NYTimes JAN 8 1972

Indictment of Federal Grand Juries

By MICHAEL TIGAR
and MADELEINE LEVY

SANTA BARBARA, Calif. — The grand jury sits in secret, a practice begun to protect the innocent. But the modern-dress version makes the secrecy strikingly reminiscent of the oath *ex officio* procedure which for a time threatened to still the first stirrings of the adversary system, the presumption of innocence and the right of public trial. The evils which were disowned in the creation of the right to a fair trial are, in fact, quite at home in the grand jury room: there is no right to notice of the scope and nature of the crimes being investigated; there is no confrontation of the witnesses who have led the trail of the investigation to the witnesses' doorstep and, collaterally, there is no possibility, much less a right, to cross-examine those witnesses. In essence there is trial in secret, and by inquiry.

There is the ordeal of examination without counsel, which even (Joseph McCarthy-type) Congressional committees never sought to impose. In the grand jury room, counsel is not permitted. True, the witness may ask the government lawyer to be excused and retire to the anterom to consult counsel, but the atmosphere is heavily weighted in favor of the government. There is no judge or other supposedly impartial official present — only the grand jurors and government counsel.

There are limitations on the right to bail and to appeal. A defendant charged with crime, even a serious offense, can usually — in the Federal courts — secure prompt release on bail pending trial. A grand jury witness found summarily in contempt for refusal to answer can expect serious and often insurmountable difficulty in obtaining release pending appellate review. And the review available, under the 1970 crime bill, is truncated, providing in many cases no opportunity even to have the record of proceedings below transmitted to the appellate court.

"The technology of privacy-invasion makes the grand jury on the loose doubly chilling."

The grand jury dispenses with the privilege against self-incrimination. By the consistent course of Federal decision, a witness may decline to provide any information which may form a link in a chain of evidence incriminatory of him or her. When government casts wide its conspiracy net, and the inquisition begins into friendships and associations, almost any question is potentially productive of incriminatory testimony. To undermine the privilege against self-incrimination, the 1970 crime bill greatly expands the scope of the so-called "immunity" provision of the United States Code.

The bill provides not for complete immunity but for a partial, or "use" immunity. If *A* incriminates herself or himself, the government may not use the incriminatory testimony *itself* at a later trial of *A*, but there is no provision that having discovered the misdeed the government may not seek to prosecute it by gathering other evidence.

Let us consider this problem in the broader context of a sixth objection: the grand jury inquisition destroys associational freedom by an assault upon political privacy. To begin, the grand jury's organ grinder, the government lawyer, has access to wire-tap and other electronic surveillance material which can be used as a basis for questioning and intimidating witnesses.

The technology of privacy-invasion, and the public sense of its unbridled use, makes the grand jury on the loose doubly chilling. Another aspect of privacy-invasion arises from indiscriminate poking and prying into associational freedom. In an active political organization, meetings, friendships, discussions and interchange of ideas are the means by which business is done. Assume that one member is subpoenaed to testify. That member can invoke the privilege against self-incrimination as to his or her own activities, but not with respect to the activities, words or beliefs of others.

The grand jury is often convened to surveil a group or groups whom the Attorney General suspects, seeking some pretext for making a formal charge. Frequently, the indictments that do result are for offenses peripheral to the purported purpose of the grand jury, or are so ludicrously unsupported as to be *post hoc* apologies for having begun the investigation in the first place. The Federal grand jury is more and more utilized to probe, expose, and punish the exercise of political freedom by its immediate targets and chill dissent among all but the hardiest.

Michael Tigar and his legal colleague, Madeleine Levy, presented this paper at the Center for Democratic Institutions.