

William M. Windsor

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October 17, 2011

Ms. Brenda Nelson
Federal Grand Jury Clerk
U.S. Attorney's Office
600 Richard B. Russell Federal Building
75 Spring Street, SW
Atlanta, GA 30303

Dear Ms. Nelson:

The courier is delivering one PERSONAL AND CONFIDENTIAL envelope for the Grand Jury. Please ensure that this is personally delivered to the Grand Jury.

MAKE SURE THESE ARE GIVEN TO EACH GRAND JUROR. I WILL CONSIDER FAILURE TO DO SO TO BE A VIOLATION OF MY RIGHTS, AND I WILL TAKE LEGAL ACTION TO PROTECT MY RIGHTS.

These envelopes contain nothing related to any matter before the Grand Jury at this time. The envelopes do contain information about criminal charges against the U.S. Attorney and others.

Please call me to confirm delivery to each grand juror. I carry my cell phone at all times – 404-606-1885.

I will be outside the Grand Jury Room every Tuesday that the Grand Jury meets until I have an opportunity to speak with them.

Sincerely,



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Case Law on Grand Jury Powers

In 1895 in *Frisbie v. United States*, 157 U.S. 160, 163, 15 S.Ct. 586, 587, 39 L.Ed. 657, 658 (1895), the Court expressed the proposition in this way: “But in this country **the common practice is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them....**”

A citizen's right to ask a federal grand jury for permission to appear before it is now expressly protected by statute. **18 U.S.C.A. § 1504**, which prohibits attempts to improperly influence a grand juror by written communication regarding pending matters, also provides that “**[n]othing in this section shall be construed to prohibit the communication of a request to appear before the grand jury.**”

In 1974, U.S. Supreme Court Justice Powell said the grand jury has two purposes: deciding whether a crime has been committed and **protecting the citizen from the government.**

High Court Justice Lewis Powell, in *United States v. Calandra*, 414 U.S. 338, 343 (1974), said this: “The institution of the grand jury is deeply rooted in Anglo-American history. [n3] In England, the grand jury [p343] served for centuries both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action. In this country, the Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by “a presentment or indictment of a Grand Jury.” *Cf. Costello v. United States*, 350 U.S. 359, 361-362 (1956). The grand jury’s historic functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions. *Branzburg v. Hayes*, 408 U.S. 665, 686-687 (1972).”

In 1992, Supreme Court Justice Antonin Scalia explained that the grand jury is not part of the three branches of government set forth in the Constitution – Justice Scalia also says **the grand jury “is an institution separate from the courts, over whose functioning the courts do not preside.”** – it is perfectly reasonable to characterize the grand jury as the “**fourth branch of government.**” In *United States v. Williams*, 504 U.S. 36 at 47 (1992), Justice Antonin Scalia, delivered the opinion of the Supreme Court:

“[R]ooted in long centuries of Anglo-American history,” *Hannah v. Larche*, 363 U. S. 420, 490 (1960) (Frankfurter, J., concurring in result), the grand jury is mentioned in the Bill of Rights, but not in the body of the Constitution. It has not been textually assigned, therefore, to any of the branches described in the first three Articles. It “is a constitutional fixture in its own right.” *United States v. Chanen*, 549 F. 2d 1306, 1312 (CA9) (quoting *Nixon v. Sirica*, 159 U. S. App. D. C. 58, 70, n. 54, 487 F. 2d 700, 712, n. 54 (1973)), cert. denied, 434 U. S. 825 (1977).”

In the same place, Justice Scalia says this:

“. . . In fact, the whole theory of its function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people. See *Stirone v. United States*, 361 U.S. 212, 218 (1960); *Hale v. Henkel*, 201 U.S. 43, 61 (1906); G. Edwards, *The Grand Jury* 28-32 (1906). Although the grand jury normally operates, of course, in the courthouse and under judicial auspices, its institutional relationship with the Judicial Branch has traditionally been, so to speak, at arm's length. Judges' direct involvement in the functioning of the grand jury has generally been confined to the constitutive one of calling the grand jurors together and administering their oaths of office. See *United States v. Calandra*, 414 U.S. 338, 343 (1974); Fed.Rule Crim.Proc. 6(a). [504 U.S. 36, 48]"

The Grand Jury is independent.

The Fifth Amendment "presupposes an investigative body acting independently of either prosecuting attorney or judge." *United States v. Dionisio*, 410 U.S. 1, 16 (1973) (internal quotation marks omitted). The Fifth Amendment may be violated if the independence of the grand jury in performing its historical function is substantially infringed. See *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255-57 (1988). (*United States of America v. Elide T. Caruto*, No. 09-50309 WQH-1, (9th Cir. 12/08/2010).)

"...in order to perform its protective function, the grand jury must remain detached from and independent of the Executive Branch. Therefore, the grand jury is under no compulsion to follow the orders of the prosecutor." (*United States v. Smyth*, 104 . upp. 83, 294 (N.D. Cal. 1952). See generally Note, 37 Minn. L. Rev., supra note 145, at 599-600.) (*Richard M. Nixon, v. the Honorable John J. Sirica*, CDC.0000249, DC Circuit (10/12/73).)

The grand jury also has another role, as an investigatory and accusatory body. The federal grand jury "has not been textually assigned" to any of the three branches of federal government. *Williams*, 504 U.S. at 47. The institution is not mentioned in the body of the Constitution, but in the Bill of Rights. Id.; U.S. Const. amend. V. It is thus a "constitutional fixture in its own right"; it is not an arm of the district court. *Williams*, 504 U.S. at 47 (internal quotation marks omitted) (quoting *United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir. 1977)). Indeed, "the whole theory of its function is that it belongs to no branch of the institutional Government." Id. Thus, the grand jury remains functionally and constitutionally "at arm's length" from the judicial branch. Id.; see also *Stern v. U.S. Dist. Court for the Dist. of Mass.*, 214 F.3d 4, 15 (1st Cir. 2000). (*In re United States*, 441 F.3d 44 (1st Cir. 03/24/2006).)

As the Supreme Court has noted, the grand jury is "[r]ooted in long centuries of Anglo-American history" and is "a constitutional fixture in its own right." *United States v. Williams*, 504 U.S. 36, 47 (1992) (internal quotations and citations omitted). It may "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." *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297 (1991). Therefore, "[a]s a necessary consequence of

its investigatory function, the grand jury paints with a broad brush." *Id.* A subpoena is perhaps the most important of the grand jury's tools of investigation, and its authority to subpoena witnesses "is not only historic, but essential to its task . . . [because] 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege." *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (citations omitted). Courts exercise limited control over the functioning of the grand jury and extend great deference to this historic institution and its broad powers. See *Impounded*, 241 F.3d at 312. The grand jury "belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people." *Williams*, 504 U.S. at 47. As we have acknowledged, the grand jury's "great powers of investigation and inquisition" allow it to " 'compel the production of evidence or testimony of witnesses . . . unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials.' " *In re Grand Jury Subpoena*, 223 F.3d at 216 (quoting *United States v. Calandra*, 414 U.S. 338, 343 (1974)). While courts have some authority to limit the grand jury's power, see *Impounded*, 241 F.3d at 312-13, the Supreme Court has stated that "[g]iven 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." *Williams*, 504 U.S. at 49-50. (*In re Grand Jury*, 286 F.3d 153 (3d Cir. 04/05/2002).)

The fundamental concept underlying the Fifth Amendment guarantee is that in order for an indictment to be recognized as actually issuing from a grand jury, it must be the product of an investigative deliberation that is independent of both the prosecuting attorney and the court. See *United States v. Williams*, 504 U.S. 36, 49, 112 S.Ct. 1735, 1743, 118 L.Ed.2d 352 (1992) ("Recognizing [the] tradition of independence [of the grand jury], we have said that the Fifth Amendment's constitutional guarantee presupposes an investigative body acting independently of either prosecuting attorney or judge.") (emphasis in original) (internal quotation marks and citations omitted); *United States v. Dionisio*, 410 U.S. 1, 18, 93 S.Ct. 764, 773, 35 L.Ed.2d 67 (1973) (finding that a grand jury "must be free to pursue its investigations unhindered by external influence"); *Wood v. Georgia*, 370 U.S. 375, 390, 82 S.Ct. 1364, 1373, 8 L.Ed.2d 569 (1962) (recognizing "[t]he necessity to society of an independent and informed grand jury"); *John Roe, Inc. v. United States (In re: Grand Jury Proceedings)*, 142 F.3d 1416, 1425 (11th Cir.1998) (explaining that although a grand jury relies on the judiciary when it seeks subpoenas or contempt sanctions, it "performs its investigative and deliberative functions independently"). Without a guarantee of independence, the indictment would not be the genuine issue of a grand jury within the meaning of the Constitution.

It is clear, for example, that if a prosecutor simply drew up an "indictment," had a grand jury foreperson sign it, and then used it to charge the defendant with a criminal offense, we would dismiss the "indictment" out of hand as violative of the Fifth Amendment. This is because the "indictment" would in no sense be the product of a constitutionally required grand jury proceeding. So, too, would we dismiss an indictment that was issued by a "kangaroo grand jury"-one whose deliberations were so overborne by a prosecutor or judge that the indictment was, in effect, the prosecutor's or judge's handiwork, and not the

result of a considered judgment by an independently functioning grand jury. See *United States v. McKenzie*, 678 F.2d 629, 631 (5th Cir.1982) (holding that an indictment may be dismissed "when prosecutorial misconduct amounts to overbearing the will of the grand jury so that the indictment is, in effect, that of the prosecutor rather than the grand jury"); see also *Stirone v. United States*, 361 U.S. 212, 218, 80 S.Ct. 270, 273, 4 L.Ed.2d 252 (1960) ("the very purpose of the requirement that a man be indicted by a 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."). (Stirone relied on and reaffirmed the proscription of *Ex Parte Bain*, 121 U.S. 1, 10, 13, 7 S.Ct. 781, 786, 787-88, 30 L.Ed. 849 (1887), against court amendments to an indictment. Bain held that a judge's excessive interference in grand jury proceedings violated the Fifth Amendment. *Bain*, 121 U.S. at 10, 7 S.Ct. at 786. In *Bain*, the trial judge struck a portion of the indictment as surplusage, thereby (according to the petitioner) making it easier for the government to prove its case. *Id.* at 5, 7 S.Ct. at 783. The Supreme Court's subsequent repudiation, in *United States v. Miller*, 471 U.S. 130, 142-43, 105 S.Ct. 1811, 1818, 85 L.Ed.2d 99 (1985), of "the proposition that the striking out of parts of an indictment invalidates the whole of the indictment" does not affect the continuing validity of *Bain*'s generalized proscription against court interference in the grand jury process or *Stirone*'s requirement that the defendant be convicted of the specific offense charged in the indictment. In *Miller*, the Court held that "[t]he proposition that a defendant cannot be convicted of an offense different from that which was included in the indictment [that] was broadly declared in *Bain* ... has been reaffirmed in a number of subsequent cases." *Id.*) (*United States v. Sigma International, Inc.*, 244 F.3d 841 (11th Cir. 03/15/2001).)

The Fifth Amendment requires that an indictment issue from an independent grand jury. Where a grand jury proceeding is so corrupted by the conduct of a prosecutor or judge that it "substantially influenced the grand jury's decision to indict, or if there is grave doubt that the decision to indict was free from ... substantial influence," *Bank of Nova Scotia*, 487 U.S. at 256, 108 S.Ct. at 2374 (internal quotation marks and citations omitted), courts should not hesitate to remedy the violation because the indictment is not, in reality, "of a Grand Jury," U.S. Const. amend. V. (*United States v. Sigma International, Inc.*, 244 F.3d 841 (11th Cir. 03/15/2001).)

The Supreme Court has observed that the grand jury is mentioned in the Bill of Rights, but not in the body of the Constitution. It has not been textually assigned, therefore, to any of the branches described in the first three Articles. It is a constitutional fixture in its own right. *United States v. Williams*, 504 U.S. 6, 47, 112 S.Ct. 1735, 1742 (1992) (quotation marks and citation omitted). (*United States v. Barry*, 371 Fed.Appx. 3 (11th Cir. 03/24/2010).)

Historically, the grand jury has operated as an autonomous body, independent of the court or prosecutors. See *Stirone v. United States*, 361 U.S. 212, 218, 80 S.Ct. 270, 273, 4 L.Ed.2d 252 (1960) (explaining that constitutional right to grand jury indictment presupposes "group of fellow citizens acting independently of either prosecuting attorney or Judge"); *Costello v. United States*, 350 U.S. 359, 362, 76 S.Ct. 406, 408, 100 L.Ed. 397 (1956) (noting that grand jury "acquired an independence in England free from control by the Crown or Judges"). Although the grand jury must rely on the court's

process to summon the attendance of witnesses and to compel the testimony of witnesses who refuse to testify, see *United States v. Williams*, 504 U.S. 36, 47, 112 S.Ct. 1735, 1743, 118 L.Ed.2d 352 (1992), the grand jury performs its investigative and deliberative functions independently. See *United States v. Dionisio*, 410 U.S. 1, 17, 93 S.Ct. 764, 773, 35 L.Ed.2d 67 (1973) (explaining that grand jury "must be free to pursue its investigations unhindered by external influence or supervision"). As the Supreme Court has stated: Although the grand jury normally operates ... in the courthouse and under judicial auspices, its institutional relationship with the Judicial Branch has traditionally been, so to speak, at arm's length. Judges' direct involvement in the functioning of the grand jury has generally been confined to the constitutive one of calling the grand jurors together and administering their oaths of office. *Williams*, 504 U.S. at 47, 112 S.Ct. at 1742; see also *United States v. Calandra*, 414 U.S. 338, 343, 94 S.Ct. 613, 617, 38 L.Ed.2d 561 (1974) ("No Judge presides to monitor [grand jury] proceedings. It deliberates in secret and may determine alone the course of its inquiry."); *Blalock v. United States*, 844 F.2d 1546, 1549-50 (11th Cir.1988) (per curiam) (recognizing independence of grand jury and declining to grant injunctive relief to prevent grand jury from returning an indictment tainted by alleged governmental misconduct). (*John Roe Inc. v. United States*, 142 F.3d 1416 (11th Cir. 06/12/1998).)

As the Supreme Court has reminded us on occasion, "the grand jury is an institution separate from the courts." *United States v. Williams*, 504 U.S. 36, 47 (1992). The function of that separate institution is to "serv[e] as a kind of buffer or referee between the government and the people." *Id.* The function of the grand jury "depends on 'maintaining the secrecy of the grand jury proceedings in the federal courts.'" *In re Sealed Case*, 199 F.3d at 526 (quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958)). The authorities collected in *In re Sealed Case* recite the broad variety of circumstances in which the courts have upheld this grand jury secrecy, a secrecy that has been the persistent rule for grand jury proceedings for at least four hundred years. See *Douglas Oil v. Petrol Stops Northwest*, 441 U.S. 211, 218 n.9 (1979) ("Since the 17th century, grand jury proceedings have been closed to the public, and records of such proceedings have been kept from the public eye."). (*In re Grand Jury Subpoena*, 397 F.3d 964 (D.C.Cir. 02/15/2005).)

Indeed, as the Supreme Court has noted, the grand jury is not even a part of the judicial system. See *United States v. Williams*, 504 U.S. 36, 47 (1992) ("[T]he grand jury is an institution separate from the courts."). The theory "of its function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people." *Id.* That function depends on "maintain[ing] the secrecy of the grand jury proceedings in the federal courts." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958). As the Court noted, "[s]ince the 17th century, grand jury proceedings have been closed to the public, and records of such proceedings have been kept from the public eye." *Douglas Oil*, 441 U.S. at 218 n.9. (*In re Sealed Case*, 199 F.3d 522 (D.C.Cir. 01/04/2000).)

The only thing the judge should do, says the Supreme Court, is assemble the grand jurors and swear them in. That's all! And the prosecutor (U.S. Attorney's Office) has no power over the Grand Jury. The grand jury goes to work "as a kind of buffer or referee between the

Government and the people.” The grand jury protects the people. It oversees the government. It does that by investigating the government, by rooting out government corruption.

It is the duty of your Grand Jury to investigate any crime, no matter how or by whom communicated to you.

United States v. Smyth, 104 F. Supp. 283, 287 n.1 (N.D. Cal. 1952). The judge concluded that "the grand jurors... may initiate prosecutions based on information received from persons who have no connection officially with them." *Id.* at 295.

In *King v. Second Nat'l Bank & Trust Co. of Saginaw, Mich.*, 173 So. 498, 499 (Ala. 1937), the court concluded that "[p]ublic policy demands that the citizen, without hazard to himself, may freely bring before the grand jury the fact that a crime has been committed, request an investigation, and furnish such information as he has in aid of the investigation.