

THE TESTIMONY OF THADDEUS HOFFMEISTER
BEFORE THE OHIO CONSTITUTION MODERNIZATION COMMISSION
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The right to the grand jury was a critical protection which introduced the conscience of the community into the criminal process and dampened the political power of the prosecutor and the judge. The actual grand jury process, as it currently operates, has lost its independence. Some criticize the grand jury process as nothing more than a rubber-stamp for the prosecutor. Absent restoration of some independence and separation from the prosecutor, the grand jury process remains a costly façade that adds little protection to our criminal justice system.

Because the Supreme Court has never found that the protection of a grand jury applies to prosecutions in state courts, approximately two-thirds of the states use an alternative method of formalizing charges. The preliminary hearing stands in place of the grand jury in most states. Under this approach, the prosecutor files a criminal complaint, setting forth the charges sought, and notifies the accused of the preliminary hearing. As this is a critical stage of the adversarial procedure, the accused has a constitutional right to counsel at the hearing. A judge or magistrate presides over the preliminary hearing. The prosecution presents its evidence through witness testimony. States differ on whether the strict rules of evidence will apply or whether evidence that will be admissible at trial, such as hearsay, will be permitted. Like at trial, the defense has the opportunity to cross-examine witnesses and present its own defense. At the conclusion of the hearing, the judge decides, without considering the weight of the evidence, whether the state has probable cause to proceed with the charges. If probable cause is found, the case is “bound over” for trial.

In contrast to the grand jury process, the preliminary hearing provides a variety of protections to the accused. Because the accused is both present and represented by counsel at the preliminary hearing, the process eliminates the secrecy and risk of misconduct looming over the grand jury. This not only safeguards the process from the potential wrongdoing of the prosecutor, but also provides the defense an opportunity to preview the state's evidence and cross-examine witnesses. A defendant who is bound over for trial will have a better understanding of the case against him, providing some leverage for a plea deal or an advantage in developing a defense. The inexperience and lack of legal education of the grand jurors creates a dangerous dependence upon the biased prosecutor, but the judge presiding over the preliminary hearing is likely to have experience and understanding, possibly restoring independence to the criminal justice process.

There are also disadvantages for the accused in the preliminary hearing process. First, in the states that utilize the preliminary hearing, it is not the exclusive method for filing formal charges in the states (some states in addition to the grand jury allow for direct filing by the prosecutor). If the complaint is dismissed by a judge who finds that probable cause has not been proven, the prosecutor can still present the case to a grand jury or to another judge. The prosecutor also has a choice of venues which can be used strategically to provide a greater chance of formal charges. Also, although the judge is trained and experienced in criminal law, inserting a judge into the process does not provide the same protection as a truly independent, community conscience—like the ideal grand jury. The judge and the prosecutor are both government entities, and they are likely to have a working relationship. It is this strong

possibility of bias or political motives of prosecutors and judges that caused the country's founders to guarantee a right to a grand jury in federal prosecutions.

Other key benefits to the prosecution arising from the preliminary hearing include:

- (a) putting a key prosecution witness to test in public
- (b) promoting the victim's interests in a public forum
- (c) learning the defense's perspective during cross examination of the prosecution's witnesses
- (d) gaining further identification of the suspect
- (e) promoting public confidence in a sensitive prosecutorial decision

Other key disadvantages to the prosecution arising from the preliminary hearing include:

- (a) slowing down the criminal process due to the number of exhibits or witnesses required at a preliminary hearing
- (b) allowing the defense additional discovery
- (c) increasing the number of times a witness may have to testify

Ohio's grand jury process can provide a protection that parallels the guarantee found in the 5th Amendment. This right is one that is not provided for in most state prosecutions, and it should not be disposed of without thoughtful deliberation. While the popular preliminary hearing process creates some new protections for the accused, it cannot deliver the protection contemplated by the constitution—an independent community conscience. Eliminating the

grand jury removes the community from the process entirely. Although the right to the grand jury belongs to the accused, society stands to benefit from community involvement in a fair process in which the grand jury's independence is restored.