* Court balanced the need for society to ensure safer highways against the individual's right to be secure in his person. *Id.* The Court reasoned that the minor intrusion of a blood test outweighed the highly substantial government interest of highway safety. *Id.* The Court, therefore, affirmed Breithaupt's conviction. *Id.* at 440.

under the influence of alcohol."[145] The primary piece of evidence used to convict Schmerber was the result of a blood test which revealed that Schmerber was intoxicated at the time of the offense.[146] Schmerber alleged[147] that law enforcement officials violated his Fourth Amendment rights when they ordered the withdrawal and subsequent chemical analysis of his blood.[148]

The Supreme Court ruled that any government ordered bodily intrusion mandates Fourth Amendment review.[149] The government's conduct, therefore, must satisfy the requirements of the Fourth Amendment.[150] Although the Supreme Court ultimately concluded that the conduct of law enforcement officials in *Schmerber* was reasonable,[151] the Court ruled that the Fourth Amendment applies to government intrusions upon the physical integrity of one's body.[152] The Court reasoned that the Fourth Amendment was intended to protect an individual's "personal privacy and dignity against unwarranted intrusion by the state"[153] and that the explicit language of the Fourth Amendment[154] protects the sanctity of an individual's "person."[155] Accordingly, the extraction of a blood sample violates an individual's physical

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145. *Schmerber*, 384 U.S. at 758.

146. *Id.* at 759.

147. Schmerber also challenged his conviction on Fifth, Sixth, and Fourteenth Amendment grounds. *Id.* at 759. The Court rejected Schmerber's Fourteenth Amendment claim. *Id.* at 760. Relying on *Breithaupt*, the Court held that the circumstances in which Schmerber's blood was withdrawn did not "offend 'that sense of justice' of which we spoke in *Rochin v. California*." *Id.* (citing *Breithaupt*, 352 U.S. at 435).

Schmerber also raised his Fifth Amendment privilege against self-incrimination as grounds for suppressing the blood test results. *Id.* at 760. The Court held that the Fifth Amendment privilege does not extend to physical evidence derived from an individual's body (i.e. blood). *Id.* at 764. Rather, the Fifth Amendment applies only to the government compulsion of "testimony" or "communications." *Id.* The Court found that the blood test in no way implicated Schmerber's testimonial capacities and thus, the Fifth Amendment was inapplicable. *Id.* at 765.

Finally, Schmerber contended that he was denied his Sixth Amendment right to assistance of counsel. *Id.* The Court rejected this claim because in reality Schmerber was granted counsel. *Id.* at 766. Although counsel wrongly advised Schmerber, he was not denied counsel. *Id.* Thus, the Court refused to overturn Schmerber's conviction based on Fifth, Sixth, or Fourteenth Amendment grounds.

148. *Id.* at 759.

149. *Id.* at 767-68.

150. *Id.* at 768.

151. *Id.* at 772.

152. *Id.* at 767.

153. *Id.* The Court reasoned that "at the core of the Fourth Amendment" is the protection of "[t]he security of one's privacy against arbitrary intrusion by" the state. *Id.* (quoting Wolf v. Colorado, 338 U.S. 25 (1964)). In *Schmerber*, a non-consensual blood test violated the defendant's privacy and dignity rights. *See id.*

154. See *supra* note 1 for the text of the Fourth Amendment.

155. *Schmerber*, 384 U.S. at 767.

integrity.[156] The Court held that any government ordered bodily intrusion constitutes a search and must, therefore, meet the requirements of the Fourth Amendment.[157]

The *Schmerber* Court ruled that law enforcement officials possessed probable cause to test Schmerber's blood for alcohol.[158] Given the existence of probable cause, the Court then addressed the issue of whether the Fourth Amendment requires the arresting officer to obtain a search warrant.[159] The Court stressed the importance of the warrant requirement and the necessity for an "informed, detached and deliberate determination" of whether probable cause to search existed.[160] The Court found that the arresting officer in *Schmerber* "might reasonably have believed he was confronted with an emergency."[161] Thus, the Fourth Amendment did not require the officer to seek a search warrant.[162] The Court pointed specifically to the likelihood that evidence of Schmerber's intoxication might be destroyed[163] given the time expended to transport Schmerber to the hospital and to investigate the

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156. *Id.* at 767-77.

157. *Id.* at 767. Before proceeding to an evaluation of the reasonableness of the government's conduct, the Court recognized that the Fourth Amendment does not constrain all government intrusions upon one's person. *Id.* at 768. The Court stated that only those intrusions "which are not justified in their circumstances . . . or manner" are proscribed by the Fourth Amendment. *Id.* Thus, some government ordered bodily intrusions will be permissible. *Id.*

In evaluating the government's conduct in light of the Fourth Amendment, the Court recognized that law enforcement officials possessed probable cause to arrest Schmerber and that they validly arrested Schmerber. *Id.* at 768-69. The Court ultimately characterized the extraction of blood from Schmerber's body as a search incident to a lawful arrest. *Id.* at 769, 771. The Court reasoned that the purpose of a search incident to a lawful arrest is to neutralize the danger of concealed weapons and the possible destruction of evidence. *Id.* at 769; see *also* text accompanying *supra* notes 112-24 for a discussion of the characteristics of this exception. The Court ruled, in the case of bodily intrusions, however, that the mere possibility of evidence is insufficient to justify a search incident to a lawful arrest. *Id.* at 769-70. There must be "a clear indication that evidence will be found." *Id.* at 770. The "fundamental human interests [in dignity and privacy] require law officers to suffer the risk that such evidence may disappear." *Id.* at 770. The *Schmerber* Court ruled that law enforcement officials possessed probable cause to search and seize Schmerber's person, therefore, the Court characterized the search as incident to an arrest. *Id.* at 769-71.

158. *Id.* The facts which led to the creation of probable cause are as follows: the smell of liquor on Schmerber's breath; his eyes were bloodshot; and he was unsteady on his feet. *Id.* at 769.

159. *Id.* at 770.

160. *Id.*

161. *Id.*

162. *Id.* at 771.

163. The possibility of evidence destruction may be used to establish exigent circumstances. *Id.* at 770. This possibility, however, does not justify a search where law enforcement officials lack probable cause to search. *Id.* at 769. The *Schmerber* Court ruled that law enforcement officers may possess probable cause to "seize" the individual, and therefore, the officers acquire the rights associated with a search incident to lawful arrest. *Id.* at 769-71. In the case of bodily intrusions, however, the police must also have probable cause to "search" the individual's person. *Id.*

crime scene.[164] The Court concluded that "[g]iven these special facts" the arresting officer's conduct was reasonable.[165]

The Court also ruled that the means used to extract and analyze Schmerber's blood were reasonable and not in violation of the Fourth Amendment.[166] A blood test "involves virtually no risk, trauma, or pain."[167] In addition, the test was done in a "hospital environment according to accepted medical practices."[168] Thus, the Court concluded that the police officer had not violated Schmerber's Fourth Amendment rights.[169]

The Court cautioned that its holding was limited to the facts before it and stated:

> That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions *in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.*[170]

Therefore, under *Schmerber*, all government compelled bodily intrusions demand Fourth Amendment review. In addition, the government may compel a substantial bodily intrusion only in the presence of probable cause to search. Without probable cause to search the individual, the government's conduct will not withstand a Fourth Amendment challenge.

2. Winston v. Lee

In *Winston v. Lee*, the Supreme Court was again presented with the issue of whether a government compelled intrusion of an individual's physical integrity violates the Fourth Amendment.[171] Relying on *Schmerber*, the Supreme Court ruled that government compelled surgery to remove a bullet lodged in Lee's chest violated the Fourth Amendment.[172] The Court concluded that surgical procedures constitute the "more substantial intrusion[s] cautioned against in *Schmerber*."[173] The Supreme Court, therefore, denied the State's request to permit surgery.

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164. *Id.* at 771.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.* at 772.
170. *Id.* (emphasis added).
171. 470 U.S. 753 (1985).
172. *Id.* at 755.
173. *Id.*

In *Lee*,[174] law enforcement officials petitioned the state court to order Lee to undergo minor surgery to remove a bullet lodged in his chest.[175] After the Virginia Supreme Court granted the petition, the Supreme Court of the United States granted certiorari "to consider whether a state may, consistently with the Fourth Amendment, compel a suspect to undergo surgery . . . in a search for evidence of a crime."[176]

The Court first determined that "[a] compelled surgical intrusion into an individual's body for evidence . . . implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' even if" probable cause exists.[177] An intrusion beneath the skin's surface constitutes an imposition on an individual's personal privacy and bodily integrity.[178] Thus, the *Lee* Court ruled that government compelled bodily intrusions fall within the purview of the Fourth Amendment and must, therefore, satisfy the requirements of the Fourth Amendment.

To evaluate the reasonableness of the State's conduct, the *Lee* Court applied the analysis set forth in *Schmerber*.[179] First, the Court looked for the presence of probable cause and prior judicial authoriza-

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174. The facts of *Lee* are as follows: Ralph Watkinson was shot while closing his store. *Id.* at 755. Prior to being shot, Watkinson fired his weapon at his assailant. *Id.* Watkinson believed he had injured his assailant. *Id.* The armed assailant fled the scene. *Id.* The police arrived shortly thereafter and transported Watkinson to the hospital. *Id.* at 755-56.

Responding to a separate call, law enforcement officials found Lee, eight blocks from the earlier crime scene with a bullet wound in his left chest area. *Id.* at 756. Lee claimed he had been shot by two armed thieves. *Id.* The police transported Lee to the same hospital treating Watkinson. *Id.* When Lee entered the emergency room, Watkinson shouted " '[t]hat's the man that shot me.' " *Id.* After a brief investigation, law enforcement officials charged Lee with attempted robbery, malicious wounding and two counts of using a firearm in the commission of a felony. *Id.* Law enforcement officials subsequently petitioned the state to require Lee to undergo surgery. *Id.* Initially, the state court granted the motion. *Id.* at 757. The Virginia Supreme Court upheld the trial court's ruling, which denied Lee's writ of prohibition and writ of habeas corpus. *Id.* In addition, the United States District Court for the Eastern District of Virginia denied Lee's motion for a preliminary injunction holding that Lee had little likelihood of success on the merits of a Fourth Amendment challenge. *Id.* Shortly before surgery, Lee's physician ordered another set of x-rays which revealed that the bullet was lodged deeper within Lee's body than originally thought. *Id.* Moreover, the surgeon believed that a general anesthetic would now be required. *Id.*

Lee moved the court for a rehearing based on new evidence. *Id.* After holding an evidentiary hearing, the state court denied Lee's request for a rehearing. *Id.* The Virginia Supreme Court affirmed. *Id.* Lee then moved the federal district court to alter or amend the judgement previously entered against him. *Id.* After an evidentiary hearing, the district court granted Lee's motion and enjoined the surgery. *Id.* The Fourth Circuit Court of Appeals affirmed. *Id.* at 758.

175. *Id.* at 756.

176. *Id.* at 757-58.

177. *Id.* at 759.

178. *Id.* at 762. Although the Court ruled that all such intrusions are impositions, all such intrusions are not "unduly" burdensome on an individual's privacy and dignity. *Id.*

179. *See id.* at 763-67.

tion.[180] Second, the Court attempted to balance the nature of the intrusion against "the community's interests in fairly and accurately determining guilt or innocence."[181]

The *Lee* Court found that Virginia "plainly had probable cause to conduct the search."[182] The Court found that the question of prior judicial authorization was irrelevant given that the case was before the Court in an attempt to obtain prior judicial authorization.[183]

The Court then proceeded to balance the nature of the intrusion against society's need to obtain evidence.[184] In assessing the nature of the intrusion, the Court considered: (1) the extent to which the procedure threatened Lee's safety or health; and (2) the extent to which the government's conduct invaded his interests in personal privacy and bodily integrity.[185] The Court recognized that substantial medical uncertainty existed as to the risks involved with Lee's surgery.[186] Furthermore, a substantial invasion of Lee's privacy and physical integrity would occur if the government was allowed to search Lee's body for the bullet.[187] The Court concluded that "[t]his kind of surgery involves a . . . total divestment of respondent's ordinary control over surgical probing beneath his skin."[188] Thus, the Court categorized the nature of the intrusion as severe.[189]

Weighing this severe intrusion against the Commonwealth's need to obtain evidence, the Court concluded that the State's need for the bullet was minimal when compared with the proposed degree of intrusion on Lee's Fourth Amendment interests.[190] The State already possessed substantial evidence connecting Lee with the crime.[191] Moreover, the Court noted that comparison between the bullet and the store

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180. *Id.* at 763.

181. *Id.* at 762; *see also id.* at 766.

182. *Id.* at 763. The Court acknowledged the following facts tending to establish probable cause: Watkinson's identification of Lee as the man who shot him; the bullet was lodged in the area Watkinson believed he had hit; and Lee was found near the scene of the crime. *Id.* at 765.

183. *Id.* at 763.

184. *Id.*

185. *Id.* at 761-62.

186. *Id.* at 764. Medical experts disputed several factors. *Id.* First, the duration of the surgery, and second, whether there was a risk of permanent muscle, nerve or other damage to the chest and pleural cavity. *Id.*

187. *Id.* Quoting the Fourth Circuit, the Court stated:

> that the Commonwealth proposes to take control of [Lee's] body, to 'drug this citizen—not yet convicted of a criminal offense—with narcotics and barbiturates into a state of unconsciousness' and then . . . search beneath his skin for evidence of a crime.

Id. at 765.

188. *Id.*

189. *Id.*

190. *Id.* at 766.

191. *Id.* at 765.

owner's weapon might be impossible since dispute existed as to whether the bullet had begun to erode.[192] Thus, the Court ruled the State's need was minimal and therefore, to compel surgery was violative of Lee's Fourth Amendment rights.

"[W]hen the State seeks to intrude upon an area which our society recognizes as a significantly heightened privacy interest, a more substantial justification is required to make the search reasonable."[193] Individuals possess a heightened expectation of privacy in their person. In both *Schmerber* and *Winston*, the government attempted to invade the individual's privacy in two ways. First, when the needle or other surgical instrument penetrates the skin to collect evidence, the government has attempted to access something normally removed from public view. Second, when the government conducts a chemical analysis of the evidence obtained from beneath the skin's surface, it attempts to gain information previously not exposed to the public, such as blood type, DNA, and pregnancy. These actions intrude upon both the sanctity of the individual's body and his right to privacy. At a bare minimum, probable cause is required to make the government's conduct reasonable.

III. Analysis

One of the most powerful weapons in the government's arsenal to combat crime is the grand jury[194] and its almost unrestricted power to issue *subpoenas duces tecum*.[195] The Fourth Amendment, however, restricts the grand jury's power and requires that the grand jury, and its

192. *Id.* at 766 n.10.

193. *Id.* at 767.

194. United States v. Sells Eng'g, 463 U.S. 418, 423 (1983) (grand jury powerful investigatory body); United States v. Calandra, 414 U.S. 338, 344 (1974) (grand jury important investigatory tool); F.T.C. v. American Nat'l Cellular, 868 F.2d 315, 319 (9th Cir. 1989) (recognizing grand jury as important investigatory tool); United States v. Davis, 702 F.2d 418, 421 (2d Cir. 1982) (recognizing grand jury as powerful investigatory tool), *cert. denied sub nom.*, Veliotis v. United States, 463 U.S. 1215 (1983).

195. United States v. R. Enter., Inc., 498 U.S. 292, 297 (1991) (recognizing broad subpoena power); *In re* Grand Jury Investigations (Detroit Police Dep't Special Cash Fund), 922 F.2d 1266, 1269 (grand jury vested with broad subpoena power); United States v. Alwelt, 532 F.2d 1165, 1168 (7th Cir.) (grand jury possesses broad subpoena power), *cert. denied*, 429 U.S. 840 (1976); *In re* Grand Jury Matters (United States), 486 F.2d 85, 90 (3d Cir. 1973) (grand jury's subpoena power is broad); *In re* Grand Jury Subpoena Duces Tecum (Richard Arrington, Jr., Mayor), 782 F. Supp. 1518, 1525 (N.D. Ala. 1992) (some restrictions, but generally grand jury has broad subpoena power); *In re* Grand Jury Investigation, 746 F. Supp. 866, 867 (E.D. Wis. 1990) (grand jury has broad subpoena power); United States v. Five Persons, 472 F. Supp. 64, 67 (D. N.J. 1979) (recognizing grand jury's broad power to issue subpoenas); *see also* Wilson & Matz, *Obtaining Evidence for Federal Economic Crime Prosecutions: An Overview and Analysis of Investigative Methods*, 14 Am. Crim. L. Rev. 656, 683-90 (1977). A *subpoena duces tecum* commands an individual to produce documents or other materials under his control. *See* Fed. R. Crim. P. 17(c); *see also* text accompanying *supra* notes 31-33.

agents, satisfy the reasonableness requirement of the Fourth Amendment.[196] Although prosecutors generally comply with the requirements of the Fourth Amendment,[197] some have used the grand jury's broad subpoena power to intrude upon an individual's protected Fourth Amendment rights.[198] Where such an intrusion occurs, courts are hesitant to quash the subpoena, given the grand jury's important investigatory function[199] and a fear of invading upon the powers of the executive branch.[200] Thus, prosecutors retain almost complete control over the grand jury process.[201]

To prevent possible abuses, the scope of Federal Rule of Criminal Procedure 17(c) should be expanded to include all non-testimonial evidence. In addition, the amended rule should require courts to quash a subpoena on motion if the subpoena unreasonably intrudes upon an individual's interest in human dignity, privacy, or personal security. Furthermore, any reasonableness ruling by the court should be accomplished through an *in camera* review. Such an amendment to 17(c) ensures the protection of Fourth Amendment rights while maintaining both the secrecy and efficiency of the grand jury process. As amended,

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196. *Calandra*, 414 U.S. at 345 (possible Fourth Amendment violation where there is an intrusion upon something not knowingly exposed to public); United States v. Dionisio, 410 U.S. 1, 9-18 (1973) (holding possible Fourth Amendment violation in grand jury where there is an intrusion upon something not knowingly exposed to public); United States v. Mara, 410 U.S. 19, 21 (1973) (holding possible Fourth Amendment violation where there is an intrusion upon something not knowingly exposed to public); Hale v. Henkel, 201 U.S. 43, 76 (1906) (Fourth Amendment proscribes grand jury from making *subpoena duces tecum* "too sweeping in its terms"); Henry v. Ryan, 775 F. Supp. 247, 252 (N.D. Ill. 1991) (Fourth Amendment applicable to grand jury); United States v. Riccardi, 337 F. Supp. 253, 255 (D. N.J. 1984) (Fourth Amendment applicable to grand jury).

197. *See, e.g.*, United States v. Miller, 425 U.S. 435 (1976) (no intrusion into privacy where documents subpoenaed); *Dionisio*, 410 U.S. 1 (no intrusion into privacy where voice exemplar subpoenaed); *Mara*, 410 U.S. 19 (no intrusion into privacy where handwriting exemplars subpoenaed); *In re* Grand Jury Proceedings (Mills), 686 F.2d 135 (3d Cir.) (no intrusion into privacy where hair sample subpoenaed), *cert. denied*, 459 U.S. 1020 (1982).

198. *See, e.g., In re* Grand Jury Subpoena (Under Seal), No. 86-5134, 1987 WL 37526 (4th Cir. May 21, 1987) (court approved unlawful bodily intrusion), *cert. denied sub nom.*, Cox v. United States, 484 U.S. 955 (1987); *In re* Grand Jury Proceedings (TS), 816 F. Supp. 1196 (W.D. Ky. 1993) (court disapproved unlawful bodily intrusion); *Henry*, 775 F. Supp. 247 (N.D. Ill. 1991) (court required further inquiry to determine whether violated Fourth Amendment).

199. *See* United States v. R. Enter., Inc., 498 U.S. 292, 297 (1991) (recognizing important investigatory function of grand jury).

200. United States v. Channen, 549 F.2d 1306, 1313 (9th Cir.) (court's supervisory powers may not be exercised in a manner encroaching on the other branch's power), *cert. denied*, 434 U.S. 825 (1977); *In re* Grand Jury Proceedings (Schofield), 486 F.2d 85, 90 (3d Cir. 1973) (grand jury is prosecutorial and investigatory arm of the executive branch).

201. United States v. Santucci, 674 F.2d 624, 662 (7th Cir. 1982) (prosecutor given considerable leeway), *cert. denied*, 459 U.S. 1109 (1983); *In re* Grand Jury Investigation (McLean), 565 F.2d 318, 320-21 (5th Cir. 1977) (prosecutor given considerable leeway); *see* EISENSTEIN, *supra* note 11, at 186; FRANKEL & NAFTALIS, *supra* note 27, at 21.

17(c) will also provide the courts with guidance as to the proper balance between the executive and judiciary in the grand jury context.

A. The Fourth Amendment and the Grand Jury Subpoena Duces Tecum

The Fourth Amendment was designed to protect an individual's interest in personal security, human dignity, and privacy.[202] Thus, where the government's actions intrude upon one of these interests, its conduct must be reasonable.[203] If, however, the government's conduct does not intrude upon these interests, the Fourth Amendment's reasonableness requirement is not applicable.[204]

Repeatedly, the United States Supreme Court has ruled that the grand jury process is subject to Fourth Amendment review.[205] By its own language, however, the Fourth Amendment proscribes only searches and seizures which are unreasonable. This implies that some government searches or seizures are reasonable and are, therefore, constitutionally permissible.[206] Similarly, many uses of the grand jury *subpoena duces tecum* are reasonable and, therefore, constitutionally permissible.[207] Where the grand jury's actions intrude upon an individual's protected Fourth Amendment interests, however, the grand jury and its

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202. *See* United States v. Chadwick, 433 U.S. 1, 9 (1977) (Fourth Amendment designed to protect privacy interest); United States v. Mara, 410 U.S. 19, 42 (1973) (Marshall, J., dissenting) ("Fourth Amendment stands as an essential bulwark against arbitrary and unreasonable . . . intrusion[s]"); Harris v. United States, 331 U.S. 145, 158 (Frankfurter, J., dissenting) (Fourth Amendment designed to protect personal security); *see also* 1 LAFAVE, *supra* note 24, § 2.1(d); Tomkovicz, *supra* note 24, at 647, 662.

203. *See* Calandra v. United States, 414 U.S. 338, 345 (1974); (government conduct must be reasonable); Vale v. Louisiana, 399 U.S. 30 (1970) (government conduct must be reasonable); Terry v. Ohio, 392 U.S. 1, 20-21 (1968) (government conduct must be reasonable); Camara v. Municipal Court, 387 U.S. 523, 534-37 (1967) (government conduct required to be reasonable).

204. United States v. Miller, 425 U.S. 435, 440-41 (1976) (no intrusion into privacy, no requirement of reasonableness); *Mara*, 410 U.S. at 21 (no intrusion into privacy, no requirement of reasonableness).

205. *See, e.g., Calandra*, 414 U.S. 338 (1974); United States v. Dionisio, 410 U.S. 1 (1973); *Mara*, 410 U.S. 19 (1973); Hale v. Henkel, 201 U.S. 43 (1906).

206. *See* New Jersey v. T.L.O., 469 U.S. 325, 370 (1985) (Brennan, J., concurring) (only unreasonable searches and seizures proscribed); Terry v. Ohio, 392 U.S. 1, 20 (1968) (only unreasonable searches and seizures proscribed); California v. Schmerber, 384 U.S. 757, 767 (1966) (only unreasonable searches and seizures proscribed); United States v. Leftkowitz, 285 U.S. 452, 456 (1932) (only unreasonable searches and seizures proscribed).

207. *See, e.g., Miller*, 425 U.S. 435 (use of grand jury *subpoena duces tecum* to obtain documents reasonable); *Dionisio*, 410 U.S. 1 (use of grand jury *subpoena duces tecum* to obtain voice sample reasonable); *Mara*, 410 U.S. 19 (use of grand jury *subpoena duces tecum* to obtain handwriting exemplar reasonable); *In re* Grand Jury Proceedings (Mills), 686 F.2d 135 (3d Cir.) (use of grand jury *subpoena duces tecum* to obtain hair sample reasonable), *cert. denied*, 459 U.S. 1020 (1982); United States v. Giacalone, 541 F.2d 508 (4th Cir. 1976) (use of grand jury to obtain car reasonable).

agents are bound by the reasonableness requirements of the Fourth Amendment.[208]

The problem lies in distinguishing between uses of the *subpoena duces tecum* which are reasonable and non-violative of the Fourth Amendment and those which are not. If reasonableness is thought of as a continuum, a prosecutor's use of the grand jury *subpoena duces tecum* falls somewhere along this continuum.[209] At one end of the continuum are those uses of the *subpoena duces tecum* which do not intrude upon an individual's protected Fourth Amendment interests in human dignity, privacy, or personal security and are thus reasonable.[210] At the other end of the continuum are those uses of the *subpoena duces tecum* which unreasonably intrude upon protected Fourth Amendment interests.[211]

1. United States v. Dionisio: Use of the *Subpoena Duces Tecum* Outside the Fourth Amendment

In *United States v. Dionisio*, a special grand jury was convened to investigate violations of federal gambling statutes.[212] Subsequently, prosecutors submitted incriminating tape recorded conversations to the grand jury.[213] The grand jury then subpoenaed twenty people, seeking to obtain voice exemplars for comparison with the tape recorded conversations.[214] Dionisio challenged the subpoena on grounds that it violated his Fourth Amendment rights at two levels.[215] First, Dionisio asserted that compelling him to appear and produce evidence constituted

208. *Calandra*, 414 U.S. at 345.

209. A comparison of three cases illustrates the range of reasonableness with which a grand jury *subpoena duces tecum* may be utilized. *See Dionisio*, 410 U.S. 1; *Mills*, 686 F.2d 135; In re Grand Jury Proceedings (TS), 816 F. Supp. 1196 (W.D. Ky. 1993). For example, the use of grand jury *subpoena duces tecum* to obtain voice exemplars in *Dionisio* represents a constitutionally permissible use of the grand jury *subpoena duces tecum* because the evidence sought falls outside of the purview of the Fourth Amendment. 410 U.S. at 14-15. The use of the grand jury *subpoena duces tecum* to obtain hair samples in *Mills* represents the middle of the continuum in which a protected Fourth Amendment interest is implicated; the government's conduct was in accordance with the requirements of the Fourth Amendment and, therefore, the search or seizure was permissible. 686 F.2d at 143. The use of a grand jury subpoena to obtain blood samples in *TS* represents the opposite extreme of the continuum, in which the prosecutor's use of the grand jury *subpoena duces tecum* unreasonably intrudes upon an individual's protected Fourth Amendment interests.

210. *See Dionisio*, 410 U.S. at 14-15; *Mara*, 410 U.S. at 21.

211. *See, e.g., In re* Grand Jury Subpoena (Under Seal), No. 86-5134, 1987 WL 37526 (4th Cir. May 21, 1987); *TS*, 816 F. Supp. 1196; Henry v. Ryan, 775 F. Supp. 247 (N.D. Ill. 1991).

212. 410 U.S. 1, 2 (1973).

213. *Id.*

214. *Id.* at 3.

215. *Id.* at 8-14. Dionisio also challenged the subpoena on Fifth Amendment grounds. *Id.* at 5-7. The Court, relying on *Schmerber*, rejected this claim. *Id.* at 6-7.

an unreasonable seizure of his person.[216] Second, Dionisio asserted that the identification or analysis of his voice constituted an unreasonable government search.[217]

In resolving Dionisio's Fourth Amendment challenge, the Supreme Court recognized that obtaining physical evidence from a person involves two potential Fourth Amendment violations.[218] First, the seizure of the person necessary to bring him into contact with government agents may constitute an unreasonable government seizure.[219] Second, the search for evidence may also constitute an unreasonable search.[220]

The Court held that a grand jury subpoena does not intrude upon an individual's interest in human dignity.[221] Quoting Justice Friendly, the Supreme Court stated that "[a] subpoena is served in the same manner as other legal process . . . [and thus,] no stigma whatsoever" attaches to being subpoenaed.[222] The Court further reasoned that, "if the time for appearance is inconvenient" for the individual, it can generally be altered.[223] Thus, an individual's dignity and reputation are not harmed by appearing before the grand jury.

Similarly, an individual's personal security is not implicated when subpoenaed to appear before the grand jury.[224] Although an individual sacrifices time, he goes to the grand jury proceeding on his own.[225] His freedom of movement is not restrained as it would be if he were fully arrested.[226] Thus, the Court concluded that compelling Dionisio to appear before the grand jury did not constitute a seizure of his person.[227]

The Court also rejected Dionisio's claim that the production, and subsequent analysis, of his voice constituted an unreasonable government search.[228] An individual's voice is not private, and thus, it is unprotected by the Fourth Amendment.[229] Relying on *Katz v. United*

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216. *Id.* at 8.

217. *Id.* at 13-14. Both Dionisio and the Court failed to identify whether the search was of Dionisio's person or possessions. Although an argument can be made that one's voice is an intangible asset or possession, one's voice is not freely transferable like other intangible assets such as goodwill. One's voice is more akin to a physical characteristic such as one's facial features. Thus, an analysis of one's voice for purposes of comparison constitutes a search of one's person.

218. *Id.* at 8.

219. *Id.*

220. *Id.*

221. *Id.* at 10.

222. *Id.* (quoting United States v. Doe (Schwartz), 457 F.2d 895, 898 (2d Cir. 1972), *cert. denied*, 410 U.S. 941 (1973)).

223. *Id.*

224. *See id.* at 11.

225. *See id.* at 10-11.

226. *Id.*

227. *Id.* at 13.

228. *Id.* at 14.

229. *Id.*

States,[230] the Court stated that "[t]he physical characteristics of a person's voice, its tone and manner . . . are constantly exposed to the public."[231] Thus, the Court concluded "[t]here [is] no basis for constructing a wall of privacy, [for the individual] against the grand jury [where one does] . . . not [already] exist in casual contacts with strangers."[232]

In *Dionisio*, the Supreme Court ruled that the grand jury's use of a *subpoena duces tecum* to obtain voice exemplars did not implicate any Fourth Amendment interests.[233] Thus, the grand jury could constitutionally compel citizens to produce voice exemplars. The Court compared the bodily intrusion of *Schmerber* with the disclosure of one's voice.[234] When one's bodily integrity is intruded upon such as in *Schmerber*, the Fourth Amendment is applicable because one's human dignity, personal security, and privacy are being invaded.[235] The Court also compared the disclosure of one's voice to the "patdown" in *Terry v. Ohio*.[236] The disclosure of an individual's voice does not implicate his interest in personal security because no bodily contact occurs.[237] Moreover, an individual's interest in human dignity is not implicated because disclosure of a person's voice is not a "frightening . . . [or] humiliating experience."[238] Thus, the *Dionisio* Court found that the compelled disclosure and analysis of a person's voice does not constitute a government search or seizure for Fourth Amendment purposes.[239]

The *Dionisio* decision illustrates that where the prosecutor uses the grand jury *subpoena duces tecum* in a manner that does not intrude upon an individual's interest in human dignity, personal security, or privacy, the Fourth Amendment is inapplicable. Thus, the *Dionisio* decision registers on the end of the reasonableness continuum which permits the use of the grand jury *subpoena duces tecum* because no Fourth Amendment interests are implicated.

2. In re Grand Jury Proceeding (Mills): The Middle Ground of the Continuum

The middle ground of the continuum may be categorized as involving some level of governmental intrusion into protected Fourth

230. 389 U.S. 347 (1967).
231. *Dionisio*, 410 U.S. at 14.
232. *Id.* (quoting *Doe*, 457 F.2d at 898-99).
233. *Id.*
234. *Id.* (citing Schmerber v. California, 384 U.S. 757 (1966)).
235. *Id.* at 14-15.
236. *Id.* (citing Terry v. Ohio, 392 U.S. 1, 24-25 (1968)).
237. *Id.* at 15.
238. *Id.* (quoting *Terry*, 392 U.S. at 24-25).
239. *Id.*

Amendment interests.[240] The intrusions in these cases, however, are reasonable given their justification and scope. The courts often find these cases difficult to resolve because strong arguments can be made supporting differing conclusions.[241] *In re Grand Jury Proceedings (Mills)*[242] is such a case. Although all members of the United States Court of Appeals for the Third Circuit concluded that the grand jury could compel Mills to produce hair samples,[243] their rationales differed. A majority found little, if any, intrusion into Mills' protected Fourth Amendment interests in privacy, personal security, and human dignity.[244] Judge Gibbons, however, in his concurring opinion, concluded that an intrusion into Mills' protected Fourth Amendment interests existed, and thus, the Fourth Amendment was applicable.[245]

a. The *Mills* Majority

Central to the majority's analysis in *Mills* was an evaluation of whether the search for and seizure of Mills hair intruded upon Mills' interest in privacy.[246] Relying largely on *Dionisio*, the court reasoned that when an individual knowingly exposes something to the public, he no longer has an expectation of privacy in that item.[247] Exposing one's hair is akin to exposing one's voice.[248] A person does not offer his voice to the public with the expectation that "the tone, inflections and modulations will be subjected to minute technical analysis."[249] Similarly, individuals do not expose their hair to the public with an expectation that

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240. *See, e.g., In re* Grand Jury Proceedings (Mills), 686 F.2d 135 (3d Cir.), *cert. denied*, 459 U.S. 1020 (1982).

241. *Id.* (compare majority opinion with Judge Gibbon's concurrence).

242. 686 F.2d 135 (3d Cir.), *cert. denied*, 459 U.S. 1020 (1982).

243. In *Mills*, the grand jury was investigating an armed bank robbery. *Id.* at 136. One of the armed men wore a dark blue ski mask during the robbery. *Id.* The ski mask was later recovered at the scene with strands of hair found inside the ski mask. *Id.* The prosecutor suspected Mills of being the masked robber. *Id.*

Thus, the prosecutor used the grand jury *subpoena duces tecum* to order Mills to produce samples of scalp and facial hair for purposes of comparison with the hairs found in the ski mask. *Id.* Mills refused to comply and challenged the subpoena as violative of his Fourth Amendment rights. *Id.* at 136-37.

244. *Id.* at 139.

245. *Id.* at 141 (Gibbons, J., concurring).

246. *Id.* at 138. Although the focus of the majority's analysis was on the extent of the intrusion, in note two of the majority's opinion, the court pointed out that the grand jury could not provide a basis for its suspicion nor did it have probable cause to suspect Mills of armed bank robbery. *Id.* at 136 n.2.

247. *Id.*

248. *Id.* at 139.

249. *Id.* Courts, however, permit the government to perform this analysis because it does not intrude upon an individual's protected Fourth Amendment Interests. *Id.*

it will be subjected to analysis.[250] The fact remains, however, that the hair is exposed to the public and not hidden from view.[251]

The majority also concluded that the government's conduct of "searching" Mills' hair did not intrude upon Mills' interests in personal security and human dignity.[252] Snipping a few hairs is akin to the involuntary touching required in the fingerprinting process which involves little if any infringement on an individual's interest in personal security.[253] "Cutting . . . a few strands of [Mills'] hair . . . [did not amount to] the sort of 'annoying, frightening and perhaps humiliating experience' involved in [a] police patdown."[254] Thus, the majority concluded that the government did not intrude upon Mills' Fourth Amendment interests in privacy, human dignity, and personal security. The court, therefore, concluded that the *Mills* grand jury need not comply with the requirements of the Fourth Amendment.[255]

b. Judge Gibbons' Concurrence — Another Outlook

Although concurring in the decision, Judge Gibbons vehemently opposed the majority's conclusion that Mills had no expectation of privacy in his hair and that his Fourth Amendment interests in personal security and human dignity were not implicated.[256] Focusing on the procurement of the sample,[257] Judge Gibbons reasoned that Mills had a reasonable expectation of privacy in thinking "that the government [would] not detain [him] unwillingly to comb through, pull or clip [his] head and beard hairs."[258] Gibbons concluded that the Fourth Amendment was applicable and, therefore, the government's conduct must be reasonable. Gibbons further concluded that the intrusion into Mills' interests in privacy, human dignity, and personal security was minor. The substantial government interest in having the grand jury investigate

250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.* (quoting Terry v. Ohio, 392 U.S. 1 (1968)).
255. *Id.* Although the majority concluded that no Fourth Amendment interests were implicated, it mistakenly went to the second prong of the Fourth Amendment analysis—evaluating the reasonableness of the government's conduct. *See id.* at 139-40. Relying on *Schmerber*, the majority concluded that the government's conduct was reasonable. *Id.* at 139. The court reasoned that the "sampling was to be accomplished under the supervision of a duly authorized agent of the grand jury and [was] to be effected by a doctor or other trained medical personnel." *Id.* at 140 n.4. Thus, the court concluded that the government's conduct was reasonable, and therefore, constitutionally permissible. *Id.* at 140.
256. *Id.* at 141 (Gibbons, J., concurring).
257. The focus of Judge Gibbons's opinion was on the procurement, whereas the majority focused on the subsequent analysis of Mills' hair. *Id.*
258. *Id.* at 142.

criminal activity and the procedural safeguards in existence to protect Mills' Fourth Amendment rights outweighed the minor intrusion into Mills' protected Fourth Amendment interests.[259]

The intrusion into Mills' interests in human dignity, privacy and personal security was minor according to Judge Gibbons.[260] He reasoned that requiring someone to appear before the grand jury involves little stigma or humiliation.[261] Also, a grand jury appearance constitutes only a limited infringement upon the individual's personal security.[262] Finally, the intrusion into the individual's privacy is minor given that law enforcement officials do not go to the individual's place of business and the individual is generally free to reschedule if the time is inconvenient.[263]

Counterbalancing this minor intrusion were procedural safeguards and the government's interest in having the grand jury investigate crime.[264] Three procedural mechanisms exist to ensure the reasonableness of the grand jury's conduct.[265] First, the court retains supervisory powers which are a "considerable protection against grand jury abuse and invasion of privacy."[266] Second, the grand jury is dependent upon the court for enforcement of the subpoena.[267] As a result, an individual is permitted to challenge the subpoena in court before the subpoena is judicially enforced, thereby preventing possible Fourth Amendment violations.[268] Third, twenty-three individuals comprise the grand jury, curbing "the aggressive tendencies of zealous government prosecutors."[269]

Also outweighing this minor intrusion was the State's "legitimate interest [in having] the grand jury . . . effective[ly] administer . . . [the] criminal justice [system] . . . [by] 'proffer[ing] . . . charges in serious criminal cases.' "[270] The minor intrusion into protected Fourth Amendment interests caused by a grand jury *subpoena duces tecum* compelling production of hair samples is reasonable given the important constitutional function the grand jury performs and the existence

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259. *Id.* at 144-46.

260. *Id.* at 146.

261. *Id.* at 145. The stigma or humiliation involved is slight because the individual comes on his own and is not subjected to a police-station confrontation. *Id.*

262. *Id.* Law enforcement officials do not escort the individual to the courthouse. *Id.*

263. *Id.*

264. *Id.* at 144-46.

265. *Id.*

266. *Id.* at 145.

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.* at 145-46 (quoting Berger v. United States, 295 U.S. 78, 88 (1935); Costello v. United States, 350 U.S. 359, 367 (1956)).

of substantial procedural mechanisms protecting the individual's Fourth Amendment rights.[271] Thus, the grand jury *subpoena duces tecum* compelling Mills to produce hair samples was constitutionally permissible.[272]

Mills illustrates the inherent intricacies of the Fourth Amendment and the difficulty courts have in applying the Fourth Amendment. The Fourth Amendment protects interests which are difficult to define, such as human dignity, privacy, and personal security. As a result, bright line rules do not exist for those cases which fall in the middle of the reasonableness continuum.

3. In re Grand Jury Proceedings (TS)—An Unconstitutional Use of the Grand Jury *Subpoena Duces Tecum*

As the government's conduct registers near the unconstitutional end of the reasonableness continuum, it becomes clear that the government's conduct implicates the Fourth Amendment. Where government conduct intrudes upon a Fourth Amendment interest, a court's analysis must focus on the reasonableness of the government's conduct. This idea is clearly reflected in *In re Grand Jury Proceedings (TS).*[273] *TS* represents a use of a grand jury *subpoena duces tecum* which unreasonably intrudes upon a heightened expectation of privacy and, thus, falls at the unconstitutional end of the reasonableness continuum.

In *TS,*[274] federal prosecutors moved the federal district court to compel TS to comply with a grand jury *subpoena duces tecum* requesting blood samples.[275] The Federal District Court for the Western District of Kentucky labeled the request for TS' blood as a search.[276] The court stated that the request intruded upon TS's interests in privacy and personal security.[277] The court found that TS, like Schmerber, had a reasonable expectation of privacy in his blood because its identifying

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271. *Mills,* 686 F.2d at 145-46.

272. *Id.* at 146.

273. 816 F. Supp. 1196 (W.D. Ky. 1993).

274. In *TS*, prosecutors wanted to compare TS' blood with other blood samples. *Id.* at 1197. In addition, prosecutors refused to reveal why TS' blood was subpoenaed unless discussed *in camera. Id.*

Upon advice of counsel, TS moved the court to quash the subpoena as violative of his Fourth Amendment rights. *Id.* TS also challenged the blood sample as violative of his Fifth Amendment privilege against self-incrimination. *Id.* Relying on *Schmerber*, the court rejected this claim. *Id.* at 1198; see *supra* note 147 for a discussion of Schmerber and the Fifth Amendment.

275. *TS*, 816 F. Supp at 1197.

276. *See id.* at 1205 (recognizing and holding that involuntary blood samples are searches).

277. *See id.* at 1198-1200, 1205 (recognizing that taking of blood sample intrudes upon privacy and bodily integrity).

features were not exposed to the public.[278] Thus, the *TS* court was able to distinguish between a request for a blood sample and a request for a voice exemplar.[279] The court stated that "[u]nlike [a person's] voice, a person's blood is not a characteristic knowingly exposed to the public."[280] Individuals, therefore, have a reasonable expectation of privacy in their own blood.[281]

An individual's interest in personal security is also intruded upon when he is compelled to give a blood sample.[282] Relying on *Winston*, the court reasoned that one's interest in personal security is intruded upon when he is compelled to give a blood sample because medical personnel are penetrating beneath the surface of the skin.[283] The court also concluded that this touching also violates an individual's right to bodily integrity.[284] Therefore, the district court ruled that a grand jury *subpoena duces tecum* which attempts to obtain blood samples constitutes a search for Fourth Amendment purposes.[285]

Having characterized the intrusion as a search, the court then proceeded to evaluate the reasonableness of the grand jury's conduct.[286] In *TS*, law enforcement officials lacked a warrant.[287] Furthermore, the State failed to produce evidence establishing probable cause.[288] Thus, the court was forced to apply a balancing test. Application of the balancing test resulted in the finding that prosecutors acted unreasonably and in violation of TS' Fourth Amendment rights.[289]

The *TS* court categorized an intrusion beneath the skin as a massive intrusion into an individual's privacy, personal security, and human dignity.[290] Thus, for the conduct to have been reasonable, compelling government interests must have existed which would counterbalance the "risk of harm to [the subpoenaed party] and the infringe[ment

278. *Id.* at 1205. An individual's blood is generally shielded from public view by his skin. *Id.*

279. *Id.*

280. *Id.*

281. *See id.* (blood samples are protected by Fourth Amendment); see also *supra* text accompanying notes 64-95 for a discussion of interests protected by the Fourth Amendment.

282. *Id.* at 1200 (adopting reasoning of Winston v. Lee, 470 U.S. 753 (1985), that submission to a blood test intrudes upon personal security).

283. *See id.* at 1205.

284. *See id.*

285. *Id.*

286. *See id.* at 1200-06.

287. *Id.* at 1205.

288. *See id.* The State may have had probable cause, but it refused to reveal this information to TS. *Id.* at 1205 n.8.

289. *Id.* at 1205.

290. *Id.* at 1200 (adopting *Schmerber* and *Winston* holdings that beneath the skin intrusions are massive intrusions into protected Fourth Amendment interests).

upon that person's] dignitary interests in privacy."[291] This was not, however, the situation in *TS*.

In *TS*, the government did not delineate compelling government interests.[292] For instance, a special need beyond the normal need for law enforcement or exigent circumstances was not present which would justify requiring the blood sample.[293] In addition, the government's interest in affording the grand jury wide investigatory latitude, although important, was neither compelling nor substantial.[294] Moreover, the importance of affording the grand jury broad investigatory power was outweighed by the idea that massive intrusions into protected Fourth Amendment interests must not be based on mere suspicion.[295] Thus, the *TS* court held that the government's conduct was unreasonable given the massive intrusion and minimal government interests.

The court also held that where prosecutors attempt to intrude upon the bodily integrity of an individual, the prosecutor must possess probable cause or a search warrant.[296] Further, the search warrant must only be issued where the government has a compelling interest justifying the search.[297] The court reasoned that such a requirement prevents prosecutors from "transform[ing] the subpoena into an instrument by which an illegal search is effectuated."[298]

The *TS* grand jury attempted an unconstitutional use of the grand jury *subpoena duces tecum* because it unreasonably intruded upon TS' heightened expectation of privacy, personal security, and human dignity. As a result, *TS* and *Dionisio* register on opposite ends of the reasonableness continuum with *Mills* registering in the middle.

B. Unconstitutional Uses of the Grand Jury Subpoena Duces Tecum

When confronted with a constitutional challenge to a grand jury *subpoena duces tecum*, many courts presume the use of the *subpoena duces tecum* to be constitutional.[299] Relying largely on *Dionisio*, courts

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291. *Id.* at 1206.

292. *Id.* at 1205-06. The State refused to explain why it needed the blood test. *Id.* at 1205.

293. *Id.* at 1200; see *supra* text accompanying notes 112-20 for a discussion of the exigent circumstances exception to the warrant requirement.

294. *TS*, 816 F. Supp. at 1203-04.

295. *See id.* (rejecting even the heightened standard of individualized suspicion in favor of probable cause).

296. *Id.* at 1204, 1206.

297. *Id.*

298. *Id.* at 1205.

299. *See, e.g.*, United States v. Calandra, 414 U.S. 338, 343 (1974); United States v. Dionisio, 410 U.S. 1, 10-18 (1973).

afford the grand jury great deference.[300] These courts, however, fail to recognize that there is "great potential for expanded application of the *subpoena duces tecum*" in the grand jury context.[301] With advances in forensics, the government has the means available to learn a great deal about an individual's private affairs through scientific tests.[302] It is, therefore, incumbent upon the courts to scrutinize the grand jury process to ensure that government prosecutors are not using the *subpoena duces tecum* to unreasonably intrude upon an individual's Fourth Amendment rights.

Although courts are charged with the constitutional duty to ensure that prosecutors are not using *subpoena duces tecum* in violation of the Fourth Amendment, some courts have failed to fulfill this obligation.[303] *In re Grand Jury Subpoena (Under Seal)*[304] presented the United States Court of Appeals for the Fourth Circuit with a case factually similar to *TS*. The court, however, failed to declare the use of the *subpoena duces tecum* unconstitutional.[305] In *Under Seal*, federal prosecutors subpoenaed a South Carolina inmate to produce blood samples for the grand jury.[306] The inmate initially refused to comply.[307] The district court ordered prison personnel to use all reasonable force necessary to extract the blood sample.[308] On appeal, the Fourth Circuit ruled that "[t]he district court ordered a routine, minimal physical intrusion in order to allow the grand jury to obtain evidence which the record shows will be highly relevant and probative in an ongoing investigation."[309] Thus, the Fourth Circuit ruled that no Fourth Amendment violation occurred.

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300. *See Calandra*, 414 U.S. at 350; *In re* Grand Jury Subpoena (Under Seal), No. 86-5134, 1987 WL 37526 (4th Cir. May 21, 1987); *In re* Grand Jury Proceedings (Mills), 686 F.2d 135 (3d Cir.), *cert. denied*, 459 U.S. 1020 (1982).

301. *See Mills*, 686 F.2d at 143 (Gibbons, J., concurring).

302. *Id.* at 140. In *Mills*, Judge Gibbons noted that advances in forensics can provide a grand jury with information regarding the medication or alcohol one consumes. *Id.*

303. *See, e.g., In re* Grand Jury Selection v. (Under Seal), No. 86-5134, 1987 WL 37526 (4th Cir. May 21, 1987).

304. In *Under Seal*, federal prosecutors subpoenaed a South Carolina inmate to produce a blood sample for the grand jury on a certain date. *Id.* at *1. The inmate refused to comply. *Id.* Subsequently, the district court held a hearing to show cause why the inmate should "not be held in contempt." *Id.* At the close of the hearing, the inmate "indicated he would comply." *Id.* The district court then issued an order requiring the inmate to submit to the blood test. *Id.* The order also authorized agents of the grand jury to use reasonable force to obtain the blood sample if the inmate refused to comply. *Id.* Instead of complying, the inmate appealed to the Fourth Circuit, challenging the district court's order as violative of his Fourth Amendment rights. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.* at *2.

The Fourth Circuit correctly ruled that the government conduct in *Under Seal* constituted an intrusion into protected Fourth Amendment interests.[310] The Fourth Circuit, however, mischaracterized the intrusion as minor and failed to recognize that a government compelled blood test is a minor intrusion only in stringently limited circumstances.[311] In addition, the court incorrectly balanced the nature of the intrusion against the government's need. Thus, the Fourth Circuit's holding that the prosecutor had acted reasonably was incorrect.

Government compelled blood tests constitute minor intrusions only in stringently limited circumstances.[312] The existence of probable cause or a special law enforcement need, beyond the normal need for law enforcement, are among the limited circumstances which will enable a court to characterize an intrusion as minor.[313] The Supreme Court of the United States in *Schmerber* and *Winston* explicitly ruled that an intrusion upon an individual's physical integrity may not be ordered on the mere chance that evidence may be found.[314] In *Under Seal*, law

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310. It is unclear from the *Under Seal* opinion whether the court considered the request for the blood sample as a separate search and the reasonable force provision as a separate seizure. It is entirely possible that the Fourth Circuit made no such distinction. This article, however, will presume that the court made such a distinction, and thus, will focus only on the search (the request for the blood sample).

It is important to note that the reasonable force provision presents a Fourth Amendment issue. Individuals have a cherished right in being free from bodily restraint. *See* Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891). The Supreme Court ruled that "[n]o right is held more sacred . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Id.* Although, in the present case the inmate's freedom of movement was given up by his incarceration, he retained his right to bodily integrity. This right includes the right to be free from intrusive medical procedures and involuntary touching. The reasonable force provision called for involuntary touching. *Under Seal*, No. 86-5134, at *2. The Fourth Amendment was therefore implicated, and thus required that the reasonable force provision comport with the reasonableness requirement of the Fourth Amendment. Given that the order requiring the inmate to produce a blood sample was unconstitutional, the reasonable force provision only served to magnify the constitutional violation. Thus, the reasonable force provision was unconstitutional and violative of the individual's Fourth Amendment rights.

311. *See, e.g.,* Winston v. Lee, 470 U.S. 753, 767 (1985) (holding bodily intrusion permissible in limited circumstances); Schmerber v. California, 384 U.S. 757, 772 (1966) (holding bodily intrusion permissible in limited circumstances).

312. *See Winston*, 470 U.S. at 767; *Schmerber*, 384 U.S. at 772.

313. *See, e.g.,* Skinner v. Railway Labor Exec. Ass'n, 489 U.S. 602 (1989) (special need beyond need for law enforcement justifies search); *Schmerber,* 384 U.S. at 760 (holding bodily intrusion permissible where exigent circumstances exist); *In re* Grand Jury Proceedings (TS), 816 F. Supp. 1196 (W.D. Ky. 1993) (recognizing bodily intrusions permissible where exigent circumstances exist).

314. *Winston*, 470 U.S. at 758-60; *Schmerber*, 384 U.S. at 769.

enforcement officials plainly lacked probable cause, and thus, were proceeding on the mere chance that evidence would be found.[315]

In addition, special circumstances did not exist which would allow the Fourth Circuit to categorize the intrusion as minor. The prosecutor's need for evidence in *Under Seal* was indistinguishable from the need of a police officer to search a house suspected of containing contraband. In each case, the desired evidence will be highly relevant and probative to a criminal investigation. No special need beyond the normal need for law enforcement existed which justified the categorization of the intrusion as minor. The Fourth Circuit, therefore, mischaracterized the intrusion in *Under Seal* as minor.

Given that the Fourth Circuit mischaracterized the intrusion in *Under Seal* as minor, its balancing of the nature of the intrusion against the government interest was flawed. In addition, no substantial government interest existed. Although the grand jury plays an important investigatory role in American law enforcement, it is simply another means of enforcing the law of the land. The grand jury, like other law enforcement agencies, is bound by the constitutional requirements of the Fourth Amendment.[316] As a result, the mere existence of a grand jury does not create a compelling government need. Thus, the Fourth Circuit misapplied the balancing test in *Under Seal,* and the court's holding that the prosecutors in that case acted reasonably is flawed.

Under Seal is representative of those cases where courts overemphasize the importance of the grand jury's investigatory function. Although grand juries perform important investigatory functions, their need to acquire evidence does not exceed that of other law enforcement entities. Thus, they too must satisfy the requirements of the Fourth Amendment. At a minimum, courts must require prosecutors to possess probable cause when issuing a grand jury *subpoena duces tecum* for physical evidence. This will ensure that prosecutors and grand juries do not unreasonably intrude upon an individual's protected Fourth Amendment interests.

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315. The term probable cause is conspicuously absent from the opinion. It is highly unlikely that had law enforcement officers possessed probable cause, the Fourth Circuit would have failed to so state in its opinion.

316. *See* United States v. Dionisio, 410 U.S. 1, 11 (1973) (grand jury bound by Fourth and Fifth Amendments); United States v. Mara, 410 U.S. 19, 22 (1973) (Fourth Amendment is a limitation on grand jury); Hale v. Henkel, 201 U.S. 43, 47 (1906) (Fourth and Fifth Amendments are applicable to grand jury).

C. *Reform*

Under Seal reflects the hesitancy of courts to declare an act of the grand jury unconstitutional.[317] As a result, a situation has developed where prosecutors are free to use the grand jury *subpoena duces tecum* to intrude upon an individual's protected Fourth Amendment interests. A solution must be developed requiring courts to apply the Fourth Amendment strictly to both the grand jury and prosecutors. One viable means of achieving this objective is to amend Federal Rule of Criminal Procedure 17(c) so that it explicitly provides for situations where an individual's bodily integrity may be violated. Criminal Rule 17(c) should be amended to require courts to quash a subpoena for physical evidence upon motion by the subpoenaed party where the intrusion into protected Fourth Amendment interests is unreasonable. Congressional[318] amendment of Criminal Rule 17(c) has several advantages. Primary among these advantages is the protection of Fourth Amendment rights.

1. Proposed Amendment

The focus of Criminal Rule 17(c) is presently confined to the production of documentary evidence and objects.[319] In order to facilitate the protection of Fourth Amendment rights, the scope of 17(c) should be expanded to include all evidence except testimonial evidence. Expanding the scope of 17(c) can be achieved by changing the title, structure, and substance of the rule.

The title of 17(c) should be changed to clearly reflect the expanded scope of 17(c), demonstrating its inclusion of all non-testimonial evidence. Structurally, 17(c) should be divided into two subsections. Subsection one should retain the present language of 17(c). Subsection two should contain new language and reflect the substantive changes to the rule.

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317. *See e.g.*, United States v. Eisenberg, 711 F.2d 959, 964 (11th Cir. 1983) (hesitant to declare act of grand jury unconstitutional because of grand jury's unique constitutional function); United States v. Pabian, 704 F.2d 1533, 1536 (11th Cir. 1983) (hesitancy because of grand jury's constitutional function).

318. Congress may create procedures for federal courts. *See* Willy v. Coastal Corp., 112 S. Ct. 1076, 1080 (interim ed. 1992) ("it has been firmly established that Congress [may] make all laws 'necessary and proper' [for] . . . regulating . . . th[e] courts"); Mistretta v. United States, 488 U.S. 361, 387 (1989) (holding Congress has the power to create federal judicial procedures); Hanna v. Plumer, 380 U.S. 460, 473 (1965) (detailing the "long recognized power of Congress to prescribe . . . rules for federal courts"). Congressional authority to create judicial rules of procedure derives from the Necessary and Proper Clause of Art. I, § 8, cl. 18 of the United States Constitution. *Willy*, 112 S. Ct. at 1080.

319. *See* FED. R. CRIM. P. 17(c).

Subsection two should place the initial burden of proof on the subpoenaed party to show that a protected Fourth Amendment interest is implicated by the subpoena. Having satisfied this burden, the burden should then switch to the government to prove the reasonableness of the subpoena. In addition, 17(c)(2) should provide for a completely *in camera* review of 17(c)(2) motions. Thus, 17(c) should be amended to provide as follows:

> 17. Subpoena
> (c) FOR PRODUCTION OF NON-TESTIMONIAL EVIDENCE
> (1) A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion may quash or modify the subpoena if compliance would be unreasonable or oppressive. The Court may direct that books, papers, documents, or objects designated in the subpoena be produced before trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.
> (2) A subpoena may be used to obtain physical evidence. The subpoena may not be used to unreasonably intrude upon an individual's interests in privacy, personal security, or human dignity. Upon motion by the subpoenaed party, the court shall make a determination of whether the subpoena intrudes upon any of these interests. If one of the above interests is implicated, the government must establish through an *in camera* hearing that the subpoena is reasonable. The reasonableness of a subpoena may be established by the existence of probable cause or a special need, which when compared to the nature of the intrusion, is substantial. The court shall quash the subpoena, if the government fails to establish the reasonableness of the subpoena.

2. Evaluation of Proposed Amendment

The primary focus of 17(c), as proposed, is to reinforce the protections of the Fourth Amendment. Specifically, 17(c), as proposed, is intended to protect an individual's interests in personal security, human dignity, and privacy. Opponents may argue that the proposed rule creates the possibility for mini-trials on the merits. A significant burden of proof, however, is placed on the subpoenaed party, thus preventing such a possibility in that the subpoenaed party must first establish an intrusion into his Fourth Amendment rights. In addition, *in camera* review of the reasonableness of the subpoena protects the secrecy of the grand jury proceedings. Also, 17(c), as proposed, provides the courts and prosecutors with guidance regarding the proper balance to be struck between the executive branch's need to enforce the law and the judici-

ary's responsibility to protect individuals from unreasonable government searches or seizures.

The Supreme Court of the United States has repeatedly ruled that the Fourth Amendment applies in the grand jury context.[320] Theoretically, the applicability of the Fourth Amendment to grand juries forecloses the possibility of an unreasonable intrusion upon an individual's personal security, human dignity, and privacy. As *Under Seal* illustrates, however, some courts fail to apply the Fourth Amendment to grand jury conduct. These courts recite the general rule of the Fourth Amendment's applicability to grand juries and then presume the government's actions reasonable.[321] As a result, the government is permitted to unreasonably intrude upon an individual's Fourth Amendment interests.

Proposed 17(c) provides individuals with a procedural mechanism for challenging unreasonable government conduct. Thus, the individual is afforded another means for protecting his interest in privacy, personal security, and human dignity beyond a Fourth Amendment constitutional challenge.

Courts afford the grand jury great deference because of the important investigatory function the grand jury performs.[322] The Supreme Court in *Dionisio* stated that "any holding that would saddle a grand jury with minitrials and a preliminary showing would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal law."[323] Courts have consistently reiterated this concern for the delay in the administration of justice when they are confronted with a question of whether a subpoena satisfies Fourth Amendment reasonableness.[324]

This same concern could be raised with regard to the proposed 17(c). The proposed rule, however, does not require a preliminary showing of reasonableness. In addition, the subpoenaed party is re-

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320. *See e.g.*, United States v. Calandra, 414 U.S. 338 (1974); *Dionisio*, 410 U.S. 1; *Mara*, 410 U.S. 19; *Hale*, 201 U.S. 42.

321. *See* In re Grand Jury Subpoena v. (Under Seal), No. 86-5134, 1987 WL 37526 (4th Cir. May 21, 1987).

322. *See e.g.*, United States v. R. Enter., Inc., 498 U.S. 292, 299 (1991) (holding grand jury needs wide latitude to investigate); United States v. Mandujano, 425 U.S. 564, 573 (1976) (recognizing grand jury's important investigatory function); *Calandra*, 414 U.S. at 350 (recognizing grand jury's important investigatory function); *Dionisio*, 410 U.S. at 16 (recognizing grand jury's important investigatory function).

323. *Dionisio*, 410 U.S. at 17.

324. *See, e.g., In re* Grand Jury Subpoena 84-1-24 #1 to Robert Battle, III, 748 F.2d 327, 331 (6th Cir. 1984) (delay harmful to grand jury efficiency); *In re* Grand Jury Proceedings (Schofield), 507 F.2d 963, 967 (3d Cir. 1975) (delay harmful to efficiency of grand jury); United States v. Mid-States Exch., 620 F. Supp. 358, 359 (D. S.D. 1985) (delay harmful to grand jury efficiency).

quired to take the first step by initiating judicial action via a motion to quash. Moreover, the initial onus or burden of proof is on the individual to establish that a Fourth Amendment interest is implicated by the government's conduct. It is only upon such a showing that the government must establish the reasonableness of the subpoena. Although this process may in some circumstances create delay, the new rule provides for the protection of a constitutionally guaranteed right. Courts have consistently ruled that the protection of a constitutional right outweighs any present public interest[325] and thus, any delay created by the new rule should be accepted by the populace.

In addition, proposed Rule 17(c) protects an individual's Fourth Amendment rights while still maintaining the secrecy of grand jury proceedings. It is well established that grand jury proceedings must be kept secret in order to facilitate the participation of grand jurors and witnesses in the process.[326] In addition, the secrecy of the grand jury must be maintained to protect the reputation of an innocent person wrongly accused.[327] By utilizing *in camera* review, proposed Criminal Rule 17(c) maintains the secrecy of the grand jury proceedings. Only upon a showing that the government's conduct implicates a Fourth Amendment interest, must the prosecutor reveal the information and justify the seizure or search to the judge. The judge, acting as a detached judicial officer, will then make a determination of reasonableness. It is important to remember that the judge, like the members of the grand jury, is legally obligated to maintain the secrecy of grand jury proceedings. Thus, the proposed rule protects individual rights without jeopardizing the secrecy of the grand jury.

In addition, many courts are hesitant to declare an act of the grand jury, or its agents, unconstitutional because the grand jury occupies a unique place in the tripartite governmental system.[328] The Con-

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325. Present public interest is often evidenced by the enactment of a statute. In *Penry v. Lynaugh*, the United States Supreme Court noted that "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislators." 492 U.S. 312, 331 (1989).

326. *See, e.g.*, United States v. Sells Eng'g, Inc., 463 U.S. 418, 424-25 (1983) (secrecy of grand jury necessary to ensure witness participation); Smith v. United States, 423 U.S. 1303, 1304 (1975) (recognizing long standing policy of grand jury secrecy); United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958) ("[g]rand jury . . . might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow"); United States v. Johnson, 319 U.S. 503, 513 (1943) (secrecy indispensable to grand jury).

327. *Sells Eng'g*, 463 U.S. at 424 (secrecy indispensable); *Johnson*, 319 U.S. at 513 (grand jury secrecy is as important for the protection of the innocent as for the pursuit of the guilty).

328. *See, e.g.*, United States v. Williams, 112 S. Ct. 1735 (interim ed. 1992) (grand jury acts presumptively reasonable because of constitutional function); United States v. Eisenberg, 711 F.2d 959 (11th Cir. 1983) (grand jury acts presumed reasonable given unique constitutional function); United States v. Pabian, 704 F.2d 1533 (11th Cir. 1983) (grand jury acts presumed reason-

stitution creates the grand jury but it does not explicitly place the grand jury in any one of the three branches of government.[329] Rather, the grand jury is an independent entity intended to act as a buffer between the people and the government.[330] Although independent, all three branches influence the grand jury.[331] Recognizing that the grand jury process is one means utilized by the executive branch to enforce the criminal laws of the United States, courts afford the grand jury wide latitude. The courts also generally presume that both the grand jury and the executive branch act constitutionally.[332] Presuming the constitutionality of grand jury proceedings is permissible if the grand jury is truly an independent entity. Presently, however, the executive branch has acquired great control over the grand jury process.[333] Thus, the actions of grand juries should be strictly scrutinized.

Proposed Criminal Rule 17(c) provides courts with legislative guidance on how to scrutinize a subpoena issued by the grand jury without violating the separation of powers doctrine. The proposed rule recognizes that the executive branch needs latitude in enforcing the laws of the United States. As a result, the rule places the initial onus on the subpoenaed party to bring judicial action and to establish that a Fourth Amendment interest has been implicated. It is only when the subpoenaed party establishes a possible Fourth Amendment violation that the government must explain or establish the reasonableness of the subpoena. Proposed Rule 17(c) in no way encroaches upon the legitimate authority of the executive branch, and is not an aggrandizement of the judiciary's power. Rule 17(c), as proposed, ensures that the grand jury is truly a buffer between the State and the people, not merely an arm of the executive branch. Thus, the proposed rule provides courts with guidance as to the proper balance to be struck between the executive and the judicial branches of government with regard to the grand jury.

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able given unique constitutional function); United States v. Cox, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965) (grand jury acts presumed reasonable given unique constitutional function); *In re* Grand Jury Proceedings, 700 F. Supp. 626 (D. P.R. 1988) (grand jury acts presumed reasonable given unique constitutional function).

329. *Williams*, 112 S. Ct. at 1741.

330. *Id.*

331. The legislative branch establishes the statutory laws of the United States and prescribes the procedures under which the grand jury operates. *Eisenberg*, 711 F.2d at 964. The executive branch, through the United States Attorney's Office, generally assists the grand jury in its investigatory and accusatory functions. *Id.* at 965. The judiciary supervises and enforces the grand jury findings or orders. *Id.*

332. *Williams*, 112 S. Ct. at 1740; *Pabian*, 704 F.2d at 1537.

333. *See supra* notes 31-34 and accompanying text.

Proposed Criminal Rule 17(c) is a viable means of protecting individual Fourth Amendment rights. In addition, Criminal Rule 17(c), as proposed, maintains the secrecy of the grand jury. Moreover, only a limited delay in the administration of justice is created. Finally, the proposed rule provides courts with legislative guidance as to the proper balance to be struck between the executive and the judiciary with regard to the grand jury.

IV. Conclusion

By allowing the prosecutor to maintain a great degree of control over the grand jury process, the present system enables a prosecutor to circumvent the warrant requirements of the Fourth Amendment with the use of a grand jury *subpoena duces tecum*. Prosecutors have used the grand jury *subpoena duces tecum* to obtain pieces of physical evidence traditionally thought to require, at a minimum, probable cause. Some lower courts have upheld these subpoenas, even when prosecutors lack probable cause. Thus, a need has arisen to amend Federal Rule of Criminal Procedure 17(c) to provide courts with a legislative mandate to invalidate unconstitutional uses of the grand jury *subpoena duces tecum*. Criminal Rule 17(c) should be amended as suggested by this article in order to protect the Fourth Amendment rights of all individuals.

Rosemary Elizabeth-Anne Smith