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ARTICLES

THE USEFUL, DANGEROUS FICTION OF GRAND JURY INDEPENDENCE

Niki Kuckes*

“A fiction may be an expedient but false assumption.”
Lon L. Fuller, Legal Fictions

The constitutional lore, nurtured by the Supreme Court, is that the federal grand jury is a “protective bulwark,” whose central mission is to protect civil liberties and shield citizens from unfounded or abusive criminal charges.¹ As a civil rights institution, however, the grand jury is an odd one. It is championed by the Department of Justice, which generally opposes any changes to grand jury procedures, even though it is federal prosecutors who are ostensibly being “checked” by the grand jury process. At the same time, the grand jury’s operations frequently come under attack by the criminal defense bar, whose clients’ rights are ostensibly being protected.²

Most recently, the Department of Justice found new and expanded uses for the federal grand jury in the wake of September 11 and the Enron case. Following the September 11 terrorist attacks on American targets, federal prosecutors have arrested and detained numerous people without criminal charges as “material witnesses” in grand jury investigations.³ Congress has created a federal grand jury

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role in foreign intelligence matters. Meanwhile, federal prosecutors have responded to national outrage over allegations of accounting fraud at major companies, such as Enron Corporation and the Arthur Andersen accounting firm, by noticeably increasing grand jury investigations and indictments of white-collar defendants.

The grand jury has never been more important to the modern federal criminal justice system. Yet despite its importance, the grand jury remains mysterious, shrouded in secrecy, and clouded in ambiguity – some would argue, deliberately so. The strict rules of secrecy that apply to the federal grand jury’s proceedings tend to shield from the public eye both the specifics of ongoing investigations and the nature of the grand jury process. When allegations of grand jury abuse come to light, the public is often surprised to learn of the one-sided rules, principles, and procedures that govern the modern federal grand jury, rules which are highly favorable to the government.

This Article argues that the disconnect between the rhetoric and reality of the grand jury is not a coincidence, or a historical vestige, but a central and important feature of the modern federal criminal justice system. Most knowledgeable observers would describe the federal grand jury more as a handmaiden of the prosecutor than a bulwark of constitutional liberty; to quote the classic vignette, the grand jury is little more than a rubber stamp that would “indict a ham sandwich” if the prosecutor asked. But the Supreme Court continues to affirm the supposed vitality of the defendant’s right to be indicted by grand jury, ostensibly

4. In the USA PATRIOT Act, Congress amended grand jury secrecy rules to allow federal prosecutors to share with other government agencies information on “foreign intelligence” obtained by the grand jury, without the judicial approval usually required for grand jury disclosures. See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56 § 203, 115 Stat. 272, 278-81 (2001).


6. Under Federal Rule of Criminal Procedure 6(e), an “obligation of secrecy” concerning all matters “occurring before the grand jury” is imposed on grand jurors, prosecutors, and their staffs. FED. R. CRIM. P. 6(e)(2). A knowing violation of this Rule may be punished as a contempt of court. Id.

7. In a recurrent pattern, highly publicized or controversial grand jury investigations tend to lead to public calls for grand jury reform. Compare Sarah Sun Beale ET AL., GRAND JURY LAW AND PRACTICE §1:9, 1-36 (2d ed. 2001) (“Criticism of the federal grand jury has reached new levels in the aftermath of the lengthy and highly publicized investigations by independent counsels into the affairs of President Clinton and a variety of Clinton administration officials.”), with Leroy D. Clark, The Grand Jury: The Use and Abuse of Political Power 5-6 (1975) (describing calls for grand jury reform that followed uses of grand jury investigations to investigate political dissidents during the Nixon Administration).

8. See In re Grand Jury Subpoena of Stewart, 545 N.Y.S.2d 974, 977 n.1 (N.Y. App. Div. 1989), modified by 548 N.Y.S.2d 679 (N.Y. App. Div. 1989) (noting that skepticism about the grand jury was “best summarized by the Chief Justice of this state in 1985 when he publicly stated that a Grand Jury would indict a ‘ham sandwich.’”). While this observation was made about the New York State grand jury, many observers have commented to the same effect about the federal grand jury. See supra note 5.
because the "grand jury right serves a vital function... as a check on prosecutorial power." This disconnect raises the obvious question of why the Court persists in its romanticized and highly fictionalized vision of the institution. This Article examines that question through the lens of legal fictions theory. Legal fictions theory reveals that a fictional ideal of grand jury independence plays a useful, but ultimately dangerous, role in the federal system, allowing the grand jury not only to speed the criminal charging process but also to mask the expansion of governmental investigative powers and to minimize judicial pretrial procedures.

Lon Fuller is the best-known modern proponent of the notion that courts consciously use legal fictions — or, as he terms them, "false statement[s] recognized as having utility"10 — to achieve other ends. Legal fictions theory helps shed light on what otherwise seems a perplexing body of law. The Supreme Court speaks in exalted terms of the "right" to grand jury indictment, yet refuses to read any meaningful content into that right. The Court declares the independence of the grand jury a constitutional necessity, yet bars the federal courts from acting to protect that independence. The Court speaks of the primacy of the grand jury's function as a "shield" against arbitrary prosecution, when its "sword" function of investigating and charging criminal conduct is almost universally perceived to be the rationale for its continued use. The classic literature on legal fictions reveals a method to this madness.

The key is Fuller's central observation that legal fictions persist because they have utility — or as he might say, because they are "expedient." Portraying the federal grand jury as a meaningful, independent institution is expedient because this allows the courts to affirm and extend the grand jury's actual powers, which have little to do with checking prosecutorial zeal and much to do with the needs of federal law enforcement.

A federal prosecutor can harness the grand jury's broad powers to issue document subpoenas with virtually no relevance limitations,11 compel witnesses to testify in secret without their lawyers and with almost no objections permitted,12 "lock" defense witnesses into trial testimony,13 time indictment decisions in order to build the government's case for trial while delaying the disclosure obligations that will apply once the case is before the court,14 and avoid judicial pretrial

10. Lon L. Fuller, Legal Fictions 9 (1967).
13. See U.S. Dep't of Justice, Federal Grand Jury Practice 32 (1993) [hereinafter Federal Grand Jury Practice] ("The prosecutor should... use the grand jury to 'lock in' certain witnesses.").
14. The government's information-gathering powers are far greater in the grand jury setting than at trial and are unencumbered by the mutual disclosure obligations that apply at trial under the federal rules. See Fed. R. Crim. P. 16; Federal Grand Jury Practice, supra note 13 (recommending that prosecutors use the grand jury "to gather as much evidence as possible" before seeking an indictment in non-routine cases).
Ultimately, the grand jury gives the prosecutor the awesome power to
indict (and the corresponding power to bargain for a guilty plea).16 For important
constitutional reasons, however, these powers can be exercised by the prosecutor
using the grand jury only if we pretend it is the grand jury that is actually
exercising them.

This Article analyzes the role that the fictional vision of grand jury indepen-
dence plays in the broader framework of the modern federal criminal justice
system. Part I briefly describes legal fictions theory, setting out the three classic
elements of a legal fiction: falsity, utility, and dangerousness. Part II demonstrates
that the judicial vision of the grand jury as an independent institution, whose role
is to check prosecutorial zeal, is "false" in the classic Fullerian sense. Part III
addresses the utility of that vision by identifying three important goals advanced
by the fiction of grand jury independence: enhancing federal investigative powers,
shielding the exercise of prosecutorial discretion from judicial oversight, and
streamlining pretrial procedures. Part IV posits that the fiction of grand jury
independence is not simply useful, but dangerous in the classic manner of legal
fictions because it distorts the debate and disguises what arguably amounts to
judicial legislating. Finally, in conclusion, the Article discusses how these insights
might help shape a federal legislative approach to grand jury reform. It argues that
the fiction of grand jury independence both artificially expands and artificially
limits the powers of the grand jury in ways that fail to fulfill the needs of a complex
modern criminal justice system. Comprehensive legislative reforms should pro-
cceed from the reality of the grand jury's role as a key tool of federal law
enforcement, rather than the fiction of the grand jury's role as an important civil
rights institution.

I. THE THEORY OF LEGAL FICTIONS

It has long been recognized that courts use fictions to justify and extend legal
rules. Prominent writers on the subject have expressed a range of views on the
desirability of legal fictions, from Jeremy Bentham, who criticized the use of legal
fictions in the strongest possible terms,17 to Sir William Blackstone, who defended

15. See, e.g., Fed. R. Crim. P. 5(c), 5.1(a) (although defendant arrested on a prosecutor's complaint is entitled
to preliminary examination at which evidence is presented and magistrate judge determines "probable cause,"
judicial hearing shall not be held "if the defendant is indicted" by grand jury).
16. See, e.g., Fred A. Bernstein, Note, Behind the Gray Door: Williams, Secrecy and the Federal Grand Jury,
69 N.Y.U. L. Rev. 563, 564 (1994) ("The typical defendant pleads guilty after the prosecutor obtains an
indictment — in practice, a powerful bargaining chip . . . .").
17. See, e.g., Jeremy Bentham, A Fragment on Government, in 1 THE WORKS OF JEREMY BENTHAM 235, note s
(John Bowring ed., 1843) ("The pestilential breath of Fiction poisons the sense of every instrument it comes
near."); Jeremy Bentham, Elements of Packing as Applied to Juries, in 5 THE WORKS OF JEREMY BENTHAM 92
(John Bowring ed., 1843) ("In English law, fiction is a syphilis, which runs in every vein, and carries into every
part of the system the principle of rottenness.").
"fictions of law" as "highly beneficial and useful." The most prominent twentieth-century writer on legal fictions was Lon Fuller, whose influential book Legal Fictions is generally agreed to be the modern Bible of legal writing on the subject.

The theory of legal fictions, their role and their use, has been thoughtfully and thoroughly analyzed elsewhere, and it is not the goal of this Article to retread ground so ably covered. Rather, this Article uses established elements of legal fictions theory to understand the role that the Supreme Court has constructed for the grand jury in the modern federal criminal justice system.

Legal fictions theory is not the only lens through which grand jury jurisprudence can be understood. But it is a particularly useful lens because it reveals with clarity not simply how the Supreme Court uses "helpful lies" about the grand jury, but more importantly why it does so. This Article argues that it is only by using a fictional description of its operations that the Court has been able to grant the grand jury an extraordinarily important role in the federal criminal justice system, giving it broad investigative powers and allowing its judgment to substitute for that of a federal magistrate judge for many pretrial procedures. This role is well understood in practice, but quite different from the vision that emerges from the express strands of the Court's decisions. Legal fictions theory is premised on the idea that courts use such reasoning, either consciously or semi-consciously, to advance the law in ways they deem desirable.

Classic theory posits that there are three qualities of a legal fiction: falsity, utility, and dangerousness. To qualify as a legal fiction, a statement must, first of all, be false. It is said to be a "common feature of every legal fiction . . . that it states an apparent falsehood." To use Bentham's definition, a legal fiction is "an assumed fact notoriously false, upon which one reasons as if it were true." The most useful test for falsity, in this regard, is to ask whether the statement asserts or implies a fact that would be regarded as false by an ordinary layperson, standing

18. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *43.
19. FULLER, supra note 10; see also Lon L. Fuller, Legal Fictions, 25 ILL. L. REV. 363 (1930). It has been said that "no writer before or since has given the topic such a thorough and sustained treatment." Louise Harmon, Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment, 100 Yale L. J. 1, 14 (1990). Lon Fuller's writing on legal fictions was part of his contribution to the twentieth-century school of legal thought known as "legal realism," whose participants frequently observed the disconnect between the ways that courts talk about their decisions, and the true import of those decisions. See Lon L. Fuller, American Legal Realism, 82 U. PA. L. REV. 429, 443 & n. 31 (1934).
21. See Harmon, supra note 19, at 15 ("Under Fuller's definition, a statement must be false before it can be a fiction.").
22. Miller, supra note 20, at 6.
outside the legal system and looking in (sort of an “emperor’s new clothes” test).  

The notion of utility is equally important to the doctrine of legal fictions. While Fuller offered two definitions of legal fiction, this Article focuses in particular on his definition of a legal fiction as “a false statement recognized as having utility.” Blackstone similarly recognized that legal fictions could be “highly beneficial and useful.” As Fuller stated, somewhat more judgmentally, a fiction may be “an expedient but false assumption.” A colleague recently summed up this notion quite effectively by terming legal fictions “helpful lies.” This term captures the contradictory quality that Fuller thought essential to the legal fiction.

Finally, a legal fiction may become dangerous. It may be carried to extremes or put to uses not intended by its original authors. It may be taken seriously as a statement of fact, rather than recognized as a useful symbol. It may be applied in ways that are undesirable rather than just. Fuller firmly believed in the potential danger posed by legal fictions, arguing that a “fiction taken seriously, i.e. ‘believed,’ becomes dangerous and loses its utility.” A legal fiction may be put to “harmful application” if not used carefully and self-consciously.

The principles of legal fictions are extremely useful when approaching the jurisprudence of the grand jury because the Supreme Court’s decisions are premised on a vision of the grand jury that exhibits all of the characteristic qualities of a legal fiction: falsity, utility, and ultimately, dangerousness. When it has been expedient to do so, the Court has used the fiction that the grand jury is an independent institution that operates to protect citizens’ rights to justify rulings that expand the federal grand jury’s powers, insulate its operations from judicial review, and substitute grand jury review for more meaningful pretrial procedures. These rulings could well have come out differently without the fiction — or at the least, would have been justified quite differently, carrying with them far more limited import for the Court’s future rulings.

This Article seeks to show that the Court’s grand jury jurisprudence is an elaborate structure built on a foundation highly questionable as a factual claim — the notion that the federal grand jury plays a meaningful independent role in

24. See Miller, supra note 20, at 8.
25. Fuller, supra note 10, at 9. As noted earlier, Fuller’s alternative definition of a legal fiction was a “statement propounded with a complete or partial consciousness of its falsity.” Id.
26. 3 William Blackstone, Commentaries *43.
27. Fuller, Legal Fictions, supra note 19, at 369 (emphasis in original).
28. This insight comes from Steve Garvey at Cornell Law School. While Fuller would not have used the term “lie” as synonymous with “fiction,” he would have included “falsehoods which are not meant to be believed.” Id. at 367 (emphasis in original). This is the sense that Garvey’s definition suggests (that is, lies that are “helpful” are not really lies).
29. Blackstone, for example, recognized that legal fictions should be used to reach just results, and optimistically believed, “as this maxim is ever invariably observed, that no fiction shall extend to work an injury.” 3 William Blackstone, Commentaries *43.
30. Fuller, Legal Fictions, supra note 19, at 370.
31. Id.
checking prosecutorial zeal. At the same time, the Court has not been serious about grand jury independence when the rulings at stake might actually have enhanced the grand jury’s constitutional function of screening criminal indictments. Whether consciously or semi-consciously, this has resulted in what Fuller would have termed the “harmful application” of an important legal fiction (yielding a result that Bentham might even have characterized as judicial legislation).  

II. GRAND JURY INDEPENDENCE IS A LEGAL FICTION BECAUSE IT ASSUMES FACTS THAT ARE “NOTORIOUSLY FALSE”

Before reaching the body of the argument – the reasons why the Supreme Court finds it useful to speak as if the federal grand jury were a viable independent institution – it is necessary first to demonstrate that grand jury independence is a legal fiction. The Court’s vision of the grand jury must be proved false. “Falsity” is the quality that establishes a statement as a legal fiction, rather than an accurate description of fact (or even an unconscious mischaracterization, which would not qualify as a legal fiction).

Although the Supreme Court chooses to describe (and this Article would argue, needs to describe) the federal grand jury as independent, the grand jury’s actual status as an independent institution is called into serious question both by structure of the modern federal grand jury and by the legal rules that govern its operation. These ensure that the ideal of grand jury independence, as espoused by the Court, is a legal fiction in the classic sense, as framed by Bentham – “an assumed fact notoriously false, upon which [the court] reasons as if it were true.” More precisely, the Court’s decisions endorse several related “notorious falsehoods.”

Three key strands emerge from the Court’s discussions of grand jury independence: (1) the suggestion that grand jury indictment is a vital constitutional right for the defendant; (2) the premise that the grand jury conducts investigations (and that it does so to ensure the reliability of its indictment decisions); and (3) the notion that the modern grand jury is an institution independent of the prosecutor and the court. It is these three related ideas that comprise the “legal fiction of grand jury independence,” as used in this Article.

Observers often focus on the problem of “prosecutorial abuse” before the grand

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32. See, e.g., Harmon, supra note 19, at 4 (“Bentham believed that there was a partnership between the monarch and the judiciary, and the purpose of that partnership was to steal power from Parliament.”).

33. In arguing that the Supreme Court’s pronouncements on the federal grand jury are “false” in the sense used in the legal fiction literature, this Article does not ascribe to the Justices either bad intent or evil motives. It simply suggests that there is both consciousness (or semi-consciousness) and clear utility to the Court’s decision to continue to endorse the historical lore of the grand jury rather than to approach its modern role more realistically.

34. The concept of a legal fiction is that the court is consciously using a false statement to achieve some desired result, not that it is negligently reaching badly reasoned decisions. It is a theory of legal reasoning, and therefore requires at least some degree of consciousness on the author’s part (although Fuller would allow “partial consciousness” of falsity to suffice, see Fuller, supra note 10, at 9).

35. Bentham, supra note 23, at 71 (defining “fiction” and describing it as one “false method of reasoning”).
Equally important, however, is that even without committing any "abuse," the prosecutor can so dominate the grand jury's decision, simply by following the rules, that its review is not independent at all. The problem is not merely that individual prosecutors, in isolated cases, are so overbearing that they deprive the grand jury of its ability to act independently. Rather, the problem is that the prosecution as an institution has a legal relationship with the grand jury as an institution that ensures, by and large, that prosecutorial decisions will be implemented without question — and that the prosecutor has a ready remedy in the few situations in which this does not occur.

The grand jury's lack of independence is not merely a feature of the modern grand jury; rather, it is a well-established fixture. In legal writing since at least the early twentieth century, authorities have been condemning grand juries' lack of independence. As early as the 1920's and 1930's, critics of the justice system decried the grand jury as a "rubber stamp." Over time, the grand jury has been described, by academics and judges alike, as a "fifth wheel," a "tool of the [e]xecutive," a "total captive of the prosecutor," a "prosecution lapdog," and an "ignominious prosecutorial puppet." While the "ham sandwich" maxim is

36. For an excellent discussion on the issue of prosecutorial abuse before the grand jury, see Peter J. Henning, Prosecutorial Misconduct in Grand Jury Investigations, 51 S.C. L. REV. 1, 4-5 (1999).

37. Henning also recognizes this dynamic. See id. at 8 ("[C]riticism of the grand jury system based on the prosecutor's domination of the process overlooks the degree to which the Court has accepted, and even encouraged, prosecutorial control of grand jury investigations.").

38. See United States v. Thompson, 251 U.S. 407, 413 (1920) (where one grand jury panel rejects proposed indictment, prosecutor is free to re-present the indictment to new grand jury panel). It is not that there are never cases in which federal grand juries refuse to approve charges proposed by a prosecutor. See, e.g., United States v. Sigma Int'l, Inc., 244 F.3d 841, 846, 870 (11th Cir. 2001) (noting that a grand jury after hearing a substantial amount of evidence over the course of a year did not return an indictment against defendant), vacated by, 287 F.3d 1325 (11th Cir. 2002). But such cases are far and away the exception rather than the rule — and more importantly, the rules governing the grand jury's decision-making process are structured in such a way as to make such cases extremely rare.

39. See George H. Dession, From Indictment to Information — Implications of the Shift, 42 YALE L.J. 163, 163 (1932) ("U[nder modern conditions] the grand jury is seldom better than a rubber stamp of the prosecuting attorney.") (quoting NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION (1931)); R. Justin Miller, Informations or Indictments in Felony Cases, 8 MINN. L. REV. 379, 397, 397 n.76 (1923) (stating that grand jurors are "practically forced to accept the judgment of the prosecuting attorney, consciously or unconsciously expressed").

40. William F. Willoughby, PRINCIPLES OF JUDICIAL ADMINISTRATION 183 (1929) (noting that the "real responsibility for the bringing of criminal charges is in fact exercised by the prosecuting attorney" and that the grand jury does "little or nothing more than follow his suggestions [sic]").


44. Bernstein, supra note 16, at 563-64.
perhaps the best-known saying about the grand jury, there is a remarkably broad body of literature reaching the same conclusion—that grand jurors are simply unable under modern conditions to reach any judgments independently of the prosecutor.

Yet, the Supreme Court has rarely even acknowledged the extensive criticism of the grand jury’s role. The Court’s studied ignorance might itself be viewed as a feature that suggests a legal fiction. Fictions must be handled carefully lest they disintegrate in the spotlight of scrutiny. Perhaps the Court’s phraseology—that the Fifth Amendment’s constitutional guarantee of grand jury indictment “presupposes an investigative body ‘acting independently of either prosecuting attorney or judge’”—should signal to us that we are in the land of “presupposition” rather than reality.


46. Without providing an exhaustive list, which would be voluminous, a few noted examples of such criticisms from different time periods include: Leonard B. Boudin, The Federal Grand Jury, 61 Geo. L.J. 1, 35 (1972) (“[The grand jury] is no longer a group of peers sitting to protect citizens; instead, it is an arm of the state, more powerful than ever before, serving the ends of the prosecution.”); Susan W. Brenner, The Voice of the Community: A Case for Grand Jury Independence, 3 Va. J. Soc. Pol’y & L. 67, 67 (1995) (“[T]he federal grand jury has become little more than a rubber stamp, indiscriminately authorizing prosecutorial decisions.”); Campbell, supra note 42, at 174 (“[T]he grand jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at any time, for almost anything, before any grand jury.”); Theodore M. Kranitz, The Grand Jury: Past – Present – No Future, 24 Mo. L. Rev. 318, 328 (1959) (“[G]enerally the grand jury does little more than rubber-stamp the opinion of the prosecutor”) (quoting Bettman & Burns, Criminal Justice in Cleveland 211-12 (1922)); Andrew D. Leipold, Why Grand Juries Do Not (and Cannot) Protect the Accused, 80 Cornell L. Rev. 260, 263 (1995) (“[A]ccording to the clichés [the grand jury] is a ‘rubber stamp,’ perfectly willing to ‘indict a ham sandwich’ if asked to do so by the government.”). Even those who argue that the grand jury should be retained in its present form concede that “federal grand juries usually adopt the prosecutor’s suggestions, and readily return indictments against the persons and upon the charges the prosecutor recommends.” Thomas P. Sullivan & Robert D. Nachman, If It Ain’t Broke, Don’t Fix It: Why The Grand Jury’s Accusatory Function Should Not Be Changed, 75 J. Crim. L. & Criminology 1047, 1949 (1984).

47. Out of the many Supreme Court decisions reviewed to prepare this Article, only two of the Court’s decisions, decided in close sequence, made any significant reference to the debate about the efficacy of the grand jury’s review process, and these gave the criticisms short shrift. In the Dionisio case, issued in 1973, Justice Douglas in dissent stated the “common knowledge” that the grand jury, although conceived as a bulwark between the citizen and the government, “is now a tool of the Executive.” United States v. Dionisio, 410 U.S. 1, 23 (1973) (Douglas, J., dissenting). In understated fashion, the majority responded that the grand jury “may not always serve its historic role” as a constitutional bulwark, but expressed confidence that by expanding the grand jury’s investigative powers, it would enhance the grand jury’s ability to protect citizens. Id. at 17-18. In its subsequent decision in United States v. Mandujano, the Court merely noted “periodic criticism, much of which is superficial, overlooking relevant history,” and asserted flatly that the “the grand jury continues to function as a barrier to reckless or unfounded charges.” 425 U.S. 564, 571 (1976). Although the Court’s acknowledgement of grand jury criticism in Dionisio was optimistically hailed “the first ‘leak in the dike’” of the Court’s regard for the grand jury, see Campbell, supra note 42, at 174, there have been no further leaks since the Mandujano case, and the dam is still holding firm.

While other commentators have generally observed a disconnect between the Supreme Court's reasoning and the reality, this Article hopes to show how deeply the Court's grand jury jurisprudence is permeated by fictions, how many aspects of the grand jury's presumed role are counterfactual, and how those fictions have affected and distorted the governing rules. To fully illustrate these points, it is useful to contrast the Court's rhetoric with the reality of the modern grand jury for each of the three key strands of the legal fiction of grand jury independence: (1) that indictment is a vital individual right, (2) that the grand jury conducts investigations to implement that right, and (3) that in so doing, the grand jury acts independently of the prosecutor (and the court).

A. Why it is False to Characterize Grand Jury Indictment as a Vital Right

The grand jury sits in an ambiguous position in the federal system. At times its powers are described as akin to those of a judge, at other times as quasi-prosecutorial in nature, at yet other times as those of a "grand inquest." In classic terms, the grand jury is both a "sword" investigating criminal conduct, and a "shield" to protect individuals from the prosecutor's powers. Given the grand jury's multiple roles, it is notable that in its decisional rhetoric, the Supreme Court has consistently chosen to characterize as the grand jury's primary mission its allegedly vital role in protecting individual rights.

The Supreme Court has posited that the federal grand jury's shield function – its role as a "shield against arbitrary or oppressive action" by the government – is its principal purpose. Indeed, the Court has made clear that the grand jury's role as shield not only predominates over but provides the essential justification for giving the grand jury its investigative powers to act as "sword." In reality, however, most would argue that the grand jury's sword function has far greater relevance as an explanation for the grand jury's continued importance in the federal system than

49. See, e.g., Leipold, supra note 46, at 323 (“The Supreme Court continues to write opinions that are influenced by the erroneous assumption that grand juries operate as a shield for the accused.”); cf. Ric Simmons, Re-examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System, 82 B.U. L. Rev. 1, 30 (2002) (“Recent decisions by the Supreme Court . . . have failed to acknowledge the truth about the federal grand jury – namely that it is little more than a tool of the prosecutor, unable to perform any meaningful function.”).


51. See, e.g., Beale et al., supra note 7, at § 1:7, 1-31 (“A colorful metaphor is used to describe these dual functions: the grand jury acts as both shield and sword.”).

52. Mandujano, 425 U.S. at 571. The Department of Justice has similarly echoed this concept. See, e.g., U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-11.010 [hereinafter U.S. ATTORNEYS’ MANUAL] (“While it is a very effective instrument of law enforcement, the grand jury is regarded primarily as a protection for the individual.”).

53. See infra, Part III.A.
its theoretical role as a bulwark between the individual and the state.\textsuperscript{54} The grand jury is a powerful investigative tool for the federal prosecutor, particularly important in cases involving white-collar crime, organized crime, drug conspiracies, and most recently, terrorism investigations.\textsuperscript{55} The Department of Justice fiercely defends the grand jury's role because of its value as an investigative tool, not because the grand jury protects citizens against unwarranted accusations by Department prosecutors.\textsuperscript{56} But the pre-eminence of the grand jury's investigative function would be hard to derive from the Supreme Court's preceedents, which focus heavily on the grand jury's allegedly essential role in providing an "independent" review of proposed criminal charges. The "most valuable function of the grand jury," the Court has emphasized, is "not only to examine into the commission of crimes, but to stand between the prosecutor and the accused."\textsuperscript{57} This rhetoric, compared to the rights the Court actually gives defendants in the grand jury process, illustrates that the notion of grand jury indictment as a vital individual right is, in fact, false.

\textbf{1. The Rhetoric: Grand Jury Indictment is a Vital Constitutional Right}

The Supreme Court's rhetoric about the federal grand jury focuses on its constitutional role in the federal criminal system under the Fifth Amendment.\textsuperscript{58} As a constitutional matter, a grand jury must vote to indict before the federal government may charge a defendant with any felony.\textsuperscript{59} In the constitutional ideal, the Fifth Amendment protects individual rights by requiring that all serious federal

\textsuperscript{54}. See, e.g., Henning, supra note 36, at 7 (noting that the federal grand jury's "[investigatory] function, more than its accusatory function, defines the importance of the grand jury in the criminal justice system").

\textsuperscript{55}. See, e.g., FEDERAL GRAND JURY PRACTICE, supra note 13, at 4 (stating that the grand jury's investigative role is "essential" in complex cases).

\textsuperscript{56}. The Department of Justice explains that the grand jury's investigative role is "essential" in complex cases because the "prosecutor and investigative agency alone cannot compel the testimony of witnesses and the production of documentary and other physical evidence." Thus, they must "work together with the grand jury to secure evidence that would not otherwise be available." Id.; see also e.g., Constitutional Rights Hearing, supra note 2 (statement of James K. Robinson) (defending grand jury rules and opposing amendments proposed by the National Association of Criminal Defense Lawyers), available at http://commdocs.house.gov.

\textsuperscript{57}. Hoffman v. United States, 341 U.S. 479, 485 (1951); cf. Hale v. Henckel, 201 U.S. 43, 59 (1906) (noting that in the ancient English system, which has been continued in the United States, "the most valuable function of the grand jury was not only to examine into the commission of crimes, but to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will.").

\textsuperscript{58}. The Fifth Amendment provides that "no person shall be held to answer for a capital, or otherwise infamous, crime unless on a presentment or indictment of a grand jury." U.S. CONST., amend. V. By including this protection in the Bill of Rights, the founders elevated the common law right in the English system to the higher status of a constitutional right in the American governmental structure. \textit{Ex parte} Bain, 121 U.S. 1, 6 (1887).

\textsuperscript{59}. The Fifth Amendment's reference to "otherwise infamous" crimes has been read to extend the right to grand jury indictment to all federal felony charges. See Mackin v. United States, 117 U.S. 348, 350-52 (1886) (explaining that infamous crimes are those punishable by imprisonment); \textit{Ex parte} Wilson, 114 U.S. 417, 426 (1985) (to same effect); 18 U.S.C. § 4083 (2000) (defining federal felonies as those crimes punishable by imprisonment).
criminal charges be considered and approved by a group of fellow citizens.60 Unless the defendant consents, she may not validly be charged with a felony by an "information" prepared and issued by the prosecutor acting alone.61

The Supreme Court has enthusiastically embraced the rhetoric of grand jury indictment as a vital right. The constitutional role of the grand jury in reviewing criminal indictments is, according to the Court, variously, a "basic guarantee of individual liberty,"62 the "primary security to the innocent against hasty, malicious and oppressive persecution,"63 a "fair method for instituting criminal proceedings,"64 "essential to basic liberties,"65 a "barrier to reckless or unfounded charges,"66 an "instrument of justice,"67 a "means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity,"68 a "kind of buffer or referee between the Government and the people,"69 a "shield against arbitrary or oppressive action" by the government,70 and a "protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor."71

There is notable continuity in the rhetoric about the grand jury among the Court's precedents, old and new. In the nineteenth century, the Court described the right to grand jury indictment as a right of "great importance"72 that is "justly regarded as one of the securities to the innocent against hasty, malicious, and oppressive public prosecutions."73 More recently, the Court similarly posited that the grand jury performs a "vital function in providing for a body of citizens that acts as a check on prosecutorial power."74 The Court's more recent precedents

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60. See generally 28 U.S.C. § 1861 (detailing that the Jury Selection and Service Act requires grand jurors to be "selected at random from a fair cross section of the community" in which the court convenes).
61. The alternative to an indictment is an "information," a document asserting criminal charges that is issued by the prosecutor acting alone. Informations are the method by which misdemeanor offenses are charged in the federal system (as well as criminal felony charges where the defendant has waived the right to grand jury indictment). See Fed. R. Crim. P. 7(a).
68. Ex parte Bain, 121 U.S. at 11.
69. Williams, 504 U.S. at 47.
70. Mandujano, 425 U.S. at 571.
71. Dionisio, 410 U.S. at 17. In grandiose terms, the grand jury is said to serve the "invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or dictated by an intimidating power or by malice and personal ill will." United States v. Mechanik, 475 U.S. 66, 74 (1986) (O'Connor, J., concurring in judgment) (quoting Wood, 370 U.S. at 390).
72. Ex parte Bain, 121 U.S. at 10.
73. Id. at 12 (quoting Jones v. Robbins, 74 Mass. (8 Gray) 329, 344 (1857)); see also Hurtado v. California, 110 U.S. 516, 522 (1884) (quoting Jones, 74 Mass. (8 Gray) at 344).
have endorsed the grand jury with somewhat less enthusiasm, but the same rhetoric persists.75

Were a reader to absorb only the Court's description of the federal grand jury as an institution, she would take comfort from the thought that the grand jury stands between the innocent (or even not-so-innocent) citizen and any federal criminal felony charges. Yet, the grand jury's true role suggests that this Fifth Amendment "right" provides cold comfort.

2. The Reality: The Right to Indictment by the Grand Jury is Downright Hazardous for the Defendant

In reality, the constitutional "right" to indictment by the grand jury has virtually no content and carries many hazards. It is true that a federal defendant has the technical right to have grand jurors vote on a felony indictment. As a supposed check on prosecutorial zeal, however, this right is worthless because there is no requirement that grand jurors engage in any meaningful process before they vote to approve indictment. To the contrary, the procedures approved by the Court ensure that the grand jury's process will only be as meaningful as the prosecutor chooses, while other pressures affirmatively encourage the prosecutor to minimize the grand jury's consideration of the evidence.

a. The Limited Contours of the Right to Grand Jury Indictment

The Fifth Amendment right to be indicted by grand jury for serious crimes is a right without meaningful content. The constitutional "protections" associated with this right are essentially limited to three rules, none of which provides much reassurance to the defendant: the defendant has the theoretical right to have the grand jury find "probable cause" before the prosecutor may proceed with felony charges;76 the courts may not amend an indictment once it is issued by the grand jury;77 and the defendant may object to racism in the selection of the grand jurors that indicted him.78 These rules fail to protect defendants in the federal system from the significant dangers inherent in the indictment process.

Very early, the Supreme Court held the Grand Jury Clause to be among the few constitutional provisions inapplicable to state governments.79 Notably, the Court

75. E.g., id. (acknowledging the validity of the position that grand jury indictment is "vital," rather than affirmatively advancing that notion).
76. See Calandra, 414 U.S. at 343 (noting the grand jury's responsibility to determine probable cause).
77. See Ex parte Bain, 121 U.S. at 13 (noting that the court has no power to change the wording of a grand jury indictment).
78. See Vasquez v. Hillery, 474 U.S. 254, 262 (1986) (noting that when a defendant is indicted by a grand jury from which members of a certain race have been purposefully excluded, he has not received equal protection of the laws).
79. See Hurtado, 110 U.S. at 538 (holding the Grand Jury Clause not applicable to states through incorporation in the Due Process Clause of Fourteenth Amendment).
reached this result not because independent review of a prosecutor's criminal charging decisions is not important, but because due process concerns can also be satisfied by allowing prosecutors to file charges by prosecutorial information, with neutral review provided "by a magistrate, certifying to the probable guilt of the defendant." In contrast to the federal system, states are free to eliminate or limit the role of the grand jury in the criminal process. Many have opted instead to allow prosecutors to initiate felony prosecutions by information, generally accompanied by a preliminary hearing before a magistrate to ensure there is probable cause to support the charges.

By contrast, in the modern federal system, in most cases, the grand jury is the only body to scrutinize the criminal charging process other than the prosecution itself. Only if the prosecutor fails to obtain a grand jury indictment before or shortly after the defendant is arrested will a federal judge review the merits of serious charges at the outset of the case. The Supreme Court has chosen to equate a grand jury indictment with a judicial determination that the evidence shows "probable cause" to support the criminal charges being pressed. Despite this theoretical equation, however, the Court has refused to read into the Fifth Amendment any procedures to ensure that the grand jury evidence actually suggests that the defendant committed the crimes charged.

A federal grand jury indictment on its face creates an irrebuttable presumption

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80. Id. at 538.
81. Many states chose by legislation or constitutional amendment to eliminate a right to grand jury indictment and substitute a preliminary hearing before a magistrate judge, while preserving the grand jury's investigative role. See generally Beale, supra note 7, at § 1:7, 1-32. ("Today, in roughly half the states . . . criminal charges may be instituted by the prosecutor's information."); Wayne R. LaFave, et al., 4 Criminal Procedure § 15.1(6) (2d ed. 1999) ("Over the years, the number of states allowing felony prosecutions to be brought by information (usually only after a preliminary hearing bindover) has grown steadily."). One might argue that such states have, by legislation, approximated the practical effects of the Supreme Court's grand jury decisions, while including important balances missing in the federal system.
82. See Fed. R. Crim. P. 5.1 (dictating that indictment eliminates right to preliminary examination before magistrate). While there are safeguards in place at later stages of a criminal proceeding that theoretically ensure that the criminal charges are appropriate, these are less significant than might appear. The extensive safeguards applicable at trial are virtually irrelevant in most cases because the vast majority of criminal cases do not go to trial. See Administrative Office of the U.S. Courts, Judicial Facts & Figures, tbl 3.5 (2003) [hereinafter Judicial Facts] (showing that in 2003, only 4 percent of defendants in federal criminal cases went to trial, while over 86 percent entered guilty pleas), available at http://www.uscourts.gov/judicialfactsfigures/contents.html. While there are also safeguards that theoretically protect the defendant during the entry of a guilty plea, see Fed. R. Crim. P. 11, in practice guilty plea hearings are orchestrated proceedings before the trial judge, geared toward approval of the plea, and there is little independent scrutiny of the basis for the criminal charges.
84. See Ex parte United States, 287 U.S. 241, 250 (1932) (holding indictment "conclusively determines the existence of probable cause for the purpose of holding the accused to answer"). As discussed infra Parts III.B, III.C, this is an important principle because, among other things, it allows a grand jury indictment to substitute for review of proposed charges by a magistrate judge, which would otherwise be constitutionally required for various pretrial purposes, including pretrial detention. See, e.g., Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (holding Fourth Amendment "requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest").
that probable cause supports the charges.\(^8^5\) This is so regardless of the evidence the
grand jury relied on or failed to consider in voting to indict, regardless of the
content of the grand jury’s legal instructions,\(^8^6\) and regardless of whether or not a
federal judge would agree that the evidence actually supports the criminal
charges.\(^8^7\) Indeed, an indictment issued by a grand jury that was \textit{wrongly} instructed
on the elements of an offense still establishes valid probable cause that the
defendant committed the offense charged.\(^8^8\)

The standard of probable cause is simply the threshold for initiating criminal
charges. As such, it is much lower than the standard required to convict and impose
punishment at trial – that the defendant is guilty “beyond a reasonable doubt.”\(^8^9\)
Still, the idea that a person may not be required to defend against criminal charges
advanced without probable cause is fundamental to the criminal justice system.
Particularly in an era in which most cases proceed quickly from indictment to
guilty plea negotiations,\(^9^0\) the power to obtain and shape an indictment is a crucial
bargaining chip. But the “right” to have the grand jury find probable cause, as
interpreted by the Court, is a hollow one indeed.

The protection afforded the defendant by the Fifth Amendment’s Grand Jury
Clause is little more than the rule that once grand jurors vote to approve the
indictment, its wording cannot be changed by the court. This has been the law
since the nineteenth-century case of \textit{Ex parte Bain}, in which the Court held that a
grand jury indictment may not be amended by the court given “the great

\(^{8^5}\) See \textit{Williams}, 504 U.S. at 54 (finding evidentiary basis of indictment not subject to review); \textit{Costello}, 350
U.S. at 363 (“An indictment returned by a legally constituted and unbiased grand jury, . . . if valid on its face, is enough to call for trial of the charge on the merits.”).

\(^{8^6}\) The notion that grand jurors must be instructed concerning their function in order to meaningfully exercise
it has been acknowledged in other grand jury systems, if not in the federal courts. In New York, for example,
governing law requires that the grand jury be instructed on the law “where necessary and reasonable,” N.Y. Crim.
Proc. Law § 190.25(6) (2001), and provides for judicial review of grand jury instructions. This is consciously
based on the recognition that incomplete or misleading instructions by the prosecutor to the grand jury may
substantially undermine the essential function of the grand jury to protect citizens from unfounded and arbitrary
accusations. See \textit{People v. Lancaster}, 503 N.E.2d 990, 993 (N.Y. 1986) (noting that the prosecutor, performing the
dual roles of advocate and public officer, has a duty to see that justice is done).

\(^{8^7}\) See infra Part III.C.

\(^{8^8}\) See \textit{FEDERAL GRAND JURY PRACTICE}, supra note 13, at 26 (“An indictment remains valid even if the
prosecutor mistakenly gives the grand jury erroneous legal instructions.”); \textit{id.} at 57 (“Courts have held, especially since \textit{Bank of Nova Scotia}, 487 U.S. 250 (1988), that if an indictment is valid on its face, there is no
need to examine grand jury minutes to determine if the prosecutor improperly instructed the grand jury.”).

\(^{8^9}\) See, \textit{e.g.}, \textit{Coleman v. Burnett}, 477 F.2d 1187, 1202 (D.C. Cir. 1973). In \textit{Coleman}, the D.C. Circuit stated:

\begin{quote}
Probable cause signifies evidence sufficient to cause a person of ordinary prudence and caution to
conscientiously entertain a reasonable belief of the accused’s guilt. Proof beyond a reasonable
doubt, on the other hand, connotes evidence strong enough to create an abiding conviction of guilt
to a moral certainty. The gap between these two concepts is broad.
\end{quote}

\textit{Id.}

\(^{9^0}\) In 2003, for example, not only did close to 9 out of 10 defendants charged with criminal offenses end their
cases by pleading to the charges, but on average it took only six months from the filing of charges to the entry of
the plea. See \textit{JUDICIAL FACTS}, supra note 82, tbl. 3.5, 4.7.
importance which the common law attaches to an indictment by a grand jury." Indeed, the Bain case is one of the Supreme Court's earliest mentions of grand jury independence, and in it the Court actually applied the principle of grand jury independence to recognize a right. In early post-Bain decisions, the Court similarly emphasized that judicial amendments deprive the defendant of the "substantial right" to have the grand jury make the charge "on its own judgment." In more recent times, however, this supposedly "substantial" right has readily given way when it would have threatened law enforcement interests.

The anti-amendment rule was effectively ignored by the Court in its most recent grand jury decision, United States v. Cotton, despite the Court's rhetoric in that case about the value of the right to grand jury indictment. If the Court had insisted upon strict application of the Bain rule, the result in Cotton would have been to invalidate under the Fifth Amendment Grand Jury Clause many lengthy sentences imposed for serious drug convictions. In these circumstances, the Bain rule readily gave way, reflecting the Court's far greater concern with the potential benefit to convicted felons than with the Fifth Amendment right to indictment by grand jury. Other federal courts have similarly given the Bain rule short shrift when it would have unduly impeded law enforcement by undermining the finality of criminal convictions.

The only other bedrock principle beneficial to defendants in the grand jury's indictment process is that an indictment issued by a grand jury selected by racially

91. Ex parte Bain, 121 U.S. 1, 9 (1887).
93. Cotton, 535 U.S. at 634 (allowing enhanced sentences based on drug quantity although indictment was silent as to quantity of drugs). In Cotton, the Court was dealing with the aftermath of its Apprendi decision, which held that a fact used to enhance a defendant's sentence must be alleged in the indictment. See United States v. Apprendi, 530 U.S. 466, 476 (2000). In Cotton, the indictment had not alleged the quantity of drugs, even though this fact significantly affected the sentence that could be imposed. The Supreme Court refused to take this omission too seriously, barely pausing over the defendant's Fifth Amendment right to indictment by grand jury, and freely speculating that changing the indictment in this respect would "surely" have made no difference to the grand jury's vote. 535 U.S. at 633.
94. While the Cotton ruling is not unrealistic as a matter of fact, it scarcely reflects the judicial respect for the "independent" institution of the grand jury suggested by the Court's fiction of grand jury independence. It is hard to find any meaningful explanation for this contrast other than expediency - a characteristic quality of legal fiction. See Fuller, Legal Fictions, supra note 19, at 369 ("The choice of the word 'fiction' here implies a recognition that the statement under discussion, although erroneous, had a certain utility."). In Cotton, of course, a not insignificant fact was that the ruling, had it come out otherwise, would have reduced the defendants' sentences in hundreds (if not thousands) of pending drug cases in which the government had obtained or was seeking a sentencing enhancement because of the very large quantities of drugs allegedly involved, but had failed to allege the drug quantity in the indictment.
95. In Gaither v. United States, 413 F.2d 1061 (D.C. Cir. 1969), for example, the D.C. Circuit struck down the routine practice of the United States Attorney to request the grand jury to vote to indict without seeing the terms of the actual indictment. While holding that this practice infringes the defendant's constitutional "right to have the grand jury make the charge on its own judgment," id. at 1072 (quoting Stirone, 361 U.S. at 218-219), the Court applied its ruling prospectively only. The Court openly admitted that it was departing from the "strict rule" against amending grand jury indictments because of "practical considerations," as the ruling would otherwise have affected "1,374... pending cases." Gaither, 413 F.2d. at 1073 n. 32.
discriminatory methods is invalid (a principle deriving from the Equal Protection and Due Process Clauses, rather than the Fifth Amendment's Grand Jury Clause). Such challenges, however, are largely irrelevant in the federal system, in which jurors are randomly selected from a combination of sources. Notably, this line of authority does not call into question those aspects of the modern selection procedures that matter the most to defendants -- the frequent excusal of educated, working, and professional jurors.

To understand how limited are the defendant's rights in the grand jury process, it is useful to look at the flip side of the issue -- the constitutional rights the Court has declined to recognize in grand jury proceedings, even though they attach to other steps in the criminal process. Most significantly, the Court has refused to find the grand jury to be a critical stage in the criminal process at which the putative defendant has the constitutional right to be represented by counsel. Even a person whom the prosecutor has already decided to indict has no right to be represented by a lawyer in the grand jury process. This is in notable contrast with the right to counsel in other analogous settings. The Court has held, for example, that the accused needs the "guiding hand of counsel" for pretrial proceedings at which a magistrate judge rather than the grand jury makes the "probable cause" determination to hold the defendant for trial. Federal judges have observed the "anomaly" created by this rule.

96. See, e.g., Vasquez, 474 U.S. at 262 (striking down "key man" procedure under which appointed grand jury foreman hand-picked other grand jurors). The defendant's right to challenge racial bias in the composition of the grand jury is not rightfully a Fifth Amendment right at all, but a right under the Equal Protection and Due Process Clauses, concerned with grand jurors' interest in not being excluded from civic participation on grounds of race (a right that the defendant is given standing to raise). See, e.g., Campbell v. Louisiana, 523 U.S. 392, 398-99 (1998) (granting standing to white defendant to raise equal protection and due process challenge to discrimination against black persons in grand jury selection).

97. "Key man" systems are not used in the federal courts, which randomly draw grand jurors by lot from drivers license, voting, and other registries. See generally 28 U.S.C. § 1861, et seq. (2000); LAFAVE, ET AL., supra note 81, at § 15.2(a), 255 (stating that in the federal system, "both the grand jury and petit jury arrays are chosen by a method of random selection from a representative source list (such as a voter registration list or a combination of that list and other comprehensive lists)").

98. See, e.g., MARVIN E. FRANKEL & GARY P. NAFTALIS, THE GRAND JURY: AN INSTITUTION ON TRIAL 45 (1975) ("Active and intelligent people are liable to have jobs that don't allow comfortably for the absences required by grand jury service.").

99. See United States v. Mandujano, 425 U.S. 564, 581 (1976) (stating that in the grand jury setting, "[n]o criminal proceedings had been instituted against respondent, hence the Sixth Amendment right to counsel had not come into play").

100. See id.; cf. Conn v. Gabbert, 526 U.S. 286, 292 (1999) ("A grand jury witness has no constitutional right to have counsel present during the grand jury proceeding.").

101. Coleman v. Alabama, 399 U.S. 1, 9 (1970) ("Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution.").

102. Dissenting in Coleman, Chief Justice Burger recognized the "anomaly" created by affording a right to counsel in preliminary hearings, but not grand jury proceedings, in which the grand jury may in secret session interrogate the person to be accused. See id. at 25 ("If . . . this Court . . . requires that counsel be present at preliminary hearings, how can this be reconciled with the fact that the Constitution itself does not permit the assistance of counsel at the decidedly more 'critical' grand jury inquiry?").
The Court's refusal to read meaningful protections into the defendant's Fifth Amendment "right" to grand jury indictment has been paralleled by its increasingly restrictive view of the defendant's non-constitutional rights in the grand jury process. In the last twenty years the Supreme Court has also issued a series of rulings that affirmatively undermine the limited protections contained in Rule 6 of the Federal Rules of Criminal Procedure.103 Like the Fifth Amendment's constitutional guarantee, Rule 6 was theoretically intended to protect the independence of grand jurors and the integrity of the grand jury's indictment process.104 In the period from 1986 to 1992, however, the Supreme Court issued a series of grand jury rulings that rendered even these limited rights virtually unenforceable. In this body of decisions, the Court adopted procedural rules strictly foreclosing judicial review of most challenges to grand jury indictments.

The Court began by holding that once a defendant is convicted of a crime, the court will not review any errors in the grand jury process.105 In a subsequent, catch-22 ruling, the Court added that the defendant also has no right to insist that the court review his grand jury abuse claims prior to his conviction.106 Further, if the trial court does choose to take up a defendant's grand jury challenge before conviction, the Court held that the defendant must meet the virtually impossible burden of proving that the error actually affected the grand jury's indictment decision.107 Justice O'Connor - no liberal when it comes to grand jury issues - went so far as to observe that the rulings effectively render the grand jury rules "a dead letter," thereby seriously undermining the grand jury's "traditional function

103. Federal Rule of Criminal Procedure 6 limits the persons who may be present in the grand jury room, requires strict secrecy for grand jury proceedings, and provides for confidentiality of the grand jury's deliberations on an indictment. FED. R. CRIM. P. 6.  
104. See Mechanik, 475 U.S. at 74 (O'Connor, J., concurring in the judgment) (stating the purpose of Rule 6 is to "guarantee that the grand jury is given the opportunity to make an independent examination of the evidence and render its probable cause and charging determinations free of undue prosecutorial influence."); see also Midland Asphalt Corp. v. United States, 489 U.S. 794, 800 (1989) ("[T]he purpose of Rule 6(d) is] to protect[t] against the danger that a defendant will be required to defend against a charge for which there is no probable cause to believe him guilty.") (quoting Mechanik, 475 U.S. at 70 (1986)).  
105. See Mechanik, 475 U.S. at 73 ("[T]he petit jury's verdict rendered harmless any conceivable error in the charging decision that might have flowed from the violation."). While Mechanik involved a conviction at trial, the same principle also bars any challenge to grand jury abuses that preceded the defendant's guilty plea.  
106. See Midland Asphalt Corp., 489 U.S. at 802 (refusing to allow interlocutory appeal on defendant's grand jury objection). The combination of Mechanik and Midland Asphalt ensures that that there will be virtually no appellate review of claims of prosecutorial abuse before the grand jury (and no recourse if the district court simply defers ruling on such a claim until after conviction, as the court did in Mechanik itself).  
107. See Bank of Nova Scotia v. United States, 487 U.S. 250, 263 (1988) (holding that even if prosecutor has committed grand jury abuse, the indictment may not be dismissed absent proof that the misconduct actually affected the grand jury's decision to indict). This is a virtually impossible standard to meet, given the nature of the grand jury's decisional process. See generally FEDERAL GRAND JURY PRACTICE, supra note 13, at 459 ("[T]he combined effect of [recent] Supreme Court cases is to severely limit a defendant's ability to attack the validity of an indictment.").
of protecting the innocent from unwarranted public accusation.”

The net result of all of these grand jury rulings is that, although charging by a prosecutor’s information is seen as a less stringent protection of a defendant’s rights, in reality, those defendants charged by a prosecutor alone often receive greater procedural protections in the charging process than those indicted by the grand jury. When it comes to whether a criminal defendant charged with a federal felony should have meaningful, enforceable rights in connection with the grand jury’s review process, the Court has signaled its clear impatience with the “right” to grand jury indictment, notwithstanding the Court’s elevated descriptions of the federal grand jury as an “essential element of personal liberty.” In truth, the Court does not really treat grand jury indictment as an individual right at all (and certainly not a vital one).

b. The Reality of the Grand Jury’s Indictment Process for the Defendant

The reality is that under the legal principles adopted by the Supreme Court, it means little that a federal grand jury has voted to indict a defendant on felony charges. Although a grand jury indictment is deemed a “judicial” probable cause determination, the grand jury process bears no resemblance to any proceeding ordinarily considered judicial in nature. As set forth below, the grand jury is subject to no evidentiary rules, its proceedings are entirely ex parte, and the basis for its indictment decision is completely unreviewable. At the same time, there are practical incentives to limit the evidence prosecutors present to the grand jury, to avoid creating impeachment evidence for the defense at trial, and to leave the government open to use evidence in subsequent civil suits. The net result is that grand jury indictments issue from

108. Mechanik, 475 U.S. at 73 (O’Connor, concurring in the judgment). Justice O’Connor was referring to the majority’s decision in Mechanik.

109. In the federal system, for example, a defendant charged with a felony by the prosecutor alone is entitled to a preliminary examination before a federal magistrate judge. See Fed. R. Crim. P. 5.1(a). This is an adversary hearing at which the prosecutor presents evidence of probable cause, the defendant has counsel who may cross-examine and call witnesses, and an independent judicial officer reviews the sufficiency of the proposed charges. See Fed. R. Crim. P. 5.1; Coleman, 399 U.S. at 9 (emphasizing importance of defense counsel at preliminary hearing). By contrast, in the grand jury setting, the “probable cause” determination is made by non-lawyers in a secret session governed by no evidentiary rules, from which the accused’s lawyer is excluded entirely. See supra text accompanying notes 36-39.

Not surprisingly, while the preliminary hearing in theory is simply a preliminary stage to determine if the defendant should be held for proceedings of the grand jury, United States v. Quinn, 357 F. Supp. 1348, 1351-52 (N.D. Ga. 1973), most defendants would prefer to have a preliminary hearing than to have probable cause decided by the grand jury itself. Conversely, the prosecutor has every incentive to try to obtain a grand jury indictment in time to avoid a preliminary hearing. See, e.g., United States v. Gurary, 793 F.2d 468, 473 (2d Cir. 1986) (criticizing the “practice in some districts of routinely granting a continuance [of the preliminary examination] to allow the Government to satisfy the probable cause requirement by filing an indictment.”). This dynamic has not been lost on the federal courts. See, e.g., United States v. Lane, 707 F. Supp. 368, 373 (N.D. Ill. 1989) (“It is true that a defendant who is charged by information may enjoy certain advantages over a defendant who is charged by indictment.”).
summary proceedings in which there are no protections to ensure the accuracy of indictment decisions.

While the grand jury’s indictment is deemed to establish that there is “probable cause” that the defendant committed the crime charged, it is irrelevant whether or not the evidence before the grand jury actually supports that conclusion. This has been true since the Supreme Court issued its turning point decision in Costello v. United States. Read most narrowly, the Costello decision held that grand jury proceedings are not subject to evidentiary hearsay rules. More broadly, however, the Court refused to read any content into the Fifth Amendment right to have the grand jury indict, or to place any limits on the kind of evidence upon which grand juries may act. The Court flatly ruled that an indictment issued by a legally constituted grand jury “if valid on its face, is enough to call for trial of the charge on the merits.”

Costello established the key principle of non-reviewability – the broad principle that federal courts are “to abstain from reviewing the evidentiary support for the grand jury’s judgment.” So long as a properly selected grand jury technically voted to approve an indictment alleging conduct that would amount to a crime, the criminal prosecution will proceed (or more often, plea negotiations with the prosecutor will follow). In accordance with this principle, there are no evidentiary limitations on the modern grand jury’s proceedings. The grand jury may lawfully indict based on “tips, rumors, evidence offered by the prosecutor, or their own

110. “A challenge to the reliability or competence of the evidence presented to the grand jury’ will not be heard.” Williams, 504 U.S. at 54 (quoting Bank of Nova Scotia, 487 U.S. at 261).

111. Costello, 350 U.S. at 362-63. The Costello decision involved a federal tax prosecution based on accounting principles of “net worth,” in which the defendant argued that the indictment was invalid because it was based on hearsay (specifically, on the testimony of a case agent, summarizing the evidence). Id. at 360-61. Not coincidentally, this decision was issued in the same period in which the United States saw the rise of the modern regulatory state, which has significantly increased the importance of federal grand juries as a tool in investigating complex regulatory and business offenses, drug crimes, and other crimes of national scope. See, e.g., Beale, supra note 7, § 1:6 (“In recent years the investigative grand jury has become increasingly important in the federal system because of the emphasis the government has placed on prosecutions involving large scale well-organized criminal activity.”).

112. Costello v. United States, 350 U.S. 359, 362 (1956). The outcome of the Costello case was by no means a foregone conclusion. A 1929 treatise states flatly, for example, that “[i]t goes without saying that only legally admissible evidence should be received before a grand jury.” Willoughby, supra note 40, at 179; see also George J. Edwards, The Grand Jury 142 (1906) (“The grand jury should . . . receive only the best evidence which can be procured, being admissible evidence before the petit jury.”). As for the broader question of judicial review of the grand jury’s decision-making process, many courts had been willing to review the grand jury’s evidence in extreme cases to prevent miscarriages of justice. As Justice Burton emphasized, concurring in the result in Costello, even if the courts are not to apply strict evidentiary rules at the grand jury stage, this does not inevitably lead to the conclusion that any evidence, no matter how unreliable, may serve as a legitimate basis for prosecution. Costello, 350 U.S. at 364 (1956) (Burton, J., concurring). Following Costello, the federal courts extended the same principles to reject any challenges based on the alleged insufficiency – or even the illegality – of the evidence presented to the grand jury to obtain indictment. See supra text accompanying notes 50-52.

113. Williams, 504 U.S. at 54; see also, e.g., Bank of Nova Scotia, 487 U.S. at 261 (“[A]n indictment valid on its face is not subject to such a challenge.”).
personal knowledge." The technical rules of evidence are inapplicable. More importantly, there is no requirement that the grand jury act upon evidence that has any indicia of reliability.\(^{115}\)

In seeking approval of a proposed indictment, the prosecutor may pose only leading questions calling for one-word responses by a government agent.\(^{116}\) The prosecutor need not call any eyewitnesses at all, and may ask the grand jury to indict based on hearsay, double hearsay, or even triple hearsay.\(^{117}\) The grand jury may indict based on inadmissible evidence, even if it is highly damaging in its power of suggestion, such as a defendant’s prior criminal convictions.\(^{118}\) An indictment may be based on illegally seized and unconstitutionally obtained evidence.\(^{119}\) And a rule often surprising to those uninitiated in grand jury practice holds that a grand jury indictment is valid even if the prosecutor, in obtaining the indictment, chose not to disclose to the grand jury known evidence that would have cleared the defendant.\(^{120}\)

Equally important, there are strategic considerations that ensure that the grand jury will rarely, if ever, hear the full scope of relevant evidence before voting on indictment. To understand this, recall that the grand jury’s indictment process is simply the beginning of the criminal process. Theoretically at least, it is the precursor to a full-blown criminal trial (although far more often, it is the door to plea negotiations with the defendant). Because trial is always a possibility, even if an unlikely one, the prosecutor has an affirmative incentive to limit the evidence presented to the grand jury in connection with the

\(^{114}\) United States v. Dionisio, 410 U.S. 1, 15 (1973); see also Federal Grand Jury Practice, supra note 13, at 64-65 (“Grand juries may initiate and conduct investigations based on tips, rumors, hearsay, speculation, evidence offered by the prosecutor, and the grand jurors’ own personal knowledge.”).

\(^{115}\) See generally Federal Grand Jury Practice, supra note 13, at 66-67 (noting that indictments based on hearsay, illegally obtained evidence, and inadvertently false testimony have been allowed to stand).

\(^{116}\) See, e.g., id. at 28 (“Since the Federal Rules of Evidence are inapplicable, the prosecutor may present the case by asking the summary witness a series of leading questions.”).

\(^{117}\) See Costello, 350 U.S. at 363 (holding that a grand jury indictment may be based entirely on hearsay evidence).

\(^{118}\) See United States v. Levine, 700 F.2d 1176, 1179 (8th Cir. 1983) (noting that the indicting grand jury heard evidence of prior convictions and of the accused’s refusal to talk with police); United States v. Camporeale, 515 F.2d 184, 189 (2d Cir. 1975) (commenting that the indicting grand jury knew of the accused’s criminal record).

\(^{119}\) See Calandra, 414 U.S. at 344-45 (holding that a grand jury’s consideration of evidence seized in violation of the Fourth Amendment does not invalidate indictment); Lawn v. United States, 355 U.S. 339, 349-50 (1958) (holding that there is no right to challenge grand jury’s alleged reliance on evidence seized in violation of defendant’s Fifth Amendment rights).

\(^{120}\) See Williams, 504 U.S. at 52-54 (reversing the Tenth Circuit rule that the prosecutor must disclose to grand jurors known evidence that clearly negates guilt). This rule is intuitively disturbing to many, even though it is arguably one of the most defensible of the grand jury rules. If the grand jury’s traditional function is simply to “determine whether... the evidence for the prosecution [is] sufficient to sustain a conviction,” then theoretically it should not be necessary to hear from the defense at this stage in the case. Edwards, supra note 112, at 141. Problems arise, however, when the prosecution-side-only rule is combined with the Costello-line cases placing no evidentiary limits on the evidence that supports indictment. This combination sets such a low standard that it renders the grand jury’s indictment decision truly meaningless even as a test of the prosecutor’s prima facie case.
Every time a witness testifies to the grand jury, his testimony may create helpful evidence for the defense. If the prosecution later calls the same witness at trial, the defendant will have a right to his grand jury testimony for cross-examination as a prior witness statement discoverable under the Jencks Act. If the witness says something exculpatory of the defendant, that testimony will have to be disclosed to the defendant at trial as a matter of due process under the Supreme Court's Brady decision. The Department of Justice is well aware of these strategic considerations, and advises prosecutors to avoid creating unnecessary Jencks material in their grand jury submissions.

The prosecutor can anticipate and minimize the potential for creating cross-examination material for trial by using a "one-agent summary," a canned presentation from a case agent who provides a summary of the evidence, as vetted by the prosecutor, after which the prosecutor requests that the grand jurors vote to approve the indictment. In one-agent summary presentations, the evidence presented is "necessarily derivative and abbreviated," and the potential for undermining the grand jury's independent decision-making is widely recognized. At the same time, such presentations are unquestionably lawful and frequently used by federal prosecutors. This process, not surprisingly, rarely produces a vote by the grand jury against indictment. And it is an efficient one, from the prosecutor's standpoint. The one-agent summary has been reported to produce as many as fifteen indictments in forty-five minutes.

Grand jury secrecy rules also create the incentive to limit the evidence presented

121. 18 U.S.C. § 3500.
122. See Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that the Due Process Clause requires that defendant be provided upon request with material evidence favorable to the defense on guilt or punishment).
123. See, e.g., FEDERAL GRAND JURY PRACTICE, supra note 13, at 28, n. 54 (warning that an agent’s testimony to the grand jury may have to be disclosed to the defense at trial under the Jencks Act, and suggesting questions to be asked in order to "make it more difficult for opposing counsel to use the grand jury transcripts to impeach the witness" at trial).
124. United States v. A1 Mudarris, 695 F.2d 1182, 1187 (9th Cir.), cert. denied, 461 U.S. 932 (1983). The courts have recognized that although the summary witness procedure is "economical and expedient," it may be subject to abuse by "pressuring grand jurors into a precipitous decision." Id.; see also, e.g., United States v. Catino, 403 F.2d 491, 496 (2d Cir. 1968) ("[E]xcessive use of hearsay in the presentation of government cases to grand juries ... tends to destroy the protection from unwarranted prosecutions that grand juries are supposed to afford to the innocent."). (quoting United States v. Umans, 368 F.2d 725, 730 (2d Cir. 1966)). The Department of Justice itself recognizes the dangers of such one-agent summary presentations, warning that prosecutors "should not allow the practice to lead to carelessness." FEDERAL GRAND JURY PRACTICE, supra note 13, at 24, 70 (noting that summaries are "an important tool to be used with caution").
125. See FEDERAL GRAND JURY PRACTICE, supra note 13, at 23 (noting that in cases presented to the grand jury for indictment only, "federal prosecutors routinely present the evidence gathered by the agency through the summary testimony of the case agent, without calling any of the first-hand witnesses").
126. Bernstein, supra note 16, at 573 (citing one prosecutor's "record"). In the District of Columbia, for example, the federal prosecutors' office has a procedure expressly described as the "Rapid Indictment Program," a high-volume grand jury docket of routine criminal offenses that are heard and decided by the grand jury within a day (usually involving "only one police witness"). COUNCIL FOR COURT EXCELLENCE, THE GRAND JURY OF
to the grand jury. In contrast to matters presented to the grand jury, which must be kept secret, there are no general secrecy rules restricting the government’s use of evidence gathered through other investigative means.\textsuperscript{127} If there is a possibility that the government will seek civil as well as criminal sanctions, Department of Justice policy calls for prosecutors to minimize the evidence presented to the grand jury in seeking indictment, so as to avoid the application of grand jury secrecy rules that could later limit the use of the same evidence in the government’s civil case.\textsuperscript{128} Minimizing grand jurors’ exposure to the evidence maximizes the prosecutor’s freedom to use the evidence for civil purposes following the criminal proceedings.

Given all of these considerations, it is not surprising that, in terms of the evidence the grand jury actually hears in voting on indictment, federal prosecutors follow the principle that “less is more.” Recent statistics show that on average, the grand jury spends well under an hour considering evidence of a defendant’s guilt before voting to indict that defendant for a serious federal crime.\textsuperscript{129}

From the defendant’s perspective, the grand jury is not an independent institution that provides constitutional protection for the individual, but a critical tool in preparing the prosecutor’s case for trial and strengthening her hand in plea negotiations.\textsuperscript{130} Ironically, the most vigorous defenders of the current grand jury

\textsuperscript{127} Evidence obtained by the grand jury may not be used for later civil litigation (or for other non-criminal purposes) without an order of the court. See Fed. R. Crim. P. 6(e); United States v. Sells Engineering, Inc., 463 U.S. 418, 432 (1983) (finding that “disclosure [of materials] to government attorneys for civil use poses a significant threat to the integrity of the grand jury itself” and is therefore only permissible in a narrow set of circumstances). This rule, however, is limited to “matters occurring before” the grand jury, and does not apply to all materials obtained or generated in the course of the prosecutor’s investigation. See United States v. Baggot, 463 U.S. 476, 478 (1983).

\textsuperscript{128} Where the government may wish to pursue both civil and criminal penalties, the Department of Justice directs prosecutors to use other investigative tools before opening a grand jury investigation, and to gather evidence by means other than grand jury subpoenas whenever possible. See Coordination of Criminal and Civil Fraud, Waste and Abuse Proceedings, Memorandum from Att’y Gen. Edwin Meese III, to all United States Attorneys (July 16, 1986) (dictating procedures to “minimize problems arising from grand jury secrecy” in criminal cases in which civil recoveries may also be available). See generally \textit{Federal Grand Jury Practice}, supra note 13, at 216-220 (noting that “[c]riminal attorneys are instructed to obtain records through methods other than grand jury subpoenas”).

\textsuperscript{129} In 2001, for example, federal grand juries on average spent 5.1 hours per session, and on average indicted 6 defendants per session (or 50 minutes per defendant indicted). Bureau of Justice Statistics, U.S. Dep’t of Justice, Sourcebook of Crim. Justice Statistics 79, tbl. 1.74 (2001). This statistic likely overstates the amount of time actually spent by the grand jury before indicting defendants in routine cases, since it also includes the time grand juries spent investigating more complex crimes.

\textsuperscript{130} In those cases in which the grand jury hears more evidence than the testimony of a single agent before voting to indict, it is generally for the prosecutor’s purposes in preparing for trial. A prosecutor may have a witness testify live to the grand jury to “lock in” the witness’s testimony, thereby ensuring that the often-untrustworthy witnesses to criminal conduct will not have a change of heart (and more importantly, a change of testimony) before trial. If the witness gives testimony at trial inconsistent with his grand jury testimony, the prosecutor can introduce the grand jury transcript as substantive evidence. See Fed. R. Evid. 801(d)(1)(A). The prosecutor may
system are prosecutors, whose actions theoretically are reviewed and checked by the grand jury. Its most vociferous critics are members of the criminal defense bar, whose clients theoretically benefit from the constitutional right to grand jury indictment. The truth is the exact opposite of the constitutional fiction. While the grand jury undoubtedly is a vital institution in the scheme of federal criminal law enforcement, to characterize grand jury indictment as a vital individual right clearly is a "notorious falsehood" as defined by Bentham.

B. Why it is False to Say that Grand Jurors Conduct Grand Jury Investigations

A related fiction permeating the Supreme Court's grand jury jurisprudence is the idea that grand jurors themselves run grand jury investigations (and the integrally related idea that they do so as part of their role to protect defendants from unfounded criminal charges). The Court has characteristically described the grand jury's investigative function as subsidiary to - and derived from - its duty to provide independent review of criminal indictments. As the Court has put it, because the grand jury investigates to ensure that it will "return only well-founded indictments, its investigative powers are necessarily broad."

As this linkage reflects, it is the grand jury's constitutional function of returning indictments that is thought to validate the federal grand jury's considerable investigative powers. The Department of Justice has described this notion by saying that "the grand jury's power, although expansive, is limited by its function toward possible return of an indictment." Again, it is instructive to compare the
Court's elevated rhetoric about the grand jury's investigative role with the reality of the legal principles governing federal grand jury investigations.

1. The Rhetoric: Grand Jurors Conduct Grand Jury Investigations

If an observer were to draw an understanding of a grand jury investigation solely from the Supreme Court's grand jury precedents, the result would be a romanticized and seriously inaccurate portrayal of federal grand jurors' civic role. According to the Court, a grand jury investigation begins when the grand jury "embarks upon an inquiry" by opening its own criminal investigation. Grand jurors may initiate an investigation, the Court posits, because of their "suspicion that the law is being violated" or simply because the grand jury "wants assurance that [the law] is not" being violated. In this process, according to the Court, the grand jury's function is to "inquire into all information that might possibly bear on its investigation." According to the Court, the grand jurors "select targets of investigation" and investigate to "determine for [themselves] whether a crime has been committed." At the investigation's conclusion, the grand jury supposedly "controls not only the initial decision to indict, but also significant decisions such as how many counts to charge and whether to charge a greater or lesser offense, including the important decision to charge a capital crime." As the Court describes the process, the grand jury must "remain 'free to pursue its investigations unhindered by external influence or supervision'" — including external supervision by the courts — except in the rare cases in which the court steps in to prevent the grand

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important implications. For example, the grand jury is generally barred from continuing to investigate once an indictment has issued, and may only do so if it is investigating in order to issue an indictment against other defendants or for other offenses. See generally U.S. ATTORNEYS' MANUAL, supra note 52, at § 9-11.120 (stating that because its function is limited to indictment, "the grand jury cannot be used solely to obtain additional evidence against a defendant who has already been indicted"). Once an indictment has been issued, there is thought to be no legitimate purpose for which the grand jury is investigating.

136. United States v. R. Enter., Inc., 498 U.S. 292, 297 (1991); see also United States v. Williams, 504 U.S. 36, 48 (1992) (defining the scope of the grand jury's "functional independence" as including the power to determine the manner in which it will "investigate criminal wrongdoing"); United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950) (noting that 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").
137. R. Enter Inc., 498 U.S. at 297 (concluding that a grand jury investigation terminates when "it has identified an offense or satisfied itself that none has occurred").
138. Id. at 299.
139. Id. at 303.
140. Campbell v. Louisiana, 523 U.S. 392, 399 (1998); see also Vasquez, 474 U.S. at 263 (asserting that the racial make-up of grand jury is critical because the grand jurors decide not only whether probable cause exists, but also whether "to charge a greater offense or a lesser offense, numerous counts or a single count, and perhaps most significant of all, a capital offense or a non-capital offense — all on the basis of the same facts"). The D.C. Circuit has gone so far as to say that the "content of the charge, as well as the decision to charge at all, is entirely up to the grand jury." Gaither v. United States, 413 F.2d 1061. 1066 (D.C. Cir. 1969).
jury from "trench[ing] upon the legitimate rights of any witnesses."\textsuperscript{141}

The picture painted by these precedents is gravely inaccurate. It is a fiction that the modern federal grand jury either conducts "its investigations," or hears "all information that might possibly bear on its investigation," let alone determines the crimes to be charged.

2. The Reality: the Prosecutor Conducts Grand Jury Investigations

The reality is that prosecutors, not grand jurors, conduct grand jury investigations. The prosecutor directs and controls the investigation, determines the evidence actually heard by the grand jurors, and decides on the charges, if any. A grand jury investigation is simply the term for an investigation in which the prosecutor chooses to use the grand jury as one of her tools of investigation.\textsuperscript{142}

This principle is well-recognized in the Court’s other lines of authority, if rarely acknowledged in its grand jury precedents.

The Court’s grand jury jurisprudence cannot be understood without reference to the critical parallel doctrine of prosecutorial discretion, which gives federal prosecutors broad, generally unreviewable discretion to investigate, charge, and resolve criminal cases in the federal system.\textsuperscript{143} Interestingly, this doctrine is rarely mentioned in the Court’s grand jury decisions. Yet grand jurors do not function in a vacuum, but against the constant backdrop of the federal prosecutor’s powers. As the Court has elsewhere emphasized, in our federal system it is the United States Department of Justice that is charged with enforcing federal criminal law.\textsuperscript{144}

Thus, although the Supreme Court speaks in grand jury cases as if federal grand juries conduct investigations, this clearly is a fiction. Prosecutors conduct grand jury investigations. The prosecutor determines which witnesses and documents should be subpoenaed by the grand jury. In fact, prosecutors actually sign and issue "grand jury" subpoenas without asking for permission to seek evidence in the grand jury’s name.\textsuperscript{145} Courts consistently back prosecutors in cases where control

\textsuperscript{141} Williams, 504 U.S. at 48-49 (quoting United States v. Dionisio, 410 U.S. 1, 17-18 (1973)). The Court has similarly described the history of the grand jury as one in which "laymen conduct their inquiries unfettered by technical rules." \textit{Williams}, 504 U.S. at 50 (quoting Costello v. United States, 350 U.S. 359, 364 (1956)).

\textsuperscript{142} See infra Part III.A (discussing investigative tools available to the prosecutor to gather evidence).

\textsuperscript{143} See, e.g., Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (the prosecutor has discretion to make the "decision whether or not to prosecute, and what charge to file or bring before a grand jury. . ."); Wayte v. United States, 470 U.S. 598, 607 (1985) ("In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute.").

\textsuperscript{144} United States v. Armstrong, 517 U.S. 456, 464 (1996) ("The Attorney General and the United States Attorneys retain 'broad discretion' to enforce the Nation's criminal laws."). In fulfilling this law enforcement function, federal prosecutors enjoy broad discretion to initiate and conduct criminal prosecutions as they deem appropriate, including decisions to investigate, prosecute, grant immunity, plea bargain, and decide whether to charge and what charges to bring. See Teah R. Lupton, Project, Prosecutorial Discretion, 90 GEO. L.J 1279, 1280-84 (2002) (summarizing case law).

\textsuperscript{145} See \textit{Beale et al.}, supra note 7, at § 6:2 ("The federal courts have universally rejected the claim that the prosecutor must secure the prior authorization of the grand jury before he can issue a subpoena.").
over the grand jury’s investigative powers has been contested. Despite the rhetoric of grand jury “independence,” for example, grand juries cannot subpoena evidence against a prosecutor’s wishes.\textsuperscript{146} The fact that the prosecutor controls the grand jury’s subpoena power is no secret.\textsuperscript{147} Documents and other evidence obtained by grand jury subpoenas are routinely delivered to the prosecutor’s offices or to case agents, not to the grand jury. From the evidence gathered in the grand jury’s name and using the grand jury’s powers, the prosecution decides which documents if any the grand jury actually will see.\textsuperscript{148} If a witness ignores or objects to a grand jury subpoena, the prosecutor decides whether to enforce it in court or whether to grant the witness immunity.\textsuperscript{149}

It is also decidedly not the case, as the Court’s grand jury precedents suggest, that a grand jury investigation culminates when the grand jury decides whether to charge a criminal defendant and with what offenses. Far from having “sweeping powers . . . over the terms of the indictment,”\textsuperscript{150} the grand jury has no power over the timing of indictment, let alone the formulation of criminal charges, or the determination whether to prosecute. These are, once again, the prerogative of the prosecutor. Where the two have clashed – when the desires of the grand jury have conflicted with those of the prosecutor – the courts have made clear that the prosecutor, not the grand jury, has the power in deciding whether to charge a federal crime.\textsuperscript{151}

In short, for all these reasons it is “notoriously false” to say that the grand jury conducts “its” investigations and hears “all” evidence related thereto, let alone that it thoroughly investigates the evidence before deciding what criminal charges to press.\textsuperscript{152} The reality is that an investigating grand jury hears evidence only to the extent the prosecutor finds it helpful in building her case for trial. Prosecutors use the grand jury’s powers in a highly strategic way, with the full knowledge of the

\textsuperscript{146} See, e.g., United States v. Terry, 39 F. 355, 361-63 (N.D. Cal. 1889) (refusing to set aside indictment even though “the grand jury requested the district attorney to subpoena certain witnesses in behalf of the defense, which the district attorney refused to do.”).

\textsuperscript{147} Although “strictly speaking, only grand juries” have power to coerce unwilling witnesses to provide evidence under pain of contempt, “prosecutors can freely invoke it in the grand jury’s name.” Daniel C. Richman, \textit{Prosecutors and Their Agents, Agents and Their Prosecutors}, 103 COLUM. L. REV. 749, 779 (2003).

\textsuperscript{148} See \textit{Beale et al.}, supra note 7, at § 6:2 (“[A prosecutor] may decide not to have [a subpoenaed] witness testify before the grand jury after all, or not to present some or all of the subpoenaed physical evidence to the grand jury.”).

\textsuperscript{149} Even in those decisions in which the Court has suggested that the grand jury is conducting the investigation, it has recognized that it is the prosecutor who must “determine whether the answer is of such overriding importance as to justify a grant of immunity to the witness.” United States v. Mandujano, 425 U.S. 564, 575 (1976).

\textsuperscript{150} Gaither, 413 F.2d at 1066.

\textsuperscript{151} See, e.g., United States v. Cox, 342 F.2d 167, 171-72 (5th Cir. 1965) (en banc), \textit{cert. denied} 381 U.S. 935 (1965) (holding that the grand jury cannot force prosecutor to sign or proceed with indictment).

\textsuperscript{152} Despite grand jurors’ theoretical power to call witnesses on their own initiative, “jurors rarely will make a demand for additional evidence,” and are particularly unlikely to know what witnesses might be the source of exculpatory evidence. \textit{LaFave et al.}, \textit{supra} note 81, at § 15.2(b).
Department of Justice and the backing of the courts. In this scheme, the grand jury merely has the theoretical power to exercise a temporary, nonbinding veto over the prosecution's charging decisions. This is a far cry from the expansive—and this Article would submit, fictional—characterization of the grand jury's investigative and charging powers in Supreme Court precedents.

C. Why it is False to Say that the Grand Jury is “Independent” of the Prosecutor and the Court

The final component of the grand jury's fictional role as a “bulwark” against the government in criminal prosecutions is its nominal independence, primarily from the prosecutor, but also from the court. As the Supreme Court has put it, the Fifth Amendment's “constitutional guarantee presupposes an investigative body 'acting independently of either prosecuting attorney or judge.'”

1. The Rhetoric: the Grand Jury Acts “Independently” of the Prosecutor and the Court

The grand jury's theoretical independence as an institution is an essential element of its fictional role in protecting the defendant. If the grand jury is actually to serve as a check on the prosecutor's excessive zeal in bringing criminal charges, it must be able to conduct an independent review of the prosecutor's decision and obtain the information it sees fit to make that independent determination. As the Supreme Court has written, “[t]he very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.”

The Supreme Court has thus emphasized the linkage between the constitutional right to grand jury indictment and the grand jury's institutional independence. In concept at least, the Fifth Amendment right is not simply a technical right to have a grand jury sign the prosecutor's indictment, but rather a “right to have the grand jury make the charge on its own judgment,” a constitutional entitlement that the Court describes as a “substantial right.” Consistent with this rationale, in the recommended grand jury charge circulated to federal judges, grand jurors are to be advised that “it is extremely important for you to realize that under the United States Constitution, the Grand Jury is independent of the United States Attorney

153. See supra, note 56 and accompanying text.
154. Dionisio, 410 U.S. at 16-17; see Williams, 504 U.S. at 48-49 (same); Wood v. Georgia, 370 U.S. 375, 390 (1962) (noting the “necessity to society of an independent and informed grand jury.”); UNITED STATES ATTORNEYS' MANUAL, supra note 52, at § 9-11.010 (the prosecutor must “recognize that the grand jury is an independent body.”).
156. Stirone, 361 U.S. at 218-219 (refusing to allow trial court to amend grand jury indictment).
and is not an arm of ... any governmental agency charged with prosecuting a crime."

This constitutionally derived independence has also been a vital aspect of the Court's willingness to grant the grand jury broad investigative powers. Even when the Court has not directly tied the grand jury's investigative powers to its function as a "shield" to protect individual rights, it has justified those powers in terms of the grand jury's role in making an independent review of the indictment. According to the Court, the grand jury is "entitled to determine for itself whether a crime has been committed." In this view, the grand jury has broad subpoena powers because it needs 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." 159

2. The Reality: The Grand Jury is Controlled by the Prosecutor and Dependent on the Court

In reality, the grand jury is not an independent institution in any meaningful sense. The grand jury per se does not actually exist. Instead, the institution of the federal grand jury consists of a series of panels of citizens summoned for part-time service as grand jurors, who meet at the convenience of the prosecutor and the court. 160 Congress has not recognized the grand jury as a separate institution for purposes of funding, regulation, or status. 161 A federal grand jury has no permanent physical presence, no building of its own, and none of its own funding, staff, or any other attributes of an independent government body. 162 The court summons and convenes the grand jury, 163 initially charges the jurors with respect to their mission, 164 and enforces the grand jury's subpoenas. 165 It is the court that has the

157. See Beale et al., supra note 7, at § 4:5; see also id. at 4-19 ("[Y]ou must depend on your own judgment, never becoming an arm of the United States Attorney's office. The government attorneys are prosecutors. You are not.").
158. R. Enter., Inc., 498 U.S. at 303.
159. Id. at 297.
160. The federal grand jury is not a monolithic institution, but a series of rotating bodies of citizens empanelled for service by the federal court in groups of twenty-three. See, Federal Grand Jury Practice, supra note 13, at § 1.4; Fed. R. Crim. P. 6(a)(1). See generally LaFave et al., supra note 81, at § 15.2(f).
161. In 1951, it was observed that "[f]rom 1789 to the present, Congress has made no definitive statement concerning grand jury powers." Note, Powers of Federal Grand Juries, 4 Stan. L. Rev. 68, 68 (1951). That remains true today.
162. Many scholars have commented on the detrimental effect on grand jury independence of its lack of funds or authority to hire its own staff. See, e.g., id. at 70 (among the "powerful practical factors compelling [the grand jury's] reliance on the United States attorney's office" is that "[e]xpert assistance - counsel, investigators, accountants - is necessary to effective investigation."). In 1951, seeking to enhance the powers of the grand jury, then-Senator Richard M. Nixon introduced a bill that would have allowed grand juries to hire their own "special counsel and special investigators." Id. at 74 n.38.
163. See LaFave et al., supra note 81, at § 15.2(a).
164. See, e.g., Cobbledick v. United States, 309 U.S. 323, 327 (1940) (stressing that the court gives grand jurors "general instructions").
165. See 18 U.S.C. § 1826 (granting court civil contempt power to enforce grand jury subpoena).
discretion when and whether to empanel a grand jury, and (perhaps most importantly) the power to discharge a grand jury panel at any time in its discretion.\textsuperscript{166}

Equally important, there are strong reasons to believe that grand jurors are not engaged in independent decision-making. This point is best illustrated by examining the utilitarian details of the federal grand jurors' actual role, as approved by the Court. Even more important than the grand jury's institutional dependence on the court, the grand jury is not "independent" of the prosecutor in any meaningful way. Grand jurors have no independent knowledge of their powers, no institutional memory, and no control over their meeting schedule or their docket. Indeed, in major urban areas, it is common to classify some grand juries as "indicting grand juries" which sit simply to vote on proposed indictments, and others as "investigating grand juries" which sit to help the prosecutor gather evidence in more complex cases.\textsuperscript{167}

Once a particular grand jury commences operation, the prosecutor is usually the only lawyer grand jurors ever see during the lengthy period of their grand jury service.\textsuperscript{168} In modern practice, the prosecutor has the right to be present in the grand jury room at all times except when grand jurors are voting on indictment.\textsuperscript{169} At the same time, grand jury secrecy rules bar from the grand jury room counsel for the target of the investigation as well as any lawyers for witnesses.\textsuperscript{170} This ensures that, other than any initial charge by the court at their swearing-in, grand jurors virtually never hear from any voice of legal authority other than the prosecutor.

In modern practice, some federal prosecutor is with the grand jurors at virtually every moment the grand jury meets. The prosecutor runs the proceedings, calls the witnesses, presents the evidence, answers grand juror questions, and directs the grand jury when it is time to vote on the charges, which the prosecutor prepares.\textsuperscript{171}

\begin{itemize}
\item \textsuperscript{166} FED. R. CRIM. P. 6(g) ("A grand jury must serve until the court discharges it . . . ").
\item \textsuperscript{167} See Beale et al., \textit{supra} note 7, at § 1:7 ("In large federal districts . . . there is usually one grand jury empanelled to perform the routine screening or indicting function, while a another investigative grand jury hears cases requiring lengthy and complex investigations."). In this way, even the (theoretically related) functions of the grand jury have been divided in a way to make it more efficient for the prosecutor.
\item \textsuperscript{168} Grand jury panels generally serve for up to eighteen months at a time, and may serve up to three years or longer in the case of a "special grand jury" empanelled to investigate a particular crime. See 18 U.S.C. § 3333(e) (special grand jury); FED. R. CRIM. P. 6(g) (regular grand jury).
\item \textsuperscript{169} See \textit{Federal Grand Jury Practice}, \textit{supra} note 13, at § 2.9 ("By rule, the prosecutor has authority to attend grand jury sessions."). The only exception is when grand jurors are deliberating and voting. See FED. R. CRIM. P. 6(d)(2).
\item \textsuperscript{170} See FED. R. CRIM. P. 6(d)(1) (noting that only "attorneys for the government," the witness being examined, interpreters if needed, and a stenographer may be present when the grand jury is in session).
\item \textsuperscript{171} It appears that this was not always the case. When the Fifth Amendment was adopted, the prosecutor reportedly had "no right to attend" grand jury sessions and it was "even doubtful whether he had a right, unsolicited, to send indictments" to the grand jury for consideration. See United States v. Wells, 163 F. 313, 324 (D. Idaho 1908). As late as 1876, the Supreme Court of South Carolina emphasized that by tradition and recollection of the "oldest members of the court," the prosecutor "has no business in the grand jury-room." Lewis v. Wake County, 74 N.C. 194 (1876), available at 1876 WL 2570 at *4. Rather, the examination of witnesses was
\end{itemize}
The grand jurors meet alone only at the ultimate point at which they vote to approve an indictment (and even then, the prosecutor’s presence does not necessarily invalidate the ensuing indictment).\(^{172}\)

At the same time the prosecutor serves as the government’s advocate before the grand jury, she is also charged with acting as the “neutral” legal adviser to grand jurors.\(^{173}\) The grand jury’s independence would be enhanced if it could pose questions directly to the court, rather than being forced to rely on the prosecutor. Under the grand jury rules outlined above, however, the grand jurors’ only relationship is with the prosecutor. Thus, at the very time the grand jury is supposed to be checking excessive zeal by the prosecutor, the prosecutor is serving as its sole contact, its legal adviser, and the subject of its “review.” This alone has a psychological co-opting effect on the grand jury. Commentators have long noted the tendency of grand jurors to try to ascertain the prosecutor’s views, and unconsciously to adapt their own views accordingly.\(^{174}\)

Other structural aspects of modern federal grand jury practice also undermine its supposed independence and increase the institutional power of the prosecutor. Not only is the grand jury a rotating, temporary body (in contrast to the prosecutor, who is generally a permanent government employee), but only a majority of grand

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172. See **Fed. R. Crim. P. 6(d)(1)** (only the grand jurors may be present during deliberations or voting). But see **Wells**, 163 F. 313, at 327 (“If the District Attorney, through inadvertence, without intending to influence the grand jury, is present during its deliberations, or even during the taking of a vote, it is not necessarily fatal to its action by bill returned.”).

173. See, e.g., **FEDERAL GRAND JURY PRACTICE**, supra note 13, at 11 (“By tradition and case law, the prosecutor is not merely an advocate, but is the grand jury’s legal advisor.”). Indeed, according to one older authority, the prosecutor serves simultaneously as “legal adviser of the grand jury” and “prosecutor, [and] counsel for the accused and judge as well.” Not surprisingly, the commentator describes this responsibility as “grave.” **WILLOUGHBY**, supra note 40, at 179.

174. See, e.g., **WILLOUGHBY**, supra note 40, at 179 (“After weeks or months of intimate association, the jurors often unconsciously seek to ascertain [the prosecutor’s] view and to govern themselves accordingly.”). In one of the few modern cases in which an indictment has been struck down for prosecutorial abuse before the grand jury, the prosecutor had – among other things – brought the grand jurors donuts, an act the court found was intended to “curry favor” and lead them to “abrogate their role as unbiased factfinders.” United States v. Breslin, 916 F. Supp. 438, 443 (E.D. Pa. 1996). The Department of Justice expressly advises its prosecutors to develop a “good working relationship” with the grand jurors (although presumably not by buying them baked goods). See, e.g., **FEDERAL GRAND JURY PRACTICE**, supra note 13, at 9.
jurors must vote to approve a draft indictment.\textsuperscript{175} Thus, the prosecutor need not convince all of the grand jurors to vote for indictment, but just over half. The significance of the grand jury’s vote is further diluted by the rule that it is permissible for grand jurors to vote in favor of indictment even if they were absent when evidence was presented.\textsuperscript{176} Indeed, an indictment may be sought from a grand jury that did not hear any testimony in person, based only on a summary of evidence presented to another grand jury.\textsuperscript{177}

Even more important in assessing the institutional independence of the grand jury is the fact that there is no preclusive effect of a grand jury’s decision not to indict a particular defendant or case.\textsuperscript{178} Even if, despite the institutional and procedural pressures to approve indictments, one panel of grand jurors should reject a proposed indictment, that would not be the end of the story. The federal prosecutor is entirely free, as a matter of Supreme Court doctrine, to seek approval of the same indictment from a different panel. This rule ensures that even if a particular group of grand jurors is independent of the prosecutor, the institution of the grand jury is not.

The final critical element in the equation is the rule that all proceedings before the grand jury are secret.\textsuperscript{179} Grand jury secrecy is said to protect the grand jury’s ability to act impartially and to shield the targets of investigation from public embarrassment.\textsuperscript{180} Equally important in practical terms, grand jury secrecy rules shield from public view any interaction between the prosecutor and the grand jury.\textsuperscript{181}

The reality is that virtually the only acts undertaken by modern federal grand jurors, other than sitting through witness testimony (during which they may raise a

\textsuperscript{175} See \textit{Fed. R. Crim. P. 6(f)} (stating twelve grand jurors must vote to approve indictment).

\textsuperscript{176} See \textit{United States v. Provenzano}, 688 F.2d 194, 200-03 (3d Cir. 1982) (upholding an indictment even though only three of twelve voting jurors had attended all of the grand jury sessions).

\textsuperscript{177} See, e.g., \textit{United States v. Litton Systems, Inc.}, 573 F.2d 195, 201 (4th Cir. 1978) (approving “government’s use of federal agents to summarize for the second grand jury the evidence heard by the first.”). \textit{See generally \textit{Fed. R. Crim. P. 6(e)(3)(C)(i)}} (stating that grand jury information may be disclosed to a different grand jury panel).

\textsuperscript{178} See \textit{Thompson}, 251 U.S. at 413 (holding courts may not require prior judicial approval for resubmission of proposed indictment to different grand jury panel).

\textsuperscript{179} See \textit{Fed. R. Crim. P. 6(e)} (stating rules of secrecy governing matters occurring before a grand jury).

\textsuperscript{180} Secrecy of grand jury proceedings is justified, at least in part, as a way protecting “the impartiality of that body.” \textit{Butterworth v. Smith}, 494 U.S. 624, 629 (1990); \textit{see also Posey v. United States}, 416 F.2d 545, 557 (5th Cir. 1969) (stating secrecy serves to “protect the independence of the grand jury”).

\textsuperscript{181} While commentators have questioned how well grand jury secrecy rules really fulfill the function of ensuring grand jury independence, see \textit{LaFave et al., supra} note 81, at \S 15.2(i), grand jury secrecy rules are very effective in insuring that there are no outside observers of the interaction between the prosecutor and the grand jury, and that the record of that interaction will be sealed in most cases. The net result is that the defendant, who has the most incentive to try and enforce his theoretical “right” to independent grand jury review, rarely has access to the information that would allow him to mount such a challenge. The benefits of grand jury secrecy are so weighted in the prosecutor’s favor that it is arguably also a fiction that grand jury secrecy rules are “as important for the protection of the innocent as for the pursuit of the guilty,” another of the Supreme Court’s chestnuts about the federal grand jury process. \textit{United States v. Johnson}, 319 U.S. 503, 513 (1943).
few questions, often pre-screened by the prosecutor), are the formalism of swearing witnesses and the final step of voting on indictments drafted and presented by the prosecutor. Thus, while the Supreme Court has repeatedly described the grand jury as an institution that acts "independently of either prosecuting attorney or judge," even a superficial examination of the rules governing the operation of that modern institution calls that premise into serious question.

Each of the applicable rules undermines the capacity for grand jury independence and limits the ability of the grand jury meaningfully to weigh the evidence to decide whether the charges advocated by the prosecutor are appropriate or fair. When viewed in light of these rules, the statistic that federal grand juries indict in virtually all of the cases presented by the prosecutor is not surprising.

III. GRAND JURY INDEPENDENCE IS A USEFUL FICTION BECAUSE IT ALLOWS THE COURT TO REACH RESULTS IT DEEMS DESIRABLE

Theorists posit that a legal fiction, such as grand jury independence, exists because it is useful to the court, or the judicial system, in some way. So it is with the fictional image of the federal grand jury. The fiction that the grand jury is a vital bulwark protecting individual rights could not be further from the reality that the grand jury is a vital prosecutorial tool. But the point is not simply that the legal fiction of grand jury independence and the reality of grand jury practice differ (which they do). Rather, the Court's grand jury jurisprudence is intriguing because

182. Dionisio, 410 U.S. at 17-18; see also Williams, 504 U.S. at 49 (quoting Stirone, 361 U.S. at 218); Wood, 370 U.S. at 390 (noting the "necessity to society of an independent and informed grand jury"); U.S. ATTORNEYS' MANUAL, supra note 52, at § 9-11.010 (stating the prosecutor must "recognize that the grand jury is an independent body").

183. Historical accounts suggest that the federal grand jury, as originally constituted, may have had a greater capacity to make decisions independently of the prosecutor and the courts. See, e.g., CLARK, supra note 7, at 14 ("The [colonial] grand jury... possessed in fact much of the autonomy that in theory is supposed to characterize the institution today."). In colonial times, the grand jury was made up of prominent landowners, empowered to act on personal knowledge of the cases presented, who shared a strong sense of the powers of the institution. See id. at xii-xiii. There is evidence that grand jurors in early America understood and regularly exercised their powers in important ways, at least on the state level, initiating important investigations and prosecutions of local government officials, as well as checking the politically-motivated charging decisions of prosecutors. See RICHARD D. YOUNGER, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES 1634-1941 5 (1963); see also Leipold, supra note 46, at 284 (describing the notorious example of colonial grand juries' repeated refusal to indict Peter Zenger for seditious libel). The modern federal grand jury, by contrast, is likely to be made up of jurors unfamiliar with the matters under investigation and lacking in any prior understanding of the institution's civic role. The federal grand jury's actual powers have also diminished over time. Most significantly, the federal grand jury's power to issue "presentments" (accusations of crime brought on its own initiative) was expressly eliminated, while its power to issue reports was lost by failing to instruct grand jurors of that power. See Brenner, supra note 46, at 73-74.

184. Federal grand juries have been reported to indict in over 99.9 percent of cases presented to them. See Sam Skolnick, Grand Juries: Power Shift?, THE LEGAL TIMES, Apr. 12, 1999, at 1 (reporting that over the five-year period from 1994 to 1998, federal prosecutors obtained 122,879 indictments and failed to obtain indictments from a grand jury in 83 cases).
it is the legal fiction of grand jury independence that allows the grand jury to play its other vital roles. The Fullerian concept of “utility” makes clear that it is useful and necessary for the Court to perpetuate the fiction. Without it, the operation of the federal criminal justice system could be seriously compromised.

In particular, the fiction of grand jury independence allows the Court to reach three results, all of which it deems important to the functioning of the criminal justice system, and which would be difficult or impossible to reach if one were to acknowledge that the grand jury is the captive of the prosecutor: First, the fiction of grand jury independence enables the Court to expand the powers of the prosecutor, who would otherwise have virtually no ability to demand the production of evidence in a criminal investigation. The Court reaches this end by reaffirming and expanding what are nominally the grand jury’s powers, but which actually operate, under judicially-approved doctrines, as the investigative powers of the prosecutor. Second, the fiction of grand jury independence enables the Court to limit judicial oversight of prosecutors engaged in investigative activities by hypothesizing that the grand jury is a separate and “independent” institution (in this instance, independent from the courts), whose proceedings may not be regulated by the federal courts. Third, the fiction of grand jury independence enables the Court to streamline judicial pretrial processes. This is achieved by characterizing the grand jury’s decisional process as both “independent” of the prosecutor and guided by the legal standard of “probable cause.” Such characterizations allow the grand jury’s indictment to serve as a sufficient basis, standing alone, for arresting, detaining, and trying the defendant as well as suspending the defendant from government employment and government contracting; the Court thereby obviates the need for more meaningful (and more burdensome) pretrial review procedures.

As discussed below, these decisions reflect the “utility” to the Court of the fiction of grand jury independence. They also enhance the disconnect between the court’s rhetoric about the grand jury and the way it actually decides grand jury issues— the distance between fiction and fact.185

A. Using the Fiction to Enhance the Prosecutor’s Investigative Tools

Perhaps the most important function of the fiction of grand jury independence is to allow the Supreme Court to enhance and expand the prosecutor’s criminal investigative tools. Indeed, some of the Court’s strongest language about the importance of the individual right to indictment by grand jury has been in cases affirming and extending the reach of the grand jury’s subpoena power. In this series of cases (which this Article terms its “investigative powers” cases), the Court has been presented with challenges to the enforcement of grand jury subpoenas. Interestingly, the Supreme Court’s rationale in these subpoena enforcement cases

185. Whether these uses of the fiction of grand jury independence more properly reflect its “utility” or its “dangerousness” is explored in the section that follows.
has often relied upon grand jury fictions rather than the evident fact that the grand jury serves as a key tool for law enforcement when the prosecutor uses a grand jury subpoena to investigate crime. In these “investigative powers” cases, there is a striking and important disconnect between the ostensible rationale relied on by the Court and the reality.

1. How Grand Jury Subpoenas add to the Prosecutor’s Arsenal

It is important to understand, first of all, just how the grand jury subpoena power expands the prosecutor’s investigative arsenal. The grand jury has extremely broad powers to compel testimony and obtain documents and physical evidence through the use of grand jury subpoenas, which are backed up by the court’s contempt sanctions. The grand jury is said to have a right to “every man’s evidence,”186 and its subpoenas are subject to few limits.

The breadth of the grand jury’s subpoena power is virtually without parallel. A witness who is called to testify to the grand jury may not object to questions on grounds of relevance, the illegitimacy of the grand jury’s action, or on any basis other than a valid testamentary privilege.187 Similarly, a grand jury subpoena demanding documents is presumptively reasonable. It may be challenged only on proof that it is “far too sweeping in its terms” to be deemed reasonable (such as a subpoena that seeks all corporate records)188 or if there is “no reasonable possibility” that the category sought will produce information relevant to the “general subject of the grand jury’s investigation” – a general subject that the grand jury is not necessarily required to reveal to the subpoena recipient.189 The Court has emphasized that the grand jury’s broad investigative powers are “not to be limited narrowly by questions of propriety” or doubts as to whether any particular person has committed a crime.190

In sharp contrast to the grand jury’s broad investigative powers, the federal prosecutor has no independent power to compel the production of evidence.191 In fulfilling her investigative function, the federal prosecutor does have other tools at hand to investigate criminal activity, including such devices as search warrants, physical surveillance, wire taps, interviews, undercover operations, and the other traditional investigative tools of law enforcement. Unlike grand jury subpoenas,

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186. Branzburg, 408 U.S. at 688.
187. See Blair, 250 U.S. at 282 (describing limits of testimonial objection by a grand jury witness).
188. Hale, 201 U.S. at 76-77 (holding unreasonable a subpoena requiring production of all correspondence between a corporation and at least seven other companies).
189. United States v. R. Enter., Inc., 498 U.S. 292, 301 (1991) (stating grand juries are not required to “announce publicly the subjects of their investigations”).
190. Dionisio, 410 U.S. at 13 n.12; see Hendricks v. United States, 223 U.S. 178, 184 (1912).
191. See FEDERAL GRAND JURY PRACTICE, supra note 13, at 4 (noting that prosecution team must rely on grand jury to secure evidence because the “prosecutor and investigative agency alone cannot compel the testimony of witnesses and the production of documentary and other physical evidence”).
however, other important investigative techniques are restricted by constitutional and statutory requirements of prior judicial authorization, which occur only upon a showing of "probable cause" that the search or surveillance will uncover evidence of crime.192 In a case that touches on an administrative scheme, a federal prosecutor may also have available regulatory tools to gather evidence, such as investigations by an agency’s Inspector General, or administrative subpoenas issued by the Securities and Exchange Commission or other federal agencies.193

Significantly, however, no generalized subpoena power has been given to the Department of Justice. In the few specialized areas in which Congress has granted the Department powers to issue administrative subpoenas, that power has been qualified.194 The subpoena power of the grand jury is thus a critical tool that significantly expands the prosecutor’s investigative arsenal; absent this tool, prosecutors would lack any general power to compel witnesses to provide testimony and produce documents.

Even if the prosecutor is investigating in an area in which she can “borrow” the investigative powers of another federal agency, there may be reasons why she prefers to use a grand jury subpoena instead. Most importantly, a grand jury subpoena is free from restrictions that often apply to federal prosecutors using other investigative methods. For example, if prosecutors working with a federal agency use the agency’s administrative subpoena powers, the subpoena will be subject to the general administrative rule that witnesses have a right to bring their

192. See U.S. Const. amend. IV (requiring showing of “probable cause” before a search warrant can be obtained); Title III of Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2518 (requiring finding of “probable cause” for judicial order authorizing electronic surveillance). In contrast, a grand jury subpoena requires no prior showing of probable cause, since the grand jury’s probable cause determination is made at the end, rather than the beginning, of its process. R. Enter., Inc., 498 U.S. at 297 (“[T]he 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.”).


194. In antitrust cases, the Department of Justice is given the special power to make “civil investigative demands” prior to instituting civil or criminal antitrust charges. 15 U.S.C. § 1312(a) (2000). Among other things, the Department may demand the production of documents and the oral testimony of witnesses. Id. Congress has also given the Department of Justice special authority to issue administrative subpoenas in health care fraud investigations and in investigations of alleged sexual exploitation or abuse of children. See 18 U.S.C. § 3486(a)(1)(A). Notably, however, the Department’s limited administrative subpoena powers are qualified by requirements not applicable to grand jury’s subpoena power. Witnesses who give testimony to the Department in response to antitrust subpoenas, for example, are entitled to be accompanied by counsel, and to a “reasonable opportunity to inspect the transcript” of the witness testimony. 15 U.S.C. § 1312(i). The Department’s subpoena power in health care and child sex abuse cases is limited to seeking records and testimony authenticating records. See 18 U.S.C. § 3486(a)(1)(B).
counsel into interviews with federal officials. This permits defense counsel to assert the witness's interests during the interviews and to create a reliable contemporaneous record of the witness's testimony (a record which may be widely circulated to others cooperating in the defense counsel network).

In the grand jury, by contrast, the witness's lawyer is barred from the room and the witness has no right to the transcript of his testimony. Particularly in certain types of cases (such as organized crime or drug conspiracies), prosecutors consider grand jury secrecy rules important tools that enhance the "spontaneity" of witness testimony, protect the integrity of the investigation, and allow the prosecutor to separate the witness from counsel, who may be more loyal to the investigation's target than to the witness. Grand jury subpoenas are virtually unique in this regard.

A grand jury subpoena also gives the prosecutor a powerful tool to obtain witness cooperation. Prosecutors frequently follow service of a grand jury subpoena with a request for the witness to give a "voluntary" interview before or in lieu of the grand jury appearance. The witness rarely refuses, and the prosecutor has the chance to "vet" the witness's testimony before deciding whether to take his testimony on the record. Grand jury subpoenas also play a critical role in strengthening the prosecutor's hand in strategic negotiations over immunity and plea agreements. Finally, grand jury subpoenas allow the prosecutor to gather evidence to prepare for trial while avoiding the restrictive standards that will apply at trial under the court's criminal discovery rules, as well as the constitutional

195. See 5 U.S.C. § 555(b) ("A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative.").

196. As noted, such transcripts are subject to grand jury secrecy under Rule 6(e). See GRAND JURY OF TOMORROW, supra note 126, at 69 ("[M]any federal courts routinely deny witness' motions to obtain transcripts of their testimony before a grand jury."). By contrast, under the Administrative Procedure Act, a person who is compelled to provide evidence to a federal agency "is entitled to procure a copy or transcript thereof." If the evidence was given in a nonpublic investigation, the witness must at least be allowed to conduct "an inspection of the official transcript of his testimony." 5 U.S.C. § 555(c).

197. The Department of Justice has vehemently opposed any amendment of the grand jury rules that would allow witnesses to have counsel during their grand jury testimony. See generally Kathryn E. White, What Have You Done With my Lawyer?: The Grand Jury Witness's Right to Consult with Counsel, 32 LOY. L.A. L. REV. 907, 920-21 (1999) (describing the Department of Justice's strong position in opposition to two congressional bills, in 1985 and 1987, that would have provided grand jury witnesses a right to bring counsel into the grand jury room).

198. See BEALE ET AL., supra note 7, at § 6:2 (2d ed. 2001) (noting that courts have held that an "optional pretestimony interview" is not abusive even if the prosecutor thereafter decides it will not be necessary for the witness to testify to the grand jury). Apparently the only limitation, in this regard, is that the prosecutor cannot force an office interview by issuing a grand jury subpoena for a day on which the grand jury is not actually sitting. See id.

199. See Mandujano, 425 U.S. at 575 (stating if a witness refuses to answer questions in a grand jury investigation, it is the prosecutor who "must determine whether the answer is of such overriding importance as to justify a grant of immunity to the witness").

200. See FED. R. CRIM. P. 16. This strategic dynamic is not lost on federal prosecutors. The Department of Justice explicitly recommends that prosecutors time the issuance of indictments in complex cases so as to avoid
limitations that attach once the indictment issues.\textsuperscript{201}

In the modern era of federal criminal investigations, the prosecutor, with the courts’ explicit or implicit approval, simply uses the grand jury’s investigative powers as her own.\textsuperscript{202} Not surprisingly, these investigations have given rise to disputes about the scope of the grand jury’s subpoena power. Witnesses or targets of investigations have challenged grand jury subpoenas, and the Department of Justice has defended their validity. In these “investigative powers” cases, the Supreme Court has broadly affirmed the reach of the subpoena power of the federal grand jury.

Significantly, although the Court has agreed with the Department of Justice that the grand jury’s investigative powers must be broad, it has not reached this conclusion on the most obvious ground: the fact that the grand jury’s subpoena power provides prosecutors with a vital investigative tool. Even when its decisions advert to the reality that the subpoena power serves as a “sword” to investigate crime, the Court has consistently tempered that recognition by emphasizing that the breadth of the grand jury’s powers turns on its dual role as a “shield” to protect individual rights.\textsuperscript{203}

The choice of emphasis is no coincidence. This Article argues that the Court advances the fiction of grand jury independence because it would otherwise be difficult or impossible to justify giving the grand jury investigative powers that are not given to law enforcement officials directly.\textsuperscript{204} There are two subcategories of “investigative powers” decisions that lead to this insight, each of which is described below: what this Article terms the Court’s “protective bulwark” cases, and its “informed indictment” cases.\textsuperscript{205}

\footnotesize{\textsuperscript{201} The defendant has no Sixth Amendment right to counsel until an indictment is issued. See Mandujano, 425 U.S. at 581. This means, for example, that although it would be a Sixth Amendment violation for the prosecutor to surreptitiously record conversations of an indicted defendant who is represented by counsel, see Massiah v. United States, 377 U.S. 201, 204-05 (1964), there is no constitutional bar to surreptitiously recording the conversations of an unindicted target who is represented by counsel.

\textsuperscript{202} See, e.g., In re Grand Jury Proceedings, 486 F.2d 85, 90 (3d Cir. 1973) (“[A]lthough grand jury subpoenas are occasionally discussed as if they were the instrumentalties of the grand jury, they are in fact almost universally instrumentalties of the United States Attorney’s Office or of some other investigative or prosecutorial department of the executive branch.”).

\textsuperscript{203} See, e.g., Calandra, 414 U.S. at 343 (emphasizing the grand jury’s dual role as “body of accusers” and “protector of citizens”).

\textsuperscript{204} As commentators have observed, while the federal grand jury “serves many of the same functions as federal police agencies” such as the FBI, “there are far fewer procedural protections available in a grand jury investigation than in an investigation conducted by any federal police agency.” Sarah Sun Beale & James E. Felman, Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25 Harv. J.L. \\& Pub. Pol. 699, 702 (2003).

\textsuperscript{205} What this Article terms the “protective bulwark” cases are those decisions in which the Supreme Court has broadly claimed that the grand jury is given broad investigative powers for the putative defendant’s benefit, so...
2. The Court’s “Protective Bulwark” Cases

At the extreme end, the Court has used the fiction of grand jury independence by affirmatively reasoning that its investigation must be broad because the grand jury seeks to secure individual rights. It has used this rationale even when individuals have raised seemingly reasonable complaints about the fairness of the grand jury’s investigative methods. The disconnect between facts, as asserted by the litigant, and the fiction, as endorsed by the Court, can be quite striking.

The Supreme Court’s decision in United States v. Dionisio206 is a prime example of this disconnect. In order to match a voice heard in recorded conversations, a federal prosecutor issued grand jury subpoenas to obtain voice exemplars from twenty individuals. One subpoena recipient, informed by the prosecutor that he was a “potential defendant in a criminal prosecution,” refused to give an exemplar and sued to challenge the subpoena.207 The Seventh Circuit approved a minimal degree of judicial supervision, applying a “reasonableness” standard.208 Under this standard, the scattershot subpoenas were deemed an unconstitutional search and seizure because the technique was akin to a “dragnet” technique that is unconstitutional when used by law enforcement officers.209

The Supreme Court reversed. It held that, in contrast to law enforcement personnel, the federal grand jury may freely use such investigative techniques without any “preliminary showing of reasonableness” to justify the exercise of its powers.210 The Court focused explicitly on the grand jury’s “historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor.”211 If the grand jury is to “even approach the proper performance of its constitutional mission” in this regard, the Court reasoned, “it must be free to pursue its investigations unhindered by external influence or supervision,” provided only that it does not trench on any of the witness’s legitimate rights.212

In other words, the grand jury is free from judicial supervision in a way that law enforcement officials are not, precisely because of its special status in “shielding” citizens from unjust charges. With only slight self-consciousness, the Court not

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207. Id. at 3.
208. See id. at 8 (discussing the Seventh Circuit’s application of a reasonableness standard before a grand jury witness could be compelled to furnish a voice exemplar).
209. See id. at 5 (noting the Seventh Circuit’s analogy of the situation to that of Davis v. Mississippi, 394 U.S. 721 (1969), where the Supreme Court barred introduction of fingerprints obtained during a wholesale unlawful roundup).
211. Id. at 17-18.
only ruled against the individual’s objections, but did so on the fiction that its ruling was intended to further the grand jury’s ability to protect the individual’s own rights.213 Importantly, the fiction that the grand jury acted as a neutral, quasi-judicial agency rather than a law enforcement body allowed the Court to grant the grand jury greater leeway to investigate than would have been extended to law enforcement personnel in the same circumstances.

In United States v. Mandujano,214 four members of the Court used an analogous rationale to uphold the grand jury’s power to subpoena testimony from a person slated to be indicted without warning the target of his status as a “putative defendant.”215 In Mandujano, the prosecutor decided to seek the defendant’s indictment. Before asking the grand jury to indict, and without warning the target of his status in the case, the prosecutor subpoenaed the defendant to testify to the grand jury. Later, he used the incriminating grand jury testimony against the defendant at trial.216 The question presented was whether this constituted an unconstitutional investigative tactic.217

In addressing this question, the Court once again relied on the fiction that independent grand jurors, not zealous law enforcement officials, were conducting the investigation.218 If the witness’s grand jury testimony was treated as the equivalent of statements made during a custodial interrogation by law enforcement officers, the admission of the defendant’s testimony at trial would have been objectionable under the Court’s decision in Miranda v. Arizona.219 Instead, the Justices distinguished Miranda, finding the grand jury setting more akin to a judicial appearance than to law enforcement custody.220

213. Notably, the Court’s Dionisio decision, which is clearly worded in aspirational terms, was issued over a dissent which starkly argued that it is “common knowledge” that the grand jury, although conceived as a bulwark between the citizen and the government, “is now a tool of the Executive.” United States v. Dionisio, 410 U.S. 19, 23 (1973) (Douglas, J., dissenting) (dissenting in a separately published opinion within United States v. Mara, 410 U.S. 419 (1973), applicable to both Mara and Dionisio).
215. See id. at 569-71 (writing for the plurality was Chief Justice Burger, with Justices White, Powell, and Rehnquist concurring in result). The Mandujano decision has generally been treated as if it were a decision for the Court, rather than a plurality opinion. See, e.g., Conn v. Gabbert, 526 U.S. 286, 292 (1999) (citing Mandujano for principle that an investigatory target has no right to counsel in a grand jury investigation).
216. See Mandujano, 425 U.S. at 566-69.
217. Id. at 566 (noting that case presents the question whether Miranda warnings must be given to a grand jury witness called to testify about criminal activities in which he may have been involved; and further, whether the witness’ false statements must be suppressed in a prosecution for perjury based on unwarned statements).
218. Justice Brennan recognized this fiction in his concurrence, by highlighting the fact that it was the prosecutor, not the grand jurors, who was working the puppet strings. See id. at 594-99.
220. As the Mandujano plurality put this concept, unlike a police custodial interrogation, a grand jury appearance is not deemed coercive, because it involves “questioning before a grand jury inquiring into criminal activity under the guidance of a judge.” Mandujano, 425 U.S. at 580. In this view, appearing before a group of citizens to be questioned by the prosecutor is not like being isolated and surrounded by law enforcement personnel because the presence of the grand jurors as “impartial observers” will guard against abuse. Id at 579. While this
The net effect of *Mandujano* is to give the grand jury the power (denied to law enforcement personnel under *Miranda*) to mislead a “putative defendant” into giving testimony by questioning him without warning him of his rights. Equally interesting from the standpoint of legal fictions, the Justices rationalized this power as part of the grand jury’s role as a “shield against arbitrary or oppressive action” by the government. Notwithstanding the evident fact that the prosecutors had already decided to indict Mr. Mandujano, and were calling him before the grand jury simply to put the finishing touches on their case for trial, the Justices reasoned that the defendant was being called to testify so that the grand jury could make a “considered judgment” on the defendant’s probable guilt, “in keeping with the grand jury’s historic function as a shield against arbitrary accusations.” In other words, the Justices once again ruled against the defendant ostensibly in order to protect him: The grand jury had to hear from the defendant himself, not to advance the criminal prosecution, but to be sure it was not unfairly accusing him.

If this reasoning is analyzed even superficially, it suggests that the way the Court talks about the grand jury diverges in important ways from the way the Court rules with respect to the grand jury. As the circumstances of the above cases demonstrate, defendants are not subpoenaed to testify or provide voice exemplars for their own benefit; instead, such subpoenas further the public interest in uncovering evidence of crime. This is not an individual right but a societal interest. The cases thus suggest a disconnect between the Court’s stated view of the grand jury (as a quasi-judicial body charged with serving as a “bulwark” of individual rights) and its real view of that body (as a governmental institution charged with investigating and charging crimes).

3. The Court’s “Informed Indictment” Cases

In other investigative power cases, the Supreme Court has used a different,
somewhat subtler rationale to affirm the grand jury's broad investigative powers. At times, the Court has adverted to the possibility that the grand jury has some role to play in law enforcement, as well as in protecting individual rights. Even when approaching the grand jury's role more realistically, however, the Court has often shifted to another grand jury fiction to justify the grand jury's broad investigative powers—the fiction that the grand jury must have the power to investigate broadly so that it returns informed indictments.

In these cases, the Court has rationalized that it is because the grand jury's task is "to return only well-founded indictments" that its investigative powers are "necessarily broad." This is a slightly different rationale. While the "protective bulwark" cases posit that the grand jury is granted broad investigative powers for the defendant's benefit, in the "informed indictment" cases, the Court suggests instead that giving the grand jury broad investigative powers is necessary to ensure public confidence in its criminal charging function. Like the "bulwark" cases, however, "informed indictment" cases also rest on a fiction, because it is simply untrue that the grand jury's investigative powers are exercised in order to inform its indictment decisions.

The Court's decision in United States v. R Enterprises is a good example. A federal grand jury issued subpoenas seeking records from three businesses owned by a single individual, even though the government only had evidence that one of the businesses had engaged in wrongdoing (specifically, the offense of shipping sexually explicit material into the State of Virginia). The Fourth Circuit placed limitations on the grand jury's subpoena power, requiring the government to make a threshold showing of relevancy and admissibility in order to enforce subpoenas to the two businesses that were not implicated. The Supreme Court reversed.

Rejecting any such limitations on the grand jury's power, the Court emphasized the grand jury's responsibility "to determine whether or not there is probable cause to prosecute a particular defendant." To fulfill this function, the Court concluded, the grand jury must be able to "inquire into all information that might

225. See, e.g., Branzburg v. Hayes, 408 U.S. 665, 701 (1972) (noting the "role of the grand jury as an important instrument of effective law enforcement").
226. Id. at 700 (enforcing grand jury subpoena over journalists' claims of First Amendment and common law privilege)
228. See In re Grand Jury Subpoena Duces Tecum, 884 F.2d 772, 776 (1989), rev'd by R. Enter., Inc., 498 U.S. 292 (concluding that "[t]he government does not allege, and the record contains absolutely no evidence indicating, that either MFR or R. Enterprises has ever shipped materials into, or otherwise conducted business in the Eastern District of Virginia").
229. 884 F.2d at 777 (noting that the test for enforcement is whether the subpoena constitutes "a good faith effort to obtain identified evidence rather than a general fishing expedition that attempts to use the rule as a discovery device").
230. R. Enter., Inc., 498 U.S. at 303 (reversing insofar as Court of Appeals quashed the subpoenas for R. Enterprises and MFR Court Street Books, and remanding for further proceedings).
231. Id. at 298.
possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred."\textsuperscript{232} It is because the grand jury has this exalted mission that it "paints with a broad brush."\textsuperscript{233} The \textit{R Enterprises} decision is a critical one, as it broadly rejected any judicial attempt to recognize limits on the grand jury's extraordinarily broad subpoena power.

To reach its ruling in \textit{R Enterprises}, it was essential for the Court to advance several fictions: that the grand jury actually conducts "its investigation," that the grand jury actually "inquir[es] into all information" that might bear on that investigation, and that the grand jury actually "identifi[es] offenses" or "satisfi[es] itself that none has occurred."\textsuperscript{234} In other words, to affirm and extend the grand jury's investigative powers based on its role, the Court had to use the fiction that it was indeed the powers of the grand jury that were being extended.

This constitutes what can only be described as legal-fiction-speak – reasoning from an assumed factual premise that is "notoriously false." In reality, for all the reasons described above, the grand jury neither conducts "its investigations" nor hears "all information that might possibly bear on its investigation," let alone determines the crimes committed. As the earlier discussion suggests, in the modern era, a grand jury investigation is simply the term for an investigation in which the prosecutor chooses to use grand jury subpoenas as one of her tools of investigation. The grand jurors themselves are virtually irrelevant to this process.\textsuperscript{235}

Although the Supreme Court chooses to speak as if federal grand jurors conduct investigations (and as if they do so to determine whether to indict), this is unquestionably a fiction, for all of the reasons explored above. If the prosecutor simply asks the grand jury to indict, there will be no grand jury investigation. On the other hand, if the prosecutor asks the grand jury to investigate, there will be no indictment unless and until the prosecutor is ready. There is no necessary connection between the grand jury's indictment decision and its investigative role.

\textsuperscript{232} Id. at 297.
\textsuperscript{233} Id.
\textsuperscript{234} Id.
\textsuperscript{235} For all of the reasons explained above, even in a so-called "grand jury investigation," it is not the grand jury but the prosecutor that directs and controls the investigation, decides what evidence will be heard by the grand jurors, and determines the charges, if any, that will be brought. See, e.g., Daniel C. Richman, \textit{Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket}, 36 AM. CRIM. L. REV. 339, 341 (1999). Professor Richman observed:

\begin{quote}
As a matter of physical reality, ... the only thing that clearly occurs before a grand jury is testimony by a live witness, and sometimes the introduction of exhibits. Just about everything else generally occurs in a prosecutor's office or out in the field: deliberations about what investigations the grand jury will pursue, and which witnesses and document will be subpoenaed in its name; interviews of potential witnesses conducted with an eye to deciding whether they will actually be brought before the grand jury, and receipt and review of documents obtained via grand jury subpoena.
\end{quote}

\textit{Id.} (internal citations omitted).
other than a connection of the prosecutor’s choice – a principle that finds judicial approval. The prosecutorial discretion cases make clear, even if the Supreme Court’s investigative powers cases do not, that when the Court affirms the “grand jury’s” subpoena powers, it is really the prosecutor’s powers that are being extended, not those of the grand jurors.

Yet the Supreme Court finds it useful and necessary in its investigative powers cases both to indulge the fiction that the “grand jury’s” investigative powers are being extended and to theorize that even when investigating crime, the grand jury is acting in a neutral, quasi-judicial role. Why is this so? This Article argues that maintaining a theoretical separation between the grand jury and the prosecutor and promoting a vision of the grand jury as a constitutional “shield” are both important fictions because they allow the Court to rationalize the grand jury’s unprecedented investigative powers.

It is one thing for the lower courts to turn a blind (or semi-conscious) eye on the prosecutorial practice of issuing grand jury subpoenas. But were the Supreme Court to openly acknowledge that the power to issue grand jury subpoenas is a functional power of the prosecutor, it would be granting the prosecutor investigative powers that Congress has not found it appropriate to extend to the Department of Justice. Not only would this extend the statutory powers of the Department, but it would do so in a way that arguably would implicate separation of powers concerns.

Equally important, only the theoretical linkage between the grand jury’s power to issue indictments and its power to investigate validates the grand jury’s considerable powers. Notably, the Department of Justice itself advances the

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236. See supra notes 174-76 and accompanying text.

237. The Supreme Court has recognized a separation of powers dimension inherent in the division of responsibility between the Executive Branch (which enforces the law) and the Judicial Branch (which interprets it). Requiring certain functions related to a criminal investigation to be performed through oversight by a neutral judicial officer accords with “our basic constitutional doctrine that individual freedoms will be best preserved through a separation of powers and division of functions through the different branches and levels of government.” See United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297, 317 (1972) (interpreting Fourth Amendment requirement of “probable cause” to support a warrant for electronic surveillance). Interestingly, in the grand jury context, the Supreme Court has avoided the separation of powers issues that would otherwise arise by taking pains to emphasize that the grand jury is not an executive branch appendage, but an institution in its own right. See, e.g., United States v. Williams, 504 U.S. 36 (1992) (invalidating judicial rule that would have required prosecutors to disclose to grand jury exculpatory evidence in part due to grand jury’s status as independent institution, not an arm of the courts over whose functioning the courts preside). Openly acknowledging the prosecutor’s complete control over the grand jury could potentially infringe separation of powers by giving an executive official the use of judicial, or quasi-judicial, powers.

238. Significantly, in federal jurisdictions in which the constitutional right to grand jury indictment is inapplicable (such as the territories), the federal courts have held that there is no lawful authority to convene a grand jury simply to investigate because such a grand jury “lacks the power to make formal accusations.” United States v. Christian, 660 F.2d 892, 901 (3d Cir. 1981) (refusing to allow the United States Attorney to convene an “investigatory grand jury” in the Virgin Islands because the “government’s proposed investigatory grand jury may neither indict nor present” charges). Where there is no possibility of an indictment, it is considered an abuse of the grand jury’s power to compel witnesses to produce evidence. See generally id. § 9-11.120 (finding because grand
notion that the grand jury’s investigative power is “in furtherance of its principal function of deciding whether to approve indictments,” and that grand jury power, “although expansive, is limited by its function toward possible return of an indictment.” Clearly, this linkage is important. If the grand jury plays a special constitutional role, it only follows logically that it should have special investigative powers to that end. On the other hand, if the grand jury is really acting as an arm of the prosecutor, it is difficult to see why the grand jury should have investigative powers that neither Congress nor the Constitution directly grants the prosecutor.

The fiction of grand jury independence is thus useful because it helps the Court enhance the prosecutor’s investigative powers in a way that would be difficult or impossible to accomplish if one were too honest about the facts. The “utility” of the fiction is simply this: in the classic manner of legal fiction, it allows the Court to reach a result it deems desirable. As its prosecutorial discretion cases make clear, the Court believes that prosecutors play an essential role in the enforcement of the criminal laws, one deserving of special judicial consideration. Enhancing the prosecutor’s investigative powers by affirming the broad reach of grand jury subpoenas furthers that overriding goal.

B. Using the Fiction to Limit Judicial Oversight of Prosecutors

The fiction of grand jury independence also enables the Supreme Court to implement another goal it deems important – limiting judicial oversight of the prosecutor’s investigative and charging decisions. By treating the grand jury as if it were an independent institution, the Court has been able to strike down judicially crafted rules that would have regulated the relationship between the grand jury and the prosecutor. Although the Court claims these rulings are intended to protect the grand jury, it is the prosecutor’s conduct that is effectively protected.

The prime example (and the decision that may seem the most cynical) is the Court’s landmark decision in United States v. Williams, which addressed whether prosecutors have a duty to present exculpatory evidence to the grand jury. In Williams, the Court openly used the fiction of grand jury independence – there, the

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239. See FEDERAL GRAND JURY PRACTICE, supra note 13, at 2.
241. The same solicitude is reflected, for example, in the Supreme Court’s willingness to grant broad civil immunity to prosecutors working in the grand jury setting. See, e.g., Imbler v. Pachtman, 424 U.S. 409 (1976) (treating grand jury proceeding as a judicial proceeding for purposes of granting prosecutorial immunity from civil damages suits). Peter Henning has argued that the “Court has accepted, and even encouraged, prosecutorial control of grand jury investigations” because “[i]n the Court’s view, this function is more important than the [grand jury’s] accusatory function . . . .” Henning, supra note 36, at 8.
242. Williams, 504 U.S. 36.
grand jury’s theoretical independence from the court as well as from the prosecutor – to strike down a rule that would have protected the grand jury from the unbalanced presentation of prosecutorial evidence. Although the Williams decision may seem surprising, in many ways, it is a natural successor to the Court’s far earlier decision in Thompson v. United States, which similarly limited the court’s powers to regulate the relationship between prosecutors and the grand jury.

The Williams case arose after the Tenth Circuit developed a rule that federal prosecutors seeking an indictment must disclose to the grand jury “evidence that clearly negates guilt,” to the extent known to the prosecutor. This rule was intended to ensure a more balanced presentation of evidence, so that grand jurors voting on indictment would know of evidence suggesting the absence of probable cause, as well as evidence supporting it. Similar rules had been adopted by other circuits expressly to ensure the grand jury is “independent and informed” and to fulfill its constitutional role to provide a “fair method of instituting criminal proceedings.”

Although the Tenth Circuit’s rule sought to enhance the grand jury’s independence from the prosecutor, the Supreme Court struck it down in the name of the grand jury’s independence from the trial court. The Court reasoned that the grand jury is “an institution separate from the courts, over whose functioning the courts do not preside.” Given this alleged “tradition of independence,” the Court refused to allow the trial court to “exercise supervision over the grand jury’s evidence-taking process.” Under Williams, even if a prosecutor is fully aware of evidence suggesting the defendant’s innocence of the crime, she cannot be required to disclose that evidence to the grand jury (at least, not pursuant to a judicially crafted rule).

243. Id. at 39, 47.
244. See United States v. Page, 808 F.2d 723, 727-28 (10th Cir. 1987). The same rule had also been adopted by the Seventh Circuit and the Second Circuit. See United States v. Flomenhoft, 714 F.2d 708, 712 (7th Cir. 1983) (applying standard requiring prosecutors to present evidence which clearly negates the target’s guilt), cert. denied, 465 U.S. 1068 (1984); United States v. Ciambrone, 601 F.2d 616, 623 (2d Cir. 1979) (requiring prosecutors to notify grand jury of any substantial evidence negating guilt where evidence might reasonably be expected to lead the jury not to indict).
245. Flomenhoft, 714 F.2d at 711 (quoting Wood v. Georgia, 370 U.S. 375, 390 (1962)).
246. See Williams, 504 U.S. at 49-50 (“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.”).
247. Id. at 47.
248. Id. at 49-50. Notably, continuing its pattern of refusing to read any meaningful protections into the defendant’s Fifth Amendment grand jury right, the Court also refused to find that a balanced presentation of the evidence before the grand jury was either required as part of the Fifth Amendment right to indictment by grand jury, or called for by the rhetoric surrounding that right.
249. The Court emphasized that if “there is an advantage to the proposal, Congress is free to prescribe it.” Id. at 55. Interestingly, the majority opinion in Williams does not mention that the United States Department of Justice has an internal rule that federal prosecutors must present to the grand jury “substantial evidence that directly negates the guilt” of the defendant, if the prosecutor is “personally aware” of such evidence. See U.S. ATTORNEYS’ MANUAL, supra note 52, at § 9-11.233. While the existence of this internal disciplinary rule may have given the
The notion that the grand jury functions as an institution independent of the court is clearly a legal fiction, as it reflects the use of a symbolic statement as a literal truth. To quote Bentham, to say that the grand jury is functionally independent of the court is to indulge "an assumed fact, notoriously false," and to reason from that fact as if it were true. In reality, the grand jury is no more independent from the court than it is from the prosecutor. Indeed, prior to Williams, the Court itself had previously described the grand jury as an "appendage of the court" and had traditionally responded to concerns about the potential for grand jury abuse by emphasizing that "[g]rand juries are subject to judicial control." Simply to imagine the logical next step after Williams demonstrates the fictional nature of the Court's reasoning. The Court concluded that the Tenth Circuit rule was problematic because the "grand jury is an institution separate from the courts, over whose functioning the courts do not preside." If this is so, presumably the grand jury as an "independent" body may itself adopt rules to regulate its operations, including rules governing the presentation of evidence during its own proceedings. Yet such internal regulation is inconceivable, for all of the structural, legal and functional reasons described in detail above. The grand jury could no more issue its own regulations than fly to the moon. By ignoring this reality, the Court used the fiction of grand jury independence to strike down a rule designed to enhance the grand jury's actual independence. Equally important, while the issue at hand was ostensibly about exculpatory evidence, using the fiction of grand jury independence to decide the case allowed the Court to issue a decision that went far beyond exculpatory evidence rules. In fact, it prescribed a broad structural relationship between the court and the

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250. See supra Part II.B.i-ii.
251. Brown v. United States, 359 U.S. 41, 49 (1959); see also, e.g., Blair v. United States, 250 U.S. 273, 280 (1919) (describing the inquisitorial function of the grand jury as an "incident of the judicial power").
252. Branzburg, 408 U.S. at 708 (stating that court will be available to prevent abuses of grand jury investigations directed at journalists); see also Dionisio, 410 U.S. at 9 ("[T]he powers of the grand jury are not unlimited and are subject to the supervision of the judge.") (quoting Branzburg, 408 U.S. at 688); Hoffman v. United States, 341 U.S. 479, 485 (1951) (courts must "be 'alert to repress' any abuses of the [grand jury's] investigatory power") (quoting Hale v. Henkel, 201 U.S. 43, 65 (1906)); Hale, 201 U.S. at 65 (commenting that while prosecutorial abuses of grand jury's investigative function "may be imagined, . . . were such abuses called to the attention of the court, it would doubtless be alert to repress them.").
254. See, e.g., Simmons, supra note 49, at 30 ("The gap between the judge's myth of a robust guardian of defendants' rights and the reality of an impotent federal grand jury has resulted in judicial decisions which regularly serve to hand more power to the federal prosecutor").
The broader import of *Williams* is that the courts may not adopt rules intended to regulate the prosecutor's conduct before the grand jury, but are limited to enforcement of the rules approved by Congress. Even if a federal court is inclined to adopt a rule to add content to the grand jury's constitutional role—whether by seeking to improve the balance of grand jury evidence as in *Williams* or through other means, such as requiring prosecutors fairly to describe the quality of their evidence—such efforts are impermissible under *Williams*. This broad result was made possible only by applying the equally broad fiction of "grand jury independence." The key to *Williams*, this Article posits, is that it is not properly viewed as a decision about grand jury independence at all. Instead, it represents a triumph of Justice Scalia's view, expressed in concurrence in an earlier grand jury decision, that the courts should not be able to regulate prosecutors—and certainly should not be able to regulate them when they are performing functions other than appearing before the court. The decision is a strong, if *sub silentio*, affirmation of the broad scope of prosecutorial discretion in investigating and charging criminal cases.

Interestingly, the Court's decision in *Williams* is foreshadowed by a much earlier grand jury decision issued by the Court in *Thompson*, which also involved the close relationship between judicial regulation of the grand jury and the exercise of prosecutorial discretion. The *Thompson* Court expressly used the fiction of grand jury independence—there, the notion that the grand jury is not dependent upon the court for the exertion of its powers—to establish the central principle that a federal court may not adopt a rule to add content to the grand jury's constitutional role.

The Court might have chosen to rest its decision more narrowly on the principle that it has traditionally been thought "sufficient to hear only the prosecutor's side" of the evidence before the grand jury, a proposition for which there was good historical support. See *Williams*, 504 U.S. at 51; cf. *Edwards*, supra note 112, at 140. Even if this rationale were sufficient to strike down the rule, however, it would not have led to the broad result the Court desired, since it was limited to the issue of exculpatory evidence, rather than the relationship between the court and the grand jury more generally.

255. The Court might have chosen to rest its decision more narrowly on the principle that it has traditionally been thought "sufficient to hear only the prosecutor's side" of the evidence before the grand jury, a proposition for which there was good historical support. See *Williams*, 504 U.S. at 51; cf. *Edwards*, supra note 112, at 140. Even if this rationale were sufficient to strike down the rule, however, it would not have led to the broad result the Court desired, since it was limited to the issue of exculpatory evidence, rather than the relationship between the court and the grand jury more generally.

256. See United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972) (holding that the prosecutor must clearly disclose when he or she is presenting hearsay evidence).

257. Without the fiction of grand jury independence, the Court's ruling would have been limited to striking down this particular rule about exculpatory evidence, which it believed had the effect of "substantially altering the traditional relationships between the prosecutor, the constituting court, and the grand jury itself." *Williams*, 504 U.S. at 50. By relying broadly on the fiction that the grand jury is independent of the court, however, the Court was able to transform *Williams* into a broad general rule barring any judicial initiatives to regulate prosecutors' conduct before the grand jury.

258. Justice Scalia, the author of the Court's *Williams* decision, expressed this view in his earlier concurring opinion in *United States v. Bank of Nova Scotia*, 487 U.S. 250, 264 (1988) (Scalia, J., concurring). In that case, he agreed to overturn a lower court decision dismissing an indictment based on prosecutorial misconduct before the grand jury, but reached that conclusion on the ground that courts have no general authority to regulate a prosecutor's conduct. *Bank of Nova Scotia*, 487 U.S. at 264 (Scalia, J., concurring) (finding no basis for courts to exercise supervisory powers over prosecutors "except insofar as concerns their performance before the court and their qualifications to be members of the court's bar").

259. The Court has similarly acted to protect the prosecutor's discretionary charging function in other arenas related to the grand jury, such as extending to prosecutors absolute immunity in connection with their presentation of evidence to the grand jury. See *Imbler*, 424 U.S. 409 (holding that the prosecutor has absolute immunity from suits alleging violations of defendant's rights for the initiation and pursuit of a criminal prosecution).
court may not require a prosecutor to obtain judicial approval before resubmitting to a second grand jury an indictment rejected by one panel of grand jurors.\textsuperscript{260} A rule requiring judicial approval to resubmit an indictment, the Court held, would improperly limit the "power of grand juries" and make that power dependent on an "exercise of judicial discretion."\textsuperscript{261}

The rule established by \textit{Thompson} may nominally enhance the grand jury's independence from the court, but it dramatically increases the power of the prosecutor vis-à-vis the grand jury.\textsuperscript{262} The prosecutor is not bound by one grand jury panel's decision to reject an indictment, but can simply seek the same indictment from another grand jury panel. This ensures that even if the grand jurors disagree with the prosecutor about whether to indict, the prosecutor can always have the last word.

Notably, the Supreme Court in \textit{Thompson} expressly acknowledged that its decision was designed as much to protect the prosecutor's charging discretion as to enhance the grand jury's independence. In one of the Court's few express discussions of the notion of grand jury independence in conjunction with the principle of prosecutorial discretion, the Court emphasized that judicial interference in the resubmission process would not only infringe on the power of the grand jury but also on the "right of the government to initiate prosecutions for crime."\textsuperscript{263}

Viewed through the lens of grand jury independence, the Court's stand-off approach in \textit{Williams} is hard to understand. But viewed through the lens of prosecutorial discretion, these rulings come into clear focus. From the Court's perspective, what is most important is that these decisions serve to enhance the prosecutor's power to engage in her investigative and charging functions without judicial interference. This is the "utility" of the fiction of grand jury independence in cases such as \textit{Williams} and \textit{Thompson}.\textsuperscript{264} Legal fiction theory thus allows the Court to reach results it deems desirable -- the enhancement of the prosecutor's investigative and charging discretion -- and that it could not reach by openly

\textsuperscript{260} United States v. Thompson, 251 U.S. 407, 413 (1920). In \textit{Thompson}, the prosecutor submitted a thirty-count indictment to a grand jury, which refused to approve it in its entirety. Thereafter, the prosecutor transferred the matter to a grand jury in a different city, appearing in the company of a "specially designated representative" of the Attorney General to seek the indictment. This time the grand jury (apparently duly impressed with the importance of the matter) approved the thirty-count indictment in its entirety, based on "virtually the same witnesses." \textit{Id.} at 408-10. The lower court dismissed the indictment, holding that resubmission to another grand jury requires judicial approval, and the Supreme Court reversed. \textit{Id.} at 415-16.

\textsuperscript{261} \textit{Id.} at 415.

\textsuperscript{262} See Simmons, supra note 49, at 19 ("[A] key factor that determines the extent to which the grand jury exercises meaningful power is whether a prosecutor is allowed to re-submit her case to a new grand jury if the original grand jury returns a no true bill.").

\textsuperscript{263} \textit{Thompson}, 251 U.S. at 415.

\textsuperscript{264} Others have similarly observed in \textit{Williams} a hidden motive of expediency, including Peter J. Henning in his insightful article on prosecutorial misconduct in grand jury investigations. See Henning, supra note 36, at 7 (hypothesizing that "the Supreme Court has made the grand jury, and the prosecutors that guide its proceedings, free from judicial oversight in order to protect the investigative function from outside interference").
acknowledging the true nature of the grand jury as an institution. Pretending that the grand jury functions independently is a useful fiction in these cases.

C. Using the Fiction to Streamline Pretrial Procedures

The final, critical purpose for which the Supreme Court has used the fiction of grand jury independence is to streamline pretrial judicial processes. It has done so, when "expedient," by treating the grand jury "as if" it were a neutral, semi-judicial body. The fiction that the grand jury makes an independent, neutral determination of probable cause allows grand jury indictment to substitute for the defendant's right to a judicial determination of probable cause for such important purposes as the defendant's arrest, pretrial detention, removal from government employment and suspension from government contracting.

The fiction that the grand jury independently reviews proposed criminal charges for "probable cause" is one that has much utility in the federal system. As described below, there are certain fundamentals of criminal procedure that require such neutral review for the legitimacy of governmental action. While the Court has generally insisted, in these instances, that evidence of probable cause must be decided by a neutral and detached magistrate, the grand jury's indictment provides an exception to this rule. On the fiction that the grand jury is a "responsible" judicial tribunal, the Court has held that grand jury indictment eliminates any right to a judicial probable cause determination in many settings.

Under the Fourth Amendment, for example, a person cannot be arrested without a neutral determination—that is, a determination made by someone other than the prosecutor or police—that there is probable cause to believe that she committed the crime charged. The Supreme Court has held, however, that a grand jury indictment provides such a neutral determination, and conclusively establishes the probable cause to support an arrest warrant. Thus, a court lacks any discretion to

265. Hans Vaihinger, whose writing on the subject of legal fictions inspired Fuller, termed his philosophy "as if" to express the notion that a legal fiction is "consciously-false." See HANS VAIHINGER, THE PHILOSOPHY OF "AS IF": A SYSTEM OF THEORETICAL, PRACTICAL AND RELIGIOUS FICTIONS OF MANKIND xli (C.K. Ogden trans., 2d ed 1949). See generally Miller, supra note 20, at 10-11.

266. While the Court has emphasized that "no one shall be subjected to the burden and expense of a trial until there has been a prior inquiry and adjudication by a responsible tribunal," it has found no right to "two such inquiries." Beavers v. Henkel, 194 U.S. 73, 84-85 (1904) (noting that in removal proceeding, grand jury indictment is "conclusive evidence of the existence of probable cause" in the jurisdiction in which issued); see also, e.g., United States v. Aranda-Hernandez, 95 F.3d 977, 980 (10th Cir. 1996) (while due process requires a "judicial determination of probable cause," this judicial determination "may be in the form of a preliminary examination or it may be in the form of an indictment; both are not required").

267. See Shadwick v. City of Tampa, 407 U.S. 345, 350-51 (1972) (probable cause for the issuance of an arrest warrant must be determined by someone independent of the prosecutor and police); see also Johnson v. United States, 333 U.S. 10, 14 (1948) (the Fourth Amendment's protection requires that evidentiary inferences to support a finding of probable cause be drawn by "a neutral and detached magistrate" rather than by law enforcement personnel).
refuse to issue a warrant once the grand jury has indicted.\footnote{268}{See Ex parte United States, 287 U.S. 241, 250 (1932) (“In the court to which the indictment is returned, the finding of an indictment, fair upon its face, conclusively establishes the existence of probable cause for the purpose of holding the accused to answer”). The Court expressly distinguished the court’s discretion to refuse to issue an arrest warrant where such a warrant is sought “upon complaint in the absence of an indictment.” \textit{Id.} at 249.}

The Supreme Court has held, similarly, that under the Fourth Amendment a person cannot be held in prison pending trial without a neutral probable cause determination by someone other than the prosecutor, since a “prosecutor’s responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate.”\footnote{269}{Gerstein, 420 U.S. at 117.} An indictment by a grand jury, however, fulfills that requirement. The Court’s willingness to allow a “grand jury’s judgment substitute for that of a neutral and detached magistrate” is consciously based on the grand jury’s relationship with the court and “its historical role of protecting individuals from unjust prosecution.”\footnote{270}{Id. at 118 n.19. Similarly, a grand jury indictment is deemed to satisfy the statutory requirement for a probable cause finding by a “judicial officer” for purposes of federal pretrial detention under the Bail Reform Act, which creates a presumption of pretrial detention in cases involving certain federal charges. 18 U.S.C. § 3142(e). Where the grand jury has indicted for a crime covered by the Act, this is treated as a judicial determination of probable cause that creates a presumption that the defendant will be detained pending trial. \textit{See} United States v. Suppa, 799 F.2d 115, 118-19 (3d Cir. 1986).}

Similarly, a federal felony defendant arrested on a prosecutor’s complaint is entitled to a preliminary examination at which the magistrate will determine whether there is “probable cause to believe that an offense has been committed and that the defendant committed it.”\footnote{271}{\textit{Id.} at 118 n.19. Similarly, a grand jury indictment is deemed to provide all of the process that is required to support the adverse action. In reaching this conclusion, the Court has expressly reasoned that an indictment provides adequate assurance that suspension is justified because it reflects a determination “by an independent body” that the employee likely committed the crime charged.\footnote{272}{FDIC v. Mallen, 486 U.S. 230, 244 (1988) (finding that an indicted bank official was not entitled to a pre-suspension hearing, in part because a finding of probable cause evidenced by the indictment “demonstrates that the employee has committed the crime charged” and that “the ConCourt’s judgment substitute for that of a neutral and detached magistrate” is consciously based on the grand jury’s relationship with the court and “its historical role of protecting individuals from unjust prosecution.”\footnote{273}{See supra note 104 and accompanying text.}}} But if the prosecutor obtains an indictment prior to the deadline for the magistrate’s consideration, the preliminary examination is not held.\footnote{274}{FDIC v. Mallen, 486 U.S. 230, 244 (1988) (finding that an indicted bank official was not entitled to a pre-suspension hearing, in part because a finding of probable cause evidenced by the indictment “demonstrates that the employee has committed the crime charged” and that “the ConCourt’s judgment substitute for that of a neutral and detached magistrate” is consciously based on the grand jury’s relationship with the court and “its historical role of protecting individuals from unjust prosecution.”\footnote{275}{See supra note 104 and accompanying text.}}} As a matter of strategy, a federal prosecutor will usually seek to obtain an indictment in order to avoid a preliminary examination, since, unlike a grand jury indictment, an examination before the magistrate is open to the defendant, who may attend, cross-examine, and present witnesses – and thus gain some insight into the prosecutor’s case.\footnote{276}{See supra note 104 and accompanying text.} A grand jury’s indictment also may stand in for more meaningful review procedures in other, related settings. A public official who is indicted, for example, has no due process right to a pre-suspension hearing because the grand jury’s indictment is deemed to provide all of the process that is required to support the adverse action. In reaching this conclusion, the Court has expressly reasoned that an indictment provides adequate assurance that suspension is justified because it reflects a determination “by an independent body” that the employee likely committed the crime charged.\footnote{277}{FDIC v. Mallen, 486 U.S. 230, 244 (1988) (finding that an indicted bank official was not entitled to a pre-suspension hearing, in part because a finding of probable cause evidenced by the indictment “demonstrates that the employee has committed the crime charged” and that “the ConCourt’s judgment substitute for that of a neutral and detached magistrate” is consciously based on the grand jury’s relationship with the court and “its historical role of protecting individuals from unjust prosecution.”\footnote{278}{See supra note 104 and accompanying text.}}
standing alone, to suspend a government contractor from eligibility for further contracts with the federal government, without any opportunity for a hearing to contest the factual basis of the accusations.\textsuperscript{275}

Such rulings are undoubtedly "expedient," to use the Fullerian notion of utility—without them, the federal system might be seriously burdened by additional, constitutionally-required pretrial procedures. Equally important, the same results could not have been reached but for the legal fiction that the grand jury is "independent." Probable cause determinations may be made by a range of decisionmakers. The minimal, constitutionally indispensable elements, however, require that the person chosen be independent of the police and prosecution and capable of determining whether probable cause exists.\textsuperscript{276}

The truth is that for important structural reasons, a grand jury indictment is far more like a prosecutorial information than it is like a magistrate's "neutral" probable cause determination. There is no reason to be confident the grand jury is making independent "probable cause" evaluations in any way that even approaches the review that would be afforded by a neutral magistrate judge. This is so not simply because a grand juror, unlike a federal magistrate, is not a lawyer, but more fundamentally because the absence of procedural protections in the grand jury process makes it impossible to ensure that grand jurors are making meaningful probable cause determinations, however capable they might or might not otherwise be as decisionmakers.\textsuperscript{277} It would be more accurate to say that the Supreme Court has treated a grand jury's indictment as a substitute for probable cause than to say that it has actually required the grand jury to find probable cause.

In fact, we simply have no idea on what basis federal grand jurors are deciding to approve over ninety-nine out of a hundred indictments offered to them by prosecutors, and certainly have no reason to believe that they are doing so because they have concluded that "probable cause" exists in each case. Given the structure

\textsuperscript{275} See Contractor Qualifications, 48 C.F.R. § 9.407-3 (2001); see also Debarment and Suspension Procedures, 48 C.F.R. ch. 2, App. H-102 (2001) ("In a suspension action based upon an indictment... there will be no fact-finding proceeding concerning the matters alleged in the indictment."). In James A. Meritt & Sons v. Marsh, 791 F.2d 328 (4th Cir. 1986), the Fourth Circuit upheld the procedure for suspension of government contractors based on grand jury indictment alone, with no opportunity for a factfinding hearing, on the grounds that "[a] decision to issue an indictment is made by a deliberative public body acting as an arm of the judiciary, operating under constitutional and other legal constraints" and thus has sufficient "indicia of reliability" to justify immediate suspension of any further government contract awards to defendant. Id. at 330-331.

\textsuperscript{276} See Shadwick, 407 U.S. at 348-50 (1972) (emphasizing the "now accepted fact that someone independent of the police and prosecution must determine probable cause").

\textsuperscript{277} The central thesis put forward by Professor Leipold is that "grand jurors are not qualified" to make the legal determination of probable cause. See Leipold, supra note 46, at 294. However, it is far from clear that magistrates would be able to make meaningful probable cause determinations, if called upon to do so under the procedural restrictions imposed on the grand jury.
of the process, it is far more likely that grand jurors simply think it “sounds okay” for the prosecutor to charge the defendant than that they understand that they are supposed to decide whether each believes, as an independent matter, that there is a reasonable factual basis in the evidence for the proposed charges.

The fundamental point is not that grand jurors do not determine (and may or may not be capable of determining) probable cause in the same way that a magistrate judge could at a preliminary hearing. Even more importantly, grand jurors are simply not detached from law enforcement in the same way a magistrate judge would be. While it may be a minimal hurdle to insist that a magistrate judge find probable cause that a crime has been committed, it is at least a hurdle that meets the constitutional minimum of a structurally neutral decision-maker. The same cannot honestly be said of the grand jury, whose dual role of investigator and accuser would compromise its detachment even if it were not entirely dominated by the prosecutor.

If the Court were to acknowledge the reality that the grand jury is first and foremost a law enforcement body, however, it would be unable to give a grand jury’s indictment the same weight it would give a federal magistrate’s decision in settings from arrest, to detention, to preliminary examination. Using this fiction is consistent with the Court’s impatience with pretrial procedures, and with its view that errors in charging procedures that do not harm trial rights should be freely tolerated. The “expedience” of the fiction of grand jury independence is that it allows the Court to use grand jury indictments to minimize the burden of pretrial procedures, consistent with its view that the defendant’s “real” rights should attach at the trial stage, rather than in preliminary proceedings.

IV. GRAND JURY INDEPENDENCE IS A DANGEROUS FICTION BECAUSE IT ALLOWS THE COURT TO REACH UNSUPPORTABLE RESULTS

For the very reasons that the fiction of grand jury independence has utility to the Court, it also is “dangerous,” in the sense that writers on legal fictions might use that term. As has been insightfully observed by Louise Harmon, the writing on legal fictions is “punctuated by warnings of danger,” even if these risks are not fully spelled out. The Supreme Court’s use of the fiction of grand jury independence suggests what a few of these dangers might be: The fiction is not transitional but intransient; the fiction masks results that arguably amount to new rules dressed as old ones (or as Bentham might say, to legislation in the guise of adjudication); and the fiction creates confusion and impedes honest debate over important grand jury reform issues.

278. See, e.g., United States v. Costello, 350 U.S. 359, 364 (1956) (emphasizing that reviewing the evidentiary support for grand jury indictments would “add nothing to the assurance of a fair trial”).

279. Harmon, supra note 19, at 15.
A. The Fiction has Become Prop, Rather than Scaffolding

The classic theory of legal fictions posits that fictions are transitional — that they will be given up once the law is sufficiently developed, and the fiction is no longer needed to bridge the gap between theory and reality.\textsuperscript{280} As Fuller put this notion, the “fiction is often likened to a scaffolding,” usually with the “implication that it should be discarded as soon as possible.”\textsuperscript{281} The advantage of a legal fiction, in its best sense, is that like scaffolding “it can be removed with ease.”\textsuperscript{282} The fiction of grand jury independence, however, is far more like a prop in the body of modern grand jury precedents than it is like scaffolding. The fiction is noticeably intransigent. Even though no longer applied by the Supreme Court in its original context,\textsuperscript{283} the fiction has not disappeared but has taken on new significance. This suggests that we may well be passing from the realm in which this legal fiction has “utility” to the realm in which it has become “dangerous.”\textsuperscript{284}

If grand jury independence is a legal fiction and the grand jury has instead become an investigative tool, the Court theoretically should be able to pick from the strands of grand jury doctrine and announce that our view of the grand jury’s dominant function has “evolved.” Why then aren’t we moving into the phase in which the Court can safely remove the “scaffolding” and declare the real principles that are being applied? Ironically, it is precisely because the Court has so extensively used the fiction of grand jury independence that it cannot do so.

We do not trust a prosecutor to issue significant criminal charges unilaterally, because a prosecutor’s “responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate.”\textsuperscript{285} If we are honest in admitting that the grand jury, like the prosecutor and other law enforcement personnel, is affirmatively engaged in the “often competitive enterprise of ferreting out crime,”\textsuperscript{286} the conclusion may be inevitable that grand jurors, even if well-motivated, have a zealfulness that disqualifies them from making neutral

\textsuperscript{280} See PIERRE J.J. OLIVIER, LEGAL FICTIONS IN PRACTICE AND LEGAL SCIENCE 143 (1975) (arguing that “if we accept that [a legal fiction] serves as a bridge between a given situation . . . and a desired result, the question arises: why not advance directly from the premise to the desired result?”).

\textsuperscript{281} FULLER, supra note 10, at 70.

\textsuperscript{282} See id. However, Fuller also believed that “a construction that appears to be nonfictitious, even though from a scientific standpoint it may be as inadequate as the most daring fiction, is harder to displace.” Id.

\textsuperscript{283} Some of the earliest mentions of grand jury independence are in cases like \textit{Ex parte Bain}, 121 U.S. 1 (1887), in which the principle of grand jury independence was actually applied to recognize a right (there to adopt the rule that the court may not amend a grand jury indictment).

\textsuperscript{284} Fuller, Legal Fictions, supra note 19, at 370 (arguing that “[a] fiction taken seriously, i.e., ‘believed’, becomes dangerous and loses its utility”).

\textsuperscript{285} Gerstein, 420 U.S. at 117 (citing Coolidge v. New Hampshire, 403 U.S. 443, 449-53 (1971)); see also Shadwick, 407 U.S. at 348 (stating that “the now accepted fact [is] that someone independent of the police and prosecution must determine probable cause”).

\textsuperscript{286} Gerstein, 420 U.S. at 113.
probable cause determinations.\textsuperscript{287} As the Court has emphasized elsewhere, "[w]hat
ever else neutrality and detachment might entail, it is clear that they require
severance and disengagement from activities of law enforcement."\textsuperscript{288}

It is only the fiction that the grand jury makes an "independent" probable cause
determination that allows the grand jury's indictment to serve as the necessary
predicate for such important steps as the defendant's investigation, arrest, detention
pending trial, and suspension from employment and contracting eligibility. Were the Court to announce that the grand jury is more properly viewed as
performing a law enforcement function of investigating and charging than providing
a neutral determination of probable cause, it would run head-on into these
cases. Far from being a scaffolding that can be easily removed, the fiction of grand
jury independence serves to prop up basic principles of criminal administration, a
house of cards that could be toppled by exposing and honestly exploring the grand
jury's role.\textsuperscript{289}

If the Court were to recognize that a federal grand jury indictment no more
constitutes a neutral probable cause determination than a prosecutor's information,
certain rules would have to be rewritten. Arrest warrants no longer would issue
automatically upon indictment, but would require judicial scrutiny of investigative
affidavits or prosecutorial complaints.\textsuperscript{290} Preliminary examinations would become
a routine pretrial procedure in federal criminal cases, thereby burdening the system
and affecting current procedures for pretrial discovery.\textsuperscript{291} Indictments would no

\textsuperscript{287}. \textit{Cf. id.} at 118 (quoting Justice Frankfurter in \textit{McNabb v. United States}, 318 U.S. 332, 343 (1943), who
opined that "[x]perience has therefore counseled that safeguards must be provided against the dangers of the
overzealous . . . .").

\textsuperscript{288}. \textit{Shadwick}, 407 U.S. at 350 (1972) (holding that the clerk of court qualifies as a "judicial officer" who may
issue warrants for arrest for municipal violations because the clerk "is removed from prosecutor [and] police and
works within the judicial branch").

\textsuperscript{289}. Such a development may be salutary if it were to result, for example, in greater use of the preliminary
examination, which is widely recognized as a more reliable method of determining probable cause than a grand
jury indictment. Notably, England itself, from whence we derived the grand jury, long ago abandoned the use of
grand juries and imposed a system of preliminary hearings. \textit{See Hale}, 201 U.S. at 64 (noting that the "English
practice, which requires a preliminary investigation where the accused can confront the accuser and witnesses
with testimony" was adopted in the case of \textit{Lewis v. Board of Commissioners}, 74 N.Car. 194, as "more consonant
to principles of justice and personal liberty").

\textsuperscript{290}. \textit{Cf. Shadwick}, 407 U.S. at 350 (arrest warrants require neutral probable cause determination). In the
federal system, for example, if arrest is sought without an indictment, the government must provide a sworn
complaint or supporting affidavits showing probable cause, which will be examined by the magistrate before an
arrest warrant will issue. \textit{Cf. Fed. R. Crim. P.} 3 (requiring a complaint to be made under oath before a magistrate
judge, or, if none is available, before a state or local judicial officer); \textit{Fed. R. Crim. P.} 4 (authorizing an arrest
warrant if either a complaint or supporting affidavits support probable cause).

\textsuperscript{291}. \textit{Cf. Fed. R. Crim. P.} 5(c), 5.1(a) (providing that defendant arrested on prosecutor's complaint is entitled to
preliminary examination before magistrate). If an indictment were recognized as the functional equivalent of
charges by a prosecutor, preliminary examinations would be required not only by rule but also by the Fourth
Amendment. \textit{See Gerstein}, 420 U.S. 103 (1975) (holding that defendant is entitled to judicial probable cause
determination for pretrial detention). This would have the side effect of providing additional, early discovery to
the defendant of the information disclosed at the preliminary examination. \textit{See id.} (detailing current pretrial
discovery practices).
longer carry collateral consequences in other settings.\textsuperscript{292} The results could be significant.

Similarly, if grand jurors are merely the functional equivalent of investigative agents, acting at the prosecutor's behest and direction, it becomes difficult to justify giving them investigative powers withheld from law enforcement personnel. For this reason, in justifying the grand jury's extraordinary investigative powers, the Court has been careful to emphasize the grand jury's special constitutional role. Even when acknowledging that grand jurors are acting in a law enforcement capacity,\textsuperscript{293} the Court has tempered that recognition with a reminder of the grand jury's "dual function ... of protecting citizens against unfounded criminal prosecutions."\textsuperscript{294}

The Court has rationalized that the grand jury has broad powers to investigate because of its "special role" in insuring that law enforcement is both "fair and effective,"\textsuperscript{295} a principle also acknowledged by federal prosecutors. If the Court were to acknowledge openly that the prosecutor has complete control over the grand jury's subpoena power and that the grand jury's subpoenas are geared toward building the prosecutor's case for trial, it would call into question the entire grounds on which the Court has granted the grand jury extraordinary investigative powers. Thus, the fiction of grand jury independence works in a way that, if hardly commendable, is nonetheless characteristic of legal fiction theory: it allows the Court to have its cake and eat it too.\textsuperscript{296}

In this sense, the Supreme Court is the victim of its own reasoning. Having used the fiction of grand jury independence to justify important rules, the Court cannot abandon that fiction without undermining the rules. At a minimum, without the fiction, the Court has a lot of explaining to do. This arguably reflects not simply utility but "dangerousness." By affirming the "grand jury's" investigative powers—with no reference to the fact that the prosecutor is somewhere in the picture—the Court uses the fiction of grand jury independence in a manner that breeds cynicism and avoids the thoughtful discussion that should accompany the expansion of prosecutorial powers.\textsuperscript{297} This is a dangerous use of legal fiction.

\textsuperscript{292} Recognizing that an indictment is simply the equivalent of the prosecutor's charge would require additional judicial hearing procedures before adverse governmental action could be taken against an indicted defendant in other contexts, such as employment. \textit{See, e.g.}, Mallen, 486 U.S. at 244 (due process requires adequate predeprivation hearing before loss of government employment).

\textsuperscript{293} \textit{See id.} at 687-88.

\textsuperscript{294} \textit{See id.} at 686-87.

\textsuperscript{295} \textit{Calandra}, 414 U.S. at 343.

\textsuperscript{296} \textit{See Harmon, supra} note 19, at 7 (legal fictions ensure that the "desirable result [can] be reached, and the rule [will] remain the same," and, thus, "the piece [can] be eaten without jeopardizing the cake").

\textsuperscript{297} The point is not that we should deprive federal prosecutors of powers necessary for effective law enforcement; rather, we should not expand the prosecutor's powers under cover of the fiction that grand jury is exercising those powers. Undoubtedly, in a world of complex federal crime, it is desirable for the prosecutor to have at hand powerful investigatory methods comparable to grand jury subpoenas, and the discretion as to how
B. The Fiction Masks Judicial Legislating

As its decisions make clear, the Supreme Court has applied the fiction of grand jury independence to such a degree as to silently work a fundamental change in the law. While ostensibly emphasizing the grand jury's constitutional "independence," the Court has adopted rules that ensure that the grand jury is anything but independent. The result of these rulings – a new institution cloaked in the trappings of an old one – is another of the recognized dangers of legal fictions.

In the literature of legal fictions, it is "widely accepted that judges employ fictions to conceal the fact that they have created new law."298 Scholars have characterized this process as one of using legal fictions to legislate under the guise of adjudicating.299 At some point, Fuller posited, the rule adopted by a court under the cover of a legal fiction may be so different from the existing one that it amounts to a new rule, rather than an interpretation.300 By relying on a fiction, a court invokes a traditional symbol to "create the impression that the change is no greater than that involved in the ordinary case where legal principles are extended by way of analogy."301 This "temper[s] the boldness of the change" and serves to "obscure the process of legislating."302

There is a good argument that the changes in the role of the grand jury worked by the Supreme Court in the name of grand jury independence may indeed amount to such "judicial legislating." With the approval and assistance of the Court, the federal grand jury’s investigative powers, once its own, have first been borrowed by the prosecutor, and then shaped to suit the prosecutor.303 Meanwhile, the grand jury's powers of accusation have first been diminished,304 then been rendered increasingly meaningless as a procedural protection,305 while becoming increasingly onerous in terms of their collateral consequences.306 The net result of the

298. PIERRE J.J. OLIVIER, LEGAL FICTIONS IN PRACTICE AND LEGAL SCIENCE 89 (1975); see also Jeremiah Smith, Surviving Fictions, 27 YALE L.J. 147, 150 (1917) (stating that "fiction is frequently resorted to in the attempt to conceal the fact that the law is undergoing alteration at the hands of the judges").

299. Bentham was particularly vitriolic about the notion that legal fictions simply obscure judicial legislating. He claimed that such fictions have as their object “the stealing of legislative power, by and for hands which could not, or durst not, openly claim it.” Bentham, A Fragment on Government, supra note 17, at 243.

300. FULLER, supra note 10, at 57-58.

301. Id. at 58.

302. Id. (emphasis omitted).

303. See supra note 171 (describing historical evolution from exclusion of prosecutor from grand jury room to prosecutor’s right to be present); supra notes 193-201 and accompanying text (describing affirmation of breadth of grand jury’s subpoena power).

304. See supra note 183 (explaining that over time, the grand jury has effectively lost its original powers of “presentment,” the power to initiate a criminal prosecution on its own initiative).

305. See supra note 112 (describing abandonment of historic principles regulating the quality of evidence before the grand jury).

306. See supra notes 271-80 and accompanying text (describing development of rules that grand jury indictment substitutes for judicial determinations of probable cause for various purposes).
Court’s decisions has been to expand and improve the grand jury’s function as an investigative tool, while allowing its role in providing an “independent” check on prosecutorial charging decisions to almost vanish.

The result is entirely consistent with the statutory reforms implemented in the many states to have abolished the grand jury as an indicting body while preserving its role as an investigative tool.\textsuperscript{307} The Court arguably has adopted changes legislative in nature, but without the benefit of balance and context that legislative action would have provided. The Court is scarcely blameworthy in this regard, given that Congress has failed to enact comprehensive legislation to govern the grand jury. Nonetheless, critics of the legal fiction, such as Bentham, would argue that the fiction of grand jury independence has allowed the Court to engage in another hazard of legal fictionalizing – legislating (that is, reaching new rules) in the guise of adjudicating (that is, interpreting the existing rules).\textsuperscript{308}

In the Constitution, the founders consciously placed the power to issue criminal charges in the hands of citizens acting as grand jurors – regardless of whether those charges were sought at the insistence of a prosecutor, a private citizen, or the court, or based on the grand jurors’ own knowledge.\textsuperscript{309} As the Court observes, there is a “trust reposed” by the Constitution in grand jurors, who are “not appointed for the prosecutor or for the court [but] for the government and for the people.”\textsuperscript{310}

In the face of clear evidence that prosecutors, not grand jurors, have come to exercise the grand jury’s constitutional charging power, the Supreme Court has refused to allow the federal courts to adopt reasonable rules to ensure that indictment decisions are made by grand jurors rather than prosecutors.\textsuperscript{311} To the contrary, it has adopted rules that affirmatively enhance the prosecutor’s power to dominate the grand jury’s decision-making.\textsuperscript{312} The net result is that the grand jury’s indictment decision has been reduced to a mere formality, while the prosecutor’s ability to use the grand jury’s investigative powers as a law enforce-

\textsuperscript{307}. See, e.g., Christian, 660 F.2d at 900 (“Many states that prosecute by information still provide for investigatory grand juries, especially when large and intricate conspiracies or public corruption are at stake.”). See generally Beale \textit{et al.}, supra note 7, at § 1:7, 1-33.

\textsuperscript{308}. See Harmon, supra note 19, at 5 (describing Bentham’s view that judges using legal fictions are “legislating surreptitiously” and asserting that Bentham regarded legal fictions as evil, as “usurpers of the legislative function”).

\textsuperscript{309}. See, e.g., 3 Joseph Story, \textit{Commentaries on the Constitution} § 1779 (1883), reprinted in 5 The Founders’ Constitution 295 (P. Kurland & R. Lerner eds., 1987) (“[T]he grand jury . . . [is] a great security to citizens against vindictive prosecutions, either by the government, or by political partisans, or by private enemies.”).

\textsuperscript{310}. See Hale, 201 U.S. at 61 (quoting Justice Wilson). This language was echoed in United States v. Williams, where the Court described the grand jury’s role as “serving as a kind of buffer or referee between the Government and the people.” 504 U.S. 36, 47 (1992); see also, e.g., United States v. Wells, 163 F. 313, 324 (D. Idaho 1908) (the grand jury “serves the purpose of allowing prosecutions to be initiated by the people themselves”).

\textsuperscript{311}. See generally Williams, 504 U.S. 36.

\textsuperscript{312}. See supra Part II.A.ii.2.
A birds-eye view of the Supreme Court’s grand jury decisions suggests that the Court has worked, *sub silentio*, reforms in the federal grand jury system similar to those adopted in many states, which are not limited by the Fifth Amendment’s right to grand jury indictment. A number of states have recognized and preserved the grand jury for criminal investigative purposes while eliminating the grand jury’s indictment function. There are many reasons why such a system may be preferable to a system in which the grand jury both investigates and indicts. Still, there are problems with working such a reform through the application of legal fictions in judicial decision-making, which disguise the changes being made.

Relying on legal fictions to work these changes neglects the important balancing rules that have been adopted in the states as part of grand jury reforms. Most states that allow charges to be brought based on a prosecutor’s information have not eliminated any notion of review for probable cause but have shifted that function to a magistrate, who reviews the basis for government’s charges at a preliminary hearing near the outset of the case. In the federal system, by contrast, while the grand jury’s indictment decision has effectively been rendered a mere formality, there has not been any corresponding reform in the defendant’s right to a preliminary hearing. The judicial reform has not been comprehensive or complete. To the extent that the Supreme Court has engaged in what Bentham would have decried as legislating in the guise of adjudicating, the Court has deprived federal defendants of the balances and protections they would likely be granted were the

313. Compare, for example, a description of the role of the grand jury in England in 1923, shortly before the grand jury was eliminated in that country:

> [The functions of the grand jury are in most cases largely formal . . . . No public prosecutor appears before the grand jury and no minutes of the proceedings are taken. Within three hours after the retirement of the grand jury, forty-nine indictments were returned and the entire work of the grand jury for the month was completed in two days.]

WILLOUGHBY, supra note 40, at 185. While the American grand jury retains more of the trappings of a working institution, the exercise of its indictment function is equally formalistic.

314. See Hurtado v. California, 110 U.S. 516, 535 (1884) (states are not bound by Fifth Amendment requirement of indictment by grand jury).

315. Unrestricted by the requirement for grand jury indictment in the Fifth Amendment, many states have consciously separated the functions of the grand jury – some reserving the grand jury only for investigations, others preserving the grand jury’s role in indictments. See BEALE ET AL., supra note 7, at § 1:7 1-33 n.2 (reporting that only nineteen states preserve requirement for grand jury indictment of felony cases); see also White, supra note 197, at 924-25 (stating that “not all states have retained the indicting grand jury . . . but all fifty states have retained the investigative grand jury”).

316. See generally Hurtado, 110 U.S. at 538 (emphasizing that due process concerns are served by allowing prosecutors to file charges by prosecutorial information and providing for neutral review “by a magistrate, certifying to the probable guilt of the defendant”); BEALE ET AL., supra note 7, at § 1:9 1-38 (“Critics of the grand jury contend that an information/preliminary hearing system is more economical, more efficient, and a more effective screening device.”).
same changes to be made through legislative channels.\textsuperscript{317}

\textbf{C. The Legal Fiction Confuses and Distorts the Debate}

Finally, a legal fiction can distort the rational development of the law. It may create a "morass of uncertainty," or may prevent the law from developing in a "rational and intelligent manner."\textsuperscript{318} Lower courts and others guided by the decisions may be uncertain whether to act upon the fiction that is ostensibly used or upon the message that is silently conveyed.\textsuperscript{319} The Supreme Court's fiction of grand jury independence sends a message that can be confusing to judges and other readers, who may be unsure whether the Court is saying "do as I do" or "do as I say."\textsuperscript{320} More subtly, even among those who may be most cynical about the Court's true message, the use of the fiction encourages others to advance the same fiction to argue for changes that further their own respective agendas.\textsuperscript{321}

The Supreme Court's rhetorical vision of the grand jury shapes the debate on grand jury reform by suggesting an illusory goal—grand jury independence. For all of the reasons set forth above, the theoretical "independence" of the grand jury is contravened in reality by an extensive, judicially approved body of legal rules that virtually insure that the grand jury's decisions are not independent. Yet the Court's rhetoric of independence becomes both part of the conventional wisdom about the grand jury and a rallying point for reform efforts. By continuing to advance the fiction, the Court signals that grand jury independence should be the aspirational goal and provides ammunition for others who wish to advance the same goal for their own reasons. This precludes

\begin{itemize}
\item \textsuperscript{317} See, e.g., Coleman, 399 U.S. at 9 (recognizing constitutional right to counsel in preliminary hearing); Jaben v. United States, 381 U.S. 214, 224 (1965) (stating that at preliminary hearing, magistrate must be provided with "enough information to . . . enable him to make the judgment that the charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal process").
\item \textsuperscript{318} Pierre J.J. Oliver, Legal Fictions in Practice and Legal Science 136 (1975).
\item \textsuperscript{319} Some commentators, for example, have chosen to take the Supreme Court at face value when it says that it values the "vital" right to grand jury indictment. See e.g. Simmons, supra note 49, at 45, n.128 ("For the most part, the [grand jury's] only defenders have been the courts, which have consistently described the grand jury as a powerful independent body that protects the citizenry from unjust prosecution.").
\item \textsuperscript{320} In a recent decision by the Ninth Circuit, for example, the defendant argued that the court's instructions to the grand jury improperly described the grand jury's role and functions, thereby "depriving appellants of their right to a grand jury's independent exercise of its discretion." United States v. Marcucci, 299 F.3d 1156, 1159 (9th Cir. 2002). What is most interesting about the case, which is otherwise unsurprising in its rejection of this relatively unsympathetic grand jury challenge, is that it actually provoked a dissent. In dissent, Judge Hawkins expressly invoked the Court's legal fiction, arguing that the "majority fails to accord appropriate deference to the elevated status of the grand jury as indicated in the Supreme Court's jurisprudence." Id at 1167.
\item \textsuperscript{321} For example, the former President of the National Association of Criminal Defense Lawyers (NACDL), a criminal defense lawyer, has argued that the grand jury needs to be "liberated" from its "captivity by prosecutors" in order to "resume serving their important historic role as a neutral, apolitical buffer between the power of the government and the rights of the citizenry." Gerald B. Lefcourt, High Time for a Bill of Rights for the Grand Jury, THE CHAMPION, Apr. 1998, at 34. With due respect to Mr. Lefcourt, one suspects that he may be using the fiction of grand jury independence much as self-consciously as the Court does.
\end{itemize}
comprehensive and thoughtful consideration of the grand jury’s role that could begin from a more realistic appraisal.

Consider, for example, the most prominent recent proposals – those put forward by the National Association of Criminal Defense Lawyers (NACDL). The NACDL’s proposed ten-point “Federal Grand Jury Bill of Rights” was the subject of congressional hearings in 2000. The NACDL argues that the “protective function of the grand jury” has been “trivialized” and its investigative function expanded, making it “precisely the opposite of what the Founding Fathers intended.” The group argues that the serious consequences of federal indictment “make imperative efforts to restore a meaningful shield function to the grand jury” and to restore its “historic function as an independent entity acting as a shield to safeguard the citizenry against prosecutorial excess.”

These goals could be copied directly from the Supreme Court cases that reprint the fiction of grand jury independence. Like the Court’s grand jury precedents, these reform proposals repeat the mantra that the primary function of the grand jury is to protect the rights of individuals. Yet in reality, the litany of reform proposals grouped together by the NACDL have very different goals and effects – more a laundry list of defense complaints about the grand jury process than a proposal to restore grand jury independence. One questions, for example, whether the NACDL’s goal in seeking recognition of a right to counsel for witnesses in the grand jury room is truly to ensure that the grand jury acts independently in voting to indict, or rather to protect the rights of individuals who may be caught up in a grand jury investigation.

To debate all of these reform proposals as if we are talking only about “grand jury independence” enhances the disconnect between fiction and reality. Just as prosecutors want to exclude defense counsel from the grand jury room for strategic reasons unrelated to grand jury’s needs, so defense counsel want entry to the room for their clients’ own purposes. It does not advance the ball to debate the issue in terms of whether changing grand jury secrecy rules would or would not improve

322. NACDL Grand Jury Reform Report, supra note 2, at 2.
323. Id. at 5. Toward this goal, the NACDL proposes to: (1) allow witnesses to be accompanied by counsel in the grand jury room, (2) bar prosecutors from failing knowingly to disclose to the grand jury evidence in the prosecutor’s possession that exonerates the target, (3) bar prosecutors from presenting to the grand jury evidence known to be inadmissible at trial, (4) give a target a right to testify before the grand jury, (5) give witnesses a right to receive a copy of their grand jury transcript, (6) bar the grand jury from naming a person in an indictment as an unindicted co-conspirator, (7) require that witnesses be given Miranda warnings before being questioned, (8) require at least seventy-two hours notice before a federal grand jury appearance, (9) give federal grand jurors meaningful jury instructions, and (10) bar prosecutors from calling before the grand jury a target who has stated his intent to invoke his Fifth Amendment rights against self-incrimination. Id. at 11-18.
324. Other recent proposals by academics and practitioners alike have similarly focused on the notion that measures are needed to “improv[e] the effectiveness and independence of the grand jury.” See Grand Jury of Tomorrow, supra note 126, at 2. Some notable recent law review articles advocating reform to enhance the independence of the grand jury include: Brenner, supra note 46; R. Michael Cassidy, Toward a More Independent Grand Jury: Recasting and Enforcing the Prosecutor’s Duty to Disclose Exculpatory Evidence, 13 Geo. J. Legal Ethics 361 (2000); Simmons, supra note 49.
the grand jury's ability to perform meaningful indictment review, rather than to
discuss the true interests at stake, which pitch law enforcement needs against
protection of individual rights. Given the actual role of the modern federal grand
jury, it is far from clear that chasing after a supposed "golden age" of grand jury
independence is either a useful or realistic goal.

V. CONCLUSION

If history is any guide, recent debates over grand jury reform promise to
intensify. Heavy uses of federal grand juries in corporate cases and terrorist
investigations are likely to bring the grand jury's flaws to the fore, in much the
same way as public attention followed Independent Counsel Starr's investigation
of President Clinton, and earlier reform efforts followed publicly reported abuses
of the federal grand jury in the Nixon administration.

Comprehensive grand jury reform is needed at the federal level. This Article has
highlighted and exposed the highly fictionalized way in which the Supreme Court
discusses the federal grand jury, and the consequences, both good and bad, of the
Court's grand jury lore. The federal grand jury is granted important powers on the
assumption that it is a functioning, independent institution, despite the "notorious
falsity" of that premise. The result is that the federal grand jury's powers are both
artificially broad and artificially narrow.

On one hand, the grand jury's powers are artificially enlarged by the fiction of
grand jury independence. The grand jury is freed from the legal constraints that
apply to law enforcement personnel, even when the grand jury is acting in what
can only be characterized as a law enforcement capacity. Simultaneously, the
grand jury's indictment decisions are treated as the equivalent of neutral judicial
review, even though there is nothing either neutral or judicial about the grand
jury's decision to indict. Both of these rules redound to the detriment of targets and
witnesses, whose constitutional protections are diminished.

At the same time, the grand jury's powers in other respects are artificially
limited by the fiction of grand jury independence. Most fundamentally, because its
investigative powers derive from its theoretically justifying role – the return of
criminal indictments – they can only be used to that end. This means that even
viewed as a government tool, the grand jury's powers may be constrained in ways
that the government deems contrary to its interests, such as restrictions on the use
of grand jury information for non-criminal purposes and limitations on the
purposes for which grand juries may be convened. To the extent there has been
federal grand jury reform passed in recent years, it has been piecemeal legislation

325. See e.g., FED. R. CRIM. P. 6(e) (limitations on disclosure of matters occurring before the grand jury). The
limit on the use of grand jury information for non-criminal purposes is one of the few aspects of grand jury
regulation that the Supreme Court has strictly enforced. See United States v. Sells Engineering, Inc., 463 U.S. 418
(1983).
to ameliorate some of these limitations of the grand jury process for the government.\textsuperscript{326} Such legislation, however, has arguably changed the powers of the grand jury in ways fundamentally at odds with the Supreme Court's theoretical foundation of the grand jury as an institution geared toward and justified by its prime function of conducting independent indictment review.\textsuperscript{327}

Comprehensive grand jury reform should proceed from reality rather than fiction. The reality is that the federal grand jury is a powerful and important investigative arm of federal law enforcement, but one that does a poor job of reviewing indictments for probable cause. Abandoning the fiction of grand jury independence has several important implications for legislative reform of the federal grand jury:

First, grand jury reform should be comprehensive. It should address all of the roles the grand jury plays in the modern criminal justice system, not just its nominal constitutional role in issuing indictments. Equally important, comprehensive grand jury reform should address the grand jury's central roles in the investigative and pretrial stages of the case.

Second, grand jury reform should recognize that the grand jury's indictment role is the least important of its modern functions, because the grand jury is not well-suited to this task and does not actually perform any meaningful indictment review. Protecting the defendant's legitimate interests in checking prosecutorial zeal would be better achieved by other means.

Third, grand jury reform should refine and improve the key investigative role that the grand jury fulfills. There is a need for the investigative tools that the grand jury affords federal law enforcement, but there is also a need to change some of the rules that attach to the grand jury's investigative process, both from the perspective of the government and that of targets and witnesses.

Finally, grand jury reform should reconsider whether grand jury indictment should eliminate the right to any judicial review for probable cause. In a system in which pretrial processes may be the only processes most defendants are afforded, it is important to acknowledge that the current grand jury review process fails to accord any meaningful protection for defendants' rights.

The Supreme Court, in its current make-up, clearly is not inclined to reexamine

\textsuperscript{326} Most recently, the Department of Justice has made some inroads on reforming the grand jury process by convincing Congress to pass legislative reforms favorable to federal investigators, limited to narrow categories of particularly egregious cases, such as child pornography cases and terrorism investigations. See 18 U.S.C. § 3486 (giving Department of Justice certain administrative subpoena powers in child pornography cases); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (to be codified in scattered sections of the U.S.C.) (amending grand jury secrecy rules to allow investigators to share “foreign intelligence” information with other government agencies for non-criminal purposes).

\textsuperscript{327} Commentators have argued that amendments such as those contained in the USA PATRIOT Act could fundamentally change the federal grand jury's mission, threatening a “backdoor expansion” of the grand jury's investigative jurisdiction by encouraging prosecutors to use the grand jury for national security purposes rather than its intended mission of criminal prosecutions. See Beale &. Felman, supra note 204, at 717.
or refine its rhetoric about the grand jury as an institution. Still, it is harmful for other political players to act as if the fictions that surround the grand jury are realities. A sophisticated and realistic analysis would be preferable to the distortions caused by viewing the issue through the prism of the legal fiction of grand jury independence.

While reform cannot realistically dispense entirely with the grand jury's indictment function in the federal system, the minimal constitutional standards developed by the Court simply require that grand jurors vote on indictment and do not dictate any particular indictment review process (or any specific number of grand jurors). More importantly, defendants should also have some genuinely independent review of the basis for those criminal charges.\(^{328}\) This function, however, would be better served by some other pretrial mechanism, such as broadening the role of preliminary examinations in the federal system, rather than reforming the grand jury's indictment process to make its decision truly "independent."

Particularly in a system in which guilty pleas increasingly predominate, the preliminary charging process may provide the only avenue for meaningful independent review of the prosecutor's charging decision.\(^{329}\) One must question the Supreme Court's impatience with pretrial procedures -- and its assumption that it will "all come out in the wash" at trial -- in a system in which most defendants never go to trial. Furthermore the Court has been cutting back on the protections that apply to plea negotiations.\(^{330}\) Meaningful grand jury reform should consider the relationship between the indictment process and pretrial processes such as the preliminary hearing.

On the other side of the coin, the federal grand jury's important investigative role also fits uneasily with its constitutional role of indictment review. Prosecutors' desire to use the grand jury to investigate may or may not coincide with an obligation to educate grand jurors in connection with the jurors' indictment decision. To pour greater resources into making the grand jury's decisional process

\(^{328}\) As the Supreme Court emphasized in \textit{Hurtado}, due process concerns can be satisfied as easily in a prosecutorial information/preliminary hearing system as in a system that provides for indictment by grand jury. See \textit{Hurtado}, 110 U.S. at 538.

\(^{329}\) See Bernstein, supra note 16, at 569 ("[G]iven the rise of the plea bargaining system, the indicting grand jury is 'the only sieve through which most federal prosecutions will pass.'"). The grand jury's review process has become even more significant in this regard since 1987, when Congress passed strict federal sentencing laws that significantly increased the percentage of cases ending in guilty pleas. See e.g., NACDL GRAND JURY REFORM REPORT, supra note 2, at 4 ("Now with the dramatic decrease in the percentage of federal indictments that go to trial as compared to that prior to the enactment of the federal sentencing guidelines . . . the grand jury has in effect become the body of last resort for many accused in the federal criminal justice system."); see also, e.g., JUDICIAL FACTS, supra note 82, tbl. 3.5 ("After a moderate increase over the previous 10 years, the percentage of criminal defendants convicted and sentenced has risen significantly since 1988 primarily because of the rise in the percentage of defendants pleading guilty.").

meaningful is likely to be wasteful, forcing prosecutors to consume grand jury time with more extensive indictment presentations rather than using that time for pursuing investigative leads.

Instead of being concerned with whether the grand jury is functionally separate from the prosecutor, a better focus for grand jury reform would be a concern with whether the grand jury and the prosecutor, acting together, are using investigative techniques that are both adequate for federal needs and fair to investigative targets and witnesses. The direction of reforms suggested by a focus on the grand jury's investigative primacy is quite different than one focused on the fiction of grand jury independence.

If the goal, for example, is to realize the grand jury's fictional independence, the most important reform would be to give the grand jury an independent legal adviser, selected from outside of the prosecutor's office. This would help the grand jury to use the powers that rightfully belong to the grand jury, rather than the prosecutor, and to understand the scope of those powers. Another reform to the same end might follow states that have sought to improve the quality of the grand jury's decision-making process by imposing limits on the evidence that may be presented, or by requiring balance in the prosecutor's presentation to the grand jury (for example, by requiring some quantum of exculpatory evidence to be presented). If the premise of this Article is correct, however, such reforms will transform the nature of the modern federal grand jury, without necessarily improving the quality of its indictment process.

If the goal instead is to improve the federal investigative process, as this Article advocates, very different grand jury reforms would follow. Such reforms might include changing the rule that has probably provoked the most outcry about the grand jury's investigative procedures: the rule prohibiting witnesses from having counsel in the grand jury room when they give testimony. For all the reasons that witnesses have the right to be accompanied by counsel at trials (or even in civil depositions), such a reform would enhance the fairness of the investigative process, prevent manipulation of vulnerable witnesses, and protect against inadver-

331. The importance to grand jury independence of its own staff was not lost on former President Richard M. Nixon, who saw first-hand the potential powers of the grand jury during the McCarthy era. See generally CLARK, supra note 7, at 23-25 (detailing grand juries' enthusiastic indictments of alleged Communist party members and grand jury investigations conducted concurrently with hearings into "subversive" activities by the House Un-American Activities Committee). In 1951, then-Senator Nixon introduced a bill that would have codified the common law power of federal grand juries to conduct investigations "at their own instance," and would have given them access to and authorized funding for "the services of a special counsel and special investigators" to assist in this function. See Powers of Federal Grand Juries, supra note 161, at 74 n.38. The bill would also have clarified that the court could not discharge a grand jury until its investigation was complete. Id.

332. See Simmons, supra note 49, at 22 (describing state grand jury procedures that apply rules of evidence to grand jury proceedings).

tent waivers of critical Fifth Amendment rights or attorney-client privileges.\textsuperscript{334} Other reforms to enhance investigative fairness might provide witnesses with transcripts of their testimony, or place limits on the circumstances in which grand jury subpoenas can be issued.

More broadly, reforms that focus on the grand jury’s investigative role would consider, in a comprehensive fashion, the markedly different rules that grand jury subpoenas enjoy over other federal investigative methods. Instead of arguing over the “grand jury’s” need to issue subpoenas, for example, the grand jury’s subpoena could be viewed as it actually functions – in essence, a power in the Department of Justice to issue administrative subpoenas cloaked with grand jury secrecy. In this context, it would be possible honestly to debate which types of modern criminal cases referred to the grand jury, if any, can justify eliminating the restrictions that would normally apply to administrative subpoenas, where, for example, the witness has the right to bring an attorney when testifying and secrecy rules are inapplicable.\textsuperscript{335}

Without cataloguing in detail every proposal for reform and where it lies on the scale, this Article suggests that a change in focus would result in more meaningful, and ultimately more important, reforms to the charging process. By acknowledging the true modern function of the grand jury – investigation of criminal activity – and abandoning the pretense that the grand jury serves to protect citizens against unwarranted criminal accusations in any meaningful way, it would focus the debate more directly on the true issues at stake. A narrow focus on enhancing the fictional independence of the federal grand jury neither provides an accurate description of our current grand jury system, nor a useful prescription for improving that system. The important question is not whether we can or should achieve grand jury independence, but whether there are any limits that should be placed on grand jury investigations in the interest of individual rights and liberties, in order to increase the reliability of evidence, or to further other social interests we believe should be protected.

\textsuperscript{334} See \textit{Grand Jury of Tomorrow}, supra note 126, at 44-52 (canvassing debate and recommending that “all witnesses before [federal or state] grand juries should have the right to have counsel present during their testimony before the grand jury”). At present, twenty-one states permit some witnesses to have counsel present during their grand jury appearance. \textit{Id.} at 45-46.

\textsuperscript{335} See 5 U.S.C. § 555(b).