SUPREME COURT OF THE UNITED STATES

No. 90–1972

UNITED STATES, PETITIONER *v.* JOHN H. WILLIAMS, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[May 4, 1992]

JUSTICE SCALIA delivered the opinion of the Court.

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

I

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

Williams' misrepresentation was allegedly effected through two financial statements provided to the banks, a ``Market Value Balance Sheet'' and a ``Statement of

Projected Income and Expense." The former included as ``current assets" approximately $6 million in notes receivable from three venture capital companies. Though it contained a disclaimer that these assets were carried at cost rather than at market value, the Government asserted that listing them as ``current assets"—*i. e.*, assets quickly reducible to cash—was misleading, since Williams knew that none of the venture capital companies could afford to satisfy the notes in the short term. The second document—the Statement of Projected Income and Expense—allegedly misrepresented Williams' interest income, since it failed to reflect that the interest payments received on the notes of the venture capital companies were funded entirely by Williams' own loans to those companies. The Statement thus falsely implied, according to the Government, that Williams was deriving interest income from ``an independent outside source." Brief for United States 3.

Shortly after arraignment, the District Court granted Williams' motion for disclosure of all exculpatory portions of the grand jury transcripts, see *Brady* v. *Maryland*, 373 U. S. 83 (1963). Upon reviewing this material, Williams demanded that the District Court dismiss the indictment, alleging that the Government had failed to fulfill its obligation under the Tenth Circuit's prior decision in *United States* v. *Page*, 808 F. 2d 723, 728 (1987), to present ``substantial exculpatory evidence" to the grand jury (emphasis omitted). His contention was that evidence which the Government had chosen not to present to the grand jury—in particular, Williams' general ledgers and tax returns, and Williams' testimony in his contemporaneous Chapter 11 bankruptcy proceeding—disclosed that, for tax purposes and otherwise, he had regularly accounted for the ``notes receivable" (and the interest on them) in a manner consistent with the Balance Sheet and the Income Statement. This, he contended, belied an intent to mislead the

banks, and thus directly negated an essential element of the charged offense.

The District Court initially denied Williams' motion, but upon reconsideration ordered the indictment dismissed without prejudice. It found, after a hearing, that the withheld evidence was ``relevant to an essential element of the crime charged,'' created `` `a reasonable doubt about [respondent's] guilt,' '' App. to Pet. for Cert. 23a-24a (quoting *United States* v. *Gray*, 502 F. Supp. 150, 152 (DC 1980)), and thus ``render[ed] the grand jury's decision to indict gravely suspect.'' App. to Pet. for Cert. 26a. Upon the Government's appeal, the Court of Appeals affirmed the District Court's order, following its earlier decision in *Page*, *supra*. It first sustained as not ``clearly erroneous'' the District Court's determination that the Government had withheld ``substantial exculpatory evidence'' from the grand jury, see 899 F. 2d 898, 900–903 (CA10 1990). It then found that the Government's behavior `` `substantially influence[d]' '' the grand jury's decision to indict, or at the very least raised a `` `grave doubt that the decision to indict was free from such substantial influence,' '' *id.*, at 903 (quoting *Bank of Nova Scotia* v. *United States*, 487 U. S. 250, 263 (1988)); see *id.*, at 903–904. Under these circumstances, the Tenth Circuit concluded, it was not an abuse of discretion for the District Court to require the Government to begin anew before the grand jury.[1] We granted certiorari, 502 U. S. ___ (1991).

II

Before proceeding to the merits of this matter, it is necessary to discuss the propriety of reaching them. Certiorari was sought and granted in this case on the following question: "Whether an indictment may be dis-

[1] The Tenth Circuit also rejected Williams' cross-appeal which contended that the District Court's dismissal should have been with prejudice. See 899 F.2d, at 904.

missed because the government failed to present exculpatory evidence to the grand jury." The first point discussed in respondent's brief opposing the petition was captioned ``The `Question Presented' in the Petition Was Never Raised Below." Brief in Opposition 3. In granting certiorari, we necessarily considered and rejected that contention as a basis for denying review.

JUSTICE STEVENS' dissent, however, revisits that issue, and proposes that—after briefing, argument, and full consideration of the issue by all the Justices of this Court—we now decline to entertain this petition for the same reason we originally rejected, and that we dismiss it as improvidently granted. That would be improvident indeed. Our grant of certiorari was entirely in accord with our traditional practice, though even if it were not it would be imprudent (since there is no doubt that we have jurisdiction to entertain the case) to reverse course at this late stage. See, *e.g.*, *Ferguson* v. *Moore-McCormack Lines*, 352 U. S. 521, 560 (1957) (Harlan, J, concurring in part and dissenting in part); *Donnelly* v. *DeChristoforo*, 416 U. S. 637, 648 (1974) (Stewart, J., concurring, joined by WHITE, J.). Cf. *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 816 (1985).

Our traditional rule, as the dissent correctly notes, precludes a grant of certiorari only when "the question presented was not pressed or passed upon below." *Post*, at 3 (internal quotation marks omitted). That this rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon, is illustrated by some of our more recent dispositions. As recently as last Term, in fact (in an opinion joined by JUSTICE STEVENS), we entertained review in circumstances far more suggestive of the petitioner's "sleeping on its rights" than those we face today. We responded as follows to the argument of the Solicitor General that tracks today's dissent:

> ``The Solicitor General . . . submits that the petition for certiorari should be dismissed as having been improvidently granted. He rests this submission on the argument that petitioner did not properly present the merits of the timeliness issue to the Court of Appeals, and that this Court should not address that question for the first time. He made the same argument in his opposition to the petition for certiorari. We rejected that argument in granting certiorari and we reject it again now because the Court of Appeals, like the District Court before it, decided the substantive issue presented." *Stevens* v. *Department of Treasury*, 500 U. S. ___, ___ (1991) (slip op. 6) (citations omitted) (opinion of BLACKMUN, J.).

And in another case decided last Term, we said the following:

> ``Respondents argue that this issue was not raised below. The appeals court, however, addressed the availability of a right of action to minority shareholders in respondents' circumstances and concluded that respondents were entitled to sue. It suffices for our purposes that the court below passed on the issue presented, particularly where the issue is, we believe, in a state of evolving definition and uncertainty, and one of importance to the administration of federal law." *Virginia Bankshares, Inc.* v. *Sandberg*, 500 U. S. ___, ___ (1991) (slip op. 14) (citations omitted; internal quotation marks omitted).

(JUSTICE STEVENS' separate concurrence and dissent in *Virginia Bankshares* also reached the merits. *Id.*, at ___ (slip op. ___).)[2] As JUSTICE O'CONNOR has written:

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[2] The dissent purports to distinguish *Stevens* and *Virginia Bankshares* on the ground that, ``[a]lthough the parties may not have raised the questions presented in the petitions . . . before the courts of appeals in

``The standard we previously have employed is that we will not review a question not pressed *or* passed on by the courts below. Here, the Court of Appeals expressly ruled on the question, in an appropriate exercise of its appellate jurisdiction; it is therefore entirely proper in light of our precedents for the Court to reach the question on which it granted certiorari . . . ." *Springfield* v. *Kibbe*, 480 U. S. 257, 266 (1987) (O'CONNOR, J., dissenting) (emphasis in original; citations omitted).[3]

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those cases, the courts treated the questions as open questions that they needed to resolve in order to decide the cases." *Post*, at 4, n. 4. The significance of this distinction completely eludes us. While there is much to be said for a rule (to which the Court has never adhered) limiting review to questions pressed by the litigants below, the rule implicitly proposed by the dissent—under which issues not pressed, but nevertheless passed upon, may be reviewed only if the court below thought the issue an ``open'' one—makes no sense except as a device to distinguish *Stevens* and *Virginia Bankshares*. It does nothing to further ``the adversary process'' that is the object of the dissent's concern, *post*, at 4, n. 5; if a question is not disputed by the parties, ``the adversary process'' is compromised whether the court thinks the question open or not. Indeed, if anything, it is compromised *more* when the lower court believes it is confronting a question of first impression, for it is in those circumstances that the need for an adversary presentation is most acute.

The dissent observes that where a court disposes of a case on the basis of a ``new rule that had not been debated by the parties, our review may be appropriate to give the losing party an opportunity it would not otherwise have to challenge the rule." *Post*, at 4–5, n. 5. That is true enough, but the suggestion that this principle has something to do with *Stevens* and *Virginia Bankshares* is wholly unfounded: In neither case could—or did—the losing party claim to have been ambushed by the lower court's summary treatment of the undisputed issues which we later subjected to plenary review.

[3]The Court's *per curiam* dismissal of the writ in *Kibbe* was based principally upon two considerations: (1) that the crucial issue was not raised in the District Court because of failure to object to a jury instruction, thus invoking Rule 51 of the Federal Rules of Civil Procedure, which provides that "[n]o party may assign as error the giving . . . [of] an instruction unless he objects thereto before the jury retires to consider its

There is no doubt in the present case that the Tenth Circuit decided the crucial issue of the prosecutor's duty to present exculpatory evidence.[4] Moreover, this is not, as the dissent paints it, a case in which, ``[a]fter losing in the Court of Appeals, the Government reversed its position,'' *post*, at 3. The dissent describes the Government as having ``expressly acknowledged [in the Court of Appeals] *the responsibilities described in Page*,'' *post*, at 2 (emphasis added). It did no such thing. Rather, the Government acknowledged ``*that it has certain responsibilities under . . . Page*.'' Brief for the United States in Response to Appellee's Brief in Nos. 88–2827, 88–2843 (CA10), p. 9 (emphasis added). It conceded, in other words, not that the responsibilities *Page* had imposed were proper, but merely that *Page* had imposed them—over the protests of the Government, but in a judgment that was nonetheless

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verdict," and, (2) that the crucial issue had in addition not explicitly been raised in the petition for certiorari. 480 U. S., at 259, 260. Of course, neither circumstance exists here.

[4]Relying upon, and to some extent repeating, the reasoning of its earlier holding in *Page*, the Court of Appeals said the following:

``We have previously held that a prosecutor has the duty to present substantial exculpatory evidence to the grand jury. Although we do not require the prosecutor to `ferret out and present every bit of potentially exculpatory evidence,' we do require that substantial exculpatory evidence discovered during the course of an investigation be revealed to the grand jury. Other courts have also recognized that such a duty exists. This requirement promotes judicial economy because `if a fully informed grand jury cannot find probable cause to indict, there is little chance the prosecution could have proved guilt beyond a reasonable doubt to a fully informed petit jury.' '' 899 F. 2d 898, 900 (CA10 1990) (citations omitted).

This excerpt from the opinion below should make abundantly clear that, contrary to the dissent's mystifying assertion, see *post*, at 4, and n. 3, we premise our grant of certiorari not upon the Tenth Circuit's having ``passed on'' the issue in its prior *Page* decision, but rather upon its having done so in this case. We discuss *Page* only to point out that, had the Government *not* disputed the creation of the binding Tenth Circuit precedent in that case, a different exercise of discretion might be appropriate.

binding precedent for the panel below. The dissent would apparently impose, as an absolute condition to our granting certiorari upon an issue decided by a lower court, that a party demand overruling of a squarely applicable, recent circuit precedent, even though that precedent was established in a case to which the party itself was privy and over the party's vigorous objection, see *Page*, 808 F.2d, at 727 (``The government counters that a prosecutor has no duty to disclose exculpatory evidence to a grand jury''), and even though no ``intervening developments in the law,'' *post*, at 5, n. 5, had occurred. That seems to us unreasonable.

In short, having reconsidered the precise question we resolved when this petition for review was granted, we again answer it the same way. It is a permissible exercise of our discretion to undertake review of an important issue expressly decided by a federal court[5] where, although the petitioner did not contest the issue in the case immediately at hand, it did so as a party to the recent proceeding upon which the lower courts relied for their resolution of the issue, and did not concede in the current case the correctness of that precedent. Undoubtedly the United States benefits from this rule more often than other parties; but that is inevitably true of most desirable rules of procedure or jurisdiction that we announce, the United States being the most frequent litigant in our courts. Since we

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[5] Where certiorari is sought to a state court, ``due regard for the appropriate relationship of this Court to state courts,'' *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430, 434–435 (1940), may suggest greater restraint in applying our ``pressed or passed upon'' rule. In that context, the absence of challenge to a seemingly settled federal rule deprives the state court of an opportunity to rest its decision on an adequate and independent state ground. See *Illinois* v. *Gates*, 462 U. S. 213, 222 (1983), cited by the dissent *post*, at 4–5; see also *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U. S. 71, 79–80 (1988). But cf. *Cohen* v. *Cowles Media Co.*, 501 U. S. ___, ___ (1991) (slip op. 3) (``It is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided'').

announce the rule to be applicable to all parties; since we have recently applied a similar rule (indeed, a rule even more broadly cast) to the *disadvantage* of the United States, see *Stevens* v. *Department of Treasury*, 500 U. S. ___ (1991); and since the dissenters themselves have approved the application of this rule (or a broader one) in circumstances rationally indistinguishable from those before us, see n. 2, *supra*; the dissent's suggestion that in deciding this case "the Court appears to favor the Government over the ordinary litigant," *post*, at 5, and compromises its "obligation to administer justice impartially," *ibid.*, needs no response.

III

Respondent does not contend that the Fifth Amendment itself obliges the prosecutor to disclose substantial exculpatory evidence in his possession to the grand jury. Instead, building on our statement that the federal courts ``may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress," *United States* v. *Hasting*, 461 U. S. 499, 505 (1983), he argues that imposition of the Tenth Circuit's disclosure rule is supported by the courts' ``supervisory power." We think not. *Hasting*, and the cases that rely upon the principle it expresses, deal strictly with the courts' power to control their *own* procedures. See, *e.g.*, *Jencks* v. *United States*, 353 U. S. 657, 667–668 (1957); *McNabb* v. *United States*, 318 U. S. 332 (1943). That power has been applied not only to improve the truth-finding process of the trial, see, *e. g.*, *Mesarosh* v. *United States*, 352 U. S. 1, 9–14 (1956), but also to prevent parties from reaping benefit or incurring harm from violations of substantive or procedural rules (imposed by the Constitution or laws) governing matters apart from the trial itself, see, *e.g.*, *Weeks* v. *United States*, 232 U. S. 383 (1914). Thus, *Bank of Nova Scotia* v. *United States*, 487 U. S. 250 (1988), makes clear that the supervisory power can be used to dismiss an indictment because of

misconduct before the grand jury, at least where that misconduct amounts to a violation of one of those ``few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions,'' *United States* v. *Mechanik*, 475 U. S. 66, 74 (1986) (O'CONNOR, J., concurring in judgment).[6]

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

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[6]Rule 6 of the Federal Rules of Criminal Procedure contains a number of such rules, providing, for example, that ``no person other than the jurors may be present while the grand jury is deliberating or voting,'' Rule 6(d), and placing strict controls on disclosure of ``matters occurring before the grand jury,'' Rule 6(e); see generally *United States* v. *Sells Engineering, Inc.*, 463 U. S. 418 (1983). Additional standards of behavior for prosecutors (and others) are set forth in the United States Code. See 18 U. S. C. §§6002, 6003 (setting forth procedures for granting a witness immunity from prosecution); § 1623 (criminalizing false declarations before grand jury); § 2515 (prohibiting grand jury use of unlawfully intercepted wire or oral communications); § 1622 (criminalizing subornation of perjury). That some of the misconduct alleged in *Bank of Nova Scotia* v. *United States*, 487 U. S. 250 (1988), was not specifically proscribed by Rule, statute, or the Constitution does not make the case stand for a judicially prescribable grand jury code, as the dissent suggests, see *post*, at 10–11. All of the allegations of violation were dismissed by the Court—without considering their validity in law—for failure to meet *Nova Scotia*'s dismissal standard. See *Bank of Nova Scotia*, *supra*, at 261.

A

``[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 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).

The grand jury's functional independence from the judicial branch is evident both in the scope of its power to investigate criminal wrongdoing, and in the manner in which that power is exercised. ``Unlike [a] [c]ourt, whose jurisdiction is predicated upon a specific case or controversy, the grand jury `can investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not.' '' *United States* v. *R. Enterprises*, 498

U. S. ___, ___ (1991) (slip op. 4) (quoting *United States* v. *Morton Salt Co.*, 338 U. S. 632, 642–643 (1950)). It need not identify the offender it suspects, or even ``the precise nature of the offense'' it is investigating. *Blair* v. *United States*, 250 U. S. 273, 282 (1919). The grand jury requires no authorization from its constituting court to initiate an investigation, see *Hale*, *supra*, at 59–60, 65, nor does the prosecutor require leave of court to seek a grand jury indictment. And in its day-to-day functioning, the grand jury generally operates without the interference of a presiding judge. See *Calandra*, *supra*, at 343. It swears in its own witnesses, Fed. Rule Crim. Proc. 6(c), and deliberates in total secrecy, see *United States* v. *Sells Engineering, Inc.*, 463 U. S., at 424–425.

True, the grand jury cannot compel the appearance of witnesses and the production of evidence, and must appeal to the court when such compulsion is required. See, *e.g.*, *Brown* v. *United States*, 359 U. S. 41, 49 (1959). And the court will refuse to lend its assistance when the compulsion the grand jury seeks would override rights accorded by the Constitution, see, *e.g.*, *Gravel* v. *United States*, 408 U. S. 606 (1972) (grand jury subpoena effectively qualified by order limiting questioning so as to preserve Speech or Debate Clause immunity), or even testimonial privileges recognized by the common law, see *In re Grand Jury Investigation of Hugle*, 754 F. 2d 863 (CA9 1985) (same with respect to privilege for confidential marital communications) (opinion of Kennedy, J.). Even in this setting, however, we have insisted that the grand jury remain ``free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it.'' *United States* v. *Dionisio*, 410 U. S. 1, 17–18 (1973). Recognizing this tradition of independence, we have said that the Fifth Amendment's ``constitutional guarantee *presupposes* an investigative body `acting independently of either prosecut-

ing attorney *or judge*'. . . ." *Id.*, at 16 (emphasis added) (quoting *Stirone*, *supra*, at 218).

No doubt in view of the grand jury proceeding's status as other than a constituent element of a "criminal prosecutio[n]," U. S. Const., Amdt. VI, we have said that certain constitutional protections afforded defendants in criminal proceedings have no application before that body. The Double Jeopardy Clause of the Fifth Amendment does not bar a grand jury from returning an indictment when a prior grand jury has refused to do so. See *Ex parte United States*, 287 U. S. 241, 250–251 (1932); *United States* v. *Thompson*, 251 U. S. 407, 413–415 (1920). We have twice suggested, though not held, that the Sixth Amendment right to counsel does not attach when an individual is summoned to appear before a grand jury, even if he is the subject of the investigation. See *United States* v. *Mandujano*, 425 U. S. 564, 581 (1976) (plurality opinion); *In re Groban*, 352 U. S. 330, 333 (1957); see also Fed. Rule Crim. Proc. 6(d). And although ``the grand jury may not force a witness to answer questions in violation of [the Fifth Amendment's] constitutional guarantee" against self-incrimination, *Calandra*, *supra*, at 346 (citing *Kastigar* v. *United States*, 406 U. S. 441 (1972)), our cases suggest that an indictment obtained through the use of evidence previously obtained in violation of the privilege against self-incrimination ``is nevertheless valid." *Calandra*, *supra*, at 346; see *Lawn* v. *United States*, 355 U. S. 339, 348–350 (1958); *United States* v. *Blue*, 384 U. S. 251, 255, n. 3 (1966).

Given the grand jury's operational separateness from its constituting court, it should come as no surprise that we have been reluctant to invoke the judicial supervisory power as a basis for prescribing modes of grand jury procedure. Over the years, we have received many requests to exercise supervision over the grand jury's evidence-taking process, but we have refused them all, including some more appealing than the one presented

today. In *Calandra* v. *United States*, *supra*, a grand jury witness faced questions that were allegedly based upon physical evidence the Government had obtained through a violation of the Fourth Amendment; we rejected the proposal that the exclusionary rule be extended to grand jury proceedings, because of ``the potential injury to the historic role and functions of the grand jury." 414 U. S., at 349. In *Costello* v. *United States*, 350 U. S. 359 (1956), we declined to enforce the hearsay rule in grand jury proceedings, since that ``would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules." *Id.*, at 364.

These authorities suggest that any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings. See *United States* v. *Chanen*, 549 F. 2d, at 1313. It certainly would not permit judicial reshaping of the grand jury institution, substantially altering the traditional relationships between the prosecutor, the constituting court, and the grand jury itself. Cf., *e.g.*, *United States* v. *Payner*, 447 U. S. 727, 736 (1980) (supervisory power may not be applied to permit defendant to invoke third party's Fourth Amendment rights); see generally Beale, Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts, 84 Colum. L. Rev. 1433, 1490–1494, 1522 (1984). As we proceed to discuss, that would be the consequence of the proposed rule here.

B

Respondent argues that the Court of Appeals' rule can be justified as a sort of Fifth Amendment ``common law," a necessary means of assuring the constitutional right to the judgment ``of an independent and informed grand jury," *Wood* v. *Georgia*, 370 U. S. 375, 390 (1962). Brief for Respondent 27. Respondent makes a generalized appeal to

functional notions: Judicial supervision of the quantity and quality of the evidence relied upon by the grand jury plainly facilitates, he says, the grand jury's performance of its twin historical responsibilities, *i. e.*, bringing to trial those who may be justly accused and shielding the innocent from unfounded accusation and prosecution. See, *e. g.*, *Stirone* v. *United States*, 361 U. S., at 218, n. 3. We do not agree. The rule would neither preserve nor enhance the traditional functioning of the institution that the Fifth Amendment demands. To the contrary, requiring the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body.

It is axiomatic that the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge. See *United States* v. *Calandra*, 414 U. S., at 343. That has always been so; and to make the assessment it has always been thought sufficient to hear only the prosecutor's side. As Blackstone described the prevailing practice in 18th-century England, the grand jury was ``only to hear evidence on behalf of the prosecution[,] for the finding of an indictment is only in the nature of an enquiry or accusation, which is afterwards to be tried and determined." 4 W. Blackstone, Commentaries 300 (1769); see also 2 M. Hale, Pleas of the Crown 157 (1st Am. ed. 1847). So also in the United States. According to the description of an early American court, three years before the Fifth Amendment was ratified, it is the grand jury's function not ``to enquire . . . upon what foundation [the charge may be] denied," or otherwise to try the suspect's defenses, but only to examine ``upon what foundation [the charge] is made" by the prosecutor. *Respublica* v. *Shaffer*, 1 Dall. 236 (Philadelphia Oyer and Terminer 1788); see also F. Wharton, Criminal Pleading and Practice § 360, pp. 248–249 (8th ed. 1880). As a consequence, neither in this country nor in England has the suspect under investigation by the grand jury ever been thought to

have a right to testify, or to have exculpatory evidence presented. See 2 Hale, *supra*, at 157; *United States ex rel. McCann* v. *Thompson*, 144 F. 2d 604, 605–606 (CA2), cert. denied, 323 U. S. 790 (1944).

Imposing upon the prosecutor a legal obligation to present exculpatory evidence in his possession would be incompatible with this system. If a ``balanced'' assessment of the entire matter is the objective, surely the first thing to be done—rather than requiring the prosecutor to say what he knows in defense of the target of the investigation—is to entitle the target to tender his own defense. To require the former while denying (as we do) the latter would be quite absurd. It would also be quite pointless, since it would merely invite the target to circumnavigate the system by delivering his exculpatory evidence to the prosecutor, whereupon it would *have* to be passed on to the grand jury—unless the prosecutor is willing to take the chance that a court will not deem the evidence important enough to qualify for mandatory disclosure.[7] See, *e. g.*, *United States* v. *Law Firm of Zimmerman & Schwartz, P.C.*, 738 F. Supp. 407, 411 (Colo. 1990) (duty to disclose exculpatory evidence held satisfied when prosecution tendered to the grand jury defense-provided exhibits, testimony, and explanations of the governing law), aff'd *sub nom. United States* v. *Brown*, 943 F. 2d 1246, 1257 (CA10 1991).

Respondent acknowledges (as he must) that the "common law" of the grand jury is not violated if the *grand jury itself* chooses to hear no more evidence than that which suffices

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[7]How much of a gamble that is, is illustrated by the Court of Appeals' opinion in the present case. Though the court purported to be applying the ``substantial exculpatory'' standard set forth in its prior *Page* decision, see 899 F. 2d, at 900, portions of the opinion recite a much more inclusive standard. See *id.*, at 902 (``[T]he grand jury must receive any information that is relevant to any reasonable [exculpatory] theory it may adopt''); *ibid.* (``We conclude, therefore, that the district court was not clearly in error when it found that the deposition testimony was exculpatory'').

to convince it an indictment is proper. Cf. *Thompson*, *supra*, at 607. Thus, had the Government offered to familiarize the grand jury in this case with the five boxes of financial statements and deposition testimony alleged to contain exculpatory information, and had the grand jury rejected the offer as pointless, respondent would presumably agree that the resulting indictment would have been valid. Respondent insists, however, that courts must require the modern prosecutor to alert the grand jury to the nature and extent of the available exculpatory evidence, because otherwise the grand jury ``merely functions as an arm of the prosecution.'' Brief for Respondent 27. We reject the attempt to convert a nonexistent duty of the grand jury itself into an obligation of the prosecutor. The authority of the prosecutor to seek an indictment has long been understood to be ``coterminous with the authority of the grand jury to entertain [the prosecutor's] charges.'' *United States* v. *Thompson*, 251 U. S. 407, 414 (1920). If the grand jury has no obligation to consider all ``substantial exculpatory'' evidence, we do not understand how the prosecutor can be said to have a binding obligation to present it.

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

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

> whether there was a deficiency in respect to any part of the complaint . . . ." *United States* v. *Reed*, 27 Fed. Cas. 727, 738 (No. 16,134) (CCNDNY 1852).

We accepted Justice Nelson's description in *Costello* v. *United States*, 350 U. S. 359 (1956), where we held that ``it would run counter to the whole history of the grand jury institution'' to permit an indictment to be challenged ``on the ground that there was incompetent or inadequate evidence before the grand jury.'' *Id.*, at 363–364. And we reaffirmed this principle recently in *Bank of Nova Scotia*, where we held that ``the mere fact that evidence itself is unreliable is not sufficient to require a dismissal of the indictment,'' and that ``a challenge to the reliability or competence of the evidence presented to the grand jury'' will not be heard. 487 U. S., at 261. It would make little sense, we think, to abstain from reviewing the evidentiary support for the grand jury's judgment while scrutinizing the sufficiency of the prosecutor's presentation. A complaint about the quality or adequacy of the evidence can always be recast as a complaint that the prosecutor's presentation was ``incomplete'' or ``misleading.''[8] Our words in *Costello* bear repeating: Review of facially valid indictments on such grounds ``would run counter to the whole history of the grand jury institution[,] [and] [n]either justice nor the concept of a fair trial requires [it].'' 350 U. S., at 364.

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[8]In *Costello*, for example, instead of complaining about the grand jury's *reliance* upon hearsay evidence the petitioner could have complained about the prosecutor's *introduction* of it. See, *e. g.*, *United States* v. *Estepa*, 471 F. 2d 1132, 1136–1137 (CA2 1972) (prosecutor should not introduce hearsay evidence before grand jury when direct evidence is available); see also Arenella, Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication, 78 Mich. L. Rev. 463, 540 (1980) (``[S]ome federal courts have cautiously begun to . . . us[e] a revitalized prosecutorial misconduct doctrine to circumvent *Costello*'s prohibition against directly evaluating the sufficiency of the evidence presented to the grand jury'').

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

So ordered.