DePaul Law Review

Volume 22
Issue 1 *Fall 1972*

Article 17

Criminal Procedure - People v. Sears - The Grand Jury

Paul Shapiro

CRIMINAL PROCEDURE—*PEOPLE V. SEARS*—THE GRAND JURY

The issue discussed in this paper arose from a controversy concerning the conduct of various parties involved in a special grand jury proceeding investigating the occurrence set forth below.

On December 4, 1969, at 4:45 a.m., pursuant to a search warrant for possession of illegal guns, a raid was conducted by twelve Chicago police officers and 2 members of the Cook County State's Attorney's office on an apartment located in Chicago, Illinois. During the course of the raid, gunfire broke out, and two members of the Black Panther Party then in the apartment were killed, and four other occupants were wounded. Two police officers were also injured.[1] In January 1970, the United States District Court for the Northern District of Illinois impaneled a grand jury to investigate the incident to determine if there had been a possible violation of the civil rights of the apartment occupants.[2] On May 15, 1970, this federal grand jury issued a report, critical of the conduct of certain police officers and other individuals involved in the raid but indicted no one.[3] Between May 29 and June 17, 1970, various interested individuals and groups petitioned the circuit court for a special Illinois grand jury to be impaneled to investigate the incident. In response, on June 26, 1970, the Chief Judge of the Circuit Court, Joseph A. Power, stated that the federal grand jury report raised "critical and unresolved questions concerning violations of the Illinois criminal law by employees of the state's attorney's office and employees of the Chicago Police Department."[4] He issued orders reciting jurisdiction to issue a special venire,[5] and he appointed Barnabas F. Sears[6] as a special state's attorney to prosecute any mat-

1. Report of the January, 1970 Grand Jury of the United States District Court for the Northern District of Illinois, at 1.

2. *Id.* at 3.

3. *Id.* at 242.

4. Order of June 26, 1970, at 5.

5. ILL. REV. STATS. ch. 78, § 19 (1969). "The judge of any court of competent jurisdiction may order a special venire to be issued for a grand jury at any time when he shall be of the opinion that the public justice requires it. The order for such venire shall be entered in the records of the court by the clerk thereof; and such clerk shall forthwith issue such venire under his hand and seal of the court and deliver the same to the sheriff, who shall execute the same by summoning . . . 23 persons, qualified by law, to constitute a grand jury."

6. Barnabas F. Sears is a partner in the Chicago law firm of Boodell, Sears,

ters arising out of the grand jury proceedings.[7] Sears presented a petition to Judge Power that a special venire be issued, and on November 7, 1970, Judge Power issued the venire for a special grand jury to be convened.[8] On December 7, 1970, the special grand jury was impaneled, received their instructions from Judge Power, and retired to hear evidence.[9]

On April 22, 1971, Judge Power requested Sears to bring the special grand jury with him into his court room.[10] Judge Power then told Sears that he wanted every witness who testified before the federal grand jury to appear before this one, and instructed Sears to subpoena these people. Sears said he would submit a list of those people not called to the grand jury and leave the decision to the jury members.[11] The grand jury then retired and voted not to call any witnesses not previously called.[12] The witnesses were not subpoenaed, and on April 26, 1971, Judge Power once more instructed Sears to bring the grand jury with him into his court room. Sears offered him, for an *in camera* inspection, a list of the witnesses not called and the reasons therefore, which Judge Power refused to receive.[13] The judge then ordered Sears, as an officer of the court, to

---

Sugrue and Crowley. He was admitted to the Illinois Bar in 1926 and the Bar of the Supreme Court of the United States in 1937. In 1961 Mr. Sears served as Chief Prosecutor of the State of Illinois in the Summerdale Police scandal, which resulted in the conviction of all seven police defendants. *See* People v. Beeftink, 21 Ill. 2d 282, 171 N.E.2d 632 (1961).

7. ILL. REV. STAT. ch. 14, § 6 (1969). "Whenever the attorney general or state's attorney is sick or absent, or unable to attend, or is interested in any cause or proceeding, civil or criminal, which it is or may be his duty to prosecute or defend, the court in which said cause or proceeding is pending may appoint some competent attorney to prosecute or defend such cause or proceeding, and the attorney so appointed shall have the same power and authority in relation to such cause or proceeding as the attorney general or state's attorney would have had if present and attending to the same. . . . Such attorney so appointed shall possess all of the powers and discharge all of the duties of a regularly elected state's attorney under the laws of the State. . . ."

8. Order of November 4, 1970.

9. The Grand Jury then held 55 half day sessions, heard approximately 55 witnesses, received approximately 144 exhibits and had before it a copy of the January, Federal Grand Jury Report of May 15, 1970. Sears' affidavit to the court in the April 26, 1971 proceeding, at 3-4; Brief for Appellant, p. 11.

10. Sears' affidavit to the court in the April 26, 1971 proceeding. Brief for Appellant, p. 11.

11. A short time thereafter Sears related to the press that in his opinion, the April 22, 1971 meeting should have been held in open court, for he believed the court to be without power to instruct a grand jury in a secret session. Sears' affidavit to the court in the April 26, 1971 proceeding at 4.

12. Sears' affidavit to the court in the April 26, 1971 proceeding at 3, Brief for Appellant, p. 15.

13. This list, marked exhibit 1 in that proceeding, also contained the names of those whose conduct was under investigation and were invited to testify, provided they sign immunity waivers which they refused to do.

present those uncalled witnesses. Sears refused, was held in contempt of court,[14] and then he appealed to the Illinois Supreme Court.

In the period of April 26 to April 30, 1971, various petitions[15] were filed with Judge Power by officers in the police department and state's attorney's office, requesting an *in camera* hearing by the judge of the grand jury's proceedings to determine if the jury had been tainted by adverse publicity, to suppress any indictments pending this hearing, and to dismiss the grand jury and quash any indictment if their proceedings were tainted. On April 30, Sears motioned to dismiss these petitions on grounds of lack of jurisdiction and standing. His motion, after oral argument, was denied on May 17, 1971.

On behalf of certain members of the grand jury, the foreman requested Judge Power to hold individual, *in camera* hearings with jury members who wished to do so. Judge Power agreed to this on May 18, 1971. On May 17, 1971, Barnabas Sears and various organizations[16] petitioned the Illinois Supreme Court for a stay of proceedings, and for writs of mandamus and prohibition to prevent Power from holding his *in camera* hearing of the grand jury on an individual, or group basis, pending a re-

14. The fine for this contempt was placed at $50 per hour till Sears complied. This was equal to the fee the state was paying him as special prosecutor.

15. On April 26, 1971, John Meade, a police officer under investigation, filed a verified petition praying for a discharge based on articles appearing in Chicago newspapers, specifically one in the Chicago Tribune which on April 27, 1971, reported: "After gathering evidence and hearing testimony, the jurors reportedly had agreed to indict several persons, but this was not enough to satisfy Sears and his four assistants. Then . . . in reaction . . . the jurors . . . refused to indict anyone. . . . [S]ears in a last ditch effort to save his case, reviewed the evidence . . . in a stormy session. Then, . . . the jury's response was to draw up a single bill of indictment that named, among others, the two highest officials linked to the case. In it Hanrahan was . . . listed as a defendant, and Conlisk was cited as an unindicted co-conspirator. [T]he jury also named other high police officials and two assistant state's attorneys. All . . . were indicted on charges of obstructing justice in the investigation after the raid. This action . . . satisfied Sears. [W]hen . . . presented to Judge Power, the judge balked . . . Judge Power . . . refused to sign the indictment . . . and asked them to hear more witnesses, including Hanrahan, who had refused an earlier invitation, but . . . is expected to testify today . . . ."

On April 27, 1971, Meade filed a second petition, unverified, to discharge the grand jury based on remarks made by an ABC-TV Channel 7 news commentator. These remarks were retracted a short time thereafter.

On April 29, 1971, Richard S. Jalanec, James R. Meltreger and Sheldon Soronsky of the State's Attorney's office filed an unverified petition, repeating the substance of the two Meade petitions.

On April 29, 1971, twelve persons in the Chicago Police Department filed a verified petition alleging in substance the same matters as the other three petitions.

16. These groups included the Chicago Bar Association; the American Civil Liberties Union, Illinois Division; Businessmen for the Public Interest; Alliance to End Repression; the Lawyers Committee for Civil Rights under Law; and the Chicago Council of Lawyers.

turn of indictments, and to dismiss the petitions presented by the police officers and members of the state's attorney's office.

The Illinois Supreme Court found, first in dealing with Judge Power's order of April 26, 1971

> that there may be circumstances under which the circuit court will have jurisdiction to direct that witnesses be subpoenaed to appear before a grand jury . . . . [But] that such supervisory power be exercised only when failure to do so will effect a deprivation of due process or result in a miscarriage of justice . . . [and] that the circumstances shown here do not furnish a sufficient basis for the action of the court and the order holding Sears in contempt for refusing to subpoena the witnesses is therefore reserved.[17]

The supreme court ruled with respect to the petitions for mandamus and prohibition, that the court in its inherent supervisory power could, on its own motion, make inquiry into a grand jury either *in camera,* or via transcript, to determine if it had been tainted, thereby eliminating the question of whether the police and state's attorney's officials had standing to present the petition, or whether the court had jurisdiction to entertain them before indictment. Accordingly mandamus was denied.[18]

Finally, as to the private conferences with individual grand jurors, the supreme court held that the "court has jurisdiction to meet *in camera* with the grand jury" but a writ of prohibition will issue "to preclude *in camera* communication between the court and individual grand jurors . . . . "[19]

Much publicity has been given to this grand jury investigation, most of it centered around the charges that Sears, in his role as special prosecutor, acted improperly to coerce the grand jury to return indictments against various police and state's attorney's officials. One issue raised here—whether the circuit court in its inherent supervisory power over the proceedings has jurisdiction to investigate, prior to indictment, allegedly improper actions by the prosecutor conducting the hearing—is composed of several seemingly settled points of law. The other, more significant issue raised, concerns the April 22, 1971, order of Judge Power, that the grand jury in their investigation will hear the witnesses the court demands they hear. Although the finding of contempt against Sears for violating this order was reversed by the Illinois Supreme Court, the court did hold that circumstances may exist under which "the circuit court will have jurisdiction to direct that witnesses be subpoenaed to appear before a grand jury."[20] To appreciate the impact of this holding, and why the issues

17. People v. Sears, 49 Ill. 2d 14, 31, 273 N.E.2d 380, 389 (1971).
18. *Id.* at 36, 273 N.E.2d at 392.
19. *Id.*
20. *Id.* at 31, 273 N.E.2d at 389.

raised in mandamus are of settled law, it is necessary to review the history of the grand jury, focusing on two seemingly incompatible policies: the independence of the grand jury from the court, and the inherent supervisory power of the court over the grand jury.

The fifth amendment to the United States Constitution guarantees to an individual the right to an indictment by a grand jury "for a capital or otherwise infamous crime."[21] But the procedural aspect of the fourteenth amendment due process clause[22] has not, as of yet, been extended to include this guarantee, and the states, therefore, are not required to adopt the use of the grand jury procedure.[23] If a state decides to adopt the use of the grand jury, there is no constitutional requirement that it be of the type that existed at common law.[24] The state legislature is free to fully adopt, modify, or even abolish the institution of the grand jury.[25]

The original Illinois constitution makes no mention of the grand jury,[26] but the first legislature of the state did not leave this matter open for long. One of their earliest acts was that of February 4, 1819, which declared that the "[c]ommon law of England, all statutes or acts of the British Parliament made in aid of the common law prior to the fourth year of King James I, . . . which are of a general nature . . . shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority."[27] This legislative act meant the addition of the institution of the grand jury, as it existed at common law, as the principal method of initiating criminal prosecutions in Illinois.[28] Indeed, the current

21. U.S. CONST. amend. 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 . . . ."

22. U.S. CONST. amend. XIV, § 1: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

23. Lem Woon v. Oregon, 229 U.S. 586 (1913); Hallinger v. Davis, 146 U.S. 314 (1892).

24. State v. Hartley, 22 Nev. 342, 40 P. 372 (1895), held that a general provision in a constitution for grand jury indictment requires that a grand jury be of the type that existed at common law.

25. *In re* Opinion to the Governor, 62 R.I. 200, 4 A.2d 487 (1939), held that in the absence of statutes modifying or restricting the grand jury, the fifth amendment would apply and the grand jury of the common law is adopted.

26. *See* ILL. CONST. (1818).

27. Ill. Laws of 1819, at 3.

28. During the Constitutional Convention of 1870 the issue of whether to retain or abolish the jury arose. A compromise settlement by the delegates left the ultimate responsibility of abolishing or retaining the grand jury to the legislature, as evidenced in the passage of ILL. CONST. art. II § 8: "No person shall be held to answer for a criminal offense, unless on indictment of a grand jury, except in cases in

Illinois statutes recite under the section entitled *Commencement of Prosecutions:* "All prosecutions of felonies shall be by indictment unless waived understandingly by the accused in open court . . . ."[29]

Since no constitution or legislature has ever defined the common law grand jury,[30] it is necessary to reflect upon its history, both in England and the United States, to determine its present status.

The origin of the grand jury can be traced back to the Saxon kings of the 10th century or Norman conquerors of the 11th century.[31] In this early common law period the grand inquest or assize was developed. The king's purpose in the adoption of this institution was to replace the ecclesiastical judges' practice of proceeding ex officio upon private suggestions, with the assize's procedure of definite accusation by a sworn individual to twelve lawful men summoned by the sheriff.[32] In 1166 the system was extended to the courts of the itinerate judges appointed by the king,[33] and in 1176, Henry II issued the Assize of Clarendon and the Assize of Northhampton. It was comprised of sixteen men, twelve from every 100 and four from the township, who under oath were required to state whether they had knowledge of any crime. This group came to be known as the "Grand Assize," or "jury of the hundreds," and an accusation

---

which the punishment is by fine, or imprisonment otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army and navy, or in the militia when in actual service in time of war or public danger: *Provided,* that the grand jury may be abolished by law in all cases." The response of the legislature to this article has left the common law grand jury intact at present. *See* 2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF ILLINOIS, 1434-1573 (1870), which contains discussions of the proponents and opponents of the grand jury system's continued use.

29. ILL. REV. STAT. ch. 38, § 111-2 (1969) on Commencement of Proceedings; ch. 38, § 111-3(5)(b), requires the indictment to be signed by the foreman of the grand jury. *See also,* PROPOSED ILLINOIS CODE OF CRIMINAL PROCEDURE (1963), confirming the place of the grand jury in the criminal procedure scheme.

30. People *ex rel.* Ferrill v. Graydon, 333 Ill. 429, 432, 164 N.E. 832, 833 (1929). In discussing the history of the grand jury Mr. Justice Dunn stated: "No act of the Legislature has ever attempted to define the grand jury. It had its origin in the common law and has existed for many hundred years. Its Constitution, organization, jurisdiction, and method of proceeding were all well-known features of the common law before the organization of the state of Illinois, and have been recognized and adopted in all our Constitutions and in legislation as it existed at the organization of the state."

31. Henry II decreed its use for Normandy in 1159, and for England in 1164. *See* 1 F. POLLOCK AND F. MAITLAND, THE HISTORY OF ENGLISH LAW 136-153 (2d ed. 1968).

32. *Id.*

33. Under this system secret meetings were held by selected men, presided over by the judge, who presented them with a list of crimes against the crown and requested these "jurors" to state whether any person had been reputed to be guilty of such an offense. *See* Petition of McNair, 324 Pa. 48, 187 A. 498 (1936).

by them raised a presumption of guilt.[34] These two institutions co-existed until the reign of Edward III when the inquest of the hundreds gave way to the countywide inquest.[35] Their function was "to sit and receive indictments, which are preferred to them . . . and they are only to hear the evidence on behalf of the prosecution . . . ; and the grand jury are to inquire whether there be sufficient cause to call upon the party to answer it."[36] By 1351, the grand jury and the trial court had become separate institutions, although both were representatives of the king.[37]

The move toward independence of the grand jury came to a focal point in 1681 with the *Earl of Shaftsbury* trial.[38] A bill of indictment was presented to the grand jury and the witnesses were examined in open court. The crown demanded an indictment against the Earl from the jury, ignoring their demand for a closed proceeding,[39] to insure the jury's secrecy in deliberations and vote, which the jury felt was their right according to long established practice. The jury refused to return the indictment and defiantly wrote the word "ignoramus" across the face of the document. Ever since this act "it has been held an inviolable tradition that they need follow the orders or instructions of the judge neither as to what they consider nor as to whom they indict or fail to indict,"[40] and to insure the grand jury would not be hampered in their work by reprisals from crown or accused, the rule concerning secrecy was founded.[41]

When the English settlers came to the North American shores they brought with them this grand jury and "there is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor."[42]

The basic power of the grand jury is termed inquisitorial,[43] and is

34. W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 312-325 (3rd ed. 1922).

35. L. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 138 (1947). The practice at the assize was to call the names of the county magistrates until 23 appeared, later good and lawful men were qualified to serve.

36. 2 SHARSWOOD, BLACKSTONES COMMENTARIES *301, 302.

37. BIGELOW, HISTORY OF PROCEDURE IN ENGLAND 316, 317 (1880).

38. 8 HOWELL'S STATE TRIALS 759 (1816).

39. *Id.* at 771; (Foreman) "My Lord Chief Justice, it is the opinion of the jury, that they ought to examine the witnesses in private, and it hath been the constant practice of our ancestors and predecessors to do it; and they insist upon it as their right to examine in private . . . ."

40. U.S. v. Smyth, 104 F. Supp. 283, 293-94 (N.D. Cal. 1952). Chief Justice Fee commenting on the historical precedent of the Earl's trial.

41. *See In re* Kittle, 180 F. 946 (S.D. N.Y. 1910).

42. Costello v. United States, 350 U.S. 359, 362 (1956).

43. The exercise of these inquisitorial powers is best described by the historic charge delivered a federal grand jury by Justice Field in 1872: Charge to the

derived from the fact that the proceedings before the grand jury constitute the only general criminal investigation known to the common law.[44] Its actual role, however, is one of greater breadth than a mere investigatory body. The purpose of grand jury proceedings is to protect the citizen "from an open and public accusation of crime and from trouble, expense and anxiety of a public trial before a probable cause is established by presentment or indictment of a grand jury."[45]

The statutory provision with respect to the presentment of witnesses before a grand jury is contained in a section of the Illinois criminal code entitled *Duties of Grand Jury and State's Attorney* which recites: "The Grand Jury shall hear all evidence presented by the State's Attorney."[46] The statutory provision with respect to the calling of a special grand jury is found in section 19 of the *Jurors Act* which states:

Grand Jury, 30 F. Cas. 18, 992-94 (No. 18,255) (C.C.D. Cal.): "We, therefore, instruct you that your investigations are to be limited: First, to such matters as may be called to your attention by the court; or, second, may be submitted to your consideration by the district attorney; or, third, may come to your knowledge in the course of your investigations into the matters brought before you, or from your own observations; or, fourth, may come to your knowledge from the disclosures of your associates."

Legislative enactment has modified process for the Illinois statute (ILL. REV. STAT. ch. 78, § 19 (1969)) requires that no grand juror shall make presentments upon their own knowledge unless that information is known to at least two of their number, except in cases where the single juror is sworn as a witness.

No mention is made of the "private prosecutor" in Field's charge. The private prosecutor is defined as "one who sets in motion the machinery of criminal justice against a person who he suspects to be guilty of a crime, by laying an accusation before the proper authorities, and who himself is not an officer of justice." BLACK'S LAW DICTIONARY 1386 (4th ed. 1951). This limits the power formerly exercised by grand juries, for at common law the grand jury had the power to prefer indictment at the insistence of a private prosecutor. People v. Sheridan, 394 Ill. 202, 181 N.E.2d 617 (1932). The issue of whether or not a private prosecutor could present to the grand jury was laid to rest in People v. Parker, 374 Ill. 524, 30 N.E.2d 11 (1940) where Parker was held in contempt for improperly communicating directly with the grand jury, the United States Supreme Court dismissing his appeal based on abridgement of free speech.

44. Ward Baking Co. v. Western Union Tel. Co., 205 App. Div. 723, 200 N.Y.S. 865 (1923).

45. Shaw, C.J., in Jones v. Robbins, 8 Gray (Mass.) 329, as quoted in L. ORFIELD, *supra* note 35, at 145. A countervailing view is expressed in *In re* Grand Jury Proceedings, 4 F. Supp. 283, 284 (E.D. Pa., 1933), where the theme is expressed that "[t]he inquisitorial power of a grand jury is the most valuable function which it possesses today and, far more than any supposed protection which it gives the accused, justifies its survival as an institution."

46. ILL. REV. STATS. ch. 38, § 112-4(a) (1969). This section is based on the Revised Laws of 1827 § 175 which states: "In all complaints, exhibited before the grand jury of any county, they shall hear the witnesses on behalf of the People only." This remained in effect until the adoption of the present § 112-4(a) in 1963.

The judge of any court of competent jurisdiction may order a special venire to be issued for a grand jury at any time when he shall be of the opinion that public justice requires it.[47]

To protect the grand jury and to allow it maximum freedom in its work,[48] deliberations and vote,[49] the rule concerning secrecy has survived.[50] This does not mean that a grand jury operates as an unchecked institution, for it is still subject to the inherent supervisory powers of the court. The rules of the circuit court[51] recognize that the circuit court judge has "general administrative powers within the division. He requisitions and impanels all grand juries . . . ,"[52] grand jury summons are returnable to him,[53] and he appoints a Supervisor of Jurors.[54] The Illinois Code of Criminal Procedure not only recognizes this power, but authorizes judicial inquiry into the proceedings of a grand jury. In Chapter 38, Section 112-6(b), the 1969 code recites:

Matters occurring before the Grand Jury other than the deliberations and vote of any grand juror may be disclosed when the court, preliminary to or in connection with a judicial proceeding, directs such in the interest of justice.

Another section of Chapter 38 reinforces this supervisory power. Section 114-(1)(a) states:

Upon the written motion of a defendant made prior to trial before or after a plea has been entered the court may dismiss the indictment . . . upon any of the following grounds:

---

47. ILL. REV. STAT. ch. 78, § 19 (1969). Even without statutory authority a court has the authority to issue the venire for a special grand jury. People *ex rel.* Ferrill v. Graydon, 333 Ill. 429, 164 N.E. 832 (1929).

48. *Id.* *See In re* Kittle, 180 F. 946 (S.D.N.Y. 1910).

49. ILL. REV. STATS. ch. 38, § 112-6(b) (1969). "[M]atters other than deliberations and vote of a grand jury may be disclosed by the State's Attorney solely in the performance of his duties."

50. People v. Goldberg, 302 Ill. 559, 564, 135 N.E. 84, 86 (1922), makes a good statement of the rule on secrecy: "In furtherance of justice and upon grounds of public policy the law requires that grand jury proceedings shall be regarded as privileged communications and that the secrets of the grand jury room shall not be revealed. The reasons usually given for this requirement are to prevent the escape of the accused, to secure freedom of deliberation and opinion among the grand jurors, and to prevent the testimony produced before them from being contradicted at the trial by subordination or perjury. . . . The rule of secrecy concerning matters transpiring in the grand jury room is not designed for the protection of witnesses before the grand jury, but for the protection of the grand jurors and in furtherance of public justice. A witness has no privilege to have his testimony treated as a confidential communication but must be considered as testifying under all the obligations of an oath in a judicial proceeding, and hence his testimony may be disclosed whenever it becomes material to the administration of justice."

51. General order No. 17, July 14, 1967.

52. *Id.* at 17, 2(a).

53. *Id.* at 17, 3.

54. *Id.* at 17, 5(a).

. . . .

(5) The indictment was returned by a Grand Jury which acted contrary to Article 112 . . . and which results in substantial injustice . . . .

The issue in mandamus[55] which was to be determined is whether Judge Power exceeded his jurisdiction in granting the May 17 order to review *in camera*[56] the grand jury or its transcript prior to indictment, or, more specifically, whether the possibility of substantial injustice would result from his failure. Barnabas Sears contended that the respondents had no standing to petition the court as they were not subpoenaed to appear, which is a requisite to standing, and as such the court's entry of the May 14th order exceeded the court's jurisdiction.

In *Application of Iaconi*,[57] a person not named in a grand jury subpoena sought to quash the subpoena requiring other individuals to appear, to have the proceeding stayed, and to cause the grand jury to refrain from further investigation of alleged Internal Revenue Service violations until his case, which was at that time pending in federal court, came to trial. Iaconi had no standing as he was not named in a subpoena, but nevertheless the court stated:

---

55. The attack on Power's order was made by a writ of mandamus to the Illinois Supreme Court. Mandamus is a summary extraordinary remedy which is granted by the Supreme Court to expunge a judgment of a lower court which is void for want of jurisdiction either of the subject matter, of the parties, or to enter the order complained of. People *ex rel.* Koester v. Board of Review, 351 Ill. 301, 314, 184 N.E. 325, 330 (1932), where mandamus was used to void an order of the Board of Review which allowed certain record books, relative to property assessment in Cook County, to be let out, the court continued: "The writ is not granted as a matter of absolute right, and will only issue in cases where it appears that under the law it ought to issue. The court will not order it in doubtful cases." *See also* People *ex rel.* Atchison, T. and S. F. Ry. Co. v. Clark, 12 Ill. 2d 515, 519-20, 147 N.E.2d 89, 92-3 (1958), the Illinois Supreme Court stated: "Article VI, Section 2 of the Illinois Constitution, S.H.A., confers original jurisdiction on this court in cases 'in *mandamus*'. . . . Where the performance of an official duty or act involves the exercise of judgment or discretion, the officer's action is not subject to review or control by *mandamus*. . . . [t]he writ of *mandamus* will not lie for its correction if the court has jurisdiction of the subject matter and the parties." Also *see* People *ex rel.* Dolan v. Dusler, 411 Ill. 535, 538, 104 N.E.2d 775, 777 (1952), where mandamus was denied in an appeal to expunge an order reversing a decision for the detachment of a territory from a community school district because a writ of error was the proper remedy, the Supreme Court stated: "[*M*]*andamus* is a summary, expeditious and drastic common-law writ of extraordinary character, sometimes referred to as the highest judicial writ known to law."

56. An *in camera* review is a "judicial inquiry," Levine v. United States, 362 U.S. 610 (1960), and is a result of the policy of grand jury secrecy. Approval of this method is noted in *In re* Grand Jury Investigation, 32 F.R.D. 175, 181 (S.D. N.Y. 1963), where it is stated: "[I]n camera inspection of secret or confidential information has been an approved procedural method to protect the rights of a party, through judicial control, while at the same time preserving the secret and confidential character of grand jury minutes. . . ."

57. 120 F. Supp. 589 (D. Mass. 1954).

[A]ny court . . . can exercise over a grand jury sitting in that court supervisory power to prevent . . . that grand jury from being used abusively. . . . [I]n acting sua sponte in checking abuses of a grand jury, a court may, in substance though not in form, respond to suggestions made or grievances drawn on its attention by counsel, litigants or strangers. Thus this Court may, if it sees fit, examine the application of Frank Iaconi to see whether the Court finds such an abuse of process by the Grand Jury as to warrant the Court interfering . . . .[58]

This case demonstrates that standing is not a requirement to make a charge of abuse of process against a grand jury prior to indictment.[59]

In *People v. Maslowsky*[60] the abuse of process was not at issue. The state's attorney attempted to present to the grand jury, recordings of conversations between petitioner and another individual illegally[61] obtained by means of an electric eavesdropping device, and petitioner sought to bar their presentation. Although petitioner did have standing, as he had been subpoenaed, it was immaterial, because "[a]ny evidence obtained in violation of this Article (on illegal wiretaps) is not admissible in any civil or criminal trial, or any administrative or legislative inquiry or proceeding, nor in any grand jury proceedings."[62]

It is evident from these two cases, and Chapter 38, Sections 112-6(b) and 114-1(a)5, that it is within the inherent supervisory power of the circuit court judge to review *in camera* the jury or the transcript prior to indictment, to prevent any abuse of justice, even when no one has standing to make such claim; and that he can on his own motion, examine the grand jury in an approved means with regard to abuses in addition to an abuse of process. It is evident then that Sears' contention as to petitioners' standing is moot, and since mandamus is a corrective remedy for an improper assumption of jurisdiction,[63] it was rightly denied.

The next issue arises in response to the May 16, 1971, request by the

---

58. *Id.* at 590-91. No abuse of process was shown so Iaconi's application was denied.

59. *See also In re* Grand Jury Investigation, 32 F.R.D. 175, 181 (S.D.N.Y. 1963), where grand jury subpoenas to various General Motors' employees were attacked by G.M., which had no standing, as an abuse of process since their testimony was needed as defense witnesses in a pending action stemming from a prior grand jury indictment. The court held even absent ". . . *locus standi*, [it] is sufficient to invoke this court's inherent power to supervise the grand jury so as to prevent the perversion of its process." G.M.'s motion was denied as no abuse of process was found.

60. 34 Ill. 2d 456, 216 N.E.2d 669 (1966).

61. The recordings were a violation of ILL. REV. STAT. ch. 38, §§ 14-1, 14-7 (1965).

62. 34 Ill. 2d 456, 463, 216 N.E.2d 669, 674 (1966), where the court recited the statute.

63. *See* discussion of mandamus *supra* note 55.

foreman of the grand jury, that jurors be allowed individual *in camera* conferences with Judge Power with a court reporter present. This request was challenged by way of a writ of prohibition[64] to the Illinois Supreme Court.[65] Since at the time of filing this petition for the writ, Judge Power had not given his response to the foreman's request, its affirmation would prevent him from exercising jurisdiction to hold these individual *in camera* conferences. This petition for prohibition raised the issue whether the jurisdiction to hold private conferences with individual members is within the inherent supervisory power of the circuit court judge?

In *People v. Strauch*[66] the defendant challenged the indictment because the trial judge entered the jury room to instruct the jury as to the law of criminal libel. The appellate court held that if the judge receives a request for additional instructions from the grand jury, the proper place for deliverance is in open court,[67] where their original charge is delivered.[68] In *Clinton v. Superior Court*,[69] petitioner, a grand jury member, had a matter which he wished to submit to the grand jury. The grand jury declined to accede, whereupon petitioner sought a writ of mandamus in the superior court to compel the grand jury to hear his case. In denying his writ the superior court held that the provisions relating to grand juries,

> impose *duties*, . . . do not in a legal sense grant any *rights* either to the grand jury or to an individual member thereof. The grand jury can only function as a body. . . . A member of the grand jury is without authority to perform any act as a grand juror except the performance of those official duties imposed by law and at a regular and valid session of the grand jury. Beyond that, such member has no official standing, and, in effect, is a legal non-entity. The grand jury can function legally only when in official session with a quorum present. . . .[70]

64. "A writ of prohibition is an extraordinary judicial process whereby a superior court may prevent inferior tribunals or persons from exercising a jurisdiction which they have not been vested by law." People *ex rel.* Town of Cicero v. Harrington, 21 Ill. 2d 224, 226, 171 N.E.2d 647, 648 (1961). That opinion continued: "The word 'inferior' as used in this connection does not relate to the intrinsic quality of the court itself but rather to its relative rank when compared with the court wherein the writ is sought." *See also* People *ex rel.* General Motors v. Bua, 37 Ill. 2d 180, 192, 226 N.E.2d 6, 13 (1967), where the court stated: "[T]he historic extraordinary writ of *mandamus* is a valuable judicial tool which must be considered even though some of the normal criteria for its use are absent."

65. The application for the writ in prohibition was filed with the application for the writ in mandamus.

66. 153 Ill. App. 544 (1910).

67. *Id.* at 550.

68. The indictment was not quashed because the defendant failed to show that he was prejudiced by the procedure, and therefore this breach only constituted harmless error.

69. 23 Cal. App. 2d 342, 73 P.2d 252 (1937).

70. *Id.* at 345, 73 P.2d at 253-54.

It is obvious from the holdings of these two cases that the grand jury can function only as a body, that the individual members are without power to request individual communication from the circuit court, and where a valid request for additional information from the court is made, the judge may only grant this request in open court with the entire grand jury body present.[71] To do less would violate the historic independence and secrecy of the grand jury. It must be realized that there are a variety of means, within the judge's power to prevent abuses, that do not violate these principles.[72] In *People v. Parker*,[73] a case concerning an outside citizen's private communication with a grand jury, it was concluded

> that the rule of law which forbids all communication with grand juries, engaged in criminal investigation, except through the public instructions of courts and the testimony of sworn witnesses, is a rule of safety to the community.[74]

The case stands for the proposition that the proper channel for the presentment of evidence to the grand jury is through the prosecutor, not the jurors themselves. In light of these historic principles, the Illinois Supreme Court rightly granted prohibition.

The final issue raised on the charge of contempt appealed to the state high court, involved Judge Power's April 22 order to Barnabas Sears to subpoena all witnesses who appeared before the January 1970, federal grand jury, who had not yet appeared before the state grand jury. The issue may be stated: Is it within the inherent supervisory power of the court to direct to a grand jury what evidence or witnesses it will hear, or does such an action violate the grand jury's independence?[75]

"The Grand Jury must hear all evidence presented by the State's

---

71. *See also* Hammer v. State, 337 P.2d 1097, 1110 (Okla. Ct. App. 1959), where the judge with the prosecutor entered the jury room. The court said: "In the discharge of his official duties, the place for the judge is on the bench. . . .

. . . [A]fter the grand jury has been duly organized . . . they are not subject to the control of the court . . . other than that which they may receive in the charge of the court before they proceed to enter upon their duties or by instructions subsequently given them *in open court*."

72. United States v. Smyth, 104 F. Supp. 283, 292-93 (N.D. Cal. 1952) states: "There are various methods by which the court may exercise control. An independent judiciary has power and authority without negation by higher courts. . . . The judge may discharge a grand jury at any time, for any reason or for no reason. . . . He may give instructions which do not constitute precedent. . . . These may be political manifestos. The court may refuse to authorize expenses . . . thus prevent[ing] the employment of investigators or independent counsel. Finally, it may discipline the attorneys, the attendants or the grand jurors themselves for breach of the secrecy. . . ."

73. 374 Ill. 524, 30 N.E.2d 11 (1940).

74. *Id.* at 529, 30 N.E.2d at 13-14.

75. Judge Power's order was also attacked on the ground it was given in a closed door session, a matter previously discussed.

Attorney."[76] If a judge can direct the state's attorney as to what evidence to present, then he in essence controls the grand jury. If the grand jury can direct the state's attorney as to what evidence to present, then they in essence are an independent body. The investigation of this issue must therefore ascertain whether the grand jury or the court has the authority over what is to be presented. It has already been noted that the grand jury is an arm of the court, and is subject to the court's supervisory power in certain instances.[77] This supervisory power has been extended to the presentment of evidence in *People v. Maskowsky*,[78] where the court forbade the grand jury to hear tapes illegally made.

In contrast to this power are the principles derived from the common law, going back to the separation of the grand jury from the trial court and the historic *Earl of Shaftsbury*[79] case. Their place in the present grand jury scheme is described by Judge Learned Hand in *In re Kittle*,[80] where in denying a petitioner's request to be discharged from testifying before a grand jury, because he had no power to interfere with their development of evidence, he stated,

> One purpose of the secrecy of the grand jury's doings is to insure against . . . judicial control. They are the voice of the community accusing its members. . . . Therefore, except in sporadic . . . instances, the courts have never taken supervision over what evidence shall come before them. . . .[81]

This policy is reflected in the manner in which evidence may be presented to the grand jury.[82] In *People ex rel. Ferrill v. Graydon*[83] the court stated:

> The power of the grand jury is not dependent upon the court but is original and complete, and its duty is to diligently inquire into all offenses which shall come to its knowledge, whether from the court, the state's attorney, its own members or from any source, and it may make presentment of its own knowledge without any instruction or authority from the court. The court cannot limit the scope of the investigation of the grand jury.[84]

---

76. ILL. REV. STAT. ch. 38, §§ 112-14(a) (1969).

77. For a good presentation of the court's supervisory power *see In re* National Glassworker, 287 F. 219 (N.D. Ohio 1922).

78. 34 Ill. 2d 456, 216 N.E.2d 669 (1966).

79. 8 HOWELL'S STATE TRIALS 759 (1816).

80. 180 F. 946 (S.D. N.Y. 1910).

81. *Id.* at 947. This proposition might be taken to mean a completely independent grand jury, but it was put in proper perspective in *In re* National Glassworkers, 287 F. 219 (N.D. Ohio 1922) where the court stated: "In the cases cited, 287 F. 219, 224 (N.D. Ohio 1922), particularly the *Kittle* and *Thompson* cases, expressions may be found which might lead one into the view that the power of the court to prevent abuse of its process in connection with a grand jury investigation does not exist. This does not, however, represent the weight of the law."

82. *See* Justice Field's charge and accompanying material, *supra* note 43.

83. 333 Ill. 429, 164 N.E. 832 (1929).

84. *Id.* at 433-34, 164 N.E. at 834.

The line of demarcation between the supervisory power of the court and the independence of the grand jury are described in *Application of Texas Co.*,[85] where the applicant sought to quash grand jury subpoenas and subpoena duces tecum, and to restrain the government from presenting certain witnesses, as improperly investigating for its then pending trial. The court in speaking of its control over the grand jury stated:

> It is under control by the court to the extent that it is organized and the legality of its proceedings determined by the court in accordance with the statutes. Its members are subject to the court's supervision and control for any violation of their duties. Beyond this supervisory power over them, however, the court cannot limit them in their legitimate investigation of alleged violations of the law.[86]

It appears, then, that the court's supervision ends with the presentment of legal evidence, and the power to direct what evidence shall be presented rests in the grand jury.

That this evidentiary power operates independently of the court is exemplified by *United States v. Thompson*,[87] involving a grand jury investigation of the mishandling of bank funds. The district attorney proposed a forty-seven count indictment of the bank's president. The grand jury decided to indict only on the first seventeen counts. In a subsequent grand jury proceeding, a United States special assistant was appointed to work with the district attorney to procure an indictment on the thirty other counts. Without any court authority, he directed the grand jury's attention to these counts, and after hearing witnesses the grand jury voted to indict on these counts. When the indictment was presented, the court, while expressing doubt as to its validity because the matter was taken up and evidence presented without court authority, allowed a motion to quash this indictment. In reversing that ruling the Court held that,

> the power and duty of the grand jury to investigate is original and complete, susceptible of being exercised upon its own motion and upon such knowledge as it may derive from any source which it may deem proper, and is not therefore dependent for its exertion upon the approval or disapproval of the court . . . that the United States district attorney . . . has the power to present such information without the previous approval of the court . . . and that by the same token the duty of the district attorney to direct the attention of a grand jury to crimes . . . is coterminous with the authority of the grand jury to entertain such charges.[88]

The extent to which evidence is solely the grand jury's province is

85. 27 F. Supp. 847 (E.D. Ill. 1939).
86. *Id.* at 850.
87. 251 U.S. 407 (1919).
88. *Id.* at 413-14.

demonstrated in *State v. Will.*[89] In this case the members of the grand jury decided they had finished their business, but the trial judge refused to dismiss them as he felt they had not discharged their duty. He told them to return to the jury room and hear evidence against the certain parties who had broken the law, and then entered the grand jury room to recapitulate his statements. The defendant's motion to quash the indictment, made after the case went to trial, caused the guilty finding to be reversed.[90] The court stated:

> [A]dd to that fact [that he entered the jury room] . . . that he directed the jury to indict the defendant, and we have a case where not only the province of the grand jury was improperly invaded, but the discretion and judgment wisely vested in law in that body is swept away by the positive direction of the judge of the court, and the will of one man is substituted for and in place of the judgment of the grand jury . . . to countenance such a proceeding would be to strike a fatal blow to the grand jury system, would effectively deprive that body of the exclusive discretion which the law has reposed in them, and instead of leaving them an independent body, charged with the investigation of crime, and the due presentment of those who[m] . . . they should deem to be guilty parties, would make them mere servants of the presiding judge, to register his will regardless of their own judgment.[91]

In ruling on this issue the Illinois Supreme Court enunciated the principle that "there may be circumstances under which the circuit court will have jurisdiction to direct that witnesses be subpoenaed to appear before a grand jury."[92] By making such an unqualified statement the court has opened the doors to a judicial invasion into the realm of the grand jury. This holding expressly violates the grand jury's historic independence and has the potential to make the members "mere servants of the presiding judge." Of course, the circumstances did not lie here,[93] but when would they lie? To overturn such an important touchstone in our age of political unrest could easily lead to the subversion of the entire grand jury process, for certainly a blow to their independence as to what to consider, strikes it at the heart. As it was put by James Alger Fee, then Chief Judge of Oregon, in *United States v. Smyth,*[94] in an opinion which purported to be a "clear and decisive statement of the powers and duties of the grand jury which will return to the touchstone of fundamentals and give a definite guide for the future,"[95]

89. State v. Will, 97 Iowa 58, 65 N.W. 1010 (1896).

90. Entry into the jury room is not always grounds of reversible error. *See* People v. Strauch, 153 Ill. App. 544 (1910).

91. 97 Iowa 58, 66-67, 65 N.W. 1010.

92. People v. Sears, 49 Ill. 2d 14, 17, 273 N.E.2d 380, 389 (1971).

93. *Id.*

94. 104 F. Supp. 283 (N.D. Cal. 1952).

95. *Id.* at 287.

[I]t has been held an inviolable tradition that they need follow the orders or instructions of the judge neither as to what they consider nor as to whom they indict or fail to indict. . . . Unquestionably, the grand jury are under no necessity to follow the orders of the prosecutor. They can present an indictment whether he will or no [*sic*]. Indeed, they may make a presentment contrary to the orders of the judge, the prosecutor for the king or the Chief Executive.[96]

I submit it should remain that way.

Paul Shapiro

96. *Id.* at 293-94.