

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
FORT WAYNE DIVISION

UNITED STATES OF AMERICA )  
 )  
v. ) Cause No. 1:08-CR-37 WCL  
 )  
JONATHAN N. DILLEY )

MOTION TO DISMISS COUNTS I, II, AND III

Jonathan N. Dilley (“Dilley”), moves this Article III limited office of the Judicial Power of the United States to dismiss United States employee David Capp and Anthony W. Geller’s indictment (“prosecutors” and “indictment”) against Dilley based upon this Article III inferior court completely lacking subject matter jurisdiction over the alleged “place” the acts occurred as well as the place the trial is to be held involving the alleged crimes in Count I, II and III. See 18 U.S.C. § 3231 and Article III, Section 2, Clause 3. Dismissal is also appropriate because the United States of America and its Grand Jury lack standing to charge, return or file their complaint against Dilley in this Court under Article III, Section 2, Clause 1 and 2.

PLACE ALLEGED BY PROSECUTORS AND PURPORTED GRAND JURY

COUNT I

The Article III, Section 2, Clause 3, place the Grand Jury indictment alleges Dilley committed the alleged violation of 18 U.S.C. § 514 in Count I is in the “Northern District of Indiana” and at First Source Bank without any specified location.

COUNT II

The Article III, Section 2, Clause 3, place the Grand Jury indictment alleges Dilley committed the alleged violation of 18 U.S.C. § 514 in Count II is in the “Northern District of Indiana” and at the Internal Revenue Service without any specified location.

### COUNT III

The Article III, Section 2, Clause 3, place the Grand Jury indictment alleges Dilley committed the alleged violation of 18 U.S.C. § 514 in Count III is in the “Northern District of Indiana” and with no other specific location information.

### GOVERNMENT RESPONSE TO BILL OF PARTICULARS

Dilley submitted to the prosecutors a very detailed request in order for the specific place the Grand Jury alleges the three separate crimes alleged against Dilley could be understood by Dilley and help him prepare a defense for these purported Fifth Amendment Grand Jury claims.

The prosecutors’ refuse to address the questions propounded by Dilley regarding the subject matter jurisdiction of this Article III limited office of the Judicial Power of the United State, and its Standing to be a party in the Fifth Amendment Grand Jury claims and instead chose to argue such disclosure is not needed because the prosecutors have provided 151 pages of discovery to Dilley.

The Prosecutors also argued that the Judicial Power of the United States shares concurrently with the Judicial Power of the State of Indiana subject matter jurisdiction. This the Prosecutors will eventually be request to defend against in their personal capacity as these words were uttered knowing the same not to be true.

1. THIS ARTICLE III COURT COMPLETELY LACKS ANY SUBJECT MATTER JURISDICTION OVER THE CLAIMS ADVANCED BY THE PROSECUTORS AND ITS UNCONSTITUTIONAL GRAND JURY

The prosecutors are demanding this Court proceed without any subject matter jurisdiction.

This Court derives its “subject matter jurisdiction” only from Article III.

Article III reads:

Section 1.

(1) The **judicial power** of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2.

(1)The **judicial power** shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

(2) In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

(3) The **trial** of all crimes, except in cases of impeachment, shall be by jury; **and such trial shall be held in the State where the said crimes shall have been committed**; but *when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.*

Section 3.

(1) Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act,

or on confession in open court. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

Article VI of the Constitution of the United States mandates that the "Constitution" is the "supreme Law of the Land" and the Judges in every State shall be bound thereby. See Article VI, § 2 Furthermore, "judicial officers, both of the United States and of the several States shall be bound by Oath or Affirmation, to support this Constitution;" See Article VI, § 3.

"[J]udges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872). This immunity applies to actions brought under 42 U.S.C. § 1983 to recover for alleged deprivation of civil rights. See *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967). The Supreme Court explained:

"If judges were personally liable for erroneous decisions, the resulting avalanche of suits, most of them frivolous but vexatious, would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits. The resulting timidity would be hard to detect or control, and it would manifestly detract from independent and impartial adjudication. . . . Most judicial mistakes or wrongs are open to correction through ordinary mechanisms of review, which are largely free of the harmful side-effects inevitably associated with exposing judges to personal liability." *Forrester v. White*, 484 U.S. 219, 226-27 (1988).

See *Stern v. Mascio*, 262 F.3d 600, 606-607 (6th Cir. 2001)

Because "immunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches," see *Forrester* at 227, judicial immunity has its limits, in the form of two exceptions. "First, a judge is not immune from liability for nonjudicial actions, i.e., actions not taken in the judge's judicial capacity. **Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction.**" *Mireles v. Waco*, 502 U.S. 9, 11-12

(1991) (citations omitted). The district court determined that Judge Mascio's contempt findings and sentences, ostensibly undertaken in the course of adjudicating the Clancey's Bar case, were judicial in nature. Cf. Mireles, 502 U.S. at 12 (a judge's order to apprehend an attorney and bring him before a court is a judicial act); King v. Love, 766 F.2d 962, 966 (6th Cir. 1985) (holding a contempt hearing and issuing a contempt sentence are judicial activities). In Mascio, the 6<sup>th</sup> Circuit stated that the Judge did not exceed his authority, thus what he was claimed to have done was not “undertaken in the ‘complete absence of all jurisdiction.’”

**While the “second recognized exception to judicial immunity allows suits when a judge acted ‘in the complete absence of all jurisdiction,’** simply exceeding the limits of one's jurisdiction will not eliminate immunity, because many courts are courts of limited jurisdiction regularly called upon to resolve unsettled points of law relating to the contours of their own jurisdiction. See Bradley, 80 U.S. at 352. The Supreme Court commented,

A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. **Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible.** But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend. . . . Indeed some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised.

Like other forms of official immunity, judicial immunity is an immunity from suit, not just from ultimate assessment of damages. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). Accordingly, judicial immunity is not overcome by allegations of bad faith or malice, the existence of which

ordinarily cannot be resolved without engaging in discovery and eventual trial. *Pierson v. Ray*, 386 U.S., at 554 ("[I]mmunity applies even when the judge is accused of acting maliciously and corruptly"). See also *Harlow v. Fitzgerald*, 457 U.S. 800, 815-819 (1982) (allegations of malice are insufficient to overcome qualified immunity).

“Rather, our cases make clear that the immunity is overcome in only two sets of circumstances. First, a judge is not immune from liability for nonjudicial actions, i.e., actions not taken in the judge's judicial capacity. *Forrester v. White*, 484 U.S., at 227-229; *Stump v. Sparkman*, 435 U.S., at 360. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction. *Id.*, at 356-357; *Bradley v. Fisher*, 13 Wall., at 351.” See *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991)

“Subject-matter jurisdiction defines the court's authority to hear a given type of case. . . .’ *United States v. Morton*, 467 U.S. 822, 828, 104 S.Ct. 2769, 2773, 81 L.Ed.2d 680 (1984). Congress bestows that authority on lower courts by statute; in this case, Congress has provided the district courts with jurisdiction-`exclusive of the courts of the States'-of` all offenses against the laws of the United States.’ 18 U.S.C. § 3231. *Alikhani v. U.S.*, 200 F.3d 732, 734 (11th Cir. 2000). Likewise, as Judge Easterbrook aptly summarized: "Subject matter jurisdiction in every federal criminal prosecution comes from 18 U.S.C. § 3231. . . . That's the beginning and the end of the `jurisdictional' inquiry." *McCoy v. U.S.*, 266 F.3d 1245, 1259 (11th Cir. 2001); quoting *Hugi v. United States*, 164 F.3d 378, 380 (7th Cir. 1999).

18 U.S.C. § 3231 excludes from the district court’s original jurisdiction over any offense against the laws of the United States that occurs within the judicial power of the State of Indiana (“exclusive of the courts”).

In 1939, prior to enactment of what is known today as 18 U.S.C. § 3231, Jurisdiction was conferred upon the District Courts "of all crimes and offenses cognizable under the authority of the United States." Jud. Code, § 24; 28 U.S.C. § 41 (2). *Bowen v. Johnston*, 306 U.S. 19, 22 (1939)

Crimes were thus cognizable -

"When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building." Crim. Code, § 272; 18 U.S.C. § 451, Third.

The last clause covers cases where exclusive jurisdiction is acquired by the United States pursuant to Article I, § 8, paragraph 17, of the Constitution. *Bowen v. Johnston*, 306 U.S. 19, 22 (1939) In *Bowen*, no question of fact was presented with respect to the place where the crime was committed. The indictment specified the place, that is, -

"a certain place and on certain lands reserved and acquired for the exclusive use of the United States and under exclusive jurisdiction thereof, and acquired by the United States by consent of the Legislature of the State of Georgia, to wit: Chickamauga and Chattanooga National Park, sometimes known as Chickamauga and Chattanooga National Military Park, in said State of Georgia."

*Bowen v. Johnston*, 306 U.S. 19, 23 (1939)

Today, 18 U.S.C. § 3231 states

"The district courts of the United States shall have original jurisdiction, **exclusive of the courts of the States**, of all offenses against the laws of the United States. Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."

"The office of the second sentence is merely to limit the effect of the jurisdictional grant of the first sentence." *Pennsylvania v. Nelson*, 350 U.S. 497, 512 (1956)

In *Bowen*, the sole question was whether the Chickamauga and Chattanooga National Park,

sometimes known as Chickamauga and Chattanooga National Military Park, in said State of Georgia, was within the exclusive jurisdiction of the United States. There is no question that the United States had the constitutional power to acquire the territory for the purpose of a national park and that it did acquire it. Whether or not the National Government acquired exclusive jurisdiction over the lands within the Park or the State reserved, as it could, jurisdiction over the crimes there committed, depended upon the terms of the consent or cession given by the legislature of Georgia. *Collins v. Yosemite Park Co.*, supra, pp. 529, 530. See, also, *James v. Dravo Contracting Co.*, 302 U.S. 134, 146-148. The federal courts take judicial notice of the Georgia statutes. *Owings v. Hull*, 9 Pet. 607; *Lamar v. Micou*, 114 U.S. 218, 223. If these statutes did not give to the United States exclusive jurisdiction over the Park, the indictment did not charge a crime cognizable under the authority of the United States. *Bowen v. Johnston*, 306 U.S. 19, 23 (1939)

In *Bowen*, the “sole question was whether this Park was within the exclusive jurisdiction of the United States.” *Id.* The District Court of the United States “has jurisdiction to render a particular judgment only when the offence charged is within the class of offences placed by the law under its jurisdiction.” *In re Bonner*, supra. As it is the duty of the District Court, when the prosecution is brought before it, to examine the charge and ascertain whether the offense is of that class, the District Court is thus empowered to pass upon its own jurisdiction. **This, under the applicable statute, may require consideration of the place where the offense is alleged to have been committed.** The answer to that question may require the examination and determination of questions of fact and law and that determination may be the appropriate subject of appellate review. *Bowen*, supra

“Article III operates to preserve the independence of the judiciary by requiring that the judicial power of the United States be exercised by judges having certain clearly prescribed

**attributes.** See 458 U.S. at 59, 102 S.Ct. at 2865. Article III provides:

The Judges both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

“Basic to the constitutional structure established by the Framers was their recognition that ‘[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.’” The Federalist No. 47, p. 300 (H. Lodge ed. 1888) (J. Madison). To ensure against such tyranny, the Framers provided that the Federal Government would consist of three distinct Branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct. “The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.” *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam) See *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57 (1982)

Congress, under its Article I, Section 8, Clause 9 enumerations, was given power by the Several States to constitute “tribunals inferior to the supreme Court.” Article III, Section 2, Clause 2, enumerates Congress with directing cases not within the one supreme Court’s “original jurisdiction” to be within its inferior tribunals to the one supreme Court. Congress, in 1948, enacted Judicial Districts of the United States in which the term “Indiana” is legislated at 28 U.S.C. § 94. The State of Indiana became a State of the Union under Article IV on December 11, 1816.

The “‘locus delicti [of the charged offense crime] must be determined from the nature of the crime alleged and the location of the act or acts constituting it.’” *United States v. Cabrales*, 524 U.S.

1, 6-7 (1998) (quoting United States v. Anderson, 328 U.S. 699, 703 (1946)). In performing this inquiry, a court must initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts. United States v. Rodriquez-Moreno, 526 U.S. 275, 279 (1999)

Yet, the Government suggests to Dilley and this Court that it can determine the “location of the commission of the criminal acts” from the discovery tendered to Dilley. See Prosecutor Response to Bill at 3 . This leaves this Article III Court to determine its subject matter jurisdiction over the crime scene based upon the words “in the Northern District of Indiana.” This “Northern District of Indiana” is actually the “United States Judicial District of Indiana.” See 28 U.S. C. § 94.

There is no “Northern District of Indiana” within the Constitution of the State of Indiana. The State of Indiana is not within the United States Judicial District of Indiana. The Prosecutors did not convince the Grand Jury to allege the place the crime actually occurred and even expanded their theory in the Grand Jury indictment by including aiding and abetting to the charges without any Grand Jury saying it. See Prosecutor Response to Bill at 3

Article III, Section 2, Clause 3, reserves to the State of Indiana the trial of all United States or State crimes committed within the State of Indiana. The only time Congress can place or provide original subject matter jurisdiction over a transgression against the laws of the United States is if **“when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.”** 18 U.S.C. § 3231 excludes from the United States District Courts original subject matter jurisdiction over all offenses committed against the laws of the United States within the State of Indiana.

Simply alleging “Northern District of Indiana” without specifically identifying the place

subject to the exclusive original jurisdiction of the United States Judicial District of Indiana fails to allege any offense against any laws of the United States that are authorized to be tried in a Court created by Congress. Furthermore, the place currently scheduled for trial is a Court created by Congress and falls only within the *“when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.”*

The only power Congress has to place any trial within its United States District Court located in the United States Judicial District of Indiana is if the alleged crime is not alleged to have been committed within the State of Indiana.

Yet, the Prosecutors argued in the Response to the Bill of Particulars that:

For the counts involving a presentment of a promissory note, Counts 1 and 2, the indictment specifies the entity to whom presentment was made and provides detailed information identifying the individual promissory notes, including the number, the date of the promissory note, the amount, and the payee. Although not supplying as much factual detail regarding the promissory notes for the sake of brevity and clarity, Count 3 nevertheless identifies the fictitious documents at issue by their unique note numbers.

Count I names “First Source Bank” without any other information as the place the item was allegedly presented for acceptance. Count II alleges the “Internal Revenue Service” as the place the item alleged was presented. Count III alleges no such “entity” anywhere any item was presented.

First Source Bank is not located within any exclusive place subject to the Judicial Power of the United States under Article III, Section 2, Clause 3. In fact, First Source Bank is within the State of Indiana. Count I is excluded from being tried within the United States District Court under 18 U.S.C. § 3231.

Although Count II alleged the IRS it does not identify the place where the IRS is located without which makes Count II excluded from being tried within the United States District Court under 18 U.S.C. § 3231.

Count III is simply excluded from being tried within the United States District Court under 18 U.S.C. § 3231.

Because this Article III Court completely lacks subject matter jurisdiction, pursuant to 18 U.S.C. § 3231, excluded by the Court of the State of Indiana, by Article III, Section 2, Clause 3 and the 10<sup>th</sup> Amendment, and because this Article III Court completely lacks any subject matter jurisdiction to be a place where a trial can be held for an alleged federal crime committed within the State of Indiana, presenting this office of this Court without judicial immunity, complete dismissal of Counts I, II and III is an absolute and must be the only order the inherent supervisory power of this Court of limited subject matter jurisdiction has, and must conclude it is completely without any subject matter jurisdiction over the claims in Counts I, II and III because those alleged crimes are either alleged to have taken place in the State of Indiana or as in Count III no allegation of the specific place is alleged.

2. NEITHER THE GRAND JURY CLAIMS NOR THE UNITED STATES OF AMERICA OR UNITED STATES HAVE STANDING TO BRING THEIR CLAIMS AGAINST DILLEY IN THIS COURT.

The Fifth Amendment to the Constitution of the United States provides that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. ...” U.S. v. Keller, 916 F.2d 628 (11th Cir. 1990); see also Article VII, Amendment V.

“[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. *U.S. v. Williams*, 504 U.S. 36, 47 (1992)

The “Grand Jury” “has not been textually assigned, therefore, to any of the branches described in the first three Articles.” *Id.* It “is a constitutional fixture in its own right.” *United States v. Chanen*, 549 F.2d 1306, 1312 (CA9 1977) (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. *Williams*, *supra*; 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). *Williams*, at 48

Under the 10<sup>th</sup> Amendment, taken with Article III, Section 2, Clause 3, and the place the trial is to be held for any alleged crime committed within any State, the Grand Jury was a reservation by the States regarding any violation of any law within its borders. There is no recognized Constitutional Grand Jury other than one flowing from the State of Indiana applicable in this case.

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. Williams, *supra* “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, Inc., 498 U.S. 292, 297 (1991) (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. 418, 424-425 (1983).

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 Huggle*, 754 F.2d 863 (CA9 1985) (opinion of Kennedy, J.) (same with respect to privilege for confidential marital communications). 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 prosecuting attorney or judge.' . . ." *Id.*, at 16 (emphasis added) (quoting *Stirone*, *supra*, at 218). *Williams*, at 49

A jurisdictional defect is one that "strip[s] the court of its power to act and ma[kes] its judgment void." *Escareno v. Carl Nolte Sohne GmbH & Co.*, 77 F.3d 407, 412 (11th Cir. 1996). Because parties cannot by acquiescence or agreement confer jurisdiction on a federal court, a jurisdictional defect cannot be waived or procedurally defaulted - instead, a judgment tainted by a jurisdictional defect must be reversed. See *Harris*, 149 F.3d at 1308-09; see also *United States v. Griffin*, 303 U.S. 226, 229 (1938). The constitutional right to be charged by a grand jury is a personal right of the defendant and does not go to the district court's subject matter jurisdiction because it may be waived. *McCoy v. U.S.*, 266 F.3d 1245, 1249 (11th Cir. 2001)

It is clear, for example, that if a prosecutor simply drew up an "indictment," had a grand jury foreperson sign it, and then used it to charge the defendant with a criminal offense, we would dismiss the "indictment" out of hand as violative of the Fifth Amendment. This is because the "indictment" would in no sense be the product of a constitutionally required grand jury proceeding. So, too, would we dismiss an indictment that was issued by a "kangaroo grand jury" - one whose deliberations were so overborne by a prosecutor or judge that the indictment was, in effect, the prosecutor's or judge's handiwork, and not the result of a considered judgment by an independently functioning grand jury. See *United States v. McKenzie*, 678 F.2d 629, 631 (5th Cir. 1982) (holding that an indictment may be dismissed "when prosecutorial misconduct amounts to overbearing the will of the grand jury so that the indictment is, in effect, that of the prosecutor rather than the grand jury"); see also *Stirone v. United States*, 361 U.S. 212, 218, 80 S.Ct. 270, 273, 4 L.Ed.2d 252 (1960) ("the very purpose of

the requirement that a man be indicted by a grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.")

As discussed at length in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), the Constitution “draws a basic distinction between the powers of the newly created Federal Government and the powers retained by the pre-existing sovereign States.” at 801. *Cook v. Gralike*, 531 U.S. 510 (2001) On the one hand, in the words of Chief Justice Marshall, “it was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument.” *Sturges v. Crowninshield*, 4 Wheat. 122, 193 (1819). The text of the Tenth Amendment delineates this principle:

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

On the other hand, as Justice Story observed, “the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution did not delegate to them.” 1 *Commentaries on the Constitution of the United States* § 627 (3d ed. 1858) (hereinafter Story). Simply put, “[n]o state can say, that it has reserved, what it never possessed.” *Ibid.* See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S., at 802 (Tenth Amendment “could only ‘reserve’ that which existed before”); cf. *McCulloch v. Maryland*, 4 Wheat. 316, 430 (1819) (rejecting argument that States had reserved power to tax corporations chartered by Congress because an “original right to tax” such federal entities “never existed”).

There is no power delegated to the United States to represent, present, control, counsel, sit, seat, or any other term, which enables the United States Attorney to empanel a Fifth Amendment Grand Jury. 28 U.S.C. § 547(1) only authorizes each United States Attorney to “prosecute for all offenses against the United States” that take place within “his district.” The State of Indiana is not within U.S. Attorney David Capp or his assistant’s “district.” 28 U.S.C. § 516 provides the United States can protect its interest in any case but that does not provide for the United States to usurp Article III of the Constitution nor does it provide a mechanism through default providing the United States to become a party into a case they created.

There are no United States Grand Juries. *U.S. v. Williams*, 504 U.S. 36, 47 (1992). There is no power enumerated to the United States under Article I, II or III, that authorizes the United States Department of Justice to represent a Grand Jury Indictment in this Court unless the claims are not alleged to have been committed within the State of Indiana. See Article III, Section 2, Clause 3. The pleading binding and holding Dilley, naming the United States of America, lacks standing in this Article III Court as Article III, Section 2, Clause 1, does not recognize any United States of America as a party nor does it identify any Grand Jury charges or criminal charges within Congress’ reach unless the alleged acts are not alleged to have been committed within “any State” and in this case that would be the State of Indiana.

Dilley preserves his right to only be held by an presentment or indictment by a Fifth Amendment Grand Jury empaneled under the laws of the State of Indiana to which the Grand Jury in this case was not so empaneled. Not only do the Grand Jury claims, United States of America and United States claims, each lack standing to present themselves to this Article III Court, the entire case lacks Constitutional standing in this Article III Court.

As demanded by Dilley in his Bill of Particulars, Dilley requests the Prosecutors in response herein identify what words in Article III, Section 2, they relied upon if they had to explain to the Indiana Bar Association which they in good faith relied upon providing them with the right or privilege to convene their United States Grand Jury, present a previously written document for them to sign on to, and then present that “indictment” in any Article III Court under the judicial power of the United States?

### CONCLUSION

Dilley demands this Court to direct his release from deprivation of his liberty at once as such deprivation violates the Fifth Amendment wherein no person is to be held, on grounds this Court completely lacks any subject matter jurisdiction over the claims made by the prosecutorial misconduct of both David Capp and Anthony Geller within their purported Grand Jury Indictment, as well as dismissal is appropriate as whoever the party is that is standing in support of the claims made by the purported Grand Jury claims lacks standing under Article III, Section 2, to present themselves in connection with said claims in this Article III Court created by Congress.

CONSTITUTIONALLY SUBMITTED

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jonathan-noah : dilley  
Allen County Jail  
417 South Calhoun Street  
Fort Wayne, IN 46802

CERTIFICATE OF SERVICE

I hereby certify that on the \_\_\_\_ day of June, 2008, I mailed a copy of this Motion  
to Dismiss to the following:

OFFICE OF THE U.S. ATTORNEY  
David Capp  
Anthony Geller  
E. Ross Adair Federal Building  
& United States Courthouse  
Room 3128  
1300 South Harrison Street  
Fort Wayne, IN 46802-3489  
Telephone: (260) 422-2595  
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Server