

proceedings, with the result that a witness called before a grand jury may be questioned on the basis of knowledge obtained through the use of illegally seized evidence.<sup>6</sup> In thus allowing the use of evidence obtained in violation of the Fourth Amendment, the Court nonetheless restated the principle that, although free of many rules of evidence that bind trial courts, grand juries are not unrestrained by constitutional consideration.<sup>7</sup> A witness called before a grand jury is not entitled to be informed that he may be indicted

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emphasizing the point of institution of criminal proceedings, relevant to the right of counsel at line-ups and the like, the Chief Justice not only reasserted the absence of a right to counsel in the room but also, despite his having referred to it, cast doubt upon the existence of any constitutional requirement that a grand jury witness be permitted to consult with counsel out of the room, and, further, raised the implication that a witness or putative defendant unable to afford counsel would have no right to appointed counsel. Concurring, Justice Brennan argued that access to counsel was essential and constitutionally required for the protection of constitutional rights; Brennan accepted the likelihood, without agreeing, that consultation outside the room would be adequate to preserve a witness' rights, *id.* at 602–09 (with Justice Marshall). Justices Stewart and Blackmun reserved judgment. *Id.* at 609. The dispute appears ripe for revisiting.

<sup>6</sup> *United States v. Calandra*, 414 U.S. 338 (1974). The Court has interpreted a provision of federal wiretap law, 18 U.S.C. § 2515, to prohibit use of unlawful wiretap information as a basis for questioning witnesses before grand juries. *Gelbard v. United States*, 408 U.S. 41 (1972).

<sup>7</sup> “Of course, the grand jury’s subpoena power is not unlimited. It may consider incompetent evidence, but it may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law. . . . Although, for example, an indictment based on evidence obtained in violation of a defendant’s Fifth Amendment privilege is nevertheless valid . . . , the grand jury may not force a witness to answer questions in violation of that constitutional guarantee. . . . Similarly, a grand jury may not compel a person to produce books and papers that would incriminate him. . . . The grand jury is also without power to invade a legitimate privacy interest protected by the Fourth Amendment. A grand jury’s subpoena *duces tecum* will be disallowed if it is ‘far too sweeping in its terms to be regarded as reasonable’ under the Fourth Amendment. *Hale v. Henkel*, 201 U.S. 43, 76 (1906). Judicial supervision is properly exercised in such cases to prevent the wrong before it occurs.” *United States v. Calandra*, 414 U.S. 338, 346 (1974). *See also* *United States v. Dionisio*, 410 U.S. 1, 11–12 (1973). Grand juries must operate within the limits of the First Amendment and may not harass the exercise of speech and press rights. *Branzburg v. Hayes*, 408 U.S. 665, 707–08 (1972). Protection of Fourth Amendment interests is as extensive before the grand jury as before any investigative officers, *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); *Hale v. Henkel*, 201 U.S. 43, 76–77 (1906), but not more so either. *United States v. Dionisio*, 410 U.S. 1 (1973) (subpoena to give voice exemplars); *United States v. Mara*, 410 U.S. 19 (1973) (handwriting exemplars). The Fifth Amendment’s Self-Incrimination Clause must be respected. *Blau v. United States*, 340 U.S. 159 (1950); *Hoffman v. United States*, 341 U.S. 479 (1951). On common-law privileges, *see* *Blau v. United States*, 340 U.S. 332 (1951) (husband-wife privilege); *Alexander v. United States*, 138 U.S. 353 (1891) (attorney-client privilege). The traditional secrecy of grand jury proceedings has been relaxed a degree to permit a limited discovery of testimony. *Compare* *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959), *with* *Dennis v. United States*, 384 U.S. 855 (1966). *See* Fed. R. Crim. P. 6(e) (secrecy requirements and exceptions).