

1978

Book Review

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Book Review, 46 Fordham L. Rev. 876 (1978).

Available at: <https://ir.lawnet.fordham.edu/flr/vol46/iss4/6>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

BOOK REVIEW

The Grand Jury: An Institution on Trial. By Marvin E. Frankel & Gary P. Naftalis. New York: Hill and Wang. 1977. Pp. 148. \$8.95.

The grand jury is an investigative institution of awesome power.¹ It may issue subpoenas at will, often of the notorious "forthwith" variety, requiring the appearance, sometimes on unreasonably short notice and at great inconvenience and expense, of witnesses who may be as far removed from the grand jury room as Hawaii from New York. When the witness enters the grand jury chamber, he must confront, without the presence of counsel, at least sixteen (of possibly twenty-three) strangers, and a trained, skilled, and sometimes hostile interrogator. Although in some districts every word the witness utters is stenographically transcribed, ordinarily he is not entitled to a transcript of his testimony, nor does he have to be told that he has a constitutional privilege against self-incrimination or that anything he says may be used against him. Even though he may himself be the target of the grand jury's investigation, he need not be so advised. Should he refuse to answer questions regarded as proper, he may be cited and punished for contempt of the grand jury and incarcerated until he answers or the term of the grand jury expires. In short, the modern grand jury hearing is, for the average witness, a harrowing ordeal.²

Recognition of these problems has caused some to urge the complete abolition of the institution; others have for some time sought its reform. The authors of *The Grand Jury: An Institution on Trial* espouse the latter as the better course. Federal Judge Frankel and former Assistant United States Attorney Naftalis³ bring their ability, experience and expertise to the composition of this work, which is timely, informative and intellectually stimulating. It is recommended for reading by lawyers and laymen alike. The great value of this book lies in the fact that it presents with thoroughness and clarity the changes that have been suggested for our grand jury system, the arguments for and against those suggestions, together with a forthright statement of the authors' position, and some independent proposals of their own. It would exceed the reasonable compass of this review to comment upon all these recommendations; therefore, only those regarded as perhaps ineffective or ill-advised are considered.

Selection of Grand Jurors

It will come as a surprise to some that federal grand jurors are selected "at random." The principal concern seems to be that there be compliance with the Jury Selection and Service Act of 1968,⁴ which requires that grand jurors

1. M. Frankel & G. Naftalis, *The Grand Jury: An Institution on Trial* 3-6 (1977) [hereinafter cited as Frankel & Naftalis]. The discussion throughout concerns the federal grand jury, since the authors deal primarily with that body.

2. See generally Frankel & Naftalis, *supra* note 1, at 18-32.

3. Judge Frankel sits in the Southern District of New York. Mr. Naftalis served there officially and is now a private practitioner.

4. 28 U.S.C. §§ 1821, 1861-1869, 1871 (1970 & Supp. V 1975).

"[be] selected at random from a fair cross-section of the community" and forbids their exclusion from service "on account of race, color, religion, sex, national origin or economic status."⁵ Accordingly, the names of prospective grand jurors are chosen from voter registration lists; and, of these, a particular panel is selected in a typical lottery fashion, by drawing their names from a drum. While it is true that those tentatively selected as federal grand jurors are questioned regarding certain matters, such as age, residence in the district, ability to speak, read, and write English, and the absence of disabling physical infirmities (for example, bad eyesight or poor hearing), apparently no questions are asked bearing upon native intelligence, education, experience, or integrity.⁶

A conspicuous omission in the selection procedure is the absence of any check on the truth of the answers given, none of which are made under oath. For instance, jurors must have no record of felony convictions.⁷ The authors do not state whether the court or prosecutor has independent knowledge whether such convictions exist, or if any independent investigation is made of the facts. Nor do they mention misdemeanor convictions or disposition of persons who have been arrested, or indicted, but acquitted after trial, or absolved by the court's dismissal of the charges against them.⁸ Surely, these circumstances should have a direct and material bearing upon the prospective juror's ability to perform, without prejudice, what the authors correctly describe as the sole function of a grand jury: "to determine if there is sufficient evidence to warrant putting the subject of an investigation on trial."⁹

5. *Id.* §§ 1861-1862; see Frankel & Naftalis, *supra* note 1, at 41-42.

6. Frankel & Naftalis, *supra* note 1, at 44.

7. *Id.*

8. Lest it be thought that these considerations are far-fetched, some years ago it was discovered in panelling a special grand jury that a number of those chosen "at random" to serve had committed perjury in answering two questions put to them under oath: (1) "Have you ever been criminally prosecuted?" and (2) "Have you ever had trouble with the authorities?" No check had ever been made as to the accuracy of these responses.

Investigation disclosed that, of the first 100 prospective grand jurors, five had been convicted of some offense; four had been arrested though not indicted; several had been found guilty of disorderly conduct; and many had long records of traffic violations. Subsequently, six of these were indicted for perjury in the first degree and four for perjury in the second degree. Of the six, five pleaded guilty. Of the four indicted for perjury in the second degree, only one was tried, and he was acquitted.

Further investigation of the same panel disclosed that the grand jury list included many individuals who proved to be unfit to serve by reason of false statements made in civil proceedings, larceny from employers who had been persuaded not to prosecute, suspicious proofs of claim in insurance cases, and mental incapacity known to the individuals' families.

As a result, the New York legislature enacted a statute (Judiciary Law, Article 17) applicable to all counties having a population of 100,000 or more, providing for more thorough checks upon the qualifications of both grand and petit jurors. In 1941 the New York Legislature enacted a further provision whereby it became necessary for each prospective grand juror to be fingerprinted at the time of being examined as to his qualifications. See J. Amen, Report of Kings County Investigation: 1938-1942, at 14, 34-39.

9. Frankel & Naftalis, *supra* note 1, at 19.

In view of this disturbing laxity, the authors' suggestion that a grand jury be given adequate instructions by the judge with respect to their broad authority and duties to their fellow citizens¹⁰ seems to miss the mark. If, as the authors urge, grand juries must exercise independence in the performance of their functions, much more attention should be paid to their qualifications and verification made of the basic prerequisites of intelligence, experience, and integrity. At the very least, a thorough check should be made into the criminal records of all prospects, and to facilitate this, their fingerprinting should be required.

Pretrial Testing of the Sufficiency of Grand Jury Testimony

Early in the book, reference is made to the fact that federal courts deny an indicted defendant the right to test before trial the sufficiency of the grand jury evidence upon which the indictment is based.¹¹ Continuance of this long-standing practice is favored by the authors, except possibly in egregious cases of grand jury irresponsibility. This rule obtains even though, theoretically, the grand jury evidence must be sufficient to establish a *prima facie* case that there is "probable cause" to believe that a crime has been committed and that the accused committed it.¹² In fact, the required "probable cause" may be properly found, even where *all* the grand jury evidence is incompetent,¹³ as with mere hearsay, or some of it was obtained by unconstitutional means, such as an illegal wiretap.¹⁴

These standards (or lack of them) of course remain largely academic, since the defendant may not have them effectively applied by an appropriate motion to dismiss the indictment before trial.¹⁵ It is said in favor of the present rule that there should be only one trial—the one in open court—to determine the sufficiency of the evidence.¹⁶ But the question arises, and regrettably is left unanswered: Why should the defendant be put to the mental and emotional trauma of an indictment and the harassment and expense of a trial when the accusation to be tried is based upon "evidence" universally recognized as incompetent and therefore, in legal contemplation, no evidence at all?

Other arguments seem even less convincing. For example, the authors say that (1) rules of evidence are designed to govern only proceedings in a trial

10. *Id.* at 121-22.

11. *Id.* at 27; *see, e.g.*, *United States v. Calandra*, 414 U.S. 338, 345 (1974); *United States v. Blue*, 384 U.S. 251, 255 n.3 (1966) (illegally seized evidence); *Lawn v. United States*, 355 U.S. 339, 349 (1958) (evidence obtained in violation of petitioners' fifth amendment privilege against self-incrimination); *Costello v. United States*, 350 U.S. 359, 363 (1956) (hearsay testimony); *Holt v. United States*, 218 U.S. 245, 248 (1910) (incompetent evidence).

12. *United States v. Calandra*, 414 U.S. 338, 343 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 687-88 (1972).

13. *Costello v. United States*, 350 U.S. 359 (1956); *see United States v. Mandujano*, 425 U.S. 564 (1976).

14. *United States v. Calandra*, 414 U.S. 338, 349-51 (1974). *But see id.* at 355 n.11.

15. *See* cases cited note 11 *supra*.

16. *Frankel & Naftalis, supra* note 1, at 26.

court; and (2) evidentiary questions may be properly raised only by objections (those not objected to become unobjectionable) and there is no one (no defense attorney) present in the grand jury room to object.¹⁷ This position seems at best facetious. Nor would the problem be solved by permitting the defense counsel's presence in the grand jury room, for the authors, while favoring this, would limit the attorney's presence to the period of his client's testimony before the grand jury, and even then would not permit him to object to prosecution questions that are objectionable.¹⁸

The contention is made that permitting a pretrial test of the sufficiency of grand jury testimony might increase the danger that the secrecy of grand jury proceedings would be breached. But this eventuality does not appear to have occurred in the State of New York, for instance, where the law provides for an inspection of grand jury minutes limited to a court alone in its consideration of a defendant's pretrial motion to dismiss a pending indictment against him for insufficiency of proof.¹⁹ Here the people are protected against an adverse decision of the motion, since the prosecutor has the right of appeal from an order of dismissal.²⁰ No cogent reason appears why the New York rule should not be adopted federally, since it provides fair and needed protection to the accused and does not prejudice the legitimate interests of the prosecution.

A "Bill of Rights" for Witnesses

The dependence of the grand jury on the prosecutor is almost routine, since it is hardly avoidable. He determines what evidence is presented to them—the amount and the kind. He may, if he wishes, exclude from their consideration any exculpatory facts in his possession. His treatment, or mistreatment of witnesses, is unrestrained. When the evidence is all in, the grand jury, composed as it is of laymen, looks to the prosecutor to tell it whether the evidence is sufficient to show that a crime has been committed, what particular crime it is, and if the accused is *prima facie* guilty of it. Although, theoretically, the ultimate decision as to whether or not to indict is the grand jury's since the prosecutor must absent himself from the room when they vote, in reality the determination is the prosecutor's.

The authors review various suggestions made to remedy these conditions, some their own, which they include in "a bill of rights for witnesses." A number of these are very much in order: that regular reports on the work of federal grand juries should be made, presumably by the district attorneys to the Attorney General and by him to the Congress and to the Administrative Office of the United States Courts; that complete stenographic transcripts should be made of all that goes on in the grand jury room, except the grand jurors' private deliberations; that a prospective defendant, known as such,

17. *Id.*

18. *Id.* at 124.

19. N.Y. Crim. Proc. Law §§ 210.20, 210.30 (McKinney 1971 & Supp. 1977); see *People v. Howell*, 3 N.Y.2d 672, 148 N.E.2d 867, 171 N.Y.S.2d 801 (1958).

20. N.Y. Crim. Proc. Law § 450.20 (McKinney 1975).

called as a grand jury witness, should be advised of his situation, and that no witness should be summoned to testify if the prosecutor knows beforehand that if called, he will invoke his privilege against self-incrimination; that a prospective defendant, if not called, should have the right to appear voluntarily at his request and present his version of the facts, although he should not have the right to call exculpatory witnesses on his own behalf, nor should the prosecutor be required to present such evidence; and that press conferences and "other celebrations" to mark the issuance of indictments, with all the fanfare of Kleig light exposure, are no proper business of prosecutors.²¹

Two additional "reforms" require special consideration. One is the suggestion that "a witness should be permitted to have a lawyer with him in the grand jury room to advise him there and then of his rights and liabilities."²² The other deals with measures intended to afford additional cover to the secrecy of grand jury proceedings.²³

The authors would only favor the presence of counsel for a witness who could afford one, but they also support a law providing a lawyer at public cost to any grand jury witness who claims he cannot afford to retain one. At the same time, they have considered and found wanting, although not "weightless," the argument that permitting a lawyer for the witness to be present would delay and obstruct the grand jury's work.²⁴ They respond that the remedy is not to exclude the attorney altogether, but to limit his role in the grand jury room strictly to advising the witness of his rights.²⁵

There are those who agree with this position, among them the prestigious American Bar Association;²⁶ and pending congressional bills would enact enabling legislation.²⁷ This reviewer finds himself in disagreement with this respectable body of opinion. The feared legalistic obstructionism and interminable delay, not to mention the heavy financial burden that would be involved, buttress this view. While it is true that an attempt will be made to limit the attorney's role, the question will certainly arise in particular cases of how far he may go and whether he has exceeded permissible limits. This would require at least one, and probably repeated, applications to the court, involving the time and energies of the prosecutor, witness' counsel, the district judge presiding, and the grand jury stenographer, plus perhaps a transcript (assuming it is required and available) of the pertinent grand jury

21. Frankel & Naftalis, *supra* note 1, at 121-28. Many of these proposals are embodied in a resolution approved by the House of Delegates of the American Bar Association at its meeting in Chicago on August 9, 1977, which contains 25 suggested legislative changes in the present grand jury system. See N.Y. Times, Aug. 10, 1977, at A1, col. 3.

22. Frankel & Naftalis, *supra* note 1, at 123-24.

23. *Id.* at 132-35.

24. *Id.* at 124.

25. *Id.*

26. *Id.*

27. See, e.g., H.R. Rep. No. 94, 95th Cong., 1st Sess. (Jan. 4, 1977). Similar legislation has been pending at least since September 28, 1976. See *Hearing Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. (Sept. 28, 1976) (reform of the grand jury system).

proceedings. In the meantime, the members of the grand jury would either be held in idleness or excused pending a decision which may, in close cases, be reserved. As a consequence, the grand jury hearing will be transformed into an adversary proceeding, with a pretrial trial of tangential issues far removed from the substantive matters under grand jury inquiry.

Nor does this take into account questions of appeal: Will there be a right in the witness or the prosecutor to appeal an adverse ruling by the court? If so, further prolonged delay will be required. If not, what is there to prevent an arbitrary judicial disposition of the matter? And what of grand jury secrecy and unwanted publicity? Is the judicial hearing to be held in open court or *in camera*? If the former, are the minutes of the pertinent grand jury proceeding to be read aloud or in silence? And, in either case, what is to prevent an avid press from reporting or detecting grand jury material?

As for grand jury secrecy, to permit the presence of each witness' counsel in the grand jury room is to create a myriad of possible "sources" for the news media. Grand jury "leaks" can hardly be prevented now, when only the witness is legally free to reveal his testimony. Is his attorney to be free to do so also, or is he to be silenced? And how stifling will the muffler prove to be, so long as reporters continue, as they will, to go to jail for contempt before revealing their "confidential source?"

Finally, one may question how more effective counsel will be inside the grand jury room than he is now, as he is permitted to be, just outside it. All he may do in either instance is to advise the witness of his rights. Objection is raised to requiring a witness to leave the grand jury room to consult with counsel. This has been characterized as "a ludicrous situation that can cast doubt on a witness's veracity."²⁸ But will not continuous consultation with the counsel in the grand jury room raise similar, if not stronger, doubts? For example, suppose counsel instructs the witness not to answer in the presence of the grand jury. Will they form no adverse opinions as to his openness and veracity?

None of the foregoing considerations takes into account the case of the witness who cries "poverty." How and by whom is his claim to be determined? Certainly, the *fact* of his indigence should be thoroughly proved before counsel is employed at public expense.

These questions are not raised with any specificity by the book under review. The suggestion that the presence of counsel be permitted in the grand jury room is made with the laudable intent of giving the witness much-needed protection.²⁹ At the same time, all will agree that the important work of grand juries must go on, and that in this instance, as in others, "justice delayed is justice denied."

The necessity for striking a balance between considerations of grand jury expedition and efficiency, on the one hand, and protection of witnesses on the

28. Richard E. Gerstein, Esq., *quoted in* N.Y. Times, Aug. 10, 1977, at A1, col. 5. Mr. Gerstein served as chairperson of the committee which drafted the proposals adopted by the American Bar Association's House of Delegates, referred to in note 21 *supra*.

29. Frankel & Naftalis, *supra* note 1, at 124.

other, leads this reviewer to suggest that, instead of opening the doors of the grand jury room to attorneys imbued with the spirit of advocacy, a Federal magistrate be assigned by the court to preside over the empanelling and proceedings of the grand jury. In this way, the hearing would remain nonadversary and yet the witness' rights would be protected.

Should this proposal be adopted, it is suggested that:

First. The magistrate would preside over the selection of the grand jury. He would question prospects about their qualifications and see to it that the selection methods are fair and nondiscriminatory and that a thorough check is made of the presence or absence of a criminal record.

Second. The magistrate would hear all excuses from service advanced by prospective grand jurymen.

Third. The signature of a magistrate would be required on all grand jury subpoenas for their validity. Before affixing his signature, he would have to be satisfied that the subpoena was for a legitimate grand jury purpose (not merely for harassment), and that it was reasonable in terms of time and distance.

Fourth. The magistrate would charge the grand jury as to its powers and its independence in sifting the evidence and deciding who shall be indicted and who not.

Fifth. The magistrate would be present in the grand jury room while the jury is in session. As the body took up the investigation of a particular case, the magistrate would charge the jury on the applicable criminal statute. Should the jury, during the development of evidence, have questions, the magistrate would undertake to answer them.

Sixth. The presence of the magistrate in the grand jury room should itself be a salutary restraint on an overzealous prosecutor; but, if not, the magistrate would be empowered to intervene and guide the interrogation of a particular witness, so far as necessary. In sum, he would see that each witness was fairly treated.

Seventh. On completion of the evidence, the magistrate would again address the grand jury, instructing them as to the relevant penal provisions involved and the quantum of evidence required by law for a *prima facie* case.

Eighth. The magistrate and prosecutor would withdraw from the grand jury room during the jurors' deliberations. If the grand jury had questions the magistrate and the prosecutor would return to the grand jury room, where the magistrate would give further instructions.

Ninth. Should the grand jury vote an indictment, magistrate, prosecutor, and jurors would repair to a designated courtroom where the indictment would be presented.

Tenth. The magistrate would be accountable at all times to the appropriate district judge for any alleged misperformance of his duties.

In this way, it is believed the dual purpose of preservation of grand jury effectiveness and protection of grand jury witnesses might be achieved.

Grand Jury Secrecy

The authors describe the prevailing grand jury "secrecy" as "too much and too little."³⁰ They assert there is presently an excessive regard for secrecy in that witnesses are denied grand jury minutes of their testimony, except that, if one is called as a prosecution trial witness, counsel for the defense may have a transcript of the witness' grand jury testimony for the purpose of cross-examination. They suggest, rather vaguely, that "subject to safeguards of scope and timing . . . grand jury transcripts be far more freely available to defendants."³¹ Presumably, only *defendants* would be given such transcripts.

However, it seems to this reviewer that every witness before the grand jury should be given access to a transcript of his grand jury testimony, but only if and when he is called as a trial witness, whether for prosecution or defense. It is common practice that prosecution witnesses are given access to their grand jury testimony to refresh their recollection and to avoid substantial contradiction and divergencies between their grand jury and trial testimony. Why should not the same assistance be accorded a defense witness who has given grand jury testimony?

Contrary to the authors' view, it does not seem either wise or necessary to supply any witness, prosecution or defense, with a transcript of his testimony as a matter of course. To do so would open wider the door to public disclosure of grand jury proceedings. On the other hand, it appears only fair that any prospective trial witness be permitted to read his grand jury testimony (but not to copy it), at a time reasonably in advance of the trial, but not before then.

As to grand jury "leaks," the authors join the majority of critics in deploring them.³² They find the principal culprits to be the prosecutors and the media. They favor pending congressional legislation which would make it a federal misdemeanor, punishable by a fine of up to \$500 or six months' imprisonment to reveal grand jury activities; and where the disclosure is motivated by financial remuneration or aimed at influencing the grand jury's proceedings, punishable by a fine of \$20,000 or imprisonment for five years.³³ A further suggestion is made that the victim of unauthorized leaks might be given a statutory cause of action for the recovery of money without proof of "actual damages," or for punitive damages. However, the authors would not, on first amendment grounds, impose similar sanctions on the news media.³⁴

Both remedies are likely to be ineffective, for they would require proof of the unprovable. To begin with, although grand jurors,³⁵ the prosecutor, and

30. *Id.* at 132.

31. *Id.* at 133.

32. *Id.* at 133-34.

33. *Id.* at 134 & n.66.

34. *Id.* at 134.

35. Grand jurors themselves have unlawfully disclosed grand jury testimony. See *Innes v. Cosgrove*, 177 Misc. 464, 30 N.Y.S.2d 951 (Sup. Ct. 1941), *aff'd*, 263 App. Div. 830, 32 N.Y.S.2d 149, *aff'd*, 288 N.Y. 700, 43 N.E.2d 89 (1942). There, one of the grand jurors leaked grand jury testimony to a target of the investigation and, constrained by overwhelming evidence

the official stenographer are prohibited from revealing grand jury evidence,³⁶ a grand jury witness is legally free to disclose his testimony.³⁷ Thus the media now have one legitimate means of access to what, all agree, should be inaccessible to them.

One practical way to cut off this spigot of information might be to place a grand jury witness under the same restraint of silence as that imposed on others, except that he should be permitted to relate his grand jury testimony to his attorney as a confidential communication. But whether grand jury disclosure is legitimate or not, as long as news reporters are willing to go to jail rather than reveal their sources, it is hardly possible to make effective the existing sanctions against public exposure of grand jury proceedings. Therefore, one is led inevitably to make the publication of grand jury proceedings before the filing of an indictment illegal and criminal. In this way, revelation of sources by reporters is dispensed with as not relevant, for then *publication*, rather than procurement, becomes the wrong. Although such a statutory prohibition would inevitably be tested for its constitutionality, its survival of the test might well be expected, if, as the Supreme Court has said "the press is not free to publish with impunity everything and anything it desires to publish."³⁸

Conclusion

That the present grand jury system should be reformed in some respects is a proposition that has become almost universally accepted. The question is: To what extent and by what means? In the presentation of proposals for change and the arguments for and against them, which this book embodies, the authors have performed a welcome service to the legal profession and the public at large.

William R. Meagher*

against him, came before his fellow grand jurymen and admitted his guilt. Thereupon, they authorized the filing of an information against him. However, the information was subsequently dismissed, the court finding that during the grand jury proceedings resulting in the information a special attorney general was improperly in the grand jury room. As far as is known, this violation of the secrecy of the grand jury is the first and only reported case of its kind in the State of New York. For a detailed history of this case, see J. Amen, Report of Kings County Investigation: 1938-1942, at 39-42.

36. Fed. R. Crim. P. 6e; N.Y. Penal Law § 215.70 (McKinney 1971 & Supp. 1977); N.Y. Crim. Proc. Law § 190.25 (McKinney 1975).

37. Fed. R. Crim. P. 6e; see, e.g., *In re* Investigation Before April 1975 Grand Jury, 531 F.2d 600, 607 n.11 (D.C. Cir. 1976).

38. *Branzburg v. Hayes*, 408 U.S. 665, 683 (1972).

* A member of the Bar of the State of New York and Adjunct Professor of Law, Fordham University School of Law; Special Assistant Attorney General, State of New York, 1938-1942.