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Reading the Jurors Their Rights: The Continuing Question of Grand Jury Independence

Gregory T. Fouts
Indiana University School of Law

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GREGORY T. FOUTS*

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INTRODUCTION

> [T]he jury system calls on the lawyer to have faith in the common man—that the average citizen can be relied on, when given an adequate explanation, to understand a problem, apply reason to it, and arrive at a wise solution. This faith in the common man to solve his problems by his own reason is of the essence of a democracy.[1]

The grand jury occupies a unique place in the American criminal justice system. Prior to the trial of a criminal case, it provides the only forum for citizen review of, and input into, the criminal process.[2] With the criminal trial becoming increasingly rare, the grand jury often provides the only such opportunity for citizen involvement.[3] The historical importance of civic participation in the criminal justice system via the grand jury is difficult to understate: as an institution, the grand jury is nearing its nine-hundredth year,[4] and across the centuries English and American grand juries have served roles as diverse as shielding the accused

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* J.D. Candidate, 2004, Indiana University School of Law—Bloomington; B.A., 1999, Wake Forest University. I wish to dedicate this Note with love to Molly Sweep, and to my family and my friends, for whose help and support I am very grateful.

1. United States v. Cox, 342 F.2d 167, 179-80 (5th Cir. 1965) (quoting E.R. Mattoon, *The Lawyer as a Social Force*, 15 ALA. LAW. 55, 64 (1954)).

2. Ric Simmons, *Re-examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 3 (2002).

3. *Id.*

4. *See infra* Part I.

from politically unpopular prosecutions,[5] toppling corrupt municipal officials,[6] and supervising the infrastructure of cities and towns.[7]

The Constitution reflects the historical importance of the grand jury and guarantees its continuing involvement in the criminal justice system.[8] As has often been observed in recent years, however, the contemporary grand jury is an institution adrift from its historical moorings.[9] Commentators have noted that, far from its intended role as a neutral panel that reviews evidence and determines whether an indictment should be returned, the modern grand jury is "little more than a rubber stamp, indiscriminately authorizing prosecutorial decisions."[10] Because the grand jury is no longer an independent body, but rather an arm of the prosecution, it cannot effectively serve its potential role as the community's voice in the criminal justice system.[11]

The issue of grand jury independence came to the fore recently in the Ninth Circuit's decision in *United States v. Marcucci*.[12] The defendants in *Marcucci* argued that the district court should have dismissed their indictments because the district court's instructions to the grand jury, which were based on the Model Grand Jury Charge recommended by the Administrative Office of the United States Courts, "misstated its constitutional role and function."[13] The basis of the error, they argued, was the district court's failure to inform the grand jury of its power to refuse to indict them, even if the government presented sufficient evidence for the grand jury to find probable cause to support an indictment.[14] A panel of the Ninth Circuit rejected this argument, holding that the district court's instruction to the jurors that they "should" indict the defendant if they found probable cause left "room—albeit limited room—for a grand jury to reject an indictment that, although supported by probable cause, is based on governmental passion, prejudice, or injustice."[15] A spirited dissent[16] argued that the majority opinion "fail[ed] to accord appropriate deference to the elevated status of the grand jury" by infringing on the

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5. *See* Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 281-84 (1995).

6. *See* RICHARD D. YOUNGER, THE PEOPLE'S PANEL 234-36 (1963).

7. *See id.* at 15-18 (discussing role of colonial grand juries in monitoring the condition of public roads, bridges, and buildings, and reporting to the court on deficiencies in the same).

8. The Fifth Amendment to the United States Constitution guarantees, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." US CONST. amend V.

9. The literature detailing, and usually lamenting, the grand jury's loss of its traditional independence is quite extensive. *See*, Judith M. Beall, Note, *What Do You Do with a Runaway Grand Jury?: A Discussion of the Problems and Possibilities Opened up by the Rocky Flats Grand Jury Investigation*, 71 S. CAL. L. REV. 617, 630-32 (1998); Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL'Y & L. 67, 67-68 (1995); R. Michael Cassidy, *Toward a More Independent Grand Jury: Recasting and Enforcing the Prosecutor's Duty to Disclose Exculpatory Evidence*, 13 GEO. J. LEGAL ETHICS 361, 362-63 (2000); Simmons, *supra* note 2, at 27.

10. Brenner, *supra* note 9, at 67.

11. *See id.* at 68.

12. 299 F.3d 1156 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 1600 (2003).

13. *Id.* at 1158.

14. *Id.* at 1159.

15. *Id.* at 1164.

16. *Id.* at 1166 (Hawkins, J., dissenting).

"requirement of the grand jury's independent exercise of its discretion [which] is a fixed star in our constitutional universe."[17]

This Note reviews the continuing issue of grand jury independence with particular reference to the Ninth Circuit's decision in *Marcucci*. It argues that the *Marcucci* court missed the chance to strike a rare blow for the independence of the federal grand jury. Part I reviews the history and traditional function of the grand jury and examines the discrepancy between this historical role—which is still given great rhetorical respect by the courts—and the modern role of the federal grand jury.[18] Part II focuses in particular on the controversial power of the grand jury to refuse to indict an accused even if it determines that sufficient probable cause exists to return an indictment. It argues that this nullification power, if used conscientiously, provides a unique opportunity for citizens to make their voices heard in the criminal justice system, but that the ability to exercise this power legitimately depends on thorough education of the grand jurors as to the history, purpose, and role of the grand jury. Part III looks at *Marcucci* closely, and argues that the case is consistent with the modern judicial view of grand juries, which pays lip service to their independence while acquiescing in actions that severely curtail that independence. Part IV of this Note concludes by arguing that, as a start, a carefully worded uniform federal grand jury instruction could make limited but real progress in nudging the grand jury back toward its historically independent role. Such an instruction, in addition to thoroughly educating grand jurors as to their task, would also encourage the grand jurors to take upon themselves an active role in discussing with the government their powers and their function. The result could be increased civic awareness of the role an independent grand jury plays in American criminal justice.

I. A BRIEF AND TARGETED HISTORY OF THE FEDERAL GRAND JURY

A. From Serving the King to Protecting His Enemies

The modern federal grand jury is a body of sixteen to twenty-three citizens.[19] The grand jury has the power to issue an indictment[20] upon the affirmative vote of twelve or more jurors.[21] In the federal system, grand jurors are selected at random from lists of registered or actual voters.[22] The task of the grand jurors is to decide, based on presentation of evidence by prosecutors, whether probable cause exists to

17. *Id.* at 1167 (Hawkins, J., dissenting).

18. This Note will focus on the federal grand jury. In *Hurtado v. California*, 110 U.S. 516 (1884), the Supreme Court held that the Fifth Amendment right to a grand jury indictment was not applicable to state prosecutions. However, many states retain the grand jury system today, and they have generally been more amenable to reforming grand jury processes than has the federal system. *See generally* SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 1:5 (2d ed. 1997).

19. FED. R. CRIM. P. 6(a)(1) ("The grand jury shall consist of not less than 16 nor more than 23 members.").

20. If the grand jury votes to indict an accused, it is said to return a "true bill" to the prosecutor. *See* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 15.2(g) (3d ed. 2000). A refusal to indict results in a "no bill" or, traditionally, a finding of "ignoramus" (we ignore it). *Id.*

21. FED. R. CRIM. P. 6(f).

22. *See* 28 U.S.C. § 1863(b)(2) (2000).

believe the accused committed the crime,[23] and whether an indictment should issue. Grand jury proceedings are conducted in secret: "The press and public are barred from the proceedings, as are suspects and their counsel. Even judges are not allowed in the grand jury room; attendance is limited to the prosecutor, the jurors, the court reporter, and the single witness being questioned."[24] If the grand jury determines the prosecutor's evidence is legally sufficient to support an indictment, it then decides whether to indict the defendant.

This modern model of grand jury procedure is quite similar to practices utilized at the time of the Fifth Amendment's adoption.[25] That model was the heir to an ancient tradition originating with the English King Henry II in the twelfth century.[26] Under the 1166 Assize of Clarendon, a group of sixteen men were called together to decide which citizens should be charged with crimes.[27]

> Because the sheriff could not keep track of all the mischief committed by the locals, each juror was expected to bring to the proceedings the names of those suspected of crimes . . . . [F]ines were levied on panels that failed to indict those whom the Crown considered guilty. As a result, the earliest grand juries were considered a source of oppression by the citizenry rather than a protection from it.[28]

From its inauspicious beginning as an agent of the crown, however, the grand jury evolved into a "bastion of popular rights."[29] Less than one hundred years after its inception, the grand jury was considered important enough an instrument of civic power to be included as a right in the Magna Carta.[30] However, the first true illustration of the grand jury's use of its power to shield an accused against an "overzealous prosecutor" did not appear until 1681.[31] Charles II wished to prosecute two citizens, the Earl of Shaftesbury and his follower Stephen Colledge, for treason, but two London grand juries refused to indict them.[32] This celebrated case deepened the people's respect for the grand jury as an institution with the

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23. *See* Leipold, *supra* note 5, at 263. In addition to determining whether probable cause exists to indict an accused (the indicting function), the grand jury plays another role as well: investigating "whether crimes have been committed and, if so, who committed them." BEALE ET AL., *supra* note 18, § 1:7. One federal grand jury can, and usually does, serve both indicting and investigatory roles. *Id.* The investigative function is important because the grand jury possesses the power to subpoena witnesses to testify before the grand jury or to produce evidence. *Id.* The subpoena power is an important investigative resource, particularly because neither police nor prosecutor share it. *Id.* The dual powers—indicting and investigating—are traditionally referred to as the "shield" and the "sword" of the grand jury. *Id.* This Note focuses on the indicting or shield role of the grand jury, because it is that capacity in which the grand jury has lost its independence.

24. Leipold, *supra* note 5, at 266.

25. BEALE ET AL., *supra* note 18, § 1:6. *See also* United States v. Cleary, 265 F.2d 459, 460 (2d Cir. 1959) (remarking that the grand jury "has remained as free of court-made limitations and restrictions as it was in England at the time the Fifth Amendment was adopted").

26. Leipold, *supra* note 5, at 280.

27. *Id.* at 281.

28. *Id.*

29. LEONARD W. LEVY, THE PALLADIUM OF JUSTICE 63 (1999).

30. Brenner, *supra* note 9, at 69.

31. Simmons, *supra* note 2, at 8.

32. *Id.*

power to shield them from the potentially tyrannical power of the state.[33] The year after the Shaftesbury affair, the Lord Chancellor of England, Sir John Somers, wrote that "[g]rand juries are our only security, in as much as our lives cannot be drawn into jeopardy by all the malicious crafts of the devil, unless such a number of our honest countrymen shall be satisfied in the truth of the accusations."[34]

In pre-revolutionary America, the grand jury continued to enjoy a reputation as a safeguard against prosecutorial mischief or abuse. The institution existed in some form in every one of the colonies by 1683.[35] Colonial grand juries "gradually recognized the importance of the grand jury as a direct means of expressing their grievances against Royalist officials and of blunting the Royalist power to prosecute by not returning indictments."[36] The most celebrated colonial case of grand jury independence was that of the publisher John Peter Zenger, whom three successive grand juries refused to indict for seditious libel of the Royal Governor of New York in 1743.[37] Because of its powerful shield function, the grand jury was at the time of the nation's founding a "highly esteemed institution."[38] In addition to its inclusion in the federal Constitution, the grand jury guarantee was also included in most state constitutions.[39]

B. The Prosecutor Captures the Grand Jury

Although independent grand juries flourished in parts of the country during the nineteenth century,[40] the institution's efficacy at the federal level began a decline that still continues. The reasons for the grand jury's loss of independence, and the consequent loss of its ability to serve as an effective avenue for civic participation in the criminal justice system, are not clear, but commentators have offered legal, historical, and psychological explanations. By the early twentieth century, the practice of the prosecutor appearing personally before the grand jury to present evidence had become routine.[41] The adoption of the Federal Rules of Criminal Procedure in 1946 further restricted the independence of the grand jury by

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33. *See* LEVY, *supra* note 29, at 64.

34. *Id.* (quoting SIR JOHN SOMERS, THE SECURITY OF ENGLISHMEN'S LIVES 64 (1682)). Blackstone also envisioned the grand jury as a shield of the individual liberties of the people against the whims of the state, "thus permitting the grand jury to thwart executive impulses to imprison politically obnoxious subjects or to exile them." *Id.* at 64-65.

35. LEROY D. CLARK, THE GRAND JURY: THE USE AND ABUSE OF POLITICAL POWER 13 (1975).

36. *Id.* at 16. Colonial grand juries also refused to indict the publisher of the *Boston Gazette* for libel, as well as the leaders of the Stamp Act riots of Boston. YOUNGER, *supra* note 6, at 28.

37. Simmons, *supra* note 2, at 11.

38. CLARK, *supra* note 35, at 19.

39. *Id.*

40. For example, grand juries in the southern states during the Civil War period were notorious for aggressively indicting slave owners and free blacks who violated existing slavery laws, and after the war, for refusing to indict whites accused of violent crimes against newly freed black citizens. Simmons, *supra* note 2, at 14. "However we may disagree with these actions today, they served further to popularize the grand jury among the local population as a body which embodied and furthered the interests of the local community against an oppressive government, thus reinforcing the institution's reputation as a bulwark of liberty." *Id.*

41. Roger Roots, *If It's Not a Runaway, It's Not a Real Grand Jury*, 33 CREIGHTON L. REV. 821, 833 (2000).

abrogating the grand jury's traditional presentment power.[42] By restricting the power of the grand jury publicly to comment upon the results of its investigations, and to criticize the actions of the government where appropriate, the Federal Rules "pigeonholed the citizen grand jury into a minor role of either approving or disapproving of a prosecutor's actions."[43] The federal courts have acquiesced in this restriction of grand jury powers.[44]

While the legal restrictions placed on the federal grand jury tightened in the twentieth century, the federal criminal law that it was asked to apply became increasingly complex.[45] As a result, the grand jury increasingly came to rely on its only available source for advice and guidance as to the law—the federal prosecutor.[46] While the prosecutor is required to perform the role of independent grand jury advisor in addition to government advocate,[47] the information he presents to the grand jury is entirely one-sided. The government has no obligation to present to the grand jury evidence exculpatory to the accused.[48] Grand jurors may consider evidence gathered in violation of the Fourth Amendment[49] and hearsay evidence.[50] The accused has no right to testify before the grand jury, and no right to have counsel present if he does testify.[51] He has no right to present evidence in his defense.[52] Consequently, the grand jurors hear only the evidence the prosecutor wants them to hear—"the most inculpatory version of the facts possible, regardless of whether that version is based on evidence that will be considered at trial."[53]

The prosecutor's influence over the grand jury is exacerbated by the rapport that develops between prosecutors and grand jurors.[54] Although this rapport is partially the result of the realities of the federal prosecutor-grand juror relationship (the prosecutor being the sole lawyer the grand jurors regularly interact with, and carrying the inherent authority of a government figure), it is also cultivated by

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42. "A presentment is a grand jury communication to the public concerning the grand jury's investigation. It has traditionally been an avenue for expressing grievances of the people against government." *Id.* at 837. *See* FED. R. CRIM. P. 7(a) advisory committee's note (stating that "presentment is not included as an additional type of formal accusation, since presentments as a method of instituting prosecutions are obsolete, at least as concerns the Federal courts").

43. Roots, *supra* note 41, at 838.

44. *See, e.g.*, Fields v. Soloff, 920 F.2d 1114, 1118 (2d Cir. 1990) (holding that a grand juror has no federal constitutional right to present information to a court over a prosecutor's objection); United States v. Cox, 342 F.2d 167, 171-72 (5th Cir. 1965) (holding that the United States Attorney is not required to validate a grand jury's indictment by signing it).

45. *See* Brenner, *supra* note 9, at 72-73 ("While state grand jurors tend to evaluate such conceptually simple offenses as rape, theft, and murder, federal grand jurors must grapple with the often arcane intricacies of federal criminal law, which encompass a variety of legally and factually complex offenses."). Professor Brenner offers as an example the federal anti-racketeering statute, RICO. *Id.*

46. *Id.*

47. This dual role has been described as "the ultimate conflict of interest." Brenner, *supra* note 9, at 92.

48. United States v. Williams, 504 U.S. 36, 55 (1992).

49. United States v. Calandra, 414 U.S. 338, 351 (1974).

50. Costello v. United States, 350 U.S. 359, 363 (1956).

51. Leipold, *supra* note 5, at 267.

52. *Id.*

53. *Id.* at 267-68.

54. Brenner, *supra* note 9, at 73.

effective prosecutors.[55] Because grand juries typically meet regularly for terms of service that are often eighteen months long,[56] individual prosecutors appear before them frequently enough for jurors to form positive, even warm feelings for the prosecutors as professionals.[57]

The grand jury has evolved from a revered institution notable for its independence to a tool of the prosecution. In modern practice, it is "naive to cling to the notion that the grand jury is primarily a protection for the citizenry."[58] Instead, most commentators now agree, the contemporary grand jury is "a tool of the state, not a bulwark against it."[59] Federal prosecutors often regard obtaining an indictment as an easy first step in the prosecution of an offense: one government attorney reported he had obtained fifteen indictments from a grand jury in forty-five minutes,[60] while another characterized presentations to the grand jury as "brief and perfunctory, usually consisting of little more than a single government agent reading enough of the case file to the grand jury to establish probable cause."[61] The federal judiciary has recognized this fact as well: one federal judge stated that "[a]ny experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury."[62]

The grand jury's current status as "lapdog"[63] of the prosecution has been statistically borne out. In fiscal year 1984, for example, statistics show that federal grand juries returned to prosecutors 17,419 indictments, compared to sixty-eight no

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55. *See id.* ("This rapport causes jurors to identify with prosecutors, thus increasing their willingness to follow a prosecutor's lead in . . . bringing charges . . . ."); *see also* FED. R. CRIM. P. 6(e)(1) advisory committee's note on the 1979 amendment (stating that "a sophisticated prosecutor must acknowledge that there develops between a grand jury and the prosecutor with whom the jury is closeted a rapport—a dependency relationship—which can easily be turned into an instrument of influence on grand jury deliberations"). For an interesting anecdotal account of the relationship between federal prosecutors and grand jurors, see BLANCHE DAVIS BLANK, THE NOT SO GRAND JURY 23-28, 65-74 (1993).

56. *See* SUSAN W. BRENNER & GREGORY G. LOCKHART, FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE § 6.6 (1996). Regular grand juries sit for up to eighteen months; this period can be extended for up to another six months, so grand juries may serve as long as twenty-four months. *Id.* at 130. Once impaneled, grand juries hold regular sessions according to the local rules of the federal district in which they sit. *Id.* at 131-32. The frequency of these sessions varies from district to district; in smaller districts, the juries may meet only a few times a month, while in larger districts the sessions may be more frequent. *Id.* at 132.

57. BLANK, *supra* note 55, at 65-74.

58. *Id.* at 7.

59. *Id. See also* Brenner, *supra* note 9, at 67 ("[T]he federal grand jury has become little more than a rubber stamp . . . ."); Cassidy, *supra* note 9, at 361 ("The bromide that 'a grand jury would indict a ham sandwich if the prosecutor asked it to' reflects a generally accurate belief that the prosecutor exerts primary control over the flow of information before the grand jury."); Roots, *supra* note 41, at 821 ("[T]he alleged oversight function of modern grand juries [is] essentially a tragic sham.").

60. *See* Simmons, *supra* note 2, at 32 n.137 (citing an interview with a New York assistant United States attorney). *See also* BLANK, *supra* note 55, at 37 (noting that "important cases" required five or six hours to present, and on one occasion the grand jury was asked to indict after a thirteen minute presentation).

61. Simmons, *supra* note 2, at 32 (citing an interview with a New York assistant United States attorney).

62. Marvin E. Frankel & Gary P. Naftalis, *The Grand Jury: An Institution on Trial*, THE NEW LEADER, Nov. 10, 1975, at 19, 28 (quoting Federal Judge William J. Campbell).

63. Beall, *supra* note 9, at 629.

bills, a success rate of 99.6% in obtaining indictments.[64] In 2001, federal grand juries returned only twenty-one no bills.[65] These numbers suggest that, whatever the reason, the federal grand jury now exercises very little power as a shield between the government and its citizens.

II. NULLIFICATION: THE POLITICAL POWER OF THE GRAND JURY

A. When Should a Grand Jury Refuse to Indict?

The historical hallmark of the grand jury is its "complete independence in refusing to indict."[66] Of course, there are several reasons why a grand jury might return a no bill. Professor Andrew Leipold has divided the cases in which a grand jury might refuse to indict an accused into the following categories: 1) cases in which the accused is factually innocent; 2) cases in which the accused is legally innocent but factually guilty;[67] 3) cases in which the government fails to make an adequate showing of evidence to support an indictment; 4) cases in which the government makes an adequate showing of evidence, but the grand jury disbelieves the evidence or its probative value; and 5) cases which the grand jury determines should not go forward for policy reasons.[68] In the first four instances, the grand jury is asked to analyze a set of facts and apply "a specific legal test—the probable cause standard"[69] in determining whether an indictment is warranted. A grand jury's refusal to indict in such situations may provide a useful check on prosecutorial power: it may discourage prosecutors from accusing suspects based on weak or incomplete evidence, and it may protect the accused from the stress and embarrassment of an indictment that the government could not prove at trial.[70] Because the prosecutor controls the process, however, and can present ex parte the most inculpatory case possible against the accused, it is unlikely that the grand jury will often know enough about the evidence in the case to make a meaningful determination that the evidence is inadequate or somehow flawed.[71] Beyond the rare instance in which a prosecutor presents plainly insufficient evidence to it,[72] the grand jury in its evidence-weighing capacity is incapable of acting as other than a prosecutorial rubber stamp.

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64. Statistical Report of U.S. Attorney's Office, Fiscal Year 1984 (Report 1-21) at 2.

65. Federal Justice Statistics Resource Center, Federal Justice Statistics Database, *at* http://fjsrc.urban.org (last visited Jan. 24, 2004).

66. LAFAVE ET AL., *supra* note 20, at § 15.2(g).

67. That is, cases in which "the defendant committed the crime alleged, but for some procedural, evidentiary, or other reason there is a legal bar to conviction." Leipold, *supra* note 5, at 291.

68. *Id.* at 290-94.

69. *Id.* at 264.

70. *Id.* at 304-10.

71. For example, in *United States v. Williams*, 504 U.S. 36 (1992), the Supreme Court held that the prosecutor has no obligation to present to the grand jury evidence exculpatory to the accused. A grand jury which heard such evidence would be able to balance it against inculpatory evidence and determine whether the evidence tending to show innocence was enough to overcome probable cause. *Id.* 45-47. A grand jury hearing only the evidence suggestive of guilt could not make this distinction, and would be likely to vote to indict. *See* Cassidy, *supra* note 9, at 386.

72. Because the government controls the evidence the grand jury will hear, prosecutors rarely present cases which they are not fairly certain will result in indictment. *See* Leipold, *supra* note 5, at 278.

B. Grand Jury Nullification in the Courts and in History

The fifth situation—in which a grand jury determines for reasons of policy that the government should not have the power to prosecute a person when there is probable cause to believe he or she is guilty of a crime—is much different. The right of the grand jury to shield the guilty from the reach of the government is controversial, but it is well-established. This "authority of the grand jury to 'nullify' the law arguably was the most important attribute of grand jury review from the perspective of those who insisted that a grand jury clause be included in the Bill of Rights."[73] The power has long been recognized by the courts. In *Vasquez v. Hillery*,[74] the Supreme Court offered perhaps its most influential description of the independent grand jury:

> The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense—all on the basis of the same facts. Moreover, "[t]he grand jury is not bound to indict in every case where a conviction can be obtained."[75]

Lower courts have frequently recognized this power as well. In *United States v. Cox*,[76] the court stated that the grand jury "has the . . . unchallengeable power to shield the guilty, should the whims of the jurors or their conscious or subconscious response to community pressures induce twelve or more jurors to give sanctuary to the guilty."[77]

The cases that gained the grand jury its reputation as guardian against overzealous prosecution, in fact, involved this nullification power. In the celebrated Shaftesbury case,[78] for example, the Crown probably presented sufficient evidence to show that the accused were guilty of treason, at least in the technical sense in which the English law defined it.[79] In that case, then, the "London grand juries did not protect the innocent by applying a legal standard; rather, they protected the guilty by exercising their own independent discretion in a political way."[80] The Zenger[81] grand jury's no bill was likely the product of the political ideology of the jurors as well;[82] similarly, the failure of southern grand juries to indict those

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73. LAFAVE ET AL., *supra* note 20, at § 15.2(g).

74. 474 U.S. 254 (1986).

75. *Id.* at 263 (quoting United States v. Ciambrone, 601 F.2d 616, 629 (2d Cir. 1979) (Friendly, J., dissenting)).

76. 342 F.2d 167 (5th Cir. 1965).

77. *Id.* at 190 (Wisdom, J., concurring specially). *See also* United States v. Asdrubal-Herrera, 470 F. Supp. 939, 942 (N.D. Ill. 1979) (noting that "[j]ust as a prosecutor can, in the exercise of discretion, decline prosecution in the first instance, a grand jury can return a true bill or a no bill as they deem fit"); *In re* Kittle, 180 F. 946, 947 (S.D.N.Y. 1910) (Hand, J.) (stating that the grand jury is "an irresponsible utterance of the community at large, answerable only to the general body of citizens, from whom they come at random, and with whom they are again at once merged").

78. *See supra* text accompanying notes 32-33.

79. *See* Simmons, *supra* note 2, at 10.

80. *Id.*

81. *See supra* text accompanying note 37.

82. Leipold, *supra* note 5, at 287.

continuing to rebel against reconstruction policies had nothing to do with the question of sufficiency of the evidence.[83]

C. Pros and Cons of the Nullification Power

The power of the grand jury to nullify a charge on essentially political grounds raises serious questions. Most importantly, perhaps, grand jury nullification might be thought of as fundamentally undemocratic.[84] The criminal law is written by democratically elected representatives of the people. The enforcement of that law is delegated to democratically elected members of the executive branch and their appointees. It is these officials in whom the discretion to investigate and to prosecute crime lies. Nullification undermines this democratic process by substituting the will of individual grand jurors for the putative will of the collective, the voters.[85] In addition, because the power of the grand jury to nullify is absolute, and because the grand jury is not obligated to reveal the record of its proceedings to the public,[86] the risk that the grand jury will abuse this power by exercising it discriminatorily or capriciously is significant.[87] For example, a South Carolina grand jury that refused to indict members of the Ku Klux Klan for assaulting black citizens in a Reconstruction-era case[88] was exercising an unquestioned right in so refusing. Most people today would be very uncomfortable with—if not outraged by—this result. The same risk exists with the contemporary grand jury, which might be influenced by racial prejudice, the notoriety or fame of the accused, or any number of other factors unrelated to the grand jury's political concern with the prosecutor's course of action. In individual cases, this use of nullification power would be unfair (and potentially dangerous, depending on the severity of the charges against the accused); in the aggregate, it could "be a potent force for frustrating legitimate societal objectives,"[89] including not only crime control, but also, for example, equal protection of the law and the public perception of procedural fairness.[90]

Despite these serious issues, however, it is still the nullification power that affords the grand jury its best opportunity to provide an "influential, accurate, and legitimate community voice"[91] in the federal criminal justice system. As a practical matter, grand jurors are realistically unable to break ranks with the prosecutor on evidentiary questions or purely legal issues.[92] However, policy matters involve only

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83. *See* Simmons, *supra* note 2, at 14.

84. *See* Leipold, *supra* note 5, at 310.

85. *Id.* at 309.

86. The same is not true in the case of a trial jury. The trial jury's unreviewable authority to acquit a defendant in the face of overwhelming evidence of guilt is analogous to the grand jury's power to nullify. However, a trial, unlike a grand jury proceeding, is held in public, and much more information is available about the accused and about the facts of the case. *See* Leipold, *supra* note 5, at 307-10.

87. *Id.* at 309-10.

88. *See* YOUNGER, *supra* note 6, at 129.

89. Leipold, *supra* note 5, at 309.

90. *See* Simmons, *supra* note 2, at 57; *see also* Frankel & Naftalis, *supra* note 62, at 9 (arguing that "the very notion of the grand jury as beneficent for a free society would be subverted by a band of amateurs engaged in . . . indicting or not indicting as their 'independent' and untutored judgment might dictate").

91. Brenner, *supra* note 9, at 100.

92. *See supra* text accompanying notes 53-57; *see also* Leipold, *supra* note 5, at 304.

the intuition and conscience of the jurors, their "rough sense of right and wrong."[93] Every citizen is equipped to employ these tools. Substantively, the nullification power remains important despite its potential for abuse. First, imperfect though it may be, the nullification power still stands in the path of the prosecutor's otherwise unreviewable discretion.[94] Although we expect the prosecutor to act in the interest of justice in exercising this discretion, we must remember that the prosecutor is influenced by a number of sometimes competing forces. Although the individual assistant United States attorneys who initiate criminal proceedings and the United States attorneys under whom they work are not themselves elected officials, they are part of the federal executive framework, and thus may be susceptible to political or public pressure.[95] In addition, an unethical prosecutor may pursue a particular defendant for reasons antithetical to the interests of justice in a particular case.[96] For example, a prosecutor may be motivated by public pressure to solve a particular crime or series of crimes,[97] by the fact that a suspect has an extensive criminal record and represents a threat regardless of his guilt or innocence in the particular case before the grand jury, or by a desire to use the pressure of an indictment to convince the defendant to cooperate in a proceeding against another suspect.[98] Finally, the prosecutor with a heavy caseload may simply not have the time to distinguish differences in facts and circumstances that might make particular prosecutions "unfair." The grand jury, "though unelected, represents a cross-section of the community that hears from the witnesses . . . firsthand and takes at least a few minutes to consider the facts and the equities in each case."[99]

The grand jury, if it is able to act independently, has the capacity to provide the only counterweight to the structural realities of the system of government prosecution. The grand jury provides the only opportunity for the "laypeople's perspective—the voice of the community"[100] to be heard in the criminal charging process. An independent grand jury that hears the prosecutor's case and decides not to indict although there is sufficient evidence to do so sends a clear message to the prosecutor that a cross-section of citizens of the community does not agree with his actions. On the other hand, an independent grand jury that returns an indictment "enhance[s] . . . the perceived legitimacy"[101] of the charges in a way that grand jury rubber-stamping does not. This is particularly true in cases where the prosecutor's action may be susceptible to charges of bias or political motivation.[102]

But a grand jury simply cannot exercise its discretion in an effective manner if it is not clearly informed of its duties in the criminal justice system. In the recent case *United States v. Marcucci*,[103] the Ninth Circuit missed an opportunity to send a signal to prosecutors and the lower courts that the independent grand jury should

93. Leipold, *supra* note 5, at 307.

94. *See* Simmons, *supra* note 2, at 50.

95. *Cf. id.* (describing similar political pressure on unelected state prosecutors).

96. *See* Cassidy, *supra* note 9, at 392.

97. One can easily imagine contemporary examples at the federal level. The political climate surrounding, for example, post-September 11 terrorist investigations or allegations of corporate malfeasance following the collapse of Enron might make overzealous government pursuit of "suspicious" persons more likely.

98. Cassidy, *supra* note 9, at 392.

99. Simmons, *supra* note 2, at 51.

100. Brenner, *supra* note 9, at 121.

101. *Id.*

102. *See id.*

103. 299 F.3d 1156 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 1600 (2003).

be taken seriously as a constitutional institution. While this Note will argue that the court's decision in *Marcucci* was wrong, it recognizes that it fits nicely with the modern judicial view of the grand jury, which pays rhetorical service to its role while showing little concern for the demise of its independence.

III. *UNITED STATES V. MARCUCCI*: THE NINTH CIRCUIT FOLLOWS THE CROWD

A. The Model Grand Jury Charge

United States v. Marcucci was a consolidation of three unrelated cases that presented the same issue.[104] Two of the appellants in the case pleaded guilty to drug offenses following grand jury indictments;[105] the third, Marcucci, was indicted and then convicted by a jury on a charge of attempted bank robbery.[106] The drug offense appellants conditioned their guilty pleas on the opportunity to appeal the issue of the propriety of the district court's charge to the grand jury in their cases. Marcucci was initially denied the transcript of the grand jury charge in his case, but the government conceded that the grand jury charge in his case was "essentially the same"[107] as the one given to the drug offense appellants, and the court allowed him to appeal the same issue.[108]

The appellants in *Marcucci* argued that the district court, in its charge to the grand juries that indicted them, committed reversible error by failing to give a nullification instruction—that is, by failing to inform the grand jury that it could refuse to indict a suspect even if it found there was probable cause to support an indictment.[109] This failure, appellants argued, deprived them of "their right to a grand jury's independent exercise of its discretion."[110] The district judge in each case read to the jurors "almost verbatim"[111] the charge recommended for new grand juries by the Administrative Office of the United States Courts ("Model Charge").[112] Thus, the *Marcucci* case was essentially an attack on the constitutionality of the Model Charge.

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104. *Id.* at 1158.

105. One appellant pleaded guilty to possessing and importing about fifty kilograms of marijuana, the other to possessing and importing about twenty-two kilograms of marijuana. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* For the full text of the Model Grand Jury Charge that was essentially identical to the charge given in *Marcucci*, see *infra* note 112.

109. *Marcucci*, 299 F.3d at 1159.

110. *Id.*

111. *Id.*

112. The charge is reprinted in BEALE ET AL., *supra* note 18, § 4:5. While the full charge is somewhat lengthy, the relevant parts are as follows:

> LADIES AND GENTLEMEN:
>
> Now that you have been empaneled [sic] and sworn as a grand jury, it is the Court's responsibility to instruct you as to the law which should govern your actions and your deliberations as Grand Jurors.
>
> The framers of our Federal Constitution deemed the Grand Jury so important for the administration of justice, they included it in the Bill of Rights. As I said before, the Fifth Amendment to the United States Constitution provides in part that no person shall be held to answer for a capital or otherwise infamous crime without action by a Grand Jury. . . . The purpose of the Grand Jury is to determine whether there is

The Model Charge does not contain an express nullification instruction, although it does contain language emphasizing the independence of the grand jury and warning the grand jurors against becoming an "arm of the United States Attorney's Office."[113] The Model Charge also instructs the grand jury that it

> sufficient evidence to justify a formal accusation against a person. If law enforcement officials were not required to submit to an impartial grand jury proof of guilt as to a proposed charge against a person suspected of having committed a crime, they would be free to arrest a suspect and bring him to trial no matter how little evidence existed to support the charge. As members of the Grand Jury, you, in a very real sense, stand between the government and the accused. It is your duty to see to it that indictments are returned only against those who you find probable cause to believe are guilty and to see to it that the innocent are not compelled to go to trial. . . .
>
> . . . .
>
> You cannot judge the wisdom of the criminal laws enacted by Congress, that is, whether or not there should or should not be a federal law designating certain activity as criminal. That is to be determined by Congress and not by you.
>
> . . . .
>
> . . . Your task is to determine whether the government's evidence as presented to you is sufficient to cause you to conclude that there is probable cause to believe that the accused is guilty of the offense charged against him. To put it another way, you should vote to indict where the evidence presented to you is sufficiently strong to warrant a reasonable person's believing that the accused is probably guilty of the offense with which he is charged.
>
> . . . .
>
> It is extremely important for you to realize that under the United States Constitution, the Grand Jury is independent of the United States Attorney and is not an arm or agent of the Federal Bureau of Investigation, the Drug Enforcement Administration, the Internal Revenue Service, or any governmental agency charged with prosecuting a crime. There has been some criticism of the institution of the Grand Jury for supposedly acting as a mere rubber stamp approving prosecutions that are brought before it by government representatives. However, as a practical matter, you must work closely with the government attorneys. The United States Attorney and his assistants will provide you with important service in helping you to find your way when confronted with complex legal matters. It is entirely proper that you should receive this assistance. If past experience is any indication of what to expect in the future, then you can expect candor, honesty and good faith in matters presented by the government attorneys. However, ultimately, you must depend on your own independent judgment, never becoming an arm of the United States Attorney's office. The government attorneys are prosecutors. You are not. If the facts suggest that you should not indict, then you should not do so, even in the face of the opposition or statements of the United States Attorney.

Id. The court instructing the grand jury that indicted the two drug offense appellants in *Marcucci* introduced the two assistant U.S. attorneys working on the case as "two wonderful public servants [who] are here to assist you in the discharge of your duties." *Marcucci*, 299 F.3d at 1159 n.2.

113. Model Grand Jury Charge, *reprinted in* BEALE ET AL., *supra* note 18, § 4:5, at 4-19.

"should vote to indict" the accused upon a showing of probable cause;[114] it does not instruct the grand jury that it "must" or "shall" vote to indict upon probable cause.

The majority rejected the nullification argument. It concluded that the appellants' argument that a nullification charge was constitutionally required "rests . . . on appellants' mistaken construction of the history of the grand jury."[115] In fact, however, the majority's reading of grand jury history was seriously flawed.

B. Grand Jury Nullification: "Political" or "Principled"?

The court noted as an initial matter that the grand jury charge "[did] not eliminate discretion" on the part of the grand jurors, because it instructed only that they "should" indict if probable cause was present,[116] and instructed them as to their independent role.[117] While it is true that a thoughtful grand juror who was listening closely to the instructions might parse the words carefully and understand her complete freedom to refuse to indict, the realistic chance of this happening is remote. As the dissenting judge[118] observed, "the 'should' and 'shall' distinction . . . is a lawyer's distinction—not a difference to which most lay people sitting as grand jurors are likely alert."[119] This is particularly true in the context in which the charge is given—to jurors newly impaneled in a role they have likely never served before, by a federal district judge who probably does not inspire them to reflect upon their power to defy the government.

The majority's validation of the grand jury charge based on the presence of the word "should" and its further instruction that the grand jury is "independent of the United States Attorney and . . . not an arm" of the government disregards a deeper problem with the charge. As a whole, the charge instructs the grand jury that its task is to determine whether probable cause exists. A grand juror would necessarily believe that his *sole* task is to make that determination—that he had no freedom to analyze the propriety of the government's actions based on anything but the evidence presented to him.[120]

The claim that the Model Charge preserves independence is true only as far as it goes; it does instruct the jury that its decision not to indict based on a finding of lack of probable cause is unassailable regardless of the government's opposition—but it does not make clear to the grand jury that there is an entirely different class of cases in which they might, at their discretion, refuse to indict the accused.[121]

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114. *Id.*

115. *Marcucci*, 299 F.3d at 1160.

116. *Id.* at 1159.

117. *Id.* at 1163-64.

118. The dissenter in *Marcucci*, Judge Michael Hawkins, served as United States attorney for the District of Arizona from 1977 to 1980, giving him extensive first-hand experience with the grand jury system. *See* 2 ASPEN PUBLISHERS, INC., *Ninth Circuit*, *in* ALMANAC OF THE FEDERAL JUDICIARY 12, 12 (2003).

119. *Marcucci*, 299 F.3d at 1170 (Hawkins, J., dissenting).

120. *See id.* (Hawkins, J., dissenting) ("[B]oth 'reminders' of independence cited by the majority . . . occur in the context of telling the grand jurors that their duty is to determine probable cause.").

121. *See id.* (Hawkins, J., dissenting) (citing Vasquez v. Hillery, 474 U.S. 254, 263 (1986)). Judge Hawkins notes that the grand jury charge at the outset instructs the jurors that "the purpose of the Grand Jury is to determine whether there is sufficient evidence to justify a formal accusation against a person." *Id.* at 1167 (Hawkins, J., dissenting).

The majority in *Marcucci* was clearly uncomfortable with the idea of an independent grand jury. The court stated that "the historical function of the grand jury [is] protecting citizens from unfounded accusations not supported by probable cause,"[122] but this statement is only partially correct. The court argued that, historically, refusals to indict "have almost always been as much political as principled."[123] It is instructive that the court regarded the two motivations—"political" and "principled"—as mutually exclusive. It is true that some of the most well known refusals to indict might be characterized as "political" rather than "principled," not least because we are uncomfortable applying the latter word to a grand jury's shielding of, for example, a person accused of a racially motivated crime.[124] And the court expressed concern that grand juries might refuse to indict based on racial bias or "anti-government sentiment."[125] While these concerns are legitimate,[126] it is a mistake to focus on them exclusively when considering the grand jury's nullification power. A grand jury might refuse to indict based on its sense that the interests of justice would not be served by prosecuting a particular individual. It might believe that a fair law is being applied unfairly given a particular defendant's circumstances. It might believe that the government is overzealously prosecuting and imprisoning those accused of certain offenses, such as drug crimes. It might be concerned that the police in a community are being too aggressive in their investigations.

To attempt to characterize these motivations as "principled" or "political"—they may be either, or both, or neither—misses the point. The grand jury in these cases is acting in its historic role of "conscience of the community,"[127] projecting the voice of the public into the criminal justice system.

The *Marcucci* case itself presented an ideal opportunity for an independent grand jury to provide the community's input into the system. The drug offense appellants in the case were accused of transporting large quantities of marijuana into the United States. Balanced against this accusation is the fact that one of them was "young and a first time offender,"[128] and that the drug involved was marijuana, as opposed to a more dangerous drug such as heroin or cocaine.[129] Marcucci was convicted of attempted bank robbery, a serious offense; on the other side of the scale, a grand jury might weigh heavily his apparent incompetence and naiveté as a criminal. The dissent characterizes Marcucci's conduct as "bungl[ing] a rather pathetic and non-intimidating but no less stupid crime."[130] But a grand jury led to believe that its sole function was to determine the existence of probable cause would be unlikely to realize that such factors were relevant to its decision to indict. Had the jury been apprised of this, it might have found it appropriate to provide "relief where strict application of the law would prove unduly harsh."[131]

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122. *Id.* at 1164.

123. *Id.* at 1162.

124. *See supra* note 86 and accompanying text.

125. *Marcucci*, 299 F.3d at 1163.

126. *See supra* text accompanying notes 85-90.

127. Gaither v. United States, 413 F.2d 1061, 1066 n.6 (D.C. Cir. 1969) (quoting 8 ROBERT M. CIPES, MOORE'S FEDERAL PRACTICE, ¶ 6.02[1] (3d ed. 1996) (footnotes omitted)).

128. *Marcucci*, 299 F.3d at 1172 (Hawkins, J., dissenting).

129. *Id.* (Hawkins, J., dissenting).

130. *Id.* (Hawkins, J., dissenting).

131. *Id.* at 1173 (Hawkins, J., dissenting) (quoting *Gaither*, 413 F.2d at 1066 n.6).

The *Marcucci* majority argued that the relevant place for consideration of such factors as the youth of the accused and the circumstances of the offenses is "at sentencing if the Sentencing Guidelines allow."[132] While it is true that a district judge should consider mitigating factors if he has the power to do so at sentencing, the court's statement betrays a misunderstanding of the nullification power and of the role of the grand jury itself.

First, there is a vast difference between a grand jury's refusal to indict, which prevents the government from prosecuting the defendant at all,[133] and a mitigating factor under the Sentencing Guidelines, which only reduces the prison sentence of the defendant after he has been indicted, tried, or pled guilty, and been convicted of the offense. This is cold comfort to a defendant the grand jury might have shielded from prosecution altogether. Furthermore, even if the defendant is ultimately acquitted of the offense for which he is indicted, the indictment itself is damaging to the defendant financially and emotionally, because it means that he must face the ordeal of a criminal trial.[134]

Second, the court's suggestion that the sentencing judge is the only appropriate party to consider mitigating factors in administering justice denies completely the potential of the grand jury to provide the voice of the community. A federal judge may determine, to the extent it is within his discretion to do so under the Federal Sentencing Guidelines,[135] that a defendant's youth or naiveté warrants a sentence that is less than the maximum. That is fundamentally different, however, from a cross-section of the community's citizens sending a message to the government that, in its judgment, the government is acting overzealously in prosecuting a fellow citizen.

C. Marcucci*: Inside the Judicial Mainstream*

Although this Note has argued that the majority's analysis of the grand jury issue in *Marcucci* was flawed,[136] the *Marcucci* court's attitude toward the

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132. *Marcucci*, 299 F.3d at 1163 n.6.

133. In the federal system, a grand jury's return of a no bill is not the same as an acquittal at trial. If there is an initial refusal to indict, a federal prosecutor may submit the same case to a different grand jury (or to the same grand jury) until an indictment is returned. BEALE ET AL., *supra* note 18, § 8:6, at 8-38; United States v. Thompson, 251 U.S. 407, 413-15 (1920). Double jeopardy does not attach at the indictment stage, because the grand jury's initial determination of probable cause is not intended to be a conclusive answer to the question of the accused's guilt or innocence, which is a question for the trial jury. BEALE ET AL., *supra* note 18, § 8:6, at 8-37. Therefore, a grand jury's initial refusal to indict a defendant does not necessarily mean the defendant will never be prosecuted for an offense.

134. *See* Cassidy, *supra* note 9, at 403 (noting that "there are substantial costs associated with indictment which will not be remedied even by a subsequent acquittal, such as the expense of mounting a defense and the ongoing damage to one's reputation").

135. 18 U.S.C. §§ 3551-3586 (2000). In fact, these particular factors do not support a sentence reduction. *See* U.S. SENTENCING GUIDELINES MANUAL § 5H1.1 (2003).

136. If the majority had found error in the district court's instruction, the question of remedy would have been difficult. In *Bank of Novia Scotia v. United States*, the Supreme Court held that an indictment may not be dismissed based on an error in grand jury proceedings unless the error prejudiced the defendant. 487 U.S. 250, 254 (1988). The Court went on to hold that a presumption of prejudice attaches if "the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair." *Id.* at 257. In *Marcucci*, the defendants argued that the error was structural because it removed the possibility that the grand jury would decide not to indict them, and this error

independent grand jury is consistent with modern judicial thinking. The Supreme Court "continues to act on the assumption that the screening function works, regardless of whether it believes it."[137] This assumption underlies the rhetoric of numerous Supreme Court and lower federal court cases. Two Terms ago, the Supreme Court stated that "the Fifth Amendment grand jury right serves a vital function in providing for a body of citizens that acts as a check on prosecutorial power."[138]

In practice, however, the courts have approved of procedures that seriously impugn the independence of the grand jury. For example, the Supreme Court has held that evidence that would not be admissible at trial is admissible in grand jury proceedings.[139] It has also held that the government has no obligation to present exculpatory evidence to the grand jury.[140] While reasonable concerns underlie these holdings, they have the effect of depriving the grand jury of information that would be vital to the exercise of its discretion in performing the screening function. Further, in *United States v. Williams*, the Court severely curtailed the power of the federal courts to supervise grand jury proceedings. Basing its holding on the grounds of separation of powers, the Court stated that the grand jury is a body independent of both the prosecutor and the court.[141] To allow close judicial scrutiny of grand jury proceedings, the Court held, would undermine this independence from the judiciary.[142] However, removing the grand jury from the courts' scrutiny in fact increases the grand jury's reliance on the prosecution for guidance, with serious implications as to its capacity to act independently.[143]

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was sufficient to "render the proceedings fundamentally unfair." *Marcucci*, 299 F.3d at 1172. As Judge Hawkins noted in dissent in *Marcucci*, "it is hard to say with authority that the deprivation of an adequately-instructed grand jury is or is not 'fundamentally unfair.'" *Id.* (Hawkins, J., dissenting). A finding of structural error would have major implications, as it might render every conviction in the Ninth Circuit in which the Model Charge was given to the grand jury vulnerable to constitutional challenge. *Id.* at 1162. Such an "extreme result" is probably unnecessary. *Id.* The Supreme Court has presumed structural error in the grand jury system only in cases of racial discrimination in the grand jury selection process. *See* Vasquez v. Hillery, 474 U.S. 254, 262 (1986). Although a future change in the Model Charge would not benefit defendants convicted under the old charge, it would help to improve grand jury independence in future cases.

137. Leipold, *supra* note 5, at 270.

138. United States v. Cotton, 535 U.S. 625, 634 (2002) (quoting Wood v. Georgia, 370 U.S. 375, 390 (1962) (stating that the grand jury "serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will")); *see also* United States v. Williams, 504 U.S. 36, 68 (1992) (Stevens, J., dissenting) (same); United States v. John Doe, Inc. I, 481 U.S. 102, 119 (1987) (same); United States v. Mechanik, 475 U.S. 66, 74 (1986) (O'Connor, J., concurring in judgment) (same); Branzburg v. Hayes, 408 U.S. 665, 687 n.23 (1972) (same).

139. *See* United States v. Calandra, 414 U.S. 338, 349-52 (1974) (holding that evidence obtained in violation of the Fourth Amendment exclusionary rule is admissible in grand jury proceedings); Costello v. United States, 350 U.S. 359, 363 (1956) (holding that evidence that is inadmissible at trial because it violates the hearsay rule is admissible in grand jury proceedings).

140. United States v. Williams, 504 U.S. 36, 36-37 (1992).

141. *See id.* at 47-49.

142. *Id.* at 49.

143. *See* Cassidy, *supra* note 9, at 374.

IV. WILL A NEW GRAND JURY CHARGE SOLVE THE PROBLEM?

A. Reform Proposals

Grand jury reform is like the weather: everybody talks about it, but nobody actually does anything. Recent movements to reform the federal grand jury have arisen in the wake of political scandals and have usually focused on curtailing abuse of the grand jury's powers as an investigatory body. In the aftermath of the Nixon presidency, concern arose over the Justice Department's use of grand juries to harass political opponents of the administration.[144] The concern culminated in the proposed federal Grand Jury Reform Act of 1976,[145] which contained various procedural reforms but which was never passed by Congress. The aggressive pursuit of President Clinton and a number of his administration's officials by grand juries controlled by independent counsel also led to calls for reform.[146] Reform proposals relating to the grand jury's loss of independence as a screening body have not been tied directly to political scandals, but they have been raised consistently over the past two decades. Common proposals have included requiring the prosecutor to disclose exculpatory evidence to the grand jury,[147] creating a "grand jury counsel" position to reduce the grand jury's reliance on the prosecution,[148] disallowing hearsay testimony before the grand jury,[149] and giving the grand jury more accurate information as to its role and function.[150] Despite these proposals, there have been few steps taken by Congress.[151]

B. Reform: To What End?

In spite of the current attitude of Congress and the federal courts toward the grand jury, there may be some room for useful change in the grand jury system. A pertinent question remains, however: given the level to which the independent grand jury has sunk, what benefits will small changes at the margins provide? There are two possible answers: first, a grand jury fully appraised of its function and role will have at least the potential to provide a community voice in the federal criminal justice system. When deciding whether to indict, grand jurors who are aware of their power critically to analyze the totality of the circumstances in a case, and not just the sufficiency of the evidence, will be more likely to exercise their traditional role as a check on prosecutorial overzealousness. This is a good in its own right. It may also increase the perceived legitimacy of the criminal process and increase confidence in the criminal justice system in general.[152]

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144. *See* CLARK, *supra* note 35, at 5-6.

145. S. 3274, 96th Cong. (1976).

146. BEALE ET AL., *supra* note 18, § 1:9, at 1-36.

147. *See* Cassidy, *supra* note 9, at 385-92.

148. *See* Beall, *supra* note 9, at 636-37; Brenner, *supra* note 9, at 124-27.

149. *See, e.g.*, Simmons, *supra* note 2, at 70-71.

150. *See, e.g.*, CLARK, *supra* note 35, at 141-42.

151. "The last major effort by Congress at federal grand jury reform" was the Grand Jury Reform Act of 1985, H.R. 1407, 99th Cong. (1985), which was designed to "inject comprehensive due process safeguards into grand jury proceedings and insure their protective role." Mark J. Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1, 63 (1996).

152. *See* Simmons, *supra* note 2, at 57.

The second benefit of a more independent grand jury lies in the opportunity it provides to engage citizens in the political process.[153] Apart from the grand jury, few forums allow citizens in a modern democracy directly to critique and to influence the actions of public officials. And few issues are nearer to the hearts and minds of most members of a community than crime and public safety, as these issues relate to them personally, and to the quality of life in the community at large. While this justification has been dismissed as paternalistic and "condescending,"[154] the criticism rings true only as long as the grand jury retains its current status as a rubber stamp. Grand jurors empowered to exercise their discretion independently might view differently the benefits of grand jury service.

Of course, there would be problems associated with a more independent grand jury as well. Most importantly, an independent grand jury's refusal to indict defendants might be a detriment to legitimate social policy. In addition to frustrating the government's goal of prosecuting those who break the law, it might also act in ways contrary to other important social ends, such as racial equality. While these are important concerns, they do not outweigh the importance of returning the grand jury to its historical and constitutional role. Grand juries that act truly harmfully—as by refusing to indict a very dangerous criminal or by consistently refusing to indict white defendants simply because of their race—are unlikely to be common, because a grand jury whose members represent a cross-section of the community can be trusted to consider the best interests of that community.[155] If a grand jury is truly irresponsible, the prosecutor can remedy that problem by re-presenting his case to another grand jury.[156] Of course, this is true of any case in which a grand jury refuses to indict, whatever the motives of the grand jury. Ultimately, the decision whether to re-present lies with the prosecutor. The prosecutor must be trusted to carefully consider the reasons why a grand jury might have refused an indictment, and to respect the voice of the community unless truly serious concerns compel re-presentation.

C. Suggested Changes to the Model Grand Jury Charge

The question of specific reforms remains. A modest yet potentially helpful reform would be to change the way in which federal grand juries are instructed. Traditionally, judges often treated the grand jury charge as an opportunity to orate, often at length, about the greatness of the American political system and any number of other topics.[157] Today, however, the Administrative Office of the United States Courts has devised a Model Charge that it recommends be given to all grand juries at the beginning of their service.[158] This grand jury charge should be modified to reflect the true nature and function of the grand jury.

To begin with, an additional reform that has been proposed by Professor Brenner would probably increase the efficacy of a change in the Model Charge.

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153. *See* Brenner, *supra* note 9, at 121.

154. Leipold, *supra* note 5, at 317.

155. It is important to remember that for a federal grand jury to refuse to indict, at least five and perhaps as many as twelve grand jurors must so agree, because the grand jury requires a quorum of sixteen members to transact business, and twelve votes are needed to indict. *See supra* text accompanying notes 19-21.

156. *See supra* note 133.

157. *See* YOUNGER, *supra* note 6, at 47-54.

158. United States v. Marcucci, 299 F.3d 1156, 1159 (9th Cir. 2002). For the relevant text of the charge, see *supra* note 112.

Her proposal calls for the creation of the position of grand jury counsel.[159] The grand jury counsel would be a lawyer independent of the prosecutor who would advise the grand jury as to its role and powers.[160] Its purpose is to counteract the need of the grand jury to rely exclusively on the prosecutor, who cannot be a truly neutral party, for advice and information.[161] Because the grand jury is composed of laypersons, it is possible that, without such an independent resource, any attempt at reform based on changing the language of the grand jury charge might be doomed to fail. Nevertheless, it appears that, given the current attitude and policies of the courts and Congress toward the grand jury, a relatively major change such as this is unlikely in the foreseeable future.

Even without the aid of the grand jury counsel, a change in the Model Charge could have a positive impact on grand jury independence. The desirability of a more comprehensive and informative charge has been raised. For example, in 2000 the National Association of Criminal Defense Lawyers ("NACDL") proposed a "Federal Grand Jury Bill of Rights."[162] One of the proposed "rights" was that "[t]he federal grand jurors shall be given meaningful jury instructions, on the record, regarding their duties and powers as grand jurors . . . ."[163] However, specific changes in the Model Charge have not been suggested.

Several specific changes could be instituted. First, the Model Charge should not imply—as it presently does—that the *sole* function of the grand jury is to determine whether there is probable cause to charge a defendant with a crime.[164] Instead, it should instruct the jurors explicitly that one of their roles is to provide the voice of the community in the criminal justice system, and that this role includes the power to decline to indict a defendant even when they find that probable cause exists to support the charge.

Second, the provision in the Model Charge instructing the jurors that "[y]ou cannot determine the wisdom of the criminal laws enacted by Congress . . . that is to be determined by Congress and not by you"[165] should be removed. The independent grand jury does have the prerogative to consider "the wisdom of the laws enacted by Congress" in determining whether to indict. This is true historically, and courts have implicitly recognized it by holding that grand juries have the power to shield guilty individuals from prosecution.[166] To suggest otherwise cuts directly at the independence of the grand jury.[167]

Third, the language in the instruction extolling the virtues of the prosecution—"[I]f past experience is any indication of what to expect in the future, then you can expect candor, honesty and good faith in matters presented by the government attorneys"[168]—should be removed. Though seemingly innocuous, this language undercuts the open-mindedness that all grand jurors should bring to the experience. In fact, it seems to suggest that the grand jurors need not seriously assess the

159. Brenner, *supra* note 9, at 124-26.

160. *Id.*

161. *Id.*

162. Nat'l Ass'n of Criminal Def. Lawyers, *Federal Grand Jury Bill of Rights*, CHAMPION, July 2000, at 21, 21-24.

163. *Id.* at 24.

164. *See* United States v. Marcucci, 299 F.3d 1156, 1167-69 (9th Cir. 2002) (Hawkins, J., dissenting).

165. *See supra* note 112.

166. *See, e.g.*, Vasquez v. Hillery, 474 U.S. 254 (1986).

167. *See Marcucci*, 299 F.3d at 1168-69 (Hawkings, J., dissenting).

168. *See supra* note 112.

credibility of the evidence the government presents. It also tends to reduce the impression of grand jury independence, since honesty, candor, and good faith are qualities that are likely to dispose the grand jurors positively toward the government prosecutors. Prosecutors should be required to show that they possess these qualities on their own, without the assistance of the Model Charge.

Fourth, the Model Charge language relating to the independence of the grand jury[169] should be emphasized by moving it to the beginning of the instruction. It should also be reiterated in some form at the end of the charge. Independence is the single most important aspect of the grand jury, and this should be reflected in the Model Charge. The provisions relating to grand jury independence are themselves quite forceful. Emphasizing them, as well as instructing the grand jury that its independence expands beyond the boundaries of probable cause determinations, is essential.

It is fair to ask whether these changes will make any difference—particularly if the grand jury must still rely on the prosecutor for all of its guidance. The proposed language reforms do not change the reality that grand juries often develop a close rapport with the prosecutors with whom they work. They do not change the reality that the Model Charge is given to grand jurors in the midst of an experience with which they are likely to be unfamiliar and possibly uncomfortable. But at the least, the proposed changes more accurately reflect the constitutional role of the grand jury as it has been understood by history. At the most, a reformed instruction might nudge the grand jurors into further discussion about their unique task, and, ultimately, a more meaningful role as the voice of the community in the federal criminal justice system. Unfortunately, given the attitude of Congress toward the grand jury, it seems unlikely that even minor proposed changes such as these would be greeted with enthusiasm.

CONCLUSION

As an independent body, the federal grand jury might be broken beyond repair. The Ninth Circuit, in its analysis of the grand jury's function in *Marcucci*, simply kicked it while it was down. If the grand jury is to regain any of its independence, and to serve the important role of voice of the community, then grand jurors must first be fully aware of the powers and responsibilities that come with their service.

Throughout their service, grand jurors ordinarily serve under the influence of federal prosecutors. This is true because the prosecutors are the only lawyers with whom the grand jurors have contact, because the prosecutors often cultivate a positive rapport with the grand jurors, and because the prosecutors provide the only guidance to the grand jurors, who are asked to apply difficult federal criminal law to the cases before them. As a result, one of the grand jury's most important historic roles—to provide the voice of the community at the charging phase of the criminal justice system—has largely been lost.

This Note has analyzed the Ninth Circuit's decision in *Marcucci*, and concluded that the majority's reasoning, while flawed, is consistent with the modern federal judiciary's attitude toward the independent grand jury. This Note has recognized that, for the past quarter century, despite concerns frequently voiced by commentators, Congress has not been amenable to reforms that might help restore the grand jury to its historically independent role. Nevertheless, modest changes to the Model Grand Jury Charge given grand jurors at the outset of their

169. *See id.*

service may have some effect in educating grand jurors as to their potential to provide community input into the criminal justice system. Although structural problems persist, reforming the Model Grand Jury Charge would be a small step in the right direction.