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SYMPOSIUM

IF IT AIN'T BROKE, DON'T FIX IT: WHY THE GRAND JURY'S ACCUSATORY FUNCTION SHOULD NOT BE CHANGED

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The federal grand jury system has emerged relatively unscathed from the stormy attacks of the 1970's, when critics, decrying the political abuse of the grand jury by the Nixon administration, called for radical changes to the system. The 95th Congress considered several different reform bills,¹ including no less than four alternative constitutional amendments to abolish all or part of the fifth amendment requirement that grand jury indictments initiate federal prosecutions. In addition, the American Bar Association (hereinafter "A.B.A.") approved an authoritative position paper advocating significant changes (hereinafter "A.B.A. Principles").²

This reforming fervor has produced few tangible results. In 1979, Congress amended Rule 6 of the Federal Rules of Criminal Procedure to require the recording of all grand jury proceedings, except the jurors' deliberations and voting.³ Congress amended the rule further in 1983 to clarify certain matters concerning the secrecy

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¹ See *Grand Jury Reform: Hearings on H.R. 94 Before the Subcomm. on Immigration, Citizenship, and Int'l Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 484 (1977) [hereinafter cited as *House Hearings*]; *The Grand Jury Reform Act of 1978: Hearings on S. 3405 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 154 (1978).

² For a list of these principles, see ABA GRAND JURY POLICY AND MODEL ACT 4-5 (2d ed. 1982) [hereinafter cited as *ABA Pamphlet*].

³ Order Amending FED. R. CRIM. P. 6, 441 U.S. 985 (1979).

of grand jury proceedings.⁴ In 1980, the Department of Justice issued new, comprehensive guidelines governing the work of United States attorneys (hereinafter "Department of Justice guidelines").⁵ These new legislative and executive responses to widespread criticism of the grand jury have fallen short of the wishes and expectations of many reformers; nonetheless, for the time being, at least, the federal grand jury as an institution appears to be relatively stable.

The federal grand jury is a powerful body.⁶ It may summon practically anyone it wants, and, through the statute providing for the immunization of witnesses,⁷ it may compel a summoned person to testify or risk going to jail for contempt. It conducts its business through secret proceedings which are largely unreviewable by the courts.⁸ It may indict any person or entity, and thus require that defendant to stand trial for the alleged crime.⁹

⁴ Order Amending FED. R. CRIM. P. 6, 461 U.S. 1117 (1983).

⁵ U.S. Department of Justice, Principles of Federal Prosecution, 27 CRIM. L. REP. 3277 (1980).

⁶ The grand jury arose out of King Henry II's Assize of Clarendon in the year 1166. It began essentially as an administrative agency of the King. The King used it to gain power over the church and feudal barons. The Assize of Clarendon provided that all felony prosecutions were to be initiated by presentment to the grand jury, a group of twelve subjects of the king. Thus, the original grand jury had solely an accusatory, rather than protective function.

The grand jury did not emerge as a protector of citizens against the oppression of government until 1681. At that time, King Charles II sought to charge members of the Protestant opposition with treason. The grand jurors, resisting the King's attempts to have their proceedings held in public, held private sessions in which they voted not to indict the King's targets. This concept of the grand jury as protector of citizens was carried over from England to the American colonies. In 1743, when John Peter Zenger, a New York newspaper publisher aroused British anger by criticizing the Colony's governor, prosecutors sought two grand juries to return indictments for criminal libel against him, but both resisted the governor's pressure and declined to indict Zenger.

Subsequent to the Revolution, the fifth amendment to the United States Constitution formally incorporated the requirement that a grand jury initiate felony prosecutions. Many states incorporated similar provisions into their own constitutions. However, in *Hurtado v. California*, 110 U.S. 516 (1884), the Supreme Court refused to incorporate the fifth amendment's grand jury requirement into the fourteenth amendment's concept of due process of law. Thus, the states remain free to proceed with felony prosecutions by means other than grand jury indictments. For the history of the grand jury, see generally M. FRANKEL & G. NAFTALIS, *THE GRAND JURY: AN INSTITUTION ON TRIAL* 6-17 (1977); *Calandra v. United States*, 414 U.S. 338, 342 n.3 (1974) and sources cited therein.

Since *Hurtado*, several states have done away with grand juries entirely, and many others, while retaining some form of grand jury, provide for alternative means of initiating criminal prosecution. For a survey of state practices, see J. VAN DYKE, *JURY SELECTION PROCEDURES* 264-270 (1977).

⁷ 18 U.S.C. §§ 6001-05 (1976).

⁸ See FED. R. CRIM. P. 6(d), (e).

⁹ See generally U.S. CONST. amend. V; FED. R. CRIM. P. 6.

Knowledgeable observers recognize and concede that federal grand juries do not protect citizens from unwarranted accusations by the government.¹⁰ Rather, federal grand juries usually adopt the prosecutor's suggestions, and readily return indictments against the persons and upon the charges the prosecutor recommends.¹¹

The tremendous power of federal grand juries, and the occasional abuse of authority by prosecutors who control that power, has led to calls for the abolition of the grand jury,¹² or for substantial reform of its proceedings,¹³ in order to make the grand jury more independent of the prosecutor. This Article examines the accusatory function of the federal grand jury system in light of these proposals. It explores whether the system is working as intended, and to the extent it is not, which proposals hold the best chances for effecting meaningful change without crippling the law enforcement process.

This Article concludes that the grand jury should, with a few minor changes, remain as the body to initiate federal prosecutions, because the grand jury, by and large, adequately fulfills an appropriate accusatory function. Although overzealous or overreaching federal prosecutors can manipulate the federal grand jury, by and large the Department of Justice has not abused its authority. Furthermore, no current proposal for reform of the federal grand jury system can eliminate the possibility of abuse without unduly obstructing federal law enforcement and federal courts, and adding substantial cost and delay to the federal criminal justice system. Thus, the protection of citizens is best left in the hands of the conscientious prosecutors who occupy the offices of United States Attorney and their assistants throughout the country. The last part

¹⁰ See, e.g., Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463 (1980).

¹¹ See, e.g., *United States v. Mara*, 410 U.S. 19 (1973). "It is, indeed, common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive." *Id.* at 23 (Douglas, J., dissenting).

It has been alleged — and probably proven — that during the Nixon administration, the Department of Justice's Internal Security Division used federal grand juries against perceived enemies of the national administration. Government-sponsored undercover activities and threats of grand jury subpoenas created discord and suspicion among the dissident groups against which they were directed, and often led to these groups losing their effectiveness. *House Hearings*, *supra* note 1, at 13-16 (testimony of Linda Bakiel). The Internal Security Division persuaded federal grand juries to indict roughly 400 dissidents, less than 15% of whom were ultimately convicted of any crime. See Arenella, *supra* note 10 at 506 n.221.

¹² See, e.g., Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174 (1973).

¹³ See, e.g., Arenella, *supra* note 10.

of this Article discusses reforms aimed at ensuring that conscientiousness.

I. THE DOMINANCE OF THE PROSECUTOR OVER THE GRAND JURY, AND TWO CRITICAL RESPONSES

Critics of the grand jury begin with the observation that grand juries no longer perform an independent screening function, but instead merely "rubber stamp" indictments tendered by prosecutors.¹⁴ We believe this is true in most instances. Federal prosecutors and their assistants, in cooperation with the federal investigative agencies, decide upon the persons and subject matters to investigate, the witnesses to call, and the documents to subpoena. They decide which targets to pursue and which witnesses to immunize. They often orchestrate the investigations of other independent federal agencies. They act as counsel to the grand jury, advising it on legal issues, and in effect, represent the grand jury in hearings on grand jury matters before the federal judiciary. Given this role of federal prosecutors, it is understandable that the members of the grand jury come to rely upon the prosecutors to summon and produce appropriate witnesses and documents, and come to trust the prosecutors' judgment as to which cases they should pursue, and whom they should indict.

When a federal prosecutor seeks an indictment from the grand jury, almost invariably the grand jury returns a true bill.¹⁵ Indeed, "no bills" are so rare that prosecutors regard them as freak occurrences.¹⁶

Experienced federal defense lawyers understand the prosecutor's near total control of the grand jury. When they seek to avoid indictment of their clients, these defense attorneys rarely ask to have their clients appear before the grand jury. Rather, the defense lawyers address their arguments and pleas to the prosecutor, and sometimes have their clients submit to interviews with the prosecutor and the investigating agents, because they assume that the prosecutor, not the grand jury, will determine who will be indicted, and for

¹⁴ See, e.g., Arenella, *Reforming the State Grand Jury System: A Model Grand Jury Act*, 13 RUTGERS L.J. 1, 9 (1981); Campbell, *supra* note 12.

¹⁵ When federal prosecutors decide that a case, including cases in which the grand jury has reviewed evidence, should not result in an indictment, they do *not* present the case to the grand jury for return of a no bill. Rather, they fill out a form called a "Declination" in which they set forth the reasons why the case has been terminated without presentation to the grand jury for indictment.

¹⁶ During the fiscal year ending September 30, 1984, grand juries returned 17,419 indictments and only 68 "no true bills." Statistical Report of U.S. Attorneys' Offices, Fiscal Year 1984 (Report 1-21), introductory material, p.2.

what. These experienced practitioners treat the grand jury's vote simply as a formality.¹⁷

Critics have responded in two ways to the erosion of the grand jury's traditional role as an independent buffer between the state and the citizenry. Some critics have called for a total abolition of the grand jury system. They suggest that the grand jury be replaced by a system in which the prosecutor commences prosecution by means of an information, and the target of prosecution has a right to a full preliminary hearing before a neutral magistrate.¹⁸ States which have abolished the grand jury system use systems similar to that proposed.¹⁹ Other critics, notably the A.B.A., advocate retaining the grand jury but reforming certain aspects of grand jury practice in order to curb prosecutorial power and return the grand jury to its role as a screening device, designed to separate worthy from unworthy prosecutions.²⁰

Either abolition or extensive reform of the grand jury's accusatory function would add extra steps to the process of criminal prosecution, and foreseeably, would change other aspects of the criminal justice system as well.²¹ Because of the magnitude of the changes which either abolition or reform would bring, it behooves a legislator or member of the public interested in the criminal justice system to analyze carefully both the premises upon which the abolition or reform proposals are based, and the impact that the enactment of each proposal would have, before deciding whether to support a change of the system.

II. THE GRAND JURY SHOULD BE RETAINED

In a 1973 article, Judge William J. Campbell, a former United States Attorney for the Northern District of Illinois, and later Chief Judge of the District Court, proposed the abolition of the grand jury.²² Under Judge Campbell's plan, the prosecutor would have the subpoena power and the authorization to interrogate witnesses in secret. An information filed by the prosecutor would commence prosecution, followed by a probable cause hearing before a judicial officer, such as a magistrate, who would determine whether there

¹⁷ That is not to say that the grand jury is not at times helpful to the prosecutor. See *infra* text accompanying notes 18-21.

¹⁸ See, e.g., Campbell, *supra* note 12.

¹⁹ California, among other states, utilizes preliminary hearings in many instances. For a state by state survey of grand jury responsibilities, see J. VAN DYKE, *supra* note 6 at Appendix B.

²⁰ See Arenella, *supra* note 14.

²¹ See *infra* notes 80-82 and accompanying text.

²² Campbell, *supra* note 12.

was sufficient evidence to permit the prosecution to continue.²³ Judge Campbell said that this change, which would require amending the Constitution, would curb the abuses of overzealous prosecutors who now “hide anonymously behind the shield of the grand jury.”²⁴ Although Judge Campbell did not specify the abuses involved, it seems he feared that federal prosecutor-dominated grand juries indict people on insufficient evidence. By entrusting the determination as to whether a case ought to be permitted to go to trial to a neutral magistrate, rather than the grand jury, “[t]rue independence would be restored, thereby revitalizing the concept that a citizen should be protected against unfounded accusation of crime, whatever its source.”²⁵

We maintain that the proponent of a major change, such as that proposed by Judge Campbell, has a heavy burden of proof to support a need for a change. Regarding the federal system, we respectfully disagree with the premise underlying Judge Campbell’s argument. We have seen no evidence which demonstrates or even suggests that the current federal system fosters unjust accusations. Indeed, the available evidence is precisely to the contrary.²⁶

Even if unjust accusations were rampant in federal courts, Judge Campbell’s proposed solution — replacement of the grand jury with a system of prosecutorial information followed by a preliminary hearing — will do little or nothing to protect a citizen against an unfounded accusation. If Congress enacts this new system, prosecutors will be able to file informations against anyone they choose, even people they might not be able to persuade a grand jury to indict under the present system. Prosecutors could announce these informations to the press with fanfare equal to that surrounding the most sensational indictments. Once the news is public, the accused will face the stigma which accompanies any official public accusation.²⁷ Since the preliminary hearing will probably occur sooner than a trial does under the current system, a defendant

²³ *Id.* at 174, 180.

²⁴ *Id.* at 181.

²⁵ *Id.* at 180.

²⁶ See *infra* notes 52-64 and accompanying text.

²⁷ The authors whole-heartedly agree with Judge Frank’s observation in *In re Fried*, 161 F.2d 453, 458-59 (2d Cir. 1947) (Frank, J., concurring):

[A] wrongful indictment is no laughing matter; often it works a grievous, irreparable injury to the person indicted. The stigma cannot be easily erased. In the public mind, the blot on a man’s escutcheon, resulting from such a public accusation of wrong doing, is seldom wiped out by a subsequent judgment of not guilty. Frequently, the public remembers the accusation, and still suspects guilt, even after an acquittal.

Id.

may receive relief from an unjust accusation more quickly in Judge Campbell's proposed system. This probable benefit, however, does not justify the detriments of the proposed change.

Moreover, Judge Campbell's willingness to abolish the grand jury overlooks the positive functions a federal grand jury serves. Often, experienced grand jury members ask incisive questions of witnesses, make helpful suggestions as to which witnesses or documents the prosecutor should subpoena, and which leads the prosecutor should pursue. In addition, the grand jury gives the prosecutor a feel for how the case will appear to a petit jury.²⁸ The grand jury's reaction may lead the prosecutor to re-evaluate the evidence supporting a particular case. As a result, the prosecutor may either strengthen the proof or drop the contemplated indictment.

Most importantly, the federal grand jury helps to prevent prosecutorial excesses during the witness interrogation process. The presence of citizens discourages the occasional overzealous or misguided prosecutor from abusing witnesses, questioning them unfairly, or otherwise violating their rights. We fear that if prosecutors are given compulsory process to summon witnesses to their offices for questioning, without any citizens present to observe, prosecutors will tend to pressure, cajole, threaten, and through other means attempt to have witnesses state either what the prosecutors believe is the truth, or what they need in order to make their cases. We do not mean to say that federal prosecutors are evil or deliberately tinker with the truth-seeking process; we firmly believe that the vast majority are not evil and do not tinker. But we know the inclinations that virtually all advocates have — to conceive a theory of the case, and then view all testimony and evidence in a light most favorable to that theory. Inexperienced federal prosecutors can easily adopt a zealous, righteous frame of mind. Their oath of office confers on them no immunity from the frailties which beleaguer the rest of us. The grand jury's very presence stems the prosecutors' inclination to overstep; it changes a potential "hot-box" interrogation into a formal inquiry before outside observers who have no direct stake in the outcome of the investigation.

Finally, we believe Judge Campbell's suggested reform would increase drastically the cost and time of federal criminal prosecution. In complicated white collar crimes or in multi-faceted conspiracies, a probable cause hearing may last for weeks.²⁹ Even when

²⁸ A petit jury is the ordinary jury for the trial of a civil or criminal action. BLACK'S LAW DICTIONARY 445 (abridged 5th ed. 1983).

²⁹ For example, the preliminary hearings in *People v. McMartin* (a celebrated Califor-

probable cause is not seriously disputed, defense attorneys would cross-examine government witnesses in order to discover the government's evidence. Most likely, this additional layer of pre-trial hearings would require a new cadre of federal judges or magistrates as well as many more federal prosecutors.

III. THE GRAND JURY'S ACCUSATORY FUNCTION NEEDS NO MAJOR REFORMS

The perception of extensive grand jury abuse which animated Judge Campbell's call for abolition of the grand jury has led other critics to propose widespread reform of the grand jury. We believe that the best reasoned and most comprehensive proposals for reform are embodied in the A.B.A.'s Grand Jury Reform Principles and its proposed Model Grand Jury Act (hereinafter "Model Act").³⁰ The rationale behind these proposals is set forth in detail in two articles by Professor Peter Arenella, the A.B.A.'s Reporter for the Model Act.³¹ The Principles, the Model Act, and the two Arenella articles embody a coherent philosophy of reform, which we will examine in light of our experiences. We will focus exclusively on the proposals affecting the grand jury's accusatory, rather than investigative function.

The A.B.A. proposals to reform the grand jury's accusatory function assume that grand juries indict individuals who should not be indicted. The proposals lay the blame for this at the feet of overzealous, sometimes unscrupulous prosecutors, who are unchecked by an independent grand jury.³² The reformers argue that the grand jury insulates the prosecutor from public scrutiny and thereby inadvertently abets prosecutorial abuse.³³ In order to stop unwarranted indictments, the A.B.A. seeks to transform the grand jury from a prosecutorial "puppet" to an independent screening body.

nia child molestation case) lasted several months. See L.A. Daily J., Feb. 15, 1985, at 1, col. 6; L.A. Daily J., Jan. 31, 1985, at 4, col. 1.

³⁰ For a listing of these principles, see *ABA Pamphlet*, *supra* note 2, at 4-5. A.B.A. Principles will be cited by number as they appear in this footnote. For the Model Grand Jury Act, see Arenella, *supra*, note 14, at 15-49. Cites to the Model Grand Jury Act are by section number as it appears on those pages. Although the A.B.A. has not approved the entire Model Grand Jury Act, we will refer to the act as it was approved by the Grand Jury Committee, since the total act is the logical extension of the A.B.A.'s philosophy of reform. (Those portions of the Act approved by the A.B.A. are printed in the *ABA Pamphlet*, *supra* note 2, at 16-19.) Also, even though the Act refers solely to reform of the state grand jury system, we discuss it in a federal context because its principles, if accepted, call for similar reform of the federal system.

³¹ See Arenella, *supra* note 10; Arenella, *supra* note 14.

³² See *supra* notes 12-16 and accompanying text.

³³ See Arenella, *supra* note 10; Campbell, *supra* note 12.

This transformation involves two steps. First, a judge should be required to tell grand jurors that they must carefully screen cases, and second, prosecutors should be required to support their requests for indictment with evidence of the type that they will be required to produce at trial.³⁴ The A.B.A. proposals include, among others: (1) requiring that the judge inform the grand jury of its duty to screen out unworthy prosecutions;³⁵ (2) giving the target of a grand jury investigation the right to testify before the grand jury;³⁶ (3) requiring the prosecutor to present all available exculpatory evidence;³⁷ (4) forbidding the use of evidence which would be constitutionally inadmissible at trial to support an indictment;³⁸ and (5) prohibiting the use of hearsay testimony to support an indictment, except under narrowly defined circumstances.³⁹ To put teeth into these new rules, the Model Act provides for a post-indictment, pre-trial hearing to test the validity of the indictment.⁴⁰ At the hearing, a judge

³⁴ A.B.A. Principles 6 and 29; Model Grand Jury Act § 100.

³⁵ A.B.A. Principles 22 and 27; Model Grand Jury Act § 204.

³⁶ A.B.A. Principle 5; Model Grand Jury Act § 102.

³⁷ A.B.A. Principle 3; Model Grand Jury Act § 101.

³⁸ A.B.A. Principle 6; Model Grand Jury Act § 100.

³⁹ A.B.A. Principle 31, relating to hearsay, was enacted by voice vote in the February 1984 Mid-Year Meeting (reported in 52 U.S.L.W. 2473 (1984)). See A.B.A. 1984 Mid-year Meeting, Reports with Recommendations to the House of Delegates 108B [hereinafter cited as 1984 *Mid-Year Meeting Report*]; Model Grand Jury Act § 100.

⁴⁰ This provision, intended to give effect to A.B.A. Principle 25, is found in Model Grand Jury Act § 105. It reads as follows:

Section 105: MOTION TO DISMISS INDICTMENT ON GROUND OF INSUFFICIENCY OF GRAND JURY EVIDENCE

1. After arraignment upon an indictment, the court may, upon motion of the defendant made within [30] days after receipt of the grand jury transcript or as the court otherwise provides, dismiss such indictment or any count thereof upon the ground that the evidence before the grand jury was not legally sufficient to establish the offense charged or any lesser included offense.

2. The evidence presented to the grand jury is legally sufficient if, viewed in the light most favorable to the State, it would constitute probable cause as to each element of the crime. The court's review of the evidence shall be a review of the grand jury transcripts (either written or electronically recorded) and exhibits, without further testimony.

3. In evaluating the legal sufficiency of the evidence presented to the grand jury, the court can only consider evidence which would be admissible at trial except for hearsay testimony admitted under §100(2)-(4). The fact that the grand jury considered evidence which would have been excluded at trial does not invalidate the indictment as long as the remaining competent evidence is legally sufficient to constitute probable cause as to each element of the crime; except in those cases where the nature, extent, and prejudicial effect of the incompetent evidence presented to the grand jury provides strong grounds for believing that the grand jury would not have indicted the defendant if it had only considered the legally admissible evidence presented to it.

4. The validity of an order denying any motion made pursuant to this section is not reviewable upon an appeal from a judgment of conviction following trial based upon legally sufficient evidence.

or magistrate will review the transcript of grand jury proceedings to ensure that the proceedings complied with Model Act procedures, and to weigh independently the evidence presented to the grand jury for legal sufficiency.⁴¹

Most of the proposed rules for grand jury procedure strike us as sensible, and most are consistent with Department of Justice policy.⁴² But we believe that it is a mistake to grant each defendant a right to challenge the sufficiency of the evidence supporting a grand jury indictment. In complex cases involving lengthy testimony and numerous documents, "sufficiency" hearings would place substantial burdens on the judiciary. We believe that this additional burden on the federal system is not warranted, for there is no hard evidence that prosecutors, federal or state, engage in the kinds of misconduct which these proposals are designed to prevent.⁴³ Rather than making the encounter between the government and the target a fairer one, these proposals will add substantial time and expense to what is already a slow, cumbersome, and costly process.

Before taking drastic steps which embrace such troubling consequences, a legislative body must satisfy itself that a serious problem with the current system exists. The A.B.A. proposals to reform the accusatory function of the federal grand jury begin with the link between prosecutorial power and abuse of the system: "The most obvious defect [of the grand jury system] is the grand jury's complete dependence on the prosecutor for all its information, advice, and direction."⁴⁴ This observation precedes a catalogue of the enormous powers of the prosecutor in a grand jury proceeding, compared to the powerlessness of the citizens whom the grand jury chooses to investigate: the grand jury can subpoena someone within its jurisdiction virtually at will; it can conduct fishing expeditions without first establishing any likelihood of wrongdoing; it can strip individuals of the fifth amendment right against self-incrimination by granting them immunity; and it may jail them for failure to comply after being granted immunity.⁴⁵ In short, reformers argue that the omnipotent government can, and often does, take advantage of the hapless, defenseless citizen, who does not even have the benefit of counsel within the grand jury room.⁴⁶

As we have observed above, we believe that many of the reform-

⁴¹ *Id.*

⁴² See *infra* notes 88-91, 101-104, 106, & 107 and accompanying text.

⁴³ See *infra* notes 56-65 and accompanying text.

⁴⁴ Arenella, *supra* note 14, at 9.

⁴⁵ *Id.*

⁴⁶ *Id.* at 9-10.

ers' perceptions about the prosecutor's domination over the grand jury are accurate.⁴⁷ However, merely detailing the prosecutor's power over the grand jury and painting the citizen-grand jury confrontation in David and Goliath terms does not make a case for the need to reform grand jury accusatory proceedings. Instead, a meaningful call to reform the grand jury's accusatory function must begin with sound proof that, under the current system, the grand jury indicts people who should not be indicted. If this is not the case, it will be counter-productive to add more steps to the accusatory process. In other words, "If it ain't broke, don't fix it."

To determine whether grand juries indict inappropriate people, one must first define whom the grand jury properly should indict. Justice Department Principles, the A.B.A. proposals, and common sense all suggest that the likelihood of conviction at trial should be the chief standard of indictability.⁴⁸ The standard should also give weight to the nature and seriousness of the offense, the wishes of the victim, and the background of the target.

A grand jury indictment represents the decision of a grand jury to cause the government to try someone for the alleged commission of a crime. An indictment should not be used as a form of punishment. A prosecutor who is convinced that a person has committed an offense, but believes that the government probably will be unable to prove guilt beyond a reasonable doubt at trial, should not seek an indictment. The Department of Justice guidelines are also in agreement: "The attorney for the government should commence or recommend federal prosecution if he believes that the person's conduct constitutes a federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction. . . ."⁴⁹ A comment to this principle clarifies the standard: "as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact."⁵⁰ The Model

⁴⁷ See text accompanying *supra* note 30.

⁴⁸ A.B.A. Principle 4; U.S. Department of Justice, Principles of Federal Prosecution, Part B.2, 27 CR. L. REP. at 3277, 3278-79 (1980) [hereinafter Principles of Federal Prosecution, Part B.2].

⁴⁹ Principles of Federal Prosecution, Part B.2.

⁵⁰ *Id.* at 3279. The comment makes clear that the standard to be used is that of an *unbiased* trier of fact. Where bias makes conviction unlikely, the prosecutor may still proceed.

The potential that — despite the law and the facts that create a sound, prosecutable case — the fact-finder is likely to acquit the defendant because of the unpopularity of some factor involved in the prosecution or because of the overwhelming popularity of the defendant or his or her cause, is not a factor prohibiting prosecution.

Grand Jury Act suggests a similar "probability of conviction" standard.⁵¹

A prosecutor working with a grand jury has a strong incentive to seek indictments only in those cases in which there is a substantial probability of securing a conviction at trial. Prosecutors pride themselves on winning a high percentage of their cases.⁵² And since the prosecutor who secures an indictment will be identified with the case, that prosecutor is unlikely to press for an indictment when the evidence appears insufficient to convict.⁵³ Even when a prosecutor will not personally handle the case beyond the indictment stage, he is loathe to "saddle one of his cohorts with the trial of a 'turkey.'" ⁵⁴

Department of Justice statistics indicate that federal prosecutors indict only when there is a strong likelihood of conviction. Over the last decade, federal prosecutors convicted the great majority of all defendants who were prosecuted — 65.2% by plea of guilty or, in a few instances, *nolo contendere*, and 12.5% by conviction at trial.⁵⁵ Only 3.5% of all defendants were acquitted at trial.⁵⁶

The remaining defendants — 18.8% of the total—are listed as "dismissed."⁵⁷ Since "dismissed" is a catchall category, covering a wide variety of situations, a precise interpretation of this category is impossible.⁵⁸ Some dismissals result from plea agreements under which the prosecutor dismisses a felony indictment and then files an information on a lesser charge to which the defendant pleads guilty; this is listed as one dismissal and one guilty plea.⁵⁹ In other cases, the prosecutor dismisses a case against a convictable defendant in exchange for cooperation in other investigations, or in exchange for

Id.

⁵¹ See Model Grand Jury Act § 105(2) and Commentary.

⁵² Kaplan, *The Prosecutorial Discretion—A Comment*, 60 Nw. U. L. REV. 174, 180 (1965).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ FEDERAL OFFENDERS IN U.S. DISTRICT COURTS 1982, Table 3 [hereinafter *Federal Offenders*].

The statistics on which these figures are based reflect all defendants terminated in a given year in the U.S. District Courts, regardless of whether their prosecutions were begun by indictment, information, or otherwise. The federal government does not keep figures as to the dispositions of criminal cases begun solely by grand jury indictment. Nonetheless, since well over half of all federal criminal cases are initiated by indictment (see *Federal Offenders*, *supra* note 55, Table 1), these figures are probably representative of the terminations of indicted defendants.

⁵⁶ *Federal Offenders*, *supra* note 55, Table 3.

⁵⁷ *Id.*

⁵⁸ Conversation with C. Madison Brewer, Director of the Office of Management Information and Support of the Executive Office for U.S. Attorneys, whose office is responsible for compiling such statistics.

⁵⁹ *Id.*

the defendant's confession of guilt and agreement to enter a pre-trial diversion program.⁶⁰ Other dismissals reflect a procedural step, such as when a prosecutor, upon receiving new evidence or when faced with a deficiency in an already returned indictment, dismisses one indictment and presents a superseding indictment to the grand jury against the same defendant or a case is transferred to another district pursuant to Rule 20 of the Federal Rules of Criminal Procedure.⁶¹ Available statistics do not distinguish these cases from those in which the prosecutor dismisses an indictment due to insufficient evidence.⁶²

Conservatively assuming that prosecutors dismissed only half of these defendants for strategic or technical reasons unrelated to the strength of the government's cases, prosecutors have a conviction rate of over 85%.⁶³ The federal conviction rate is more likely 90% or greater.⁶⁴ This surely does not indicate any widespread error or abuse in the federal prosecutors' decisions as to whom to indict.

Since the A.B.A. reformers did not have statistical support, they relied on a mixture of speculation and anecdote to suggest that prosecutor-dominated grand juries return unwarranted indictments.⁶⁵ In one argument, they contended that many prosecutors believe it is proper to try to convict without trial someone whom they believe has committed a crime, even though the suspect's legal guilt probably cannot be proven beyond a reasonable doubt at trial because the admissible evidence is only marginally sufficient.⁶⁶ Generally, the reformers assumed that prosecutors think they can indict doubtfully convictable defendants, and still retain their high conviction rates by pressuring these defendants to plead guilty to the indicted offense or some lesser charge.⁶⁷ Thus, Professor Arenella argued:

While most prosecutors claim that they would not seek an indictment unless there was a high probability of securing a conviction at trial, recent studies of *state* prosecutorial practices suggest otherwise. Foremost among the reasons for defective screening of legal guilt is

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See *Federal Offenders*, *supra* note 55, Table 3.

⁶³ Since the "dismissed" category incorporates more than just those cases for which the prosecutor had insufficient evidence, one half of all "dismissed" defendants — 9.4% of the total group — must be eliminated from the sample base. Assuming an initial sample base of 1000 defendants, the adjusted base is 906 defendants, of whom 777 are convicted. The conviction rate is thus 777/906, or 85.8%.

⁶⁴ This is the authors' estimate and is based on trial practice experience.

⁶⁵ See Arenella, *supra* note 10.

⁶⁶ *Id.* at 503-05.

⁶⁷ *Id.*

the possibility of conviction through plea-bargaining. Many state prosecutors find nothing wrong with charging and convicting a defendant whom they believe is factually guilty even though the government lacks sufficient admissible evidence to convict at trial. Not surprisingly, they view the doctrine of legal guilt as a technicality that interferes with their own view that justice is done when criminal sanctions are applied to defendants they believe to be factually guilty. Others accept the doctrine's validity but equate it with the exclusionary rule and the trial's formal proof requirements. In their view, defendants waive its requirements when they plead guilty because the doctrine applies only to the criminal trial itself.

. . . .
Thus, a prosecutor may seek an indictment when the evidence of guilt is marginal and then offer an attractive bargain to induce a guilty plea. Moreover, the absence of any effective limits on prosecutorial discretion in filing charges permits the prosecutor to enhance the government's plea-bargaining position by charging the defendant with more serious crimes than the evidence or the facts of a particular case warrant. To prompt a plea in weak cases, some prosecutors engage in bluffing tactics where they puff the strength of the case before offering an attractive bargain. These prosecutors regard this practice as legitimate and skillful bargaining even in cases where the prosecutor knowingly lacks sufficient evidence of legal guilt to reach the jury.⁶⁸

Although Professor Arenella asserted the existence of the practice and its widespread use, he tendered no supporting evidence other than a single study which reflected the views and practices of unidentified state prosecutors.⁶⁹ Even if the study's authors are correct in their assertions about *state* prosecutors, this does not establish the need for widespread reform of the *federal* grand jury system. There does not appear to be any evidence that federal prosecutors seek indictments in cases where they know the evidence is insufficient and then offer an attractive plea bargain to the defendants.⁷⁰

Moreover, there is no persuasive evidence to support Professor Arenella's other charges of prosecutorial abuse. To support his claim that federal prosecutors may indict unconvictable defendants, Professor Arenella cited one article by a former Assistant United States Attorney who, more than 20 years ago, served for four years

⁶⁸ *Id.* at 503-05 (footnotes omitted).

⁶⁹ See H. MILLER, W. McDONALD & J. CRAMER, *PLEA BARGAINING IN THE UNITED STATES* (1978), cited in Arenella, *supra* note 10 at 471 n.26.

⁷⁰ Department of Justice guidelines forbid the practice of striking a plea bargain when the prosecutor lacks sufficient evidence to reach the jury: "[A]lthough it is proper to consider factors bearing upon the likelihood of conviction in deciding whether to enter into a plea agreement, it is obviously improper for the prosecutor to attempt to dispose of a case by means of a plea agreement if he is not satisfied that the legal standards of guilt are met." Principles of Federal Prosecution, Comment to Principle D.2(f), 27 CR. L. REP. at 3284.

in the Northern District of California.⁷¹ Yet the article he cited stated that "prosecution would almost never be commenced unless the chances of success seemed better than fair," and "most assistants felt it was not right to use the prosecutorial system just to harass an individual, however guilty he might be and hence, unless the case could be won, it was morally wrong to prosecute it."⁷²

Professor Arenella also alleged that prosecutors may seek to indict unconvictable defendants for political reasons, and cited the practices of the Nixon administration as evidence.⁷³ Clearly, prosecutorial excesses such as are attributed to the Nixon administration's Department of Justice cannot be justified. However, our experience, encompassing many years in active federal criminal practice, both defending and prosecuting, and our observations of the federal criminal justice system as it operates throughout the country, indicates strongly that today the government seldom uses or abuses federal grand juries for political purposes.⁷⁴

We believe that the A.B.A. reform proponents have failed to establish the existence of problems significant enough to justify the drastic changes they propose. Unnecessary tinkering with working machinery usually leads to trouble. The federal grand jury system "ain't broke" and therefore doesn't need fixing.

Even if it is true that, as Professor Arenella assumed, federal prosecutors seek indictments in cases in which the evidence is insufficient, or trump up indictments for political reasons,⁷⁵ it is highly questionable whether the proposed solutions will alleviate the problem. Professor Arenella's theory is that the grand jury will reliably adjudicate the appropriateness of a defendant's going to trial if it is provided with evidence similar to that which will be placed before a

⁷¹ Kaplan, *supra* note 52, cited in Arenella, *supra* note 10, at 505.

⁷² Kaplan, *supra* note 52, at 180. The author identified two areas in which he observed federal prosecutions undertaken "even though the chances of conviction appeared somewhat less than was usually demanded," namely, cases in which "the decisive question was one of search and seizure," where the case would not be prosecutable if a motion to suppress were granted, and cases involving "more serious crimes," where a greater than usual chance of losing was believed justifiable. Even for these more serious crimes, however, prosecution would not be undertaken if the case appeared too weak to obtain a conviction, or if the accused, if convicted, was unlikely to receive a sufficiently severe sentence. *Id.* at 181. Contrary to the impression Professor Arenella gives to his readers the overall thrust of Mr. Kaplan's experience is that, in almost all cases, prosecutions were not instituted unless the likelihood of conviction appeared great.

⁷³ Arenella, *supra* note 10, at 505-06.

⁷⁴ See also Kaplan, *supra* note 52, at 181. Former Assistant U.S. Attorney Kaplan states that "it was generally felt that where the public eye would be on the prosecution, the criticism would be all the more severe if the case were lost. As a result, it was often stated that, 'if you go after a big one, you must be pretty sure you can get him.'" *Id.*

⁷⁵ See Arenella, *supra* note 10, at 503-05.

petit jury at the actual trial.⁷⁶ Professor Arenella admits that this is an untested theory.⁷⁷ Indeed, there is good reason to doubt that it will be effective.

The fact that the grand jury will hear certain evidence it may not have heard without these reforms does not guarantee a better screening process. The "reformed" grand jury will probably hear more of the government's actual prospective trial witnesses, and fewer federal agents giving summaries of trial witnesses' testimony. However, there will still be no cross-examination, without which an accurate assessment of a witness' credibility cannot be made.

Furthermore, even though a judge may admonish the grand jury to screen out weak cases,⁷⁸ the grand jury will still look only to the prosecutor for guidance. Prosecutors will still decide which cases or individuals to investigate, which witnesses to call, and what evidence to present. They will still be the ones who interpret the laws for the grand jury. If prosecutors are at all sensitive, they will establish rapport with the grand jury. Prosecutors will still communicate to the grand jury, however subtly, their belief that the grand jury should indict the suspect. Thus, even with the reforms, when a grand jury is straddling the fence on the question of probable cause, it will almost certainly accede to the prosecutor's judgment, as it does in the present system.

The only real check on the initiation of prosecution, then, will be the court's review of the grand jury transcript. Professor Arenella apparently hoped that the prospect of such a review would deter the prosecutor from asking the grand jury to return indictments against defendants who have a questionable likelihood of conviction. This does not appear likely. The Model Act's standards are not difficult to meet, though they force prosecutors to jump through several hoops and burden courts with the time consuming task of applying them.⁷⁹ Marginal cases will pass this review, and thus the Model Act will not deter prosecutors from prosecuting them. At best, the review process will discourage prosecutors from pursuing egregiously weak cases, however, the reformers have not established that prosecutors present such cases for indictment to federal grand juries today.

While the benefit of these proposals is negligible, the added

⁷⁶ *Id.* at 540 n.387; see also Arenella, *supra* note 14 at 13.

⁷⁷ See Arenella, *supra* note 10, at 540 n.387.

⁷⁸ See Model Grand Jury Act §204 (elements of the charge to the grand jury).

⁷⁹ For example, the reform proposal's ban on hearsay will force prosecutors to bring several witnesses before the grand jury, rather than relying on one federal agent's summation of these witnesses' testimony.

burden they would impose on the system is certain to be great. Prosecutors will have to spend additional time and taxpayers' money preparing for more intricate grand jury proceedings. They will have to bring nearly all witnesses before the grand jury, which will necessitate not only added preparation time, but also added transportation expense. The review process will surely necessitate substantial judicial time and expense as well. As five members of the Criminal Justice Council who filed a minority report criticizing the Act stated:

The drafters of the proposed Act have created a process which is calculated to burden the criminal justice system with an additional level of review in every case. It can be expected with some confidence that the motion for review will be the norm; indeed, it will verge on ineffective representation not to make such a motion.⁸⁰

The minority report ultimately rejected the concept of judicial review in all cases, as did the A.B.A. House of Delegates at its January 1982 meeting.⁸¹ We share the minority report's opinion as to the failure of the Model Act's drafters to make the case for reform:

The drafters suggest that such a revolution [providing for judicial review of the sufficiency of every indictment] is necessary because the grand jury will otherwise be unable effectively to serve its screening function and because prosecutors now rely on their ability to bring criminal charges and to coerce guilty pleas without providing the defendant [with] a forum in which to test the legitimacy of these charges. But we suggest that, whatever the value of an academic debate on the merits of our present criminal justice system, there has been no showing of a flaw in the grand jury process sufficient to justify the A.B.A.'s proposing . . . such a revolution.⁸²

Thus, a defendant should not have the right to have a court review the sufficiency of an indictment which is valid on its face.

IV. SAFEGUARDING AGAINST PROSECUTORIAL ABUSE IN THE FEDERAL GRAND JURY

We have argued that the federal grand jury functions well as an accusatory body, and should not be subjected to radical change. Nonetheless, we realize that the grand jury system gives the federal prosecutor an awesome amount of power. As Justice Jackson said, while he was Attorney General, "The prosecutor has more control over life, liberty and reputation than any other person in America. His discretion is tremendous."⁸³

⁸⁰ Arenella *supra* note 14, at 50.

⁸¹ *Id.* at 57.

⁸² *Id.* at 51.

⁸³ Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC'Y 18 (1940).

After all is said and done, the best safeguard against grand jury abuse is the appointment and training of intelligent, experienced, compassionate people to serve as prosecutors. Since even highly capable and experienced persons can make errors of judgment, it is also important that each prosecutorial office institute a review system regarding the decision to indict. For example, for many years the federal prosecutor in the Northern District of Illinois has utilized a tiered process to review proposals to indict.⁸⁴ An Assistant U.S. Attorney ("Assistant") who wishes to submit an indictment to the grand jury must first submit a "prosecution memorandum" and a draft copy of the indictment to both the chief and deputy chief of his division. The memorandum contains the names of the prospective defendants, the specific statutes under which they will be charged, the specific counts of the contemplated indictment, the agents and agency which helped to prepare the case, a summary of the evidence available against each defendant, and an analysis of possible defenses, evidentiary problems, and other matters which might affect the successful prosecution of the case. The division chief and/or deputy meet with the Assistant in conference to discuss the prosecution memorandum. They also discuss foreseeable problems with the prosecution of the case. Often, they will ask the Assistant to do more preparation before proceeding with the approval process. If and when the division chief approves the indictment at the indictment conference, the memorandum and draft indictment are sent to the First Assistant U.S. Attorney, who reviews them and either sends them back for further clarification or approves them and forwards them to the U.S. Attorney. The U.S. Attorney performs one final review, signs the indictment, and sends it back so that the Assistant can submit the case to the grand jury. Only prospective indictments which have passed all three levels of review are submitted to the grand jury.⁸⁵

Similar systems of review are in place in many other U.S. Attorneys' offices and within the Department of Justice.⁸⁶ We believe the Department of Justice should amend the U.S. Attorneys' Manual⁸⁷

⁸⁴ These procedures have never been formalized in writing. These procedures were in effect during the period of 1977-81 when author Thomas P. Sullivan was U.S. Attorney for the Northern District of Illinois.

⁸⁵ The grand jurors do not know of this review process, nor do they see the copy of the indictment signed by the U.S. Attorney until after they have voted a true bill.

⁸⁶ It is interesting to observe that no such review system was in place during Mr. Kaplan's term as an Assistant in the Office of the U.S. Attorney for the Northern District of California. Kaplan, *supra* note 52, at 176.

⁸⁷ The U.S. ATTORNEYS' MANUAL, a Department of Justice publication contained in a series of looseleaf notebooks which are updated periodically, reflects the current state of

to mandate such a review process in every federal prosecutorial office before a prosecutor may present an indictment to the grand jury. The review will guard against an individual prosecutor's misjudgment or overreaching.

There are other adjustments which profitably may be made to the grand jury system. We support several of the fine-tunings suggested by the A.B.A. Principles and the Model Grand Jury Act, but for reasons different from those of the authors of those documents. We welcome most of the A.B.A.'s principles, but not because they will empower the grand jury to make independent judgments. We believe that every grand jury inevitably will approve almost every indictment presented by the prosecutor, even in marginal cases. The A.B.A.'s changes will benefit the system by reminding the prosecutor of his or her duty and by allowing the grand jury to better aid the prosecutor in his or her exercise of judgment. While we believe these changes to be beneficial, we do not believe them to be vital to the proper functioning of the system. Accordingly, though we support many of the A.B.A. Principles regarding prosecutorial duties as *guidelines* for federal prosecution, we do not believe a violation should be cause to dismiss the indictment.

We support the A.B.A. Principles concerning *the court's and the prosecutor's charge to the grand jury*. We believe that the court and prosecutor should clearly advise grand juries of their duties and responsibilities. Additionally, the grand juries should be told the elements of the alleged crimes.⁸⁸ The better informed the grand jury, the more it will help the prosecutor in screening cases.

The U.S. Attorneys' Manual already contains provisions reflecting several of the other proposed reforms. Regarding *exculpatory evidence*, the Manual provides, "when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of the subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person."⁸⁹ Regarding *unconstitutionally obtained evidence*, the Manual provides, "[a] prosecutor should not present to the grand jury for use against a person whose constitutional rights clearly have been violated evidence which the prosecutor personally knows was obtained as a direct re-

the law, and official Department of Justice policy. Citations are to the Manual current as of May 1, 1984.

⁸⁸ See A.B.A. Principles 22 and 27. In advocating these principles, we do not mean to suggest that defense attorneys may use an allegedly faulty grand jury instruction as a basis for quashing an indictment.

⁸⁹ U.S. ATTORNEYS' MANUAL ¶ 9-11.334.

sult of the constitutional violation.”⁹⁰ Apart from differing enforcement mechanisms, the Department of Justice and the A.B.A. are in accord regarding the prosecutor’s duty with respect to exculpatory evidence and constitutionally inadmissible evidence.⁹¹

Hearsay presents a more difficult problem. At its 1984 mid-year meeting, the American Bar Association approved a new Grand Jury Reform Principle about hearsay: “Absent some compelling necessity, the prosecutor should not present the grand jury with a hearsay version of critical eyewitness testimony as a substitute for such testimony when it is available.”⁹² The Model Act’s version of the hearsay provision, which the A.B.A. rejected, is much more stringent.⁹³ The U.S. Attorneys’ Manual, on the other hand, eschews even the broad, rather vague standards approved by the A.B.A. The Manual sets no hard and fast rule, except that prosecutors should present hearsay evidence for what it is, rather than as first-hand testimony.⁹⁴ Other than this provision, it leaves the whole question of hearsay evidence to the discretion of the individual prosecutor:

Each United States Attorney should be accountable to himself in this regard and to the grand jurors. . . . The question should not be so much whether to use hearsay evidence, but whether, at the end, the presentation was in keeping with the professional obligations of attorneys for the government, and afforded the grand jurors a substantial basis for voting upon an indictment.⁹⁵

We believe that the current Department of Justice position on hearsay is basically correct. In the abstract, the general principle, “whenever possible, present first person testimony,” is appealing, but in practice, the question of whether to use first person or hearsay testimony is often a question of available time and resources — time and money to transport the witness, and time to prepare the witness to testify. Since, in reality, the prosecutor rather than the grand jury performs the effective screening function, we are not troubled by leaving this decision up to the prosecutor’s discretion. We propose, however, adding two sentences to the U.S. Attorneys’

⁹⁰ U.S. ATTORNEYS’ MANUAL ¶ 9-11.331.

⁹¹ Compare U.S. ATTORNEYS’ MANUAL ¶ 9-11.334 with A.B.A. Principle 3; compare U.S. ATTORNEYS’ MANUAL ¶ 9-11.331 with A.B.A. Principle 6.

⁹² See 1984 Mid-Year Meeting Report, *supra* note 39, at 108B.

⁹³ See Model Grand Jury Act § 100.

2. The prosecutor shall present to the grand jury evidence admissible at trial on each of the material elements of the offense, absent some compelling necessity for use of evidence which is not admissible at trial or unless the evidence falls within sections (3) [reports of experts] or (4) [certain basic facts] below. Such necessity must be stated on the record at the time of its admission.

Id.

⁹⁴ U.S. ATTORNEYS’ MANUAL ¶ 9-11.332.

⁹⁵ *Id.*

Manual's provision on hearsay⁹⁶ to the effect that, (1) the key government witnesses, such as accomplices, eyewitnesses, and victims, should, if possible, testify before the grand jury; and (2) if U.S. Attorneys or Assistants entertain serious doubts about a witness' credibility, they should, if possible, present this witness to the grand jury for scrutiny.⁹⁷

Several A.B.A. Principles concern the *rights of witnesses before the grand jury*. Both the U.S. Attorneys' Manual and the A.B.A. Principles agree that targets of grand jury investigations should have the opportunity to testify before the grand jury,⁹⁸ that the government should tell targets that they are possible indictees,⁹⁹ and that all witnesses should know of their privilege against self-incrimination.¹⁰⁰

The *right of witnesses to be accompanied by attorneys into the grand jury room* has caused a great deal of controversy. The Department of Justice disapproves of the practice, while the A.B.A. favors it.¹⁰¹ When attorneys were first allowed into grand jury rooms in state court systems, opponents feared that attorneys would disrupt grand jury proceedings. In practice, counsel have been able to behave themselves while in the grand jury room.¹⁰² Therefore, there is no overriding reason for barring counsel from the grand jury room,¹⁰³ so long as counsel clearly understand that their role is limited to advising the client quietly, and that counsel are not permitted to address the grand jurors or otherwise take an active part in the proceedings before the grand jury.

Whether or not witnesses are allowed to bring counsel into the

⁹⁶ *Id.*

⁹⁷ We believe the prosecutor should not withhold a witness from the grand jury simply because he is reluctant to make a record which might later be used to impeach that witness.

⁹⁸ Compare A.B.A. Principle 5 with U.S. ATTORNEYS' MANUAL ¶ 9-11.252.

⁹⁹ Compare A.B.A. Principle 2 with U.S. ATTORNEYS' MANUAL ¶ 9-11.250.

¹⁰⁰ *Id.*

¹⁰¹ Contrast A.B.A. Principle 1 with U.S. ATTORNEYS' MANUAL ¶ 9-11.356.

¹⁰² See *House Hearings*, supra note 1, at 1571, 1574. "[N]o public prosecutor of any of the more populous districts of those states which to any extent authorize the presence of counsel, and of whom inquiry was made, has reported any actual disruption of the grand jury's proceedings by reason of the presence of counsel for the witness." *Id.*

¹⁰³ One special problem may arise in organized crime, corporate, or political corruption investigations, when the lawyer representing a witness also represents the witness' employer and/or the target of the investigation. Prosecutors fear that the attorney's presence in the grand jury room may inhibit an otherwise willing witness from cooperating with the grand jury. We question whether the inhibition will be much greater than it is under the current system: lawyers can usually judge whether a witness is cooperating by the length of time the witness is before the grand jury. Further, if the witness desires to cooperate with the government without his lawyer's knowledge, he can meet secretly with a government agent and give a statement to be read to the grand jury, thus avoiding the necessity of a personal appearance before the grand jury.

grand jury room, we believe that Congress should amend Federal Rule of Criminal Procedure 6(e) to provide that witnesses are entitled to a transcript of their own testimony before the grand jury, provided that they make appropriate arrangements to reimburse the government for its costs.¹⁰⁴ This is a logical extension of Rule 6(e)(1)'s requirement that grand jury proceedings be recorded, and Rule 6(e)(2)'s exemption of witnesses from the grand jury rule of secrecy. Transcripts would be especially helpful to witnesses who appear at grand jury hearings without attorneys and later seek legal representation on an issue related to their testimony. At present, many courts require witnesses to show a compelling necessity before allowing them access to their own testimony.¹⁰⁵

We also believe that Congress should amend the so-called "*Jencks Act*,"¹⁰⁶ to provide defendants with earlier access to grand jury testimony and other prior statements of prospective witnesses, unless there is a risk of physical harm or intimidation to a witness, or other good cause. The government should have the burden of proof to show cause for withholding the material. Earlier access will give the defense more time to prepare its case properly. It may also aid defendants in deciding whether or not to seek or accept a plea bargain. As Professor Arenella pointed out, defendants often are forced to make their plea-bargaining decisions in the dark, without a good idea of the strength of the prosecution's case.¹⁰⁷ If a defendant knew what kind of case the government had against him, he could make a more intelligent plea bargaining decision.

We also propose one more reform that has not been addressed by the A.B.A. We suggest that *the size of the grand jury be reduced* from twenty-three people to a smaller number, perhaps seven, nine, or eleven. This reduction in size will eliminate many logistical problems currently posed by twenty-three person grand juries, at no cost to the effectiveness of the system. The chief benefit of the grand jury — having citizens from the outside observe and participate in the investigation and charging process — can be accomplished just as well with fewer than twenty-three persons. Many

¹⁰⁴ See Wing & Cushman, *Grand Jury Taping: Should a Witness Be Allowed to Record Testimony?*, NAT. L.J., March 5, 1984, at 15.

¹⁰⁵ See, e.g., *United States v. Clavey*, 578 F.2d 1219 (7th Cir. 1978) (per curiam) (en banc), *vacating*, 565 F.2d 111 (7th Cir. 1977), *cert. denied*, 439 U.S. 954 (1978) (affirming, without en banc opinion because of equally divided en banc court, district court decision withholding from defendant a transcript of his own grand jury testimony absent a showing of compelling need); *Bast v. United States*, 542 F.2d 893, 896 (4th Cir. 1976), and cases cited therein. *But see* Judge Wyzanski's dissent in *Bast*, 542 F.2d at 897-99.

¹⁰⁶ 18 U.S.C. § 3500.

¹⁰⁷ Arenella, *supra* note 10, at 511.

states now successfully utilize grand juries with fewer than twenty-three people.¹⁰⁸ Typically, states using smaller grand juries have created a "super majority" requirement for the approval of indictments.¹⁰⁹ We believe that these requirements effectively compensate for whatever lack of diversity might result from the reduction in the number of grand jurors. On an eleven-person grand jury, for example, we propose that no indictment be returned unless approved by a vote of at least seven members.

V. CONCLUSION

Because the grand jury already functions well as an accusatory body, it should remain the primary charging vehicle in the federal system, and should not be subjected to the widespread reforms proposed by the American Bar Association and the Model Grand Jury Act. Specifically, defendants should not routinely have the right to judicial review of the sufficiency of evidence before the grand jury. Since the grand jury has such vast power, and since the prosecutor has so much influence over the grand jury, some form of oversight and guidance of federal prosecutors is necessary. We believe that a tiered system of review of the decision to seek an indictment will provide the needed oversight, and will help to eliminate whatever abuse currently exists. The other reforms which we have proposed or approved will further fine-tune the system to make it more efficient and equitable overall.

¹⁰⁸ Twenty-one states currently allow 12 or fewer people to constitute a grand jury; four of these states allow 7 or fewer people to serve as a grand jury. See J. VAN DYKE, *supra* note 6, at 264-70.

¹⁰⁹ For example, Iowa requires 5 of 7 grand jurors in order to indict and Ohio requires 7 of 9 grand jurors to indict. *Id.*