11. THE GRAND JURY

The grand jury is one of the most powerful tools in the federal prosecutor's arsenal. It has subpoena power, secrecy rules, court authority, ex parte structure, and a general solemnity that make it a very effective way to gather information, especially from people who do not want to share it.

As a matter of law, the grand jury has two functions: (1) to investigate possible criminal violations, and (2) to determine whether there is sufficient evidence to return an indictment (charge a crime). The two functions are of course closely related, since it is the power to charge that gives rise to the power to investigate.

More of corporate criminal practice occurs in the shadow of the grand jury than inside the grand jury (*i.e*., "we can do this cooperatively or we can do it in the grand jury"). But that shadow is very important, so the practitioner must understand how things work if a matter or witness ends up, or could end up, in the grand jury. And, of course, in a contested case only the grand jury can level a charge, so there is always the possibility, however slight, that a case will fail in the grand jury and never get off the ground.

A. Statutes and Rules

The Fifth Amendment gives the right to have a charge considered and returned or rejected by a grand jury in federal court before being prosecuted for any felony. This right has not been incorporated against the states, though most states have grand juries.

Rule 6 of the Federal Rules of Criminal Procedure explains (some of) how the grand jury works and has important provisions about secrecy. Notice who and what are *not* covered by the secrecy rules.

U.S. Constitution Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rules of Criminal Procedure: Rule 6. "The Grand Jury"

(a) Summoning a Grand Jury.

> **(1) In General.** When the public interest so requires, the court must order that one or more grand juries be summoned. A grand jury must have 16 to 23 members, and the court must order that enough legally qualified persons be summoned to meet this requirement.

(2) Alternate Jurors. When a grand jury is selected, the court may also select alternate jurors. Alternate jurors must have the same qualifications and be selected in the same manner as any other juror. Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror is subject to the same challenges, takes the same oath, and has the same authority as the other jurors.

(b) Objection to the Grand Jury or to a Grand Juror.

(1) Challenges. Either the government or a defendant may challenge the grand jury on the ground that it was not lawfully drawn, summoned, or selected, and may challenge an individual juror on the ground that the juror is not legally qualified.

(2) Motion to Dismiss an Indictment. A party may move to dismiss the indictment based on an objection to the grand jury or on an individual juror's lack of legal qualification, unless the court has previously ruled on the same objection under Rule 6(b)(1). The motion to dismiss is governed by 28 U.S.C. § 1867(e). The court must not dismiss the indictment on the ground that a grand juror was not legally qualified if the record shows that at least 12 qualified jurors concurred in the indictment.

(c) Foreperson and Deputy Foreperson. The court will appoint one juror as the foreperson and another as the deputy foreperson. In the foreperson's absence, the deputy foreperson will act as the foreperson. The foreperson may administer oaths and affirmations and will sign all indictments. The foreperson—or another juror designated by the foreperson—will record the number of jurors concurring in every indictment and will file the record with the clerk, but the record may not be made public unless the court so orders.

(d) Who May Be Present.

(1) While the Grand Jury Is in Session. The following persons may be present while the grand jury is in session: attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device.

(2) During Deliberations and Voting. No person other than the jurors, and any interpreter needed to assist a hearing-impaired or speech-impaired juror, may be present while the grand jury is deliberating or voting.

(e) Recording and Disclosing the Proceedings.

(1) Recording the Proceedings. Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable recording device. But the validity of a prosecution is not affected by the unintentional failure to make a recording. Unless the court orders otherwise, an attorney for the government will retain control of the recording, the reporter's notes, and any transcript prepared from those notes.

(2) Secrecy.

(A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

(i) a grand juror;

(ii) an interpreter;

(iii) a court reporter;

(iv) an operator of a recording device;

(v) a person who transcribes recorded testimony;

(vi) an attorney for the government; or

(vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

(3) Exceptions.

(A) Disclosure of a grand-jury matter—other than the grand jury's deliberations or any grand juror's vote—may be made to:

(i) an attorney for the government for use in performing that attorney's duty;

(ii) any government personnel—including those of a state, state subdivision, Indian tribe, or foreign government—that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law; or

(iii) a person authorized by 18 U.S.C. § 3322.

(B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) An attorney for the government may disclose any grand-jury matter to another federal grand jury.

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. §

401a), or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand-jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal, state, state subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

(i) Any official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Any state, state subdivision, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information only in a manner consistent with any guidelines issued by the Attorney General and the Director of National Intelligence.

(ii) Within a reasonable time after disclosure is made under Rule 6(e)(3)(D), an attorney for the government must file, under seal, a notice with the court in the district where the grand jury convened stating that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.

(iii) As used in Rule 6(e)(3)(D), the term "foreign intelligence information" means:

(a) information, whether or not it concerns a United States person, that relates to the ability of the United States to protect against—

- actual or potential attack or other grave hostile acts of a foreign power or its agent;
- sabotage or international terrorism by a foreign power or its agent; or
- clandestine intelligence activities by an intelligence service or network of a foreign power or by its agent; or

(b) information, whether or not it concerns a United States person, with respect to a foreign power or foreign territory that relates to—

- the national defense or the security of the United States; or
- the conduct of the foreign affairs of the United States.

(E) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter:

(i) preliminarily to or in connection with a judicial proceeding;

(ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury;

(iii) at the request of the government, when sought by a foreign court or prosecutor for use in an official criminal investigation;

(iv) at the request of the government if it shows that the matter may disclose a violation of State, Indian tribal, or foreign criminal law, as long as the disclosure is to an appropriate state, state-subdivision, Indian tribal, or foreign government official for the purpose of enforcing that law; or

(v) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.

(F) A petition to disclose a grand-jury matter under Rule 6(e)(3)(E)(i) must be filed in the district where the grand jury convened. Unless the hearing is ex parte—as it may be when the government is the petitioner—the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to:

(i) an attorney for the government;

(ii) the parties to the judicial proceeding; and

(iii) any other person whom the court may designate.

(G) If the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. If the petitioned court decides to transfer, it must send to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand-jury secrecy. The transferee court must afford those persons identified in Rule 6(e)(3)(F) a reasonable opportunity to appear and be heard.

(4) Sealed Indictment. The magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. The clerk must then seal the indictment, and no person may disclose the indictment's existence except as necessary to issue or execute a warrant or summons.

(5) Closed Hearing. Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury.

(6) Sealed Records. Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.

(7) Contempt. A knowing violation of Rule 6, or of any guidelines jointly issued by the Attorney General and the Director of National Intelligence under Rule 6, may be punished as a contempt of court.

(f) Indictment and Return. A grand jury may indict only if at least 12 jurors concur. The grand jury—or its foreperson or deputy foreperson—must return the indictment to a magistrate judge in open court. To avoid unnecessary cost or delay, the magistrate judge may take the return by video teleconference from the court where the grand jury sits. If a complaint or information is pending against the defendant and 12 jurors do not concur in the indictment, the foreperson must promptly and in writing report the lack of concurrence to the magistrate judge.

(g) Discharging the Grand Jury. A grand jury must serve until the court discharges it, but it may serve more than 18 months only if the court, having determined that an extension is in the public interest, extends the grand jury's service. An extension may be granted for no more than 6 months, except as otherwise provided by statute.

(h) Excusing a Juror. At any time, for good cause, the court may excuse a juror either temporarily or permanently, and if permanently, the court may impanel an alternate juror in place of the excused juror.

(i) "Indian Tribe" Defined. "Indian tribe" means an Indian tribe recognized by the Secretary of the Interior on a list published in the Federal Register under 25 U.S.C. § 479a-1.

B. Prosecutors and the Grand Jury

DOJ, in the following internal rules, tries to limit prosecutors in the grand jury more than the law requires. Notice the ways the DOJ does that. These guidelines recognize the powers of the grand jury and the potential for abuse that is mostly unreviewable. What kinds of abuses do these internal DOJ rules seek to prevent?

U.S. DEPARTMENT OF JUSTICE, JUSTICE MANUAL [Provisions on Grand Juries]

9-11.010. Introduction

This chapter contains the Department's policy on grand jury practice. For a discussion of the law, and a list of resource materials on grand jury practice, see the Criminal Resource Manual at 154 et seq.

In dealing with the grand jury, the prosecutor must always conduct himself or herself as an officer of the court whose function is to ensure that justice is done and that guilt shall not escape nor innocence suffer. The prosecutor must recognize that the grand jury is an independent body, whose functions include not only the investigation of crime and the initiation of criminal prosecution but also the protection of the citizenry from unfounded criminal charges. The prosecutor's responsibility is to advise the grand jury on the law and to present evidence for its consideration. In discharging these responsibilities, the prosecutor must be scrupulously fair to all witnesses and must do nothing to inflame or otherwise improperly influence the grand jurors.

9-11.101. Powers and Limitations of Grand Juries—The Functions of a Grand Jury

While grand juries are sometimes described as performing accusatory and investigatory functions, the grand jury's principal function is to determine whether or not there is probable cause to believe that one or more persons committed a certain Federal offense within the venue of the district court. Thus, it has been said that a grand jury has but two functions—to indict or, in the alternative, to return a "no-bill." *See* Wright, *Federal Practice and Procedure*, Criminal Section 110.

At common law, a grand jury enjoyed a certain power to issue reports alleging non-criminal misconduct. A special grand jury impaneled under Title 18 U.S.C. § 3331 is authorized, on the basis of a criminal investigation (but not otherwise), to fashion a report, potentially for public release, concerning either organized crime conditions in the district or the non-criminal misconduct in office of appointed public officers or employees. This is discussed at USAM 9-11.300 and USAM 9-11.330, and the Criminal Resource Manual at 158–59. *See Jenkins v. McKeithen*, 395 U.S. 411, 430 (1969); *Hannah v. Larche*, 363 U.S. 420 (1960). Whether a regular grand jury enjoys a comparable authority to issue a report is a difficult and complex question. *Cf. United States v. Briggs*, 514 F.2d 794 (5th Cir. 1975). The Criminal Division of the Department of Justice should be consulted before any grand jury report is initiated, whether by a regular or special grand jury. *See also* USAM 9-11.330.

9-11.120. Power of a Grand Jury Limited by Its Function

The grand jury's power, although expansive, is limited by its function toward possible return of an indictment. *Costello v. United States*, 350 U.S. 359, 362 (1956). Accordingly, the grand jury cannot be used solely to obtain additional evidence against a defendant who has already been indicted. *United States v. Woods*, 544 F.2d 242, 250

(6th Cir. 1976), *cert. denied sub nom., Hurt v. United States*, 429 U.S. 1062 (1977). Nor can the grand jury be used solely for pre-trial discovery or trial preparation. *United States v. Star*, 470 F.2d 1214 (9th Cir. 1972). After indictment, the grand jury may be used if its investigation is related to a superseding indictment of additional defendants or additional crimes by an indicted defendant. *In re Grand Jury Subpoena Duces Tecum, Dated January 2, 1985*, 767 F.2d 26, 29-30 (2d Cir. 1985); *In re Grand Jury Proceedings*, 586 F.2d 724 (9th Cir. 1978). . . .

9-11.150. Subpoenaing Targets of the Investigation

A grand jury may properly subpoena a subject or a target of the investigation and question the target about his or her involvement in the crime under investigation. *See United States v. Wong*, 431 U.S. 174, 179 n.8 (1977); *United States v. Washington*, 431 U.S. 181, 190 n.6 (1977); *United States v. Mandujano*, 425 U.S. 564, 573–75 and 584 n.9 (1976); *United States v. Dionisio*, 410 U.S. 1, 10 n.8 (1973). However, in the context of particular cases such a subpoena may carry the appearance of unfairness. Because the potential for misunderstanding is great, before a known "target" (as defined in USAM 9-11.151) is subpoenaed to testify before the grand jury about his or her involvement in the crime under investigation, an effort should be made to secure the target's voluntary appearance. If a voluntary appearance cannot be obtained, the target should be subpoenaed only after the grand jury and the United States Attorney or the responsible Assistant Attorney General have approved the subpoena. In determining whether to approve a subpoena for a "target," careful attention will be paid to the following considerations:

- The importance to the successful conduct of the grand jury's investigation of the testimony or other information sought;
- Whether the substance of the testimony or other information sought could be provided by other witnesses; and
- Whether the questions the prosecutor and the grand jurors intend to ask or the other information sought would be protected by a valid claim of privilege.

9-11.151. Advice of "Rights" of Grand Jury Witnesses

It is the policy of the Department of Justice to advise a grand jury witness of his or her rights if such witness is a "target" or "subject" of a grand jury investigation. See the Criminal Resource Manual at 160 for a sample target letter.

A "target" is a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant. An officer or employee of an organization which is a target is not automatically considered a target even if such officer's or employee's conduct contributed to the commission of the crime by the target organization. The same lack of automatic target status holds true for organizations which employ, or employed, an officer or employee who is a target.

A "subject" of an investigation is a person whose conduct is within the scope of the grand jury's investigation.

The Supreme Court declined to decide whether a grand jury witness must be warned of his or her Fifth Amendment privilege against compulsory self-incrimination before the witness's grand jury testimony can be used against the witness. *See United States v. Washington*, 431 U.S. 181, 186 and 190–91 (1977); *United States v. Wong*, 431 U.S. 174 (1977); *United States v. Mandujano*, 425 U.S. 564, 582 n.7. (1976). In *Mandujano* the Court took cognizance of the fact that Federal prosecutors customarily warn "targets" of their Fifth Amendment rights before grand jury questioning begins. Similarly, in *Washington*, the Court pointed to the fact that Fifth Amendment warnings were administered as negating "any possible compulsion to self-incrimination which might otherwise exist" in the grand jury setting. *See Washington*, at 188.

Notwithstanding the lack of a clear constitutional imperative, it is the policy of the Department that an "Advice of Rights" form be appended to all grand jury subpoenas to be served on any "target" or "subject" of an investigation. *See* advice of rights below.

In addition, these "warnings" should be given by the prosecutor on the record before the grand jury and the witness should be asked to affirm that the witness understands them.

Although the Court in *Washington*, *supra*, held that "targets" of the grand jury's investigation are entitled to no special warnings relative to their status as "potential defendant(s)," the Department of Justice continues its longstanding policy to advise witnesses who are known "targets" of the investigation that their conduct is being investigated for possible violation of Federal criminal law. This supplemental advice of status of the witness as a target should be repeated on the record when the target witness is advised of the matters discussed in the preceding paragraphs.

When a district court insists that the notice of rights not be appended to a grand jury subpoena, the advice of rights may be set forth in a separate letter and mailed to or handed to the witness when the subpoena is served.

Advice of Rights

- The grand jury is conducting an investigation of possible violations of Federal criminal laws involving: (State here the general subject matter of inquiry, e.g., conducting an illegal gambling business in violation of 18 U.S.C. § 1955).
- You may refuse to answer any question if a truthful answer to the question would tend to incriminate you.
- Anything that you do say may be used against you by the grand jury or in a subsequent legal proceeding.
- If you have retained counsel, the grand jury will permit you a reasonable opportunity to step outside the grand jury room to consult with counsel if you so desire.

Additional Advice to be Given to Targets: If the witness is a target, the above advice should also contain a supplemental warning that the witness's conduct is being investigated for possible violation of federal criminal law.

9-11.152. Requests by Subjects and Targets to Testify Before the Grand Jury

It is not altogether uncommon for subjects or targets of the grand jury's investigation, particularly in white-collar cases, to request or demand the opportunity to tell the grand jury their side of the story. While the prosecutor has no legal obligation to permit such witnesses to testify, *United States v. Leverage Funding System, Inc.*, 637 F.2d 645 (9th Cir. 1980), *cert. denied*, 452 U.S. 961 (1981); *United States v. Gardner*, 516 F.2d 334 (7th Cir. 1975), *cert. denied*, 423 U.S. 861 (1976)), a refusal to do so can create the appearance of unfairness. Accordingly, under normal circumstances, where no burden upon the grand jury or delay of its proceedings is involved, reasonable requests by a "subject" or "target" of an investigation, as defined above, to testify personally before the grand jury ordinarily should be given favorable consideration, provided that such witness explicitly waives his or her privilege against self-incrimination, on the record before the grand jury, and is represented by counsel or voluntarily and knowingly appears without counsel and consents to full examination under oath.

Such witnesses may wish to supplement their testimony with the testimony of others. The decision whether to accommodate such requests or to reject them after listening to the testimony of the target or the subject, or to seek statements from the suggested witnesses, is a matter left to the sound discretion of the grand jury. When passing on such requests, it must be kept in mind that the grand jury was never intended to be and is not properly either an adversary proceeding or the arbiter of guilt or innocence. *See, e.g., United States v. Calandra*, 414 U.S. 338, 343 (1974).

9-11.153. Notification of Targets

When a target is not called to testify pursuant to USAM 9-11.150, and does not request to testify on his or her own motion (see USAM 9-11.152), the prosecutor, in appropriate cases, is encouraged to notify such person a reasonable time before seeking an indictment in order to afford him or her an opportunity to testify before the grand jury, subject to the conditions set forth in USAM 9-11.152. Notification would not be appropriate in routine clear cases or when such action might jeopardize the investigation or prosecution because of the likelihood of flight, destruction or fabrication of evidence, endangerment of other witnesses, undue delay or otherwise would be inconsistent with the ends of justice.

9-11.154. Advance Assertions of an Intention to Claim the Fifth Amendment Privilege Against Compulsory Self-Incrimination

A question frequently faced by Federal prosecutors is how to respond to an assertion by a prospective grand jury witness that if called to testify the witness will refuse to testify on Fifth Amendment grounds. If a "target" of the investigation and his or her attorney

state in writing, signed by both, that the "target" will refuse to testify on Fifth Amendment grounds, the witness ordinarily should be excused from testifying unless the grand jury and the United States Attorney agree to insist on the appearance. In determining the desirability of insisting on the appearance of such a person, consideration should be given to the factors which justified the subpoena in the first place, i.e., the importance of the testimony or other information sought, its unavailability from other sources, and the applicability of the Fifth Amendment privilege to the likely areas of inquiry.

Some argue that unless the prosecutor is prepared to seek an order pursuant to 18 U.S.C. § 6003, the witness should be excused from testifying. However, such a broad rule would be improper and make it too convenient for witnesses to avoid testifying truthfully to their knowledge of relevant facts. Moreover, once compelled to appear, the witness may be willing and able to answer some or all of the grand jury's questions without incriminating himself or herself.

9-11.155. Notification to Targets when Target Status Ends

The United States Attorney has the discretion to notify an individual, who has been the target of a grand jury investigation, that the individual is no longer considered to be a target by the United States Attorney's Office. Such a notification should be provided only by the United States Attorney having cognizance over the grand jury investigation.

Discontinuation of target status may be appropriate when:

- The target previously has been notified by the government that he or she was a target of the investigation; and,
- The criminal investigation involving the target has been discontinued without an indictment being returned charging the target, or the government receives evidence in a continuing investigation that conclusively establishes that target status has ended as to this individual.

There may be other circumstances in which the United States Attorney may exercise discretion to provide such notification such as when government action has resulted in public knowledge of the investigation.

The United States Attorney may decline to issue such notification if the notification would adversely affect the integrity of the investigation or the grand jury process, or for other appropriate reasons. No explanation need be provided for declining such a request.

If the United States Attorney concludes that the notification is appropriate, the language of the notification may be tailored to the particular case. In a particular case, for example, the language of the notification may be drafted to preclude the target from using the notification as a "clean bill of health" or testimonial.

The delivering of such a notification to a target or the attorney for the target shall not preclude the United States Attorney's Office or the grand jury having cognizance over

the investigation (or any other grand jury) from reinstituting such an investigation without notification to the target, or the attorney for the target, if, in the opinion of that or any other grand jury, or any United States Attorney's Office, circumstances warrant such a reinstitution. . . .

9-11.233. Presentation of Exculpatory Evidence

In *United States v. Williams*, 112 S. Ct. 1735 (1992), the Supreme Court held that the Federal courts' supervisory powers over the grand jury did not include the power to make a rule allowing the dismissal of an otherwise valid indictment where the prosecutor failed to introduce substantial exculpatory evidence to a grand jury. It is the policy of the Department of Justice, however, that when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person. While a failure to follow the Department's policy should not result in dismissal of an indictment, appellate courts may refer violations of the policy to the Office of Professional Responsibility for review.

C. The Judicial Branch and the Grand Jury

The following case deals with the question of how bad things have to get for a court to actually dismiss a case because of misconduct by the government in the grand jury. Why is the scope of judicial review of such grand jury-related conduct not broader?

BANK OF NOVA SCOTIA v. UNITED STATES, 487 U.S. 250 (1988)

Justice KENNEDY delivered the opinion of the Court.

The issue presented is whether a district court may invoke its supervisory power to dismiss an indictment for prosecutorial misconduct in a grand jury investigation, where the misconduct does not prejudice the defendants.

In 1982, after a 20-month investigation conducted before two successive grand juries, eight defendants, including petitioners William A. Kilpatrick, Declan J. O'Donnell, Sheila C. Lerner, and The Bank of Nova Scotia, were indicted on 27 counts. The first 26 counts charged all defendants with conspiracy and some of them with mail and tax fraud. Count 27 charged Kilpatrick with obstruction of justice. . . .

We hold that, as a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants.

In the exercise of its supervisory authority, a federal court "may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress." *United States v. Hasting*, 461 U.S. 499, 505, 103 S. Ct. 1974, 1978, 76 L. Ed. 2d 96 (1983). Nevertheless, it is well established that "[e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions." *Thomas v. Arn*, 474 U.S. 140, 148, 106 S. Ct. 466, 471–72, 88 L. Ed. 2d 435 (1985). To

allow otherwise "would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing." *United States v. Payner,* 447 U.S. 727, 737, 100 S. Ct. 2439, 2447, 65 L. Ed. 2d 468 (1980). Our previous cases have not addressed explicitly whether this rationale bars exercise of a supervisory authority where, as here, dismissal of the indictment would conflict with the harmless-error inquiry mandated by the Federal Rules of Criminal Procedure.

We now hold that a federal court may not invoke supervisory power to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a). Rule 52(a) provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." The Rule was promulgated pursuant to 18 U.S.C. § 687 (1946 ed.) (currently codified, as amended, at 18 U.S.C. § 3771), which invested us with authority "to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict. . . ." Like its present-day successor, § 687 provided that after a Rule became effective "all laws in conflict therewith shall be of no further force and effect." It follows that Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions. The balance struck by the Rule between societal costs and the rights of the accused may not casually be overlooked "because a court has elected to analyze the question under the supervisory power." *United States v. Payner, supra,* at 736, 100 S. Ct., at 2446–47.

Our conclusion that a district court exceeds its powers in dismissing an indictment for prosecutorial misconduct not prejudicial to the defendant is supported by other decisions of this Court. In *United States v. Mechanik,* 475 U.S. 66, 106 S. Ct. 938, 89 L. Ed. 2d 50 (1986), we held that there is "no reason not to apply [Rule 52(a)] to 'errors, defects, irregularities, or variances' occurring before a grand jury just as we have applied it to such error occurring in the criminal trial itself." *Id.,* at 71–72, 106 S. Ct., at 942. In *United States v. Hasting,* 461 U.S., at 506, 103 S. Ct., at 1979, we held that "[s]upervisory power to reverse a conviction is not needed as a remedy when the error to which it is addressed is harmless since, by definition, the conviction would have been obtained notwithstanding the asserted error." We stated that deterrence is an inappropriate basis for reversal where "means more narrowly tailored to deter objectionable prosecutorial conduct are available." *Ibid.* We also recognized that where the error is harmless, concerns about the "integrity of the [judicial] process" will carry less weight, *ibid.,* and that a court may not disregard the doctrine of harmless error simply "in order to chastise what the court view [s] as prosecutorial overreaching." *Id.,* at 507, 103 S. Ct., at 1979. Unlike the present cases, see *infra,* at —, *Hasting* involved constitutional error. It would be inappropriate to devise a rule permitting federal courts to deal more sternly with nonconstitutional harmless errors than with constitutional errors that are likewise harmless.

Having concluded that our customary harmless-error inquiry is applicable where, as in the cases before us, a court is asked to dismiss an indictment prior to the conclusion of

the trial, we turn to the standard of prejudice that courts should apply in assessing such claims. We adopt for this purpose, at least where dismissal is sought for nonconstitutional error, the standard articulated by Justice O'CONNOR in her concurring opinion in *United States v. Mechanik, supra.* Under this standard, dismissal of the indictment is appropriate only "if it is established that the violation substantially influenced the grand jury's decision to indict," or if there is "grave doubt" that the decision to indict was free from the substantial influence of such violations. *United States v. Mechanik, supra,* at 78, 106 S. Ct., at 945–46. This standard is based on our decision in *Kotteakos v. United States,* 328 U.S. 750, 758–59, 66 S. Ct. 1239, 1244–45, 90 L. Ed. 1557 (1946), where, in construing a statute later incorporated into Rule 52(a), *see United States v. Lane,* 474 U.S. 438, 454–55, 106 S. Ct. 725, 734–35, 88 L. Ed. 2d 814 (1986) (BRENNAN, J., concurring and dissenting), we held that a conviction should not be overturned unless, after examining the record as a whole, a court concludes that an error may have had "substantial influence" on the outcome of the proceeding. 328 U.S., at 765, 66 S. Ct., at 1248.

To be distinguished from the cases before us are a class of cases in which indictments are dismissed, without a particular assessment of the prejudicial impact of the errors in each case, because the errors are deemed fundamental. These cases may be explained as isolated exceptions to the harmless-error rule. We think, however, that an alternative and more clear explanation is that these cases are ones in which the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice. *See Rose v. Clark,* 478 U.S. 570, 577–78, 106 S. Ct. 3101, 3105–06, 92 L. Ed. 2d 460 (1986). These cases are exemplified by *Vasquez v. Hillery,* 474 U.S. 254, 260–64, 106 S. Ct. 617, 621–24, 88 L. Ed. 2d 598 (1986), where we held that racial discrimination in selection of grand jurors compelled dismissal of the indictment. In addition to involving an error of constitutional magnitude, other remedies were impractical and it could be presumed that a discriminatorily selected grand jury would treat defendants unfairly. *See United States v. Mechanik, supra,* at 70–71, n.1, 106 S. Ct., at 942, n.1. We reached a like conclusion in *Ballard v. United States,* 329 U.S. 187, 67 S. Ct. 261, 91 L. Ed. 181 (1946), where women had been excluded from the grand jury. The nature of the violation allowed a presumption that the defendant was prejudiced, and any inquiry into harmless error would have required unguided speculation. Such considerations are not presented here, and we review the alleged errors to assess their influence, if any, on the grand jury's decision to indict in the factual context of the cases before us.

Though the standard we have articulated differs from that used by the Court of Appeals, we reach the same conclusion and affirm its decision reversing the order of dismissal. We review the record to set forth the basis of our agreement with the Court of Appeals that prejudice has not been established.

The District Court found that the Government had violated Federal Rule of Criminal Procedure 6(e) by: (1) disclosing grand jury materials to Internal Revenue Service employees having civil tax enforcement responsibilities; (2) failing to give the court

prompt notice of such disclosures; (3) disclosing to potential witnesses the names of targets of the investigation; and (4) instructing two grand jury witnesses, who had represented some of the defendants in a separate investigation of the same tax shelters, that they were not to reveal the substance of their testimony or that they had testified before the grand jury. The court also found that the Government had violated Federal Rule of Criminal Procedure 6(d) in allowing joint appearances by IRS agents before the grand jury for the purpose of reading transcripts to the jurors.

The District Court further concluded that one of the prosecutors improperly argued with an expert witness during a recess of the grand jury after the witness gave testimony adverse to the Government. It also held that the Government had violated the witness immunity statute, 18 U.S.C. §§ 6002, 6003, by the use of "pocket immunity" (immunity granted on representation of the prosecutor rather than by order of a judge), and that the Government caused IRS agents to mischaracterize testimony given in prior proceedings. Furthermore, the District Court found that the Government violated the Fifth Amendment by calling a number of witnesses for the sole purpose of having them assert their privilege against self-incrimination and that it had violated the Sixth Amendment by conducting postindictment interviews of several high-level employees of The Bank of Nova Scotia. Finally, the court concluded that the Government had caused IRS agents to be sworn as agents of the grand jury, thereby elevating their credibility.

As we have noted, no constitutional error occurred during the grand jury proceedings. The Court of Appeals concluded that the District Court's findings of Sixth Amendment postindictment violations were unrelated to the grand jury's independence and decisionmaking process because the alleged violations occurred *after* the indictment. We agree that it was improper for the District Court to cite such matters in dismissing the indictment. The Court of Appeals also found that no Fifth Amendment violation occurred as a result of the Government's calling seven witnesses to testify despite an avowed intention to invoke their Fifth Amendment privilege. We agree that, in the circumstances of these cases, calling the witnesses was not error. The Government was not required to take at face value the unsworn assertions made by these witnesses outside the grand jury room. Once a witness invoked the privilege on the record, the prosecutors immediately ceased all questioning. Throughout the proceedings, moreover, the prosecution repeated the caution to the grand jury that it was not to draw any adverse inference from a witness' invocation of the Fifth Amendment.

In the cases before us we do not inquire whether the grand jury's independence was infringed. Such an infringement may result in grave doubt as to a violation's effect on the grand jury's decision to indict, but we did not grant certiorari to review this conclusion. We note that the Court of Appeals found that the prosecution's conduct was not "a significant infringement on the grand jury's ability to exercise independent judgment," 821 F.2d, at 1475, and we accept that conclusion here. Finally, we note that we are not faced with a history of prosecutorial misconduct, spanning several cases, that is so systematic and pervasive as to raise a substantial and serious question about the fundamental fairness of the process which resulted in the indictment.

We must address, however, whether, despite the grand jury's independence, there was any misconduct by the prosecution that otherwise may have influenced substantially the grand jury's decision to indict, or whether there is grave doubt as to whether the decision to indict was so influenced. Several instances of misconduct found by the District Court-that the prosecutors manipulated the grand jury investigation to gather evidence for use in civil audits; violated the secrecy provisions of Rule 6(e) by publicly identifying the targets and the subject matter of the grand jury investigation; and imposed secrecy obligations in violation of Rule 6(e) upon grand jury witnesses-might be relevant to an allegation of a purpose or intent to abuse the grand jury process. Here, however, it is plain that these alleged breaches could not have affected the charging decision. We have no occasion to consider them further.

We are left to consider only the District Court's findings that the prosecutors: (1) fashioned and administered unauthorized "oaths" to IRS agents in violation of Rule 6(c); (2) caused the same IRS agents to "summarize" evidence falsely and to assert incorrectly that all the evidence summarized by them had been presented previously to the grand jury; (3) deliberately berated and mistreated an expert witness for the defense in the presence of some grand jurors; (4) abused its authority by providing "pocket immunity" to 23 grand jury witnesses; and (5) permitted IRS agents to appear in tandem to present evidence to the grand jury in violation of Rule 6(d). We consider each in turn.

The Government administered oaths to IRS agents, swearing them in as "agents" of the grand jury. Although the administration of such oaths to IRS agents by the Government was unauthorized, there is ample evidence that the jurors understood that the agents were aligned with the prosecutors. At various times a prosecutor referred to the agents as "my agent(s)," and, in discussions with the prosecutors, grand jurors referred to the agents as "your guys" or "your agents." There is nothing in the record to indicate that the oaths administered to the IRS agents caused their reliability or credibility to be elevated, and the effect, if any, on the grand jury's decision to indict was negligible.

The District Court found that, to the prejudice of petitioners, IRS agents gave misleading and inaccurate summaries to the grand jury just prior to the indictment. Because the record does not reveal any prosecutorial misconduct with respect to these summaries, they provide no ground for dismissing the indictment. The District Court's finding that the summaries offered by IRS agents contained evidence that had not been presented to the grand jury in prior testimony boils down to a challenge to the reliability or competence of the evidence presented to the grand jury. We have held that an indictment valid on its face is not subject to such a challenge. *United States v. Calandra,* 414 U.S. 338, 344–45, 94 S. Ct. 613, 618–19, 38 L. Ed. 2d 561 (1974). To the extent that a challenge is made to the accuracy of the summaries, the mere fact that evidence itself is unreliable is not sufficient to require a dismissal of the indictment. *See Costello v. United States,* 350 U.S. 359, 363, 76 S. Ct. 406, 408–09, 100 L. Ed. 397 (1956) (holding that a court may not look behind the indictment to determine if the evidence upon which it was based is sufficient). In light of the record, the finding that the prosecutors knew the evidence to be false or misleading, or that the Government caused the agents to testify

falsely, is clearly erroneous. Although the Government may have had doubts about the accuracy of certain aspects of the summaries, this is quite different from having knowledge of falsity.

The District Court found that a prosecutor was abusive to an expert defense witness during a recess and in the hearing of some grand jurors. Although the Government concedes that the treatment of the expert tax witness was improper, the witness himself testified that his testimony was unaffected by this misconduct. The prosecutors instructed the grand jury to disregard anything they may have heard in conversations between a prosecutor and a witness, and explained to the grand jury that such conversations should have no influence on its deliberations. In light of these ameliorative measures, there is nothing to indicate that the prosecutor's conduct toward this witness substantially affected the grand jury's evaluation of the testimony or its decision to indict.

The District Court found that the Government granted "pocket immunity" to 23 witnesses during the course of the grand jury proceedings. Without deciding the propriety of granting such immunity to grand jury witnesses, we conclude the conduct did not have a substantial effect on the grand jury's decision to indict, and it does not create grave doubt as to whether it affected the grand jury's decision. Some prosecutors told the grand jury that immunized witnesses retained their Fifth Amendment privilege and could refuse to testify, while other prosecutors stated that the witnesses had no Fifth Amendment privilege, but we fail to see how this could have had a substantial effect on the jury's assessment of the testimony or its decision to indict. The significant point is that the jurors were made aware that these witnesses had made a deal with the Government.

Assuming the Government had threatened to withdraw immunity from a witness in order to manipulate that witness' testimony, this might have given rise to a finding of prejudice. There is no evidence in the record, however, that would support such a finding. The Government told a witness' attorney that if the witness "testified for Mr. Kilpatrick, all bets were off." The attorney, however, ultimately concluded that the prosecution did not mean to imply that immunity would be withdrawn if his client testified for Kilpatrick, but rather that his client would be validly subject to prosecution for perjury. Although the District Court found that the Government's statement was interpreted by the witness to mean that if he testified favorably for Kilpatrick his immunity would be withdrawn, neither Judge Winner nor Judge Kane made a definitive finding that the Government improperly threatened the witness. The witness may have felt threatened by the prosecutor's statement, but his subjective fear cannot be ascribed to governmental misconduct and was, at most, a consideration bearing on the reliability of his testimony.

Finally, the Government permitted two IRS agents to appear before the grand jury at the same time for the purpose of reading transcripts. Although allowing the agents to read to the grand jury in tandem was a violation of Rule 6(d), it was not prejudicial. The agents gave no testimony of their own during the reading of the transcripts. The grand jury was instructed not to ask any questions and the agents were instructed not to answer

any questions during the readings. There is no evidence that the agents' reading in tandem enhanced the credibility of the testimony or otherwise allowed the agents to exercise undue influence.

In considering the prejudicial effect of the foregoing instances of alleged misconduct, we note that these incidents occurred as isolated episodes in the course of a 20-month investigation, an investigation involving dozens of witnesses and thousands of documents. In view of this context, those violations that did occur do not, even when considered cumulatively, raise a substantial question, much less a grave doubt, as to whether they had a substantial effect on the grand jury's decision to charge.

Errors of the kind alleged in these cases can be remedied adequately by means other than dismissal. For example, a knowing violation of Rule 6 may be punished as a contempt of court. *See* Fed. Rule Crim. Proc. 6(e)(2). In addition, the court may direct a prosecutor to show cause why he should not be disciplined and request the bar or the Department of Justice to initiate disciplinary proceedings against him. The court may also chastise the prosecutor in a published opinion. Such remedies allow the court to focus on the culpable individual rather than granting a windfall to the unprejudiced defendant.

We conclude that the District Court had no authority to dismiss the indictment on the basis of prosecutorial misconduct absent a finding that petitioners were prejudiced by such misconduct. The prejudicial inquiry must focus on whether any violations had an effect on the grand jury's decision to indict. If violations did substantially influence this decision, or if there is grave doubt that the decision to indict was free from such substantial influence, the violations cannot be deemed harmless. The record will not support the conclusion that petitioners can meet this standard. The judgment of the Court of Appeals is affirmed.

This next case addresses the grand jury's subpoena power and the limited basis on which one can challenge such a subpoena and try to resist compliance.

UNITED STATES v. R. ENTERPRISES, INC., 498 U.S. 292 (1991)

Justice O'CONNOR delivered the opinion of the Court.

This case requires the Court to decide what standards apply when a party seeks to avoid compliance with a subpoena *duces tecum* issued in connection with a grand jury investigation.

Since 1986, a federal grand jury sitting in the Eastern District of Virginia has been investigating allegations of interstate transportation of obscene materials. In early 1988, the grand jury issued a series of subpoenas to three companies-Model Magazine Distributors, Inc. (Model), R. Enterprises, Inc., and MFR Court Street Books, Inc. (MFR). Model is a New York distributor of sexually oriented paperback books, magazines, and videotapes. R. Enterprises, which distributes adult materials, and MFR, which sells books, magazines, and videotapes, are also based in New York. All three

companies are wholly owned by Martin Rothstein. The grand jury subpoenas sought a variety of corporate books and records and, in Model's case, copies of 193 videotapes that Model had shipped to retailers in the Eastern District of Virginia. All three companies moved to quash the subpoenas, arguing that the subpoenas called for production of materials irrelevant to the grand jury's investigation and that the enforcement of the subpoenas would likely infringe their First Amendment rights. . . .

The grand jury occupies a unique role in our criminal justice system. It is an investigatory body charged with the responsibility of determining whether or not a crime has been committed. Unlike this Court, whose jurisdiction is predicated on a specific case or controversy, the grand jury "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States v. Morton Salt Co.*, 338 U.S. 632, 642–43, 70 S. Ct. 357, 363-364, 94 L. Ed. 401 (1950). The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred. As a necessary consequence of its investigatory function, the grand jury paints with a broad brush. "A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.'" *Branzburg v. Hayes*, 408 U.S. 665, 701, 92 S. Ct. 2646, 2667, 33 L. Ed. 2d 626 (1972), quoting *United States v. Stone*, 429 F.2d 138, 140 (CA2 1970).

A grand jury subpoena is thus much different from a subpoena issued in the context of a prospective criminal trial, where a specific offense has been identified and a particular defendant charged. "[T]he identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning." *Blair v. United States*, 250 U.S. 273, 282, 39 S. Ct. 468, 471, 63 L. Ed. 979 (1919). In short, the Government cannot be required to justify the issuance of a grand jury subpoena by presenting evidence sufficient to establish probable cause because the very purpose of requesting the information is to ascertain whether probable cause exists. *See Hale v. Henkel*, 201 U.S. 43, 65, 26 S. Ct. 370, 375, 50 L. Ed. 652 (1906).

This Court has emphasized on numerous occasions that many of the rules and restrictions that apply at a trial do not apply in grand jury proceedings. This is especially true of evidentiary restrictions. The same rules that, in an adversary hearing on the merits, may increase the likelihood of accurate determinations of guilt or innocence do not necessarily advance the mission of a grand jury, whose task is to conduct an *ex parte* investigation to determine whether or not there is probable cause to prosecute a particular defendant. In *Costello v. United States*, 350 U.S. 359, 76 S. Ct. 406, 100 L. Ed. 397 (1956), this Court declined to apply the rule against hearsay to grand jury proceedings. Strict observance of trial rules in the context of a grand jury's preliminary investigation "would result in interminable delay but add nothing to the assurance of a fair trial." *Id.*, at 364, 76 S. Ct., at 409. In *United States v. Calandra*, 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974), we held that the Fourth Amendment exclusionary rule does not

apply to grand jury proceedings. Permitting witnesses to invoke the exclusionary rule would "delay and disrupt grand jury proceedings" by requiring adversary hearings on peripheral matters, *id.*, at 349, 94 S. Ct., at 621, and would effectively transform such proceedings into preliminary trials on the merits, *id.*, at 349–50, 94 S. Ct., at 620–21. The teaching of the Court's decisions is clear: A grand jury "may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials," *id.*, at 343, 94 S. Ct., at 617.

This guiding principle renders suspect the Court of Appeals' holding that the standards announced in *Nixon* as to subpoenas issued in anticipation of trial apply equally in the grand jury context. The multifactor test announced in *Nixon* would invite procedural delays and detours while courts evaluate the relevancy and admissibility of documents sought by a particular subpoena. We have expressly stated that grand jury proceedings should be free of such delays. "Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *United States v. Dionisio,* 410 U.S. 1, 17, 93 S. Ct. 764, 773, 35 L. Ed. 2d 67 (1973). *Accord, Calandra, supra,* 414 U.S., at 350, 94 S. Ct., at 621. Additionally, application of the *Nixon* test in this context ignores that grand jury proceedings are subject to strict secrecy requirements. See Fed. Rule Crim. Proc. 6(e). Requiring the Government to explain in too much detail the particular reasons underlying a subpoena threatens to compromise "the indispensable secrecy of grand jury proceedings." *United States v. Johnson,* 319 U.S. 503, 513, 63 S. Ct. 1233, 1238, 87 L. Ed. 1546 (1943). Broad disclosure also affords the targets of investigation far more information about the grand jury's internal workings than the Federal Rules of Criminal Procedure appear to contemplate.

The investigatory powers of the grand jury are nevertheless not unlimited. *See Branzburg, supra,* 408 U.S., at 688, 92 S. Ct., at 2660; *Calandra, supra,* 414 U.S., at 346, and n.4, 94 S. Ct., at 619, and n.4. Grand juries are not licensed to engage in arbitrary fishing expeditions, nor may they select targets of investigation out of malice or an intent to harass. In this case, the focus of our inquiry is the limit imposed on a grand jury by Federal Rule of Criminal Procedure 17(c), which governs the issuance of subpoenas *duces tecum* in federal criminal proceedings. The Rule provides that "[t]he court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive."

This standard is not self-explanatory. As we have observed, "what is reasonable depends on the context." *New Jersey v. T.L.O.,* 469 U.S. 325, 337, 105 S. Ct. 733, 740, 83 L. Ed. 2d 720 (1985). In *Nixon,* this Court defined what is reasonable in the context of a jury trial. We determined that, in order to require production of information prior to trial, a party must make a reasonably specific request for information that would be both relevant and admissible at trial. 418 U.S., at 700, 94 S. Ct., at 3103. But, for the reasons we have explained above, the *Nixon* standard does not apply in the context of grand jury

proceedings. In the grand jury context, the decision as to what offense will be charged is routinely not made until after the grand jury has concluded its investigation. One simply cannot know in advance whether information sought during the investigation will be relevant and admissible in a prosecution for a particular offense.

To the extent that Rule 17(c) imposes some reasonableness limitation on grand jury subpoenas, however, our task is to define it. In doing so, we recognize that a party to whom a grand jury subpoena is issued faces a difficult situation. As a rule, grand juries do not announce publicly the subjects of their investigations. *See supra,* at 727. A party who desires to challenge a grand jury subpoena thus may have no conception of the Government's purpose in seeking production of the requested information. Indeed, the party will often not know whether he or she is a primary target of the investigation or merely a peripheral witness. Absent even minimal information, the subpoena recipient is likely to find it exceedingly difficult to persuade a court that "compliance would be unreasonable." As one pair of commentators has summarized it, the challenging party's "unenviable task is to seek to persuade the court that the subpoena that has been served on [him or her] could not possibly serve any investigative purpose that the grand jury could legitimately be pursuing." 1 S. Beale & W. Bryson, Grand Jury Law and Practice § 6:28 (1986).

Our task is to fashion an appropriate standard of reasonableness, one that gives due weight to the difficult position of subpoena recipients but does not impair the strong governmental interests in affording grand juries wide latitude, avoiding minitrials on peripheral matters, and preserving a necessary level of secrecy. We begin by reiterating that the law presumes, absent a strong showing to the contrary, that a grand jury acts within the legitimate scope of its authority. *See United States v. Mechanik,* 475 U.S. 66, 75, 106 S. Ct. 938, 944, 89 L. Ed. 2d 50 (1986) (O'CONNOR, J., concurring in judgment) ("The grand jury proceeding is accorded a presumption of regularity, which generally may be dispelled only upon particularized proof of irregularities in the grand jury process"). *See also Hamling v. United States,* 418 U.S. 87, 139, n.23, 94 S. Ct. 2887, 2918, n.23, 41 L. Ed. 2d 590 (1974); *United States v. Johnson, supra,* 319 U.S., at 512–13, 63 S. Ct., at 1237–38. Consequently, a grand jury subpoena issued through normal channels is presumed to be reasonable, and the burden of showing unreasonableness must be on the recipient who seeks to avoid compliance. Indeed, this result is indicated by the language of Rule 17(c), which permits a subpoena to be quashed only "on motion" and "if *compliance* would be unreasonable" (emphasis added). To the extent that the Court of Appeals placed an initial burden on the Government, it committed error. Drawing on the principles articulated above, we conclude that where, as here, a subpoena is challenged on relevancy grounds, the motion to quash must be denied unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation. Respondents did not challenge the subpoenas as being too indefinite nor did they claim that compliance would be overly burdensome. See App. in *In re Grand Jury 87-3 Subpoena Duces Tecum,* 884 F.2d 772 (CA4), pp. A-333, A-

494. The Court of Appeals accordingly did not consider these aspects of the subpoenas, nor do we.

It seems unlikely, of course, that a challenging party who does not know the general subject matter of the grand jury's investigation, no matter how valid that party's claim, will be able to make the necessary showing that compliance would be unreasonable. After all, a subpoena recipient "cannot put his whole life before the court in order to show that there is no crime to be investigated," *Marston's, Inc. v. Strand*, 114 Ariz. 260, 270, 560 P.2d 778, 788 (1977) (Gordon, J., specially concurring in part and dissenting in part). Consequently, a court may be justified in a case where unreasonableness is alleged in requiring the Government to reveal the general subject of the grand jury's investigation before requiring the challenging party to carry its burden of persuasion. We need not resolve this question in the present case, however, as there is no doubt that respondents knew the subject of the grand jury investigation pursuant to which the business records subpoenas were issued. In cases where the recipient of the subpoena does not know the nature of the investigation, we are confident that district courts will be able to craft appropriate procedures that balance the interests of the subpoena recipient against the strong governmental interests in maintaining secrecy, preserving investigatory flexibility, and avoiding procedural delays. For example, to ensure that subpoenas are not routinely challenged as a form of discovery, a district court may require that the Government reveal the subject of the investigation to the trial court *in camera*, so that the court may determine whether the motion to quash has a reasonable prospect for success before it discloses the subject matter to the challenging party.

Applying these principles in this case demonstrates that the District Court correctly denied respondents' motions to quash. It is undisputed that all three companies—Model, R. Enterprises, and MFR—are owned by the same person, that all do business in the same area, and that one of the three, Model, has shipped sexually explicit materials into the Eastern District of Virginia. The District Court could have concluded from these facts that there was a reasonable possibility that the business records of R. Enterprises and MFR would produce information relevant to the grand jury's investigation into the interstate transportation of obscene materials. Respondents' blanket denial of any connection to Virginia did not suffice to render the District Court's conclusion invalid. A grand jury need not accept on faith the self-serving assertions of those who may have committed criminal acts. Rather, it is entitled to determine for itself whether a crime has been committed. *See Morton Salt Co.*, 338 U.S., at 642–43, 70 S. Ct., at 363–64.

Both in the District Court and in the Court of Appeals, respondents contended that these subpoenas sought records relating to First Amendment activities, and that this required the Government to demonstrate that the records were particularly relevant to its investigation. The Court of Appeals determined that the subpoenas did not satisfy Rule 17(c) and thus did not pass on the First Amendment issue. We express no view on this issue and leave it to be resolved by the Court of Appeals.

The judgment is reversed insofar as the Court of Appeals quashed the subpoenas issued to R. Enterprises and MFR, and the case is remanded for further proceedings consistent with this opinion.

The next case deals with the question of whether the prosecutor must present exculpatory evidence to the grand jury as a matter of constitutional law (as opposed to the requirements of professional or internal DOJ rules). If not, why not?

UNITED STATES v. WILLIAMS, 504 U.S. 36 (1992)

Justice SCALIA delivered the opinion of the Court.

The question presented in this case is whether a district court may dismiss an otherwise valid indictment because the Government failed to disclose to the grand jury "substantial exculpatory evidence" in its possession.

On May 4, 1988, respondent John H. Williams, Jr., a Tulsa, Oklahoma, investor, was indicted by a federal grand jury on seven counts of "knowingly mak[ing] [a] false statement or report . . . for the purpose of influencing . . . the action [of a federally insured financial institution]," in violation of 18 U.S.C. § 1014 (1988 ed., Supp. II). According to the indictment, between September 1984 and November 1985 Williams supplied four Oklahoma banks with "materially false" statements that variously overstated the value of his current assets and interest income in order to influence the banks' actions on his loan requests.

Williams' misrepresentation was allegedly effected through two financial statements provided to the banks, a "Market Value Balance Sheet" and a "Statement of Projected Income and Expense." The former included as "current assets" approximately $6 million in notes receivable from three venture capital companies. Though it contained a disclaimer that these assets were carried at cost rather than at market value, the Government asserted that listing them as "current assets"—*i.e.*, assets quickly reducible to cash—was misleading, since Williams knew that none of the venture capital companies could afford to satisfy the notes in the short term. The second document-the Statement of Projected Income and Expense-allegedly misrepresented Williams' interest income, since it failed to reflect that the interest payments received on the notes of the venture capital companies were funded entirely by Williams' own loans to those companies. The Statement thus falsely implied, according to the Government, that Williams was deriving interest income from "an independent outside source."

Shortly after arraignment, the District Court granted Williams' motion for disclosure of all exculpatory portions of the grand jury transcripts. *See Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Upon reviewing this material, Williams demanded that the District Court dismiss the indictment, alleging that the Government had failed to fulfill its obligation under the Tenth Circuit's prior decision in *United States v. Page,* 808 F.2d 723, 728 (1987), to present "substantial exculpatory evidence" to the

grand jury (emphasis omitted). His contention was that evidence which the Government had chosen not to present to the grand jury—in particular, Williams' general ledgers and tax returns, and Williams' testimony in his contemporaneous Chapter 11 bankruptcy proceeding—disclosed that, for tax purposes and otherwise, he had regularly accounted for the "notes receivable" (and the interest on them) in a manner consistent with the Balance Sheet and the Income Statement. This, he contended, belied an intent to mislead the banks, and thus directly negated an essential element of the charged offense. . . .

Respondent does not contend that the Fifth Amendment itself obliges the prosecutor to disclose substantial exculpatory evidence in his possession to the grand jury. Instead, building on our statement that the federal courts "may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress," *United States v. Hasting,* 461 U.S. 499, 505, 103 S. Ct. 1974, 1978, 76 L. Ed. 2d 96 (1983), he argues that imposition of the Tenth Circuit's disclosure rule is supported by the courts' "supervisory power." We think not. *Hasting,* and the cases that rely upon the principle it expresses, deal strictly with the courts' power to control their *own* procedures. *See, e.g., Jencks v. United States,* 353 U.S. 657, 667–68, 77 S. Ct. 1007, 1013, 1 L. Ed. 2d 1103 (1957); *McNabb v. United States,* 318 U.S. 332, 63 S. Ct. 608, 87 L. Ed. 819 (1943). That power has been applied not only to improve the truth-finding process of the trial, *see, e.g., Mesarosh v. United States,* 352 U.S. 1, 9–14, 77 S. Ct. 1, 5–8, 1 L. Ed. 2d 1 (1956), but also to prevent parties from reaping benefit or incurring harm from violations of substantive or procedural rules (imposed by the Constitution or laws) governing matters apart from the trial itself, *see, e.g., Weeks v. United States,* 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914). Thus, *Bank of Nova Scotia v. United States,* 487 U.S. 250, 108 S. Ct. 2369, 101 L. Ed. 2d 228 (1988), makes clear that the supervisory power can be used to dismiss an indictment because of misconduct before the grand jury, at least where that misconduct amounts to a violation of one of those "few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions," *United States v. Mechanik,* 475 U.S. 66, 74, 106 S. Ct. 938, 943, 89 L. Ed. 2d 50 (1986) (O'CONNOR, J., concurring in judgment).

We did not hold in *Bank of Nova Scotia,* however, that the courts' supervisory power could be used, not merely as a means of enforcing or vindicating legally compelled standards of prosecutorial conduct before the grand jury, but as a means of *prescribing* those standards of prosecutorial conduct in the first instance-just as it may be used as a means of establishing standards of prosecutorial conduct before the courts themselves. It is this latter exercise that respondent demands. Because the grand jury is an institution separate from the courts, over whose functioning the courts do not preside, we think it clear that, as a general matter at least, no such "supervisory" judicial authority exists, and that the disclosure rule applied here exceeded the Tenth Circuit's authority.

"[R]ooted in long centuries of Anglo-American history," *Hannah v. Larche,* 363 U.S. 420, 490, 80 S. Ct. 1502, 1544, 4 L. Ed. 2d 1307 (1960) (Frankfurter, J., concurring in result), the grand jury is mentioned in the Bill of Rights, but not in the body of the Constitution. It has not been textually assigned, therefore, to any of the branches

described in the first three Articles. It "'is a constitutional fixture in its own right.'" *United States v. Chanen,* 549 F.2d 1306, 1312 (CA9 1977) (quoting *Nixon v. Sirica,* 159 U.S. App. D.C. 58, 70, n.54, 487 F.2d 700, 712, n.54 (1973)), cert. denied, 434 U.S. 825, 98 S. Ct. 72, 54 L. Ed. 2d 83 (1977). In fact the whole theory of its function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people. *See Stirone v. United States,* 361 U.S. 212, 218, 80 S. Ct. 270, 273, 4 L. Ed. 2d 252 (1960); *Hale v. Henkel,* 201 U.S. 43, 61, 26 S. Ct. 370, 373, 50 L. Ed. 652 (1906); G. Edwards, The Grand Jury 28–32 (1906). Although the grand jury normally operates, of course, in the courthouse and under judicial auspices, its institutional relationship with the Judicial Branch has traditionally been, so to speak, at arm's length. Judges' direct involvement in the functioning of the grand jury has generally been confined to the constitutive one of calling the grand jurors together and administering their oaths of office. *See United States v. Calandra,* 414 U.S. 338, 343, 94 S. Ct. 613, 617, 38 L. Ed. 2d 561 (1974); Fed. Rule Crim. Proc. 6(a).

The grand jury's functional independence from the Judicial Branch is evident both in the scope of its power to investigate criminal wrongdoing and in the manner in which that power is exercised. "Unlike [a] [c]ourt, whose jurisdiction is predicated upon a specific case or controversy, the grand jury 'can investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not.'" *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297, 111 S. Ct. 722, 726, 112 L. Ed. 2d 795 (1991) (quoting *United States v. Morton Salt Co.,* 338 U.S. 632, 642–43, 70 S. Ct. 357, 364, 94 L. Ed. 401 (1950)). It need not identify the offender it suspects, or even "the precise nature of the offense" it is investigating. *Blair v. United States,* 250 U.S. 273, 282, 39 S. Ct. 468, 471, 63 L. Ed. 979 (1919). The grand jury requires no authorization from its constituting court to initiate an investigation, *see Hale, supra,* 201 U.S., at 59–60, 65, 26 S. Ct., at 373, 375, nor does the prosecutor require leave of court to seek a grand jury indictment. And in its day-to-day functioning, the grand jury generally operates without the interference of a presiding judge. *See Calandra, supra,* 414 U.S., at 343, 94 S. Ct., at 617. It swears in its own witnesses, Fed. Rule Crim. Proc. 6(c), and deliberates in total secrecy, *see United States v. Sells Engineering, Inc.,* 463 U.S. 418, 424–25, 103 S. Ct. 3133, 3138, 77 L. Ed. 2d 743 (1983).

True, the grand jury cannot compel the appearance of witnesses and the production of evidence, and must appeal to the court when such compulsion is required. *See, e.g., Brown v. United States,* 359 U.S. 41, 49, 79 S. Ct. 539, 545, 3 L. Ed. 2d 609 (1959). And the court will refuse to lend its assistance when the compulsion the grand jury seeks would override rights accorded by the Constitution, *see, e.g., Gravel v. United States,* 408 U.S. 606, 92 S. Ct. 2614, 33 L. Ed. 2d 583 (1972) (grand jury subpoena effectively qualified by order limiting questioning so as to preserve Speech or Debate Clause immunity), or even testimonial privileges recognized by the common law, *see In re Grand Jury Investigation of Hugle,* 754 F.2d 863 (CA9 1985) (opinion of Kennedy, J.) (same with respect to privilege for confidential marital communications). Even in this setting, however, we have insisted that the grand jury remain "free to pursue its investigations unhindered by external influence or supervision so long as it does not

trench upon the legitimate rights of any witness called before it." *United States v. Dionisio,* 410 U.S. 1, 17–18, 93 S. Ct. 764, 773, 35 L. Ed. 2d 67 (1973). Recognizing this tradition of independence, we have said that the Fifth Amendment's "constitutional guarantee *presupposes* an investigative body 'acting independently of either prosecuting attorney *or judge*'. . . ." *Id.,* at 16, 93 S. Ct., at 773 (emphasis added) (quoting *Stirone, supra,* 361 U.S., at 218, 80 S. Ct., at 273).

No doubt in view of the grand jury proceeding's status as other than a constituent element of a "criminal prosecutio[n]," U.S. Const., Amdt. 6, we have said that certain constitutional protections afforded defendants in criminal proceedings have no application before that body. The Double Jeopardy Clause of the Fifth Amendment does not bar a grand jury from returning an indictment when a prior grand jury has refused to do so. *See Ex parte United States,* 287 U.S. 241, 250–51, 53 S. Ct. 129, 132, 77 L. Ed. 283 (1932); *United States v. Thompson,* 251 U.S. 407, 413–15, 40 S. Ct. 289, 292, 64 L. Ed. 333 (1920). We have twice suggested, though not held, that the Sixth Amendment right to counsel does not attach when an individual is summoned to appear before a grand jury, even if he is the subject of the investigation. *See United States v. Mandujano,* 425 U.S. 564, 581, 96 S. Ct. 1768, 1778, 48 L. Ed. 2d 212 (1976) (plurality opinion); *In re Groban,* 352 U.S. 330, 333, 77 S. Ct. 510, 513, 1 L. Ed. 2d 376 (1957); *see also* Fed. Rule Crim. Proc. 6(d). And although "the grand jury may not force a witness to answer questions in violation of [the Fifth Amendment's] constitutional guarantee" against self-incrimination, *Calandra, supra,* 414 U.S., at 346, 94 S. Ct., at 619 (citing *Kastigar v. United States,* 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972)), our cases suggest that an indictment obtained through the use of evidence previously obtained in violation of the privilege against self-incrimination "is nevertheless valid." *Calandra, supra,* 414 U.S., at 346, 94 S. Ct., at 619; *see Lawn v. United States,* 355 U.S. 339, 348–50, 78 S. Ct. 311, 317–18, 2 L. Ed. 2d 321 (1958); *United States v. Blue,* 384 U.S. 251, 255, n. 3, 86 S. Ct. 1416, 1419, n. 3, 16 L. Ed. 2d 510 (1966).

Given the grand jury's operational separateness from its constituting court, it should come as no surprise that we have been reluctant to invoke the judicial supervisory power as a basis for prescribing modes of grand jury procedure. Over the years, we have received many requests to exercise supervision over the grand jury's evidence-taking process, but we have refused them all, including some more appealing than the one presented today. In *United States v. Calandra, supra,* a grand jury witness faced questions that were allegedly based upon physical evidence the Government had obtained through a violation of the Fourth Amendment; we rejected the proposal that the exclusionary rule be extended to grand jury proceedings, because of "the potential injury to the historic role and functions of the grand jury." 414 U.S., at 349, 94 S. Ct., at 620. In *Costello v. United States,* 350 U.S. 359, 76 S. Ct. 406, 100 L. Ed. 397 (1956), we declined to enforce the hearsay rule in grand jury proceedings, since that "would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules." *Id.,* at 364, 76 S. Ct., at 409.

These authorities suggest that any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings. *See United States v. Chanen,* 549 F.2d, at 1313. It certainly would not permit judicial reshaping of the grand jury institution, substantially altering the traditional relationships between the prosecutor, the constituting court, and the grand jury itself. *Cf., e.g., United States v. Payner,* 447 U.S. 727, 736, 100 S. Ct. 2439, 2447, 65 L. Ed. 2d 468 (1980) (supervisory power may not be applied to permit defendant to invoke third party's Fourth Amendment rights); *see generally* Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts,* 84 COLUM. L. REV. 1433, 1490–94, 1522 (1984). As we proceed to discuss, that would be the consequence of the proposed rule here.

Respondent argues that the Court of Appeals' rule can be justified as a sort of Fifth Amendment "common law," a necessary means of assuring the constitutional right to the judgment "of an independent and informed grand jury," *Wood v. Georgia,* 370 U.S. 375, 390, 82 S. Ct. 1364, 1373, 8 L. Ed. 2d 569 (1962). Respondent makes a generalized appeal to functional notions: Judicial supervision of the quantity and quality of the evidence relied upon by the grand jury plainly facilitates, he says, the grand jury's performance of its twin historical responsibilities, *i.e.,* bringing to trial those who may be justly accused and shielding the innocent from unfounded accusation and prosecution. *See, e.g., Stirone v. United States,* 361 U.S., at 218, n.3, 80 S. Ct., at 273, n.3. We do not agree. The rule would neither preserve nor enhance the traditional functioning of the institution that the Fifth Amendment demands. To the contrary, requiring the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body.

It is axiomatic that the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge. *See United States v. Calandra,* 414 U.S., at 343, 94 S. Ct., at 617. That has always been so; and to make the assessment it has always been thought sufficient to hear only the prosecutor's side. As Blackstone described the prevailing practice in 18th-century England, the grand jury was "only to hear evidence on behalf of the prosecution[,] for the finding of an indictment is only in the nature of an enquiry or accusation, which is afterwards to be tried and determined." 4 W. Blackstone, Commentaries 300 (1769); *see also* 2 M. Hale, Pleas of the Crown 157 (1st Am. ed. 1847). So also in the United States. According to the description of an early American court, three years before the Fifth Amendment was ratified, it is the grand jury's function not "to enquire . . . upon what foundation [the charge may be] denied," or otherwise to try the suspect's defenses, but only to examine "upon what foundation [the charge] is made" by the prosecutor. *Respublica v. Shaffer,* 1 U.S. (1 Dall.) 236, 1 L. Ed. 116 (O.T. Phila. 1788); *see also* F. Wharton, Criminal Pleading and Practice § 360, pp. 248–49 (8th ed. 1880). As a consequence, neither in this country nor in England has the suspect under investigation by the grand jury ever been thought to have a right to testify or to have exculpatory evidence presented. *See* 2

Hale, *supra,* at 157; *United States ex rel. McCann v. Thompson,* 144 F.2d 604, 605–06 (CA2), cert. denied, 323 U.S. 790, 65 S. Ct. 313, 89 L. Ed. 630 (1944).

Imposing upon the prosecutor a legal obligation to present exculpatory evidence in his possession would be incompatible with this system. If a "balanced" assessment of the entire matter is the objective, surely the first thing to be done-rather than requiring the prosecutor to say what he knows in defense of the target of the investigation-is to entitle the target to tender his own defense. To require the former while denying (as we do) the latter would be quite absurd. It would also be quite pointless, since it would merely invite the target to circumnavigate the system by delivering his exculpatory evidence to the prosecutor, whereupon it would *have* to be passed on to the grand jury-unless the prosecutor is willing to take the chance that a court will not deem the evidence important enough to qualify for mandatory disclosure. *See, e.g., United States v. Law Firm of Zimmerman & Schwartz, P.C.,* 738 F. Supp. 407, 411 (Colo. 1990) (duty to disclose exculpatory evidence held satisfied when prosecution tendered to the grand jury defense-provided exhibits, testimony, and explanations of the governing law), aff'd *sub nom. United States v. Brown,* 943 F.2d 1246, 1257 (CA10 1991).

Respondent acknowledges (as he must) that the "common law" of the grand jury is not violated if the *grand jury itself* chooses to hear no more evidence than that which suffices to convince it an indictment is proper. *Cf. Thompson, supra,* at 607. Thus, had the Government offered to familiarize the grand jury in this case with the five boxes of financial statements and deposition testimony alleged to contain exculpatory information, and had the grand jury rejected the offer as pointless, respondent would presumably agree that the resulting indictment would have been valid. Respondent insists, however, that courts must require the modern prosecutor to alert the grand jury to the nature and extent of the available exculpatory evidence, because otherwise the grand jury "merely functions as an arm of the prosecution." We reject the attempt to convert a nonexistent duty of the grand jury itself into an obligation of the prosecutor. The authority of the prosecutor to seek an indictment has long been understood to be "coterminous with the authority of the grand jury to entertain [the prosecutor's] charges." *United States v. Thompson,* 251 U.S., at 414, 40 S. Ct., at 292. If the grand jury has no obligation to consider all "substantial exculpatory" evidence, we do not understand how the prosecutor can be said to have a binding obligation to present it.

There is yet another respect in which respondent's proposal not only fails to comport with, but positively contradicts, the "common law" of the Fifth Amendment grand jury. Motions to quash indictments based upon the sufficiency of the evidence relied upon by the grand jury were unheard of at common law in England, *see, e.g., People v. Restenblatt,* 1 Abb. Pr. 268, 269 (Ct. Gen. Sess. N.Y. 1855). And the traditional American practice was described by Justice Nelson, riding circuit in 1852, as follows:

> No case has been cited, nor have we been able to find any, furnishing an authority for looking into and revising the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the

> finding was founded upon sufficient proof, or whether there was a deficiency in respect to any part of the complaint. . . . *United States v. Reed,* 27 F. Cas. 727, 738 (No. 16,134) (CCNDNY 1852).

We accepted Justice Nelson's description in *Costello v. United States,* where we held that "[i]t would run counter to the whole history of the grand jury institution" to permit an indictment to be challenged "on the ground that there was inadequate or incompetent evidence before the grand jury." 350 U.S., at 363–64, 76 S. Ct., at 409. And we reaffirmed this principle recently in *Bank of Nova Scotia,* where we held that "the mere fact that evidence itself is unreliable is not sufficient to require a dismissal of the indictment," and that "a challenge to the reliability or competence of the evidence presented to the grand jury" will not be heard. 487 U.S., at 261, 108 S. Ct., at 2377. It would make little sense, we think, to abstain from reviewing the evidentiary support for the grand jury's judgment while scrutinizing the sufficiency of the prosecutor's presentation. A complaint about the quality or adequacy of the evidence can always be recast as a complaint that the prosecutor's presentation was "incomplete" or "misleading." Our words in *Costello* bear repeating: Review of facially valid indictments on such grounds "would run counter to the whole history of the grand jury institution[,] [and] [n]either justice nor the concept of a fair trial requires [it]." 350 U.S., at 364, 76 S. Ct., at 409.

Echoing the reasoning of the Tenth Circuit in *United States v. Page,* 808 F.2d, at 728, respondent argues that a rule requiring the prosecutor to disclose exculpatory evidence to the grand jury would, by removing from the docket unjustified prosecutions, save valuable judicial time. That depends, we suppose, upon what the ratio would turn out to be between unjustified prosecutions eliminated and grand jury indictments challenged-for the latter as well as the former consume "valuable judicial time." We need not pursue the matter; if there is an advantage to the proposal, Congress is free to prescribe it. For the reasons set forth above, however, we conclude that courts have no authority to prescribe such a duty pursuant to their inherent supervisory authority over their own proceedings. The judgment of the Court of Appeals is accordingly reversed, and the cause is remanded for further proceedings consistent with this opinion. . . .

Problem 11-1

(a) You are retained to represent Shirley, who comes to your office for an initial interview. Shirley explains that she works as a trader at a medium-sized hedge fund that is privately held and is owned and operated principally by Edgar. Shirley says that she has conducted some trades in the last year, with Edgar's approval, on the basis of tips she sometimes gets from a scientist she met who works in the pharmaceutical industry. Shirley shows you a grand jury subpoena directing her to appear for testimony in two weeks and produce "any and all documents relating to trading in securities related to the pharmaceutical industry." She says, "A guy in a suit handed this to me yesterday" and starts with the question, "What is a grand jury?" Provide Shirley with the most comprehensive legal advice you can supply based upon what you have learned to this point. What are the next questions you would want to ask Shirley in order to further assist her?

(b) A mock grand jury examination in the classroom can provide some sense of what the grand jury process is like. One or more students can be assigned as the prosecutors to question Shirley. One or more can be assigned to give testimony as Shirley. One or more can be assigned to act as Shirley's lawyer. One can be assigned to act as grand jury foreperson. In preparation, think about what you would ask as the prosecutor, how you would answer as the witness, and how you would advise the witness as her lawyer (if you are Shirley, you will of course need to fill out the facts of the trading situation a bit in your own mind so that you can answer a series of questions).