SENATE JUDICIARY COMMITTEE

MINUTES OF MEETING HELD

6th DAY OF MARCH, 1973

The meeting was called to order at 9:15 a.m. Senator Close in the Chair.

PRESENT:
Senator Foley
Senator Bryan
Senator Dodge
Senator Hecht
Senator Swobe
Senator Wilson
Robert List, Attorney General
Senator Bill Raggio
Mr. William Neely, Student of the University of Nevada, and Legislative Intern to Senator Dodge
Mr. Donald Wadsworth, Assistant District Attorney, Clark County
Mr. Tom Beatty, Public Defender, Clark County
Mrs. Thel, Dondero, Member of Clark County Grand Jury
Mr. Mike Fondi, Carson City District Attorney
Mr. Albert Johns, University of Nevada, Las Vegas
Senator Joe Neal

S.B. 244 - Provides for random selection of grand jurors by county clerk or jury commissioners.

Robert List: This subject has occupied my mind in the past and was discussed at length with a law enforcement group consisting of District Attorneys, sherrifs, and police chiefs. The consensus of the group was that modification of the grand jury selection system, at least, is necessary. It was the opinion among law enforcement officers that the so-called "blue ribbon" or politically selected process does not lend itself to objective inquiry in certain investigations of county institutions or operations. For that reason, a unanimous consensus exists that a reform is necessary. We have discussed 3 or 4 different types of reform but could not specifically agree on any one.

I call the committee's attention to an article in the Criminal Law Quarterly of 1964, containing an authoritative and thoughtful inquiry and summarization of the grand jury selection process throughout the states. The method of selection used by the majority of the states was to draw names by lot from such lists as tax rolls or voter registration lists. The second method was selection by officials who may exercise discretion. This method of hand-picking

jurors was only used by 8 states, of which Nevada is one. A third method, which was only used in the two states of Colorado and Nebraska, was to randomly draw from a lot of 30 or 40 and then use discretion in the final selection of 17 jurors. This would leave some advantage of being able to pick jurors with some expertise.

Senator Wilson asked Mr. List how far the U. S. Supreme Court has gone in mandating what can and cannot be done in selection of grand jury members. Mr. List replied that they have not thrown out a system such as Nevada's, which is as challengable as any. The Nevada Supreme Court found our system is constitutional and there is no law at the present time which states that a hand-picked, blue-ribbon grand jury which does not represent a cross section of the community returning indictments is, in fact, violating constitutional principles. I do believe that it is exposed to being stricen as unconstitutional. This has been borne out through discussion with at least one member of our Supreme Court and the policy decision is certainly a compelling one.

Mr. List pointed out that a bill before the Assembly (A.B. 291) concerns him in that Section 4 provides for each district court to place into operation its own plan of random selection. Having 17 different plans within the state would be inconsistent. The bill before the Senate, S.B. 244, is free of such flaws and he, personally, would be happy with it. However, in the event the committee wants to work with a compromise bill, perhaps they should consider amending S.B. 244 in some accord with the methods used in Nebraska and Colorado.

Senator Dodge asked Mr. List if he had considered and discussed a biforcated system of one indictment panel and one civil or investigative panel. Mr. List replied that he had discussed this concept and it seemed to him that it would resolve, in effect, the criminal jurisdiction aspect of the grand jury satisfactorily, but would still leave the same evils in terms of civil investigation since evils do result, in some instances, in the investigations themselves. With a political investigating panel the issue might never be referred to the criminal panel and wondered what would be solved by having a hand-picked grand jury investigating county institutions and county officials over which the selectors have an interest.

Another problem with biforcated juries, especially in the smaller counties, would be the expense involved. Some of the smaller counties have a problem in paying the fees for one jury, and when they are able to financially empower a grand jury, they should have both criminal and civil powers. A material extension of this concept of biforcation would be to consider it for the 2 larger counties. Generally there are some advantages to this concept, but he

felt that the expense and duplication of the process overrides the advantages in terms of ultimate conclusion.

Senator Bryan remarked that there has been some concern that a randomly selected jury might not have the expertise available that a hand-picked panel would have. He asked Mr. List if he didn't think that the randomly selected panel, with the present authority to retain their own counsel and any specialized services they might need, could adequately perform. Mr. List replied that they could perform adequately, but it becomes a question of money since the county would have to pay the experts to come in which could be very expensive in a long-running investigation.

Senator Foley asked Mr. List if, continuing to empower one grand jury with both functions of indictment and investigation, more laws were enacted which required disclosure by public officials, there wouldn't be less abuse to ferret out and more direction to the inquiries.

Mr. List replied that could be true, assuming the disclosure laws are complied with. Grand juries receive many more reports of conflicts or meddling in private matters by public officials than are reported to elected officials. A person who feared going to an elected official should feel free to go to the grand jury or one of its members.

Senator Raggio: I am not appearing in furtherance or opposition of any bills being considered, but only to offer some input to the deliberations since I have dealt with grand juries as much as any other individual in the state, and do have very strong convictions of the process as a result of my experience.

I have had occasion to study the grand jury system throughout the United States and concluded that our development of the system is very unique. Throughout the several states, and the federal system, most grand juries are limited to a charging function of returning an indictment. In the federal system, indictments are returned without regard to the legal requirements of a preliminary examination or trial and hearsay evidence is admissible.

The same theory of a grand jury not determining guilt or innocense, but being a charging body as is a District Attorney or someone filing a criminal prosecution, has followed into Nevada law. However, because of the Supreme Court decisions in this area, we have built into our system a unique requirement, which is a great safeguard, that the grand jury can only be presented admissible

evidence in the course of their deliberations. Hearsay is not admissible, and this is strictly adhered to because we provide the defendant, if charged, with a transcript. The defendant may challenge the sufficiency of the evidence the same as he could before a court in a preliminary hearing. This is also unique to other states' systems because of the traditional mode of secrecy in grand juries.

Again, unlike other states, our grand jury also has an additional function. Our law presently provides for the investigative authority of a grand jury, but we go beyond that to allow and grant a reportorial power. That power is defined very clearly in a U. S. Supreme Court decision and the Supreme Court has put safeguards on that power which are excellent. A grand jury may report on the investigation within its authority, however, may not accuse anyone of a crime without indicting the person accused. That is a safeguard that is important and very cautiously observed by the grand juries.

I don't believe we need a biforcated system. There will be political abuse whether a random selection system is developed or not and, in fact, a random system might be more tampered with. When I first became involved with the grand jury, they were selected by the courts on the theory that the grand jury is an arm of the court. I objected to the change of procedure, where the grand jury is selected by the county commissioners and one judge, because I felt it eroded this historical genises of the grand jury as an arm of the court. Grand juries are limited, in that they cannot investigate the court. If judges pick grand juries it does discard the argument that county commissioners, who are subject to investigative authority, have some manner of influencing who is chosen. I would suggest going back to the system of selecting jurors by the court, yet that, nor any other method, would do away with abuse altogether.

There has always been a concerted effort, both by judges and more recently by county commissioners, to see that a wide cross-section of social, economic, geographical interests were represented. We always sought to have representatives of labor, industry, financial institutions, womens' groups, and minorities represented. Rather than throwing away the whole system, a requirement for this type of representation could be written into the law.

Having dealt with petty juries in the field of law and so-called "blue ribbon" grand juries, I would have to say that the so-called "blue ribbon" system is more productive and more able to meet the peculiar authority and additional authority that is given to grand juries in this state.

I strongly believe in the protracted retention of the grand jury. In my experience, I have found it necessary and invaluable to keep the grand jury in session for longer periods of time. They were able to recall matters from years before and act on them and the recommendations made.

Senator Foley asked Senator Raggio if there was a stigma attached to those persons called to testify before a grand jury. Senator Raggio felt that the stigma would not attach because the person is called, but would be a latent stigma the person himself created.

Chairman Close remarked that in the larger counties where there are multiple judges a system of selection by the court would work, but what would happen in the smaller counties. Senator Wilson suggested creating multi-county grand juries in the smaller counties which would resolve the financial problem and the problem of a judge stacking a grand jury. Senator Raggio agreed that in the smaller counties there is not the need for frequent meeting and a multi-county grand jury would be helpful.

Bill Neely: I am not prepared to report specifically on any bills that might come before the committee, but have researched the legal thinking contained in several law journals, the general view of the grand jury system and problems that legal scholars see with the grand jury system.

There seems to be some uneasiness with the dual role of the grand jury of indicting and investigating. The processes, procedures, and safeguards that may be appropriate to one function may not be appropriate to the other. From that objection comes the recommendation of random selections in all cases and a biforcated system.

Another problem is the merging of traditional separated power within the grand jury system. Where the grand jury was historically supposed to be a tool of the court, it too often becomes a tool of the executive through the dominance of the prosecutor. How to retain the grand jury as a tool of the court rather than the executive has always been a problem.

Another problem area is the protection of the First and Fifth Amendment rights, particularly the problem which has arisen in the federal system through use of immunity to prosecution. The First Amendment rights have been abbrogated, to some extent.

Another problem is improper presentment, or better termed, reports without indictments or damaging reports.

Still another problem is the mobile use of several grand juries in one case, where an indictment is sought and not gotten, so the case is taken to another grand jury and the same indictment is sought again. This does not seem to be much of a problem in Nevada.

The suggested solutions to these problems sometimes apply to a number of problems, and some only apply to one.

A separate investigatory and indicting panel, or a biforcated system, has been adopted in a few jurisdictions. This is an easy solution in some cases because it permits different selection processes for the two different panels, and also allows different safeguards. As to whether it is practical, particularly for small jurisdictions, is another question. One recent Supreme Court case, Caldwell v United States 1971, did suggest that the indicting function needs to be held separate within one grand jury system or a biforcated system, and even implies that certain safeguards need to be instituted in grand jury processes when it is performing an indicting function. Those safeguards are the right to counsel, cross examination, and right for someone likely to become a defendant to introduce evidence on his own behalf.

In the case of use of immunity to abbrogate the First Amendment rights, it has been suggested that legislatures should act to carefully limit the power of the grand jury to not give immunity to prosecution. It has been felt that in the federal grand jury system, the right of the grand jury to compel testimony may have been used more to stifle expression under the First Amendment than to secure indictments.

Another suggested solution, which I think has been partly accomplished in Nevada, is the right of the defendant or future defendant to full information as to the grand jury proceedings.

Finally, the most controversial issue is what to do about the legitimate investigations of the grand juries coming up with reports that are short of assertions of criminal action. Several scholars suggested that if the investigation does not reveal probable cause for indictment, that the reports should not be made public. I am not advocating that course of action, but it does point out that nationally there have been problems with grand juries taking sweeping general looks, which tend to assassinate characters without the person having recourse.

Senator Bryan asked Mr. Neely if he heard any discussion as to the legal position of a grand jury who makes inference to wrong-doing, but does not indict, and if they are exposed to libel suits. Mr.

Neely replied that there is a bill before the California legislature which would remove the immunity from libel in reports which do not result in indictments.

Don Wadsworth: I am in complete accord with Senator Raggio. The Washoe County District Attorney's office feels that any major revamping would be detrimental to the state and the system, and would not be advantageous to any jurisdiction.

The criticism of grand juries in other states is not relevant to our system because of the uniqueness and safeguards that have been developed in our system, as mentioned by Senator Raggio.

Senator Dodge asked Mr. Wadsworth to what extent he used the grand jury in relation to preliminary hearings. Mr. Wadsworth replied that he normally relies on preliminary hearings and uses the grand jury for an indictment only about once a week; however, he is able to present as many as 50 indictments for sale of narcotics in one session. Also multiple witness cases which would cost considerable time and money in justice court, can be presented to the grand jury easier and still afford the accused his constitutional rights.

We feel basically the grand jury system is a good one as it is now. The primary concern is the public confidence in selection of the grand jury. We are not in favor of random selection because it is difficult now to get people who are able and willing to serve on grand juries. They have their own committees for various aspects of their duties, as well as listening to criminal prosecution. Their duties are time consuming and they spend a full day each week in the present system, as well as time out of the grand jury room. It is hard to find, in random selection, people who can devote this much time.

The main criticism of the "blue-ribbon" selection method is the political atmosphere that embodies that selection. Our office, in accord with Senator Raggio's testimony, suggests that the ten district judges in Clark County each select five names of persons who are willing and qualified to serve, and then select the seventeen jurors from those names, at random. This would provide representation for a greater cross-section of the community, insure the needed expertise, and return the public confidence back in the selection system.

Senator Bryan remarked that the same objection that now exists could apply to district court judges, since they are required to run for office, and many times have spirited campaigns. Mr. Wadsworth replied that most judges have tenure and run unopposed, and in other cases are not involved in the same level of politics as other elected officials.

Senator Bryan then asked Mr. Wadsworth if the "grass roots" jury, which was convened in 1965, didn't function as well as the "blue-ribbon" juries. Mr. Wadsworth replied that he had spoken with the District Attorney in office at that time and he felt that, even though the "grass roots" jury did function, the present system is much superior. There is a problem in getting down to the final selection after going through any number of selections before you get a final panel, and a problem of getting people with the expertise that is necessary to perform the mandatory investigatory functions of grand jurors.

Tom Beatty: In regard to prior remarks made, I would like to make the following comments. Mr. Neely referred to an article in the Criminal Law Review regarding the right to counsel in grand jury proceedings. The thrust of that article is that the indictment stage of grand juries is a critical stage of criminal investigation at which point a defense attorney is needed. I'd like to point out that the United States Supreme Court doesn't seem to have a tendency to cut away at the grand jury in all respects.

Senator Dodge referred to a bill in the California legislature which would set up a biforcated system. The present California system is to have the judges select the jury. The thrust of the Pacific Law Review article about the grand jury system is that their system is constitutionally defective because it does not represent a cross-section of the community

It is clear in the law in this country, that in order to select jurors for a criminal or accusatory grand jury, the standard is identical as that for the selection of a petty jury. A Supreme Court case in 1946 determined standards for federal grand juries which are equally applicable to states. It said that the American tradition of trial by jury indicates representation of a cross section of the community. That does not mean that every jury must contain a representative of all economic, social, religious, racial, political, and geographic groups in the community. It does mean that jurors be selected by court officials without systematic and intentional exclusion of these groups.

There are two statutes in Nevada which were not mentioned this morning. A provision in Chapter 199 provides that it is a crime for either a person to solicit directly or indirectly for the opportunity to sit as a grand juror, and also a gross misdemeanor for any official to put a person on a grand jury as a result of solicitation either directly or indirectly. That amounts to an earlier statement by the legislature on the important points to remember in selecting grand jurors.

Some improvements can be made in our present system. One area is the instruction that the grand jury receives. Better than requiring the judge to instruct, perhaps a document can be prepared by the Legislative Counsel or by statute specifically spelling out the duties of grand jurors, spelling out the difficulties that might arrive, and formulation of ethical standards.

Another area of improvement is the problem of reporting all remarks made during grand jury deliberations. There was a problem in Clark County where the court reporter did not put all the remarks into the record and had to petition and file a new transcript.

Perhaps we could strengthen our system by strengthening our provisions for the grand jury to obtain their own legal counsel and skilled help in making investigations. Our provision now requires the approval of the board of county commissioners.

The greatest area wherein the grand jury system can be strengthened is in the selection system. It is settled, at least in the field of criminal indictments, the selection must represent a cross-section of the community. This bill, S.B. 244, would go a long way to eliminate the problems in our present system, where a complete cross section is not represented. I am sure it is quite true that no system of selection will ever be completely free from the potential for abuse.

The article previously mentioned from California, does intimate that the method of having Distict Judges select the jurors does not necessarily meet the constitutional muster. The reason is that it is difficult to say that any individual or group could reach into every segment of the community.

Thel Dondero: I didn't intend to comment on this bill, but since I have served as Secretary to the Grand Jury in Las Vegas for the last year, I wanted to lend what expertise I had to the discussion. The duties of a grand juror involves a lot of time, sometimes as much as three days a week.

As far as the method of selection is concerned, I defy anyone to get a better cross-section of people than we presently have in our grand jury.

No one knows the protection that is afforded to the accused person, or the abuse that is taken by the grand jury. I felt proud of being chosen to serve, but don't feel that way now because of the criticism being leveled against us.

I do feel that grand jury members should serve continuously if necessary. I have served over a year, and am presently working on some reports that are not finished.

It is very difficult for a lay person who doesn't know the law. We have to depend and make a judgment from what is presented to us. I think the fairness dealt out in that group has been very good.

Senator Hecht remarked that it has been alluded to that grand jury hearings are one-sided affairs. All input presented is to charge the accused, the other side is not presented.

Mrs. Dondero replied that this frustrated her in the beginning, then she realized that the accused do have another opportunity to defend their position in District Court, since the grand jury only finds probable cause.

Mike Fondi: I am here at the request of Bob Rose who could not be present today. Representing the Nevada District Attorneys' Association, he indicated that it is their position the selection process should be changed. We have not come up with a solution among all of us as to how it should be changed. The alternatives are random selection, judicial selection, and a biforcated system. Among all of us we tend to disagree on which is the better alternative.

I personally feel that consideration should be given to a combination of the first two: Random selection at first, and then judicial inquiry into the members selected in that method.

We had a classical grand jury which was investigating the Improvement District in Carson City. While performing that function, there was an attempted prison escape of a serious nature so the grand jury's function was expanded to accusatory, as well as investigatory. Witnesses were run before the grand jury, and an indictment was obtained. The defense counsel filed particular motions which the District Court Judge granted, saying that since it was a "blue-ribbon" grand jury the indictment was not supported. I have relayed this experience to you because even though we may not have any case law on this issue, the local judges are interpreting the United States Supreme Court decision in this way. We have also had an indication from Mr. List that at least one Nevada Supreme Court Justice feels that our system could be unconstitutional. We are standing a chance of having indictments over-turned, we would lose witnesses and the whole process would deteriorate.

It is hard to discern between the accusatory and investigatory stage. How do we weed out which material you can use to indict? When a criminal offense is discovered during the course of an investigation, the point at which the focus changes is not very clear. When that happens, it is better to abandon the grand jury for the purpose of bringing an indictment and pursue it through Justice Court. As a practical matter, it is difficult to dissuade the grand jury from bringing an indictment when they decide to do so, after discovering a criminal offense.

Senator Dodge asked Mr. Fondi if reforming the law to offer some safeguards would improve the grand juries as a tool for getting indictments. Mr. Fondi replied that it could improve it. Presently there is a close relationship between the prosecutor and the grand jury. Frequently the jurors act solely on his advice and bring an indictment when they should not, or not bring one when perhaps they should.

Chairman Close excused the witnesses & thanked them for their testimony.

S.J.R. 13 - Proposes constitutional amendment to make certain elective offices appointive.

Senator Neal asked Dr. John Albert to testify before the committee on the concept of S.J.R. 13. Dr. Johns testified on the problems of the executive branch and the tendency to fragment power among the executive branch.

Historically, we are still living with the problem of King George III, in fear of executive power. Recently there have been movements to give the people more power through a number of amendments concerning the right to vote. There is a counter-veiling movement in terms of trying to lead people to vote for meaningful things and shorten the ballot. Nevada's is the longest ballot of any state. Recently we have removed some of the elective officials from the ballot and have not lost anything in shortening the ballots in those areas.

This nation has become an urban nation and the public has no real ability to have technical information on the election of sheriffs and district attorneys. This Resolution proposed, would bring Nevada into the 20th century from the standpoint of the executive branch. The federal system is run in this way and there is no breakdown in the American system because of these appointive powers, and instead have been able to place responsibility in one branch of government.

It is a handicap for the Governor to have to deal with an Attorney General of another party. It would be an advancement to the democratic process to shorten the ballot and it would eliminate many candidates running around looking for backers and money with which to run.

The minutes of the meetings of February 23rd, 24th, 26th, 27th, 28th, March 1st, 2nd, and 5th were approved.

The meeting adjourned at 11:00 a.m.

Respectfully submitted,

Eileen Wynkoop
Secretary

APPROVED:

Melvin D. Close, Jr., Chairman