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CRIMINAL LAW

THE GRAND JURY LEGAL ADVISOR: RESURRECTING THE GRAND JURY'S SHIELD

THADDEUS HOFFMEISTER*

This Article advocates for the creation of a Grand Jury Legal Advisor (GJLA) to resurrect the historical autonomy of grand juries. The Article draws upon Hawaii's experiences with the GJLA, and incorporates survey responses from a representative sample of former GJLAs.

The Article begins with a general and historical overview of the grand jury process. This portion of the Article demonstrates how all three branches of government have contributed to the diminishment of the powers of grand jurors. Part IV of this Article discusses the important policy rationales underlying the need for grand jury autonomy; Part V recommends the implementation of a GJLA to re-establish that independence. Finally, Part VI reviews the potential advantages and disadvantages of employing GJLAs, including possible benefits to federal prosecutors.

This Article concludes that the GJLA strengthens the traditional role of the grand jury as a shield against unwarranted government accusations while still permitting grand jurors, prosecutors, and witnesses to perform their long-established functions. Moreover, the Article asserts that incorporating the GJLA, which has seen considerable success in both Hawaii and the military, throughout the federal court system would allay

* The author is an Assistant Professor at the University of Dayton School of Law. A special thanks goes to Professors Susan Brenner, Alea Brown, Eric Chaffee, Jeannette Cox, and Roger Fairfax for their useful and constructive suggestions. In addition, my research assistant Ashley Russell was invaluable. This Article also benefited from thorough editing by the journal staff of the Northwestern University School of Law's Journal of Criminal Law and Criminology. Of course, any errors or mistakes in the Article are solely the responsibility of the author. Finally, I would like to acknowledge the former Grand Jury Legal Advisors who took the time to participate in my survey.

fears that the grand jury is merely a tool of the prosecutor. Finally, contrary to the false assumptions of some observers, the GJLA could potentially aid federal prosecutors without unduly slowing the indictment process.

I. INTRODUCTION

In our American criminal legal system, the model grand jury is one that exercises independent judgment while serving as both an accusatory and investigatory body. When in the latter role, commonly referred to as the "sword," the grand jury uncovers wrongdoing and criminal misconduct through its sweeping investigatory powers that include the right to issue subpoenas.[1] This investigatory power is primarily strengthened by three factors. First, most observers are barred from grand jury sessions, which are shrouded in secrecy.[2] Second, as the grand jury is entitled to "every man's evidence," there are no real limits, outside of privileges, to what it can hear or investigate.[3] Third, grand juries face far fewer Fourth Amendment constraints than do police investigations.[4]

Upon completing its investigation, the grand jury assumes an accusatory role to judge the weight of the evidence brought before it and determine whether to issue an indictment.[5] At this stage, when acting as a "shield,"[6] the Supreme Court has described the grand jury as a protector of

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[1] United States v. Dionisio, 410 U.S. 1 (1973) (holding that a grand jury subpoena is not a seizure subject to the reasonableness requirements of the Fourth Amendment); John F. Decker, *Legislating New Federalism: The Call for Grand Jury Reform in the States*, 58 OKLA. L. REV. 341, 349 (2005) ("The grand jury subpoena is a valuable tool, because it uncovers evidence that may be unobtainable by other investigative bodies, such as the police.").

[2] Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 266 (1995); *see also infra* note 63.

[3] Branzburg v. Hayes, 408 U.S. 665, 688 (1972) (internal quotation marks and citations omitted).

[4] United States v. Calandra, 414 U.S. 338 (1974) (holding that evidence subject to the exclusionary rule as the product of an unlawful search in violation of the Fourth Amendment may be used by a grand jury to determine probable cause); *see also* Leipold, *supra* note 2, at 315 n.250 ("Professors Lafave and Israel have identified five advantages that grand juries have over police investigative work: (1) subpoena authority; (2) citizen participation; (3) closed proceedings; (4) the power to extend immunity; and (5) secrecy requirements."); Robert L. Misner, *In Partial Praise of Boyd: The Grand Jury as Catalyst for Fourth Amendment Change*, 29 ARIZ. ST. L.J. 805 (1997).

[5] FED. R. CRIM. P. 7(c). An indictment is a statement returned by the grand jury that sets forth the basic elements of the offense charged. Also, the indictment satisfies the Sixth Amendment requirement that the accused be informed of the charges against him or her.

[6] The terms "shield" and "sword" have been used so often to describe the dual roles of grand juries that they have now become clichés.

"citizens against unfounded criminal prosecutions."[7] This characterization was due in large part to the fact that the grand jury not only screened out weak cases that lacked sufficient probable cause, but also those that ran contrary to the views and interests of society.[8] In this way, the grand jury earned its reputation as an independent body which could protect the average citizen from unjustified prosecution by the government. In turn, this belief led American society, at least initially, to hold the grand jury in very high regard.[9]

Many are familiar with the Peter Zenger grand jury that twice refused to do the king's bidding and issue an indictment for seditious libel.[10] In addition, there were grand juries that refused to indict the Stamp Act rioters or to indict former Vice President Aaron Burr.[11] Arguably, there was sufficient probable cause in each of the aforementioned cases; however, the community, as reflected by the grand jurors, deemed it inappropriate to indict for a variety of reasons.[12]

The enthusiasm and respect for the grand jury carried over to the newly drafted state constitutions, which, except for that of New Jersey, included an express or implied right of defendants to a grand jury prior to being tried for a felony.[13] U.S. constitutional drafters continued this trend by including the Grand Jury Clause in the Fifth Amendment:

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[7] *Branzburg*, 408 U.S. at 686-87; *see also Calandra*, 414 U.S. at 342-43 ("In England, the grand jury served for centuries both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action."); Wood v. Georgia, 370 U.S. 375, 390 (1962) ("Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.").

[8] *See* Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 49 (2002); *see also* Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703 (2008).

[9] RICHARD D. YOUNGER, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941 (1963).

[10] Eben Moglen, *Considering* Zenger*: Partisan Politics and the Legal Profession in Provincial New York*, 94 COLUM. L. REV. 1495 (1994). Peter Zenger, a publisher of the *New York Weekly Journal*, was charged with libel for making defamatory remarks against William Cosby, the appointed governor of New York. Since the grand jury refused to issue an indictment, the State brought Zenger to trial pursuant to an information issued by the Attorney General. At trial, Zenger was skillfully defended by Andrew Hamilton, who persuaded the jury to return a not guilty verdict.

[11] Simmons, *supra* note 8, at 13-14.

[12] Gregory T. Fouts, *Reading the Jurors Their Rights: The Continuing Question of Grand Jury Independence*, 79 IND. L.J. 323, 331 (2004).

[13] YOUNGER, *supra* note 9.

> No person shall be held to answer for a capital, or otherwise infamous crime,[14] unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia . . . .[15]

This early support for the grand jury was based on the notion that grand juries served as a protective barrier between citizens and the criminal charging process. However, over time the American public began to disfavor the grand jury, and individual states started to allow prosecutors the choice[16] of using a grand jury, an information,[17] or a complaint.[18] Today, a majority of states now allow prosecutors the option of using the grand jury process.[19] On the federal level, because of the Fifth Amendment,

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[14] *See Ex parte* Wilson, 114 U.S. 417, 429 (1885) (finding that the Grand Jury Clause does not apply to misdemeanors).

[15] *See* Solorio v. United States, 483 U.S. 435 (1987) (noting that the Grand Jury Clause does not apply to those being tried by military courts-martial). The military, however, has its own similar pre-trial screening procedure, Article 32, discussed *infra*, Part V.C.

[16] This is permitted because, unlike other amendments in the Bill of Rights, the Fifth Amendment's Grand Jury Clause has not been held to apply to the states. *Hurtado v. California* determined that the Due Process Clause of the Fourteenth Amendment does not require states to initiate criminal proceedings by the grand jury process. 110 U.S. 516 (1884). For a critique of the *Hurtado* decision, see James R. Acker, *The Grand Jury and Capital Punishment: Rethinking the Role of an Ancient Institution Under the Modern Jurisdiction of Death*, 21 PAC. L.J. 31 (1989); Ovio C. Lewis, *The Grand Jury: A Critical Evaluation*, 13 AKRON L. REV. 33, 34 (1979) ("Perhaps it is this second-class treatment by the Court of the grand jury provision that leads us to de-emphasize analysis of the institution in law schools . . . .").

[17] An information is a written charging instrument that does not necessitate the approval of the grand jury, and requires only an accusation made under oath by a prosecutor stating that she believes a particular person has committed the crime.

[18] Decker, *supra* note 1, at 346 ("By the mid-nineteenth century, the grand jury was no longer unanimously held in high regard.").

[19] ALA. CONST. art. I, § 8 amend. 598; ALA. R. CRIM. P. 2.1, 2.2(e); ARIZ. CONST. art. II, § 30; ARIZ. R. CRIM. P. 2.2; ARK. CONST. amend. 21, § 1; CAL. CONST. art. I, § 14; CAL. PENAL CODE §§ 737, 859 (West 2008); COLO. CONST. art. II, § 8; COLO. REV. STAT. § 16-5-101 (2008); CONN. GEN. STAT. ANN. §§ 54-45, 54-46 (West 2001); FLA. CONST. art. I, § 15; HAW. CONST. art. I, § 10; HAW. REV. STAT. ANN. § 801-1 (LexisNexis 2007); IDAHO CONST. art. I, § 8; ILL. CONST. art. I, § 7; 725 ILL. COMP. STAT. ANN. 5/111-2 (LexisNexis 2000); IND. CODE ANN. § 35-34-1-1 (West 2004); IOWA CODE § 813.2, Rules 4, 5 (2003); KAN. STAT. ANN. § 22-3201 (2007); LA. CONST. art. I, § 15; MD. CONST. DECL. RTS. art. 21; MD. CODE ANN., CRIM. PROC. § 4-103 § a (LexisNexis 2008); MICH. COMP. LAWS ANN. § 767.1 (West 2000); MINN. R. CRIM. P. 17.01; MO. CONST. art. I, § 17; MONT. CONST. art. II, § 20; MONT. CODE ANN. § 46-11-101 (2007); NEB. CONST. art. I, § 10; NEB. REV. STAT. § 29-1601 (1995); NEV. CONST. art. I, § 8; N.M. CONST. art. II, § 14; N.D. R. CRIM. P. 7; OKLA. CONST. art. II, § 17; R.I. CONST. art. I, § 7; S.D. CONST. art. VI, § 10; S.D. CODIFIED LAWS § 23A-6-1 (2004); UTAH CONST. art. I, § 13; VT. R. CRIM. P. 7; WASH. CONST. art. I, § 25; WIS. STAT. ANN. § 967.05 (West 2007); WYO. CONST. art. I, § 13. Several states do continue to recognize a right to grand jury indictment in felony cases. ALA. CONST. art. I, § 8; DEL. CONST. art. I, § 8; GA. CODE ANN. §§ 17-7-70 (West 2003); KY. BILL OF RIGHTS § 12; ME. CONST. art. I, § 7; MASS. ANN. LAWS ch. 263, § 4 (LexisNexis 2002); MISS. CONST. art. III,

felony charges must proceed by indictment; however, the defendant may waive her right to a grand jury for all non-capital offenses.[20]

The reasons for the grand jury's loss of status, at least on the federal level, are multifaceted, but carry a central theme: displeasure with how it operates. Grand juries no longer issued reports,[21] except in certain limited instances.[22] These reports were quite popular with the public and useful in drawing attention to both civil and criminal problems within the community.[23] Also, grand juries stopped making presentments or filing charges on their own.[24] Finally, and most importantly, the previously discussed model grand jury that exercised independent judgment had all but vanished as grand jurors were no longer the rulers of the grand jury room; that title had passed to the prosecutor.[25]

With prosecutors in charge, grand jurors found less need and fewer reasons to involve themselves in the overall process, and subsequently made fewer decisions.[26] In turn, this retarded grand jurors' ability to

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§ 27; N.H. REV. STAT. ANN. § 601:1 (LexisNexis 2003); N.J. CONST. art. I, § 8; N.Y. CONST. art. I, § 6; N.C. CONST. art. I, § 22; OHIO CONST. art. I, § 10; OR. CONST. art. VII, § 5; PA. CONST. art. I, § 10; S.C. CONST. art. I, § 11; TENN. CONST. art. I, § 14; TEX. CONST. art. I, § 10; VA. CODE ANN. §§ 19.2-216, 19.2-217 (2008); W. VA. CONST. art. III, § 4. And a few other states require it in cases punishable by death or life imprisonment. ALA. CONST. art. I, § 8, amend. 598; FLA. CONST. art. I, § 15; LA. CONST. art. I, § 15; MINN. R. CRIM. P. 17.01; R.I. CONST. art. I, § 7.

[20] FED. R. CRIM. P. 7(a). For a more in-depth and historical discussion on this issue, see Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 MINN. L. REV. 398 (2006).

[21] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 275 (Editor ed., London, Apollo Press 1813) (1769). Reports involve statements of the grand jury on the conduct of the king's officials and the conditions of public jails and highways.

[22] Modern grand jury reports are normally reserved for high profile cases such as the investigation of the Watergate burglary. In that case, the grand jury filed a report on the break-in with Judge Sirica and asked that it be forwarded to the House Judiciary Committee that was considering President Nixon's impeachment. *In re* June 5, 1972 Grand Jury, 370 F. Supp. 1219 (D.D.C. 1974). Also, special grand juries convened under 18 U.S.C. § 3331 (2006) to combat organized crime can issue reports. *See also* Jenkins v. McKeithen, 395 U.S. 411 (1969); Clement Glynn, *The Grand Jury Report as an Infringement of Private Rights*, 23 HASTINGS L.J. 561 (1972); Misner, *supra* note 4; Barry J. Stern, *Revealing Misconduct by Public Officials Through Grand Jury Reports*, 136 U. PA. L. REV. 73 (1987).

[23] LEONARD W. LEVY, THE PALLADIUM OF JUSTICE (1999). *Contra* Glynn, *supra* note 22.

[24] Presentments, which will be discussed in greater detail in Part III.C, *infra*, are criminal charges brought solely by the grand jurors without necessarily obtaining prosecutorial approval.

[25] William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 174 (1973) ("Today, the grand jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at any time, for almost anything, before any grand jury."). Part II, *infra*, illustrates why prosecutors are the rulers of the grand jury room.

[26] Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 GEO. L.J. 1265, 1315 (2006).

properly perform their adjudicatory role or protect those being investigated from meritless indictments. Put another way, the shield was abandoned in favor of a much-sharpened sword. Most people point to this broad prosecutorial control and lack of grand juror independence as the cause of society's disenchantment with grand juries.[27]

This view, echoed by both legal practitioners and commentators alike, is supported by statistical and anecdotal evidence.[28] In testimony before Congress in 2000, the Department of Justice (DOJ) stated that 99% of the cases brought before federal grand juries resulted in indictments.[29] Moreover, many experienced white collar criminal defense attorneys, if given the choice, find it more beneficial to bring their clients directly to the prosecutor to negotiate rather than appear before a grand jury, whose actions they view as a foregone conclusion.[30] Justice William O. Douglas summed up the feelings of most members of the legal community when he wrote that it was "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."[31]

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[27] Peter Arenella, *Reforming the State Grand Jury System: A Model Grand Jury Act*, 13 RUTGERS L.J. 1, 9 (1981) ("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."); *see also* Richard L. Braun, *The Grand Jury—Spirit of the Community?*, 15 ARIZ. L. REV. 893, 915 (1973); Susan W. Brenner, *Is the Grand Jury Worth Keeping?*, 81 JUDICATURE 190, 190 (1998); Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1 (2004); Anne B. Poulin, *Supervision of the Grand Jury: Who Watches the Guardian?*, 68 WASH. U. L.Q. 885, 927 (1990); Simmons, *supra* note 8.

[28] Melvin P. Antell, *Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A. J. 153, 155 (1965) ("The so-called grand jury 'investigation', therefore, is really nothing more than a review of the prosecutor's predigested evidence and a ratification of his conclusions.").

[29] Raju Chebium, *Government Urges Congress to Leave Grand Jury System Alone*, CNN.COM, July 27, 2000, http://archives.cnn.com/2000/LAW/07/27/grand.jury/index.html ("The Justice Department said in written testimony to the House panel that grand juries return indictments in 99 percent of the cases presented to them.").

[30] Thomas P. Sullivan & Robert D. Nachman, *If It Ain't Broke, Don't Fix It: Why the Grand Jury's Accusatory Function Should Not Be Changed*, 75 J. CRIM. L. & CRIMINOLOGY 1047 (1984).

[31] United States v. Mara, 410 U.S. 19, 23 (1973) (Douglas, J., dissenting). In addition to the term used in *Mara*, many other derogatory terms have been used at one time or another to describe the grand jury: "If you gave grand jurors a napkin, they'd sign it"; "a clever prosecutor can get a grand jury to indict a ham sandwich"; "rubber stamp"; "tool"; "stagehands for the government's production"; "prosecutor's pawns"; "indictment mill"; "purely mischievous"; "relic of barbarism"; "star chamber"; "prosecution's lapdog"; "an ignominious prosecutorial puppet"; and "prosecutor's play toy." In the last couple of decades, the only real defenders of federal grand juries have been the courts and the executive branch.

The marginalization of grand jurors—aided by all three branches of government—is not a new phenomenon, nor did it occur overnight.[32] Commentators have long lamented the problems of the grand jury, and some have offered a range of reform measures.[33] Unfortunately, most of the recommendations and arguments put forward were never adopted for a variety of reasons, primarily because they would have fundamentally altered the traditional role and duties of grand juries.[34] For example, some suggested requiring the prosecutor to produce exculpatory evidence.[35] Others recommended allowing counsel for either the "target"[36] or testifying witness[37] to enter the grand jury room and make arguments before the grand jurors. These and other similar measures have been consistently rejected by the Supreme Court because they ultimately lead to an adversarial setting in the grand jury room.[38]

There is, however, one heretofore under-explored proposal that is non-adversarial in nature: the Grand Jury Legal Advisor (GJLA). Although a licensed attorney, the GJLA neither advocates on behalf of nor represents anyone appearing before the grand jury.[39] Rather, the GJLA serves as counsel to the grand jury. Her main primary responsibility is to provide grand jurors unbiased answers to their questions, legal or otherwise.

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[32] SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 1:4, at 1-20 to 1-21 (2d ed. 1997); Susan Schiappa, *Preserving the Autonomy and Function of the Grand Jury:* United States v. Williams, 43 CATH. U. L. REV. 311, 334 (1993) ("Over time, grand jurors have become more dependent upon the prosecutor in several ways.").

[33] *See* GRAND JURY POLICY AND MODEL ACT (1982); COUNCIL FOR COURT EXCELLENCE, THE GRAND JURY OF TOMORROW: NEW LIFE FOR AN ARCHAIC INSTITUTION (2001), *available at* http://www.courtexcellence.org/publications/policy_reform_reports/grand_jury_of_tomorrow_2001.pdf; Arenella, *supra* note 27 (dedicating over one hundred pages to grand jury reform measures).

[34] *Federal Grand Jury Reform Report and "Bill of Rights,"* 24 CHAMPION 16, 19 (2000) (examining criticisms of grand jury reform); *see also* Leipold, *supra* note 2, at 273 ("[M]ore than once the Supreme Court has expressed fears that additional procedural requirements would transform the grand jury into a 'mini-trial.'").

[35] *See, e.g.*, Nat'l Ass'n of Criminal Def. Lawyers, Federal Grand Jury Reform, http://www.nacdl.org/grandjury (last visited Nov. 15, 2008) [hereinafter NACDL]. The NACDL maintains a web site with a list of proposals, legislation, and articles concerning grand jury reform. *Id.*

[36] Kathryn E. White, *What Have You Done with My Lawyer?: The Grand Jury Witness's Right to Consult with Counsel*, 32 LOY. L.A. L. REV. 907, 935 (1999) (defining a "target" as a person whom the prosecutor or the grand jury has substantial evidence linking to the commission of a crime).

[37] *Id.* at 910 (explaining that a "non-target" witness can become a target at any time during the grand jury investigation).

[38] *See infra* Part II.D.

[39] The Grand Jury Legal Advisor Survey, *infra* app. A, question 7 [hereinafter GJLA Survey] ("[I]t was not an adversarial situation where independent counsel advocated on behalf of anything . . . .").

Contrary to other reform proposals that dramatically diverge from either the common law or the historical evolution of the grand jury in the United States (for example, permitting the presence of a witness's attorney[40] or presentation of exculpatory information), the GJLA is a natural outgrowth of earlier grand jury improvements. In 1979, Congress required that all federal grand jury proceedings be recorded.[41] This was done, *inter alia*, to provide better oversight once the grand jury doors shut and to "[restrain] prosecutorial abuses before the grand jury."[42] The GJLA takes the 1979 reform measure one step further, and places a live person in the grand jury room.[43]

As previously stated, the main reason for having the GJLA is to provide the grand jurors with an impartial advisor; however, there are other grounds for employing the GJLA. For instance, the GJLA serves as the honest broker in the grand jury room, ensuring that the process operates correctly.[44] While having and reviewing grand jury transcripts is helpful, that alone is insufficient to prevent or correct problems arising in the grand jury room.[45] As discussed *infra*, getting access to grand jury transcripts is no easy task, and, once obtained, it is usually too late to correct the errors found within them.[46] Furthermore, fixing grand jury problems discovered later in transcripts is time consuming and requires a large expenditure of resources.[47] Having a detached neutral person in the grand jury room who can take immediate action is far superior.

This Article examines not only the idea of providing a GJLA to federal grand jurors, but also the importance of grand jury independence. The Article is divided into six parts. Part I serves as an introduction. Part II provides a brief overview of the grand jury process, highlighting the role of the prosecutor and the level of authority she exercises. Part III takes a historical look at the grand jury's fluctuation between being an independent

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[40] Seymour Glanzer & Paul Taskier, *Attorneys Before the Grand Jury: Assertion of the Attorney-Client Privilege to Protect a Client's Identity*, 75 J. CRIM. L. & CRIMINOLOGY 1070 (1984); Earl J. Silbert, *Defense of Counsel in the Grand Jury—The Answer to the White Collar Criminal's Prayers*, 15 AM. CRIM. L. REV. 293 (1978).

[41] FED. R. CRIM. P. 6.

[42] FED. R. CRIM. P. 6(e)(1), advisory comm. n.3 (1979).

[43] Decker, *supra* note 1, at 369 ("[T]he presence of attorneys would deter many forms of prosecutorial misconduct, which currently occurs unchecked due to the veil of secrecy surrounding the proceedings.").

[44] GJLA Survey, *infra* app. A, question 7 ("I think it was helpful to have a neutral party giving advice to the grand jury.").

[45] GJLA Survey, *infra* app. A, question 7 ("[O]ur simple presence in the room probably helped somewhat, since prosecutors knew someone was watching them.").

[46] *See infra* notes 265-76.

[47] *See infra* notes 265-76.

and dependent decision-making body. Particularly relevant here is the process through which all three branches of government have played a role in diminishing the powers of the grand jurors within the grand jury process.

After demonstrating in both Parts II and III that prosecutors, not grand jurors, are now the dominant force in the grand jury room, Part IV will discuss whether this is even a problem. Some believe that grand jury autonomy is overstated and unnecessary. However, as will be discussed, one need only consider the barriers to correcting a flawed indictment to see the problems with that view. Part V examines implementation of the GJLA by considering both its current and historical applications. This Part will discuss whether and to what extent the GJLA would help restore the independence of the grand jury. The GJLA proposed by this Article will greatly resemble the model currently used in both the military and the state of Hawaii. Part VI discusses the advantages and disadvantages of employing the GJLA, including potential benefits to prosecutors.

This Article, while advocating for the creation of a GJLA, by no means suggests giving grand jurors carte blanche over the grand jury proceedings. If the GJLA is used, all indictments should still require the signature of the prosecutor to be valid, and a "no true bill" determination by one grand jury would not prevent the prosecutor from resubmitting the same evidence to a different grand jury. Also, courts should maintain the right to terminate a grand jury session at any time.[48] Thus, even with the implementation of the GJLA, the prospect of a "runaway" grand jury is not dramatically increased.

As part of the research for this Article, the author has contacted and surveyed several former GJLAs to learn about their experiences with the grand jury.[49] The questions on the GJLA Survey, which can be found in its entirety in Appendix A, covered both procedural and substantive areas. Many of the responses to the GJLA Survey have been incorporated throughout this Article and can also be found in Appendix A.[50] Although the GJLA Survey was not given to every attorney who previously served as a GJLA, the results do provide a fairly broad and representative overview of how the GJLA functions within the grand jury process. In addition, the GJLA Survey demonstrates that the GJLA has been and is working effectively, lending further support to the argument that it should be implemented in other jurisdictions.

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[48] FED. R. CRIM. P. 6(g) ("A grand jury must serve until the court discharges it . . . ."); Korman v. United States, 486 F.2d 926, 933 (7th Cir. 1973).

[49] The GJLA Survey, *infra* app. A, a first of its kind, was sent to a number of former Hawaiian GJLAs. The complete GJLA Survey results, which are on file with the author, should in no way be viewed as an exhaustive list of the views of GJLAs.

[50] GJLA Survey, *infra* app. A.

II. GRAND JURY PROCESS

To fully understand and appreciate the depth of prosecutorial control over the grand jury, it is first necessary to examine the modern grand jury process and its historical roots. Grand juries, unlike petit juries, were not created to determine guilt or innocence, but rather to ascertain whether probable cause exists for a criminal trial.[51] Probable cause need not be present when the grand jury begins its investigation.[52] The grand jury can start looking at evidence and investigating "merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."[53] Furthermore, this suspicion can be based on tips, rumors, hearsay, speculation, or the grand juror's personal knowledge.[54] However, even when probable cause is found to exist, grand juries can refrain from issuing an indictment if the charges do not reflect the views or interests of the community.[55]

Grand juries generally consist of between sixteen to twenty-three citizens and, like petit juries, are created from voter registration rolls.[56] Unlike that of petit jurors, voir dire of grand jurors is extremely limited.[57] Sixteen grand jurors must be present for a quorum to conduct a grand jury

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[51] *See* United States v. Williams, 504 U.S. 36, 51 (1992) (Scalia, J.) ("[T]he grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge."); *see also* Admin. Office of the U.S. Courts, Model Grand Jury Charge, http://www.uscourts.gov/jury/charge.html (2005).

[52] *Williams*, 504 U.S. at 48.

[53] United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950).

[54] Branzburg v. Hayes, 408 U.S. 665, 701 (1972). This ability to use and rely on personal knowledge of events and activities may be one reason why grand juries are larger than petit juries. CHARLES DOYLE, THE FEDERAL GRAND JURY 7-8 (2002) ("[W]hen the grand jury's accusations were based primarily upon the prior knowledge of the panel's members, larger panels were more understandable.").

[55] United States v. Cox, 342 F.2d 167, 189-90 (5th Cir. 1965) (special concurring opinion) ("By refusing to indict, the grand jury has the unchallengeable power to defend the innocent from government oppression by unjust prosecution. And it has the equally 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."); *see also* Vasquez v. Hillery, 474 U.S. 254, 263 (1986); United States v. Cotton, 261 F.3d 397, 407 (4th Cir. 2001); United States v. Ciambrone, 601 F.2d 616, 629 (2d Cir. 1979) (dissenting opinion).

[56] Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1869 (2000 & Supp. IV 2004). Grand juror qualifications are minimal; like petit jurors, grand jurors need only be: (1) U.S. citizens residing in the given district for one year, (2) eighteen years of age, (3) able to read, write, and speak English, (4) physically and mentally able to serve, and (5) not charged with or convicted of a felony. *Id.* § 1865(b)(1-5) (2000).

[57] FED. R. CRIM. P. 6(b)(1) does allow either the Government or defense to challenge a grand juror.

session, but those voting to indict need not attend every session.[58] The session begins after the grand jurors have been sworn in and given model grand jury instructions by the judge,[59] one of the few times that grand jurors receive guidance from anyone other than the prosecutor. Once the judge reads the instructions, grand jurors are effectively turned over to the prosecutor.[60]

Due to the secrecy associated with the process, attendance at grand jury sessions is limited to the grand jurors, the prosecutor, a stenographer, interpreter (when needed), and the witness called to testify.[61] This secrecy has resulted in some targets remaining unaware that they are under investigation until the indictment is issued.[62] The prosecutor normally informs targets of their target status if they are called to testify before the grand jury.[63] The Supreme Court has yet to affirmatively determine

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[58] *Id.* § 6(a)(1); United States v. Provenzano, 688 F.2d 194, 202-03 (3d Cir. 1982). The ability to miss certain sessions leads to even greater grand juror dependency on the prosecutor, who has attended every session.

[59] FED. R. CRIM. P. 6(a)(2).

[60] Leipold, *supra* note 2, at 265-66 ("A district court judge administers the oath and gives jurors general instructions about their duties. This marks the end of the judge's formal involvement in the process. From that point forward, the prosecutor dictates the course of the proceedings." (footnotes omitted)).

[61] FED. R. CRIM. P. 6(d); *see also* United States v. Hansel, 70 F.3d 6, 8 (2d Cir. 1995). The rules for secrecy serve several interests:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

United States v. Proctor & Gamble Co., 356 U.S. 677, 681 n.6 (1958) (quoting United States v. Rose, 215 F.2d 617, 628-29 (3d Cir. 1954)).

[62] United States v. Washington, 431 U.S. 181, 189 (1977) (stating that there is no requirement that the target be informed of that status). Although targets have no right to be notified of an investigation or to testify before a grand jury, the Department of Justice (DOJ) encourages U.S. Attorneys to provide notice and, where feasible, the opportunity to testify. *See* U.S. DEP'T OF JUST., UNITED STATES ATTORNEYS' MANUAL § 9-11.152-53 (1997), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/index.html; *see also* J. Robert Brown, Jr., *The Witness and Grand Jury Secrecy*, 11 AM. J. CRIM. L. 169 (1983); Daniel C. Richman, *Grand Jury Secrecy: Plugging the Leaks in the Empty Bucket*, 36 AM. CRIM. L. REV. 339 (1999).

[63] U.S. DEP'T OF JUST., *supra* note 62, § 9-11.153.

whether a known target must be Mirandized before providing grand jury testimony; however, it is DOJ policy to provide such warnings.[64]

All witnesses testifying, including targets, do so without their attorneys;[65] however, a testifying witness may leave the grand jury room periodically to consult with counsel.[66] Absent assertion of a privilege, the witness must answer the questions at the grand jury session and has no right to present her own evidence.[67] In fact, a grand jury witness lacks many of the same rights as someone interrogated by the police.[68] In addition, grand jurors, unlike petit jurors, are not restricted from hearing certain types of information, and the Rules of Evidence are, for the most part, inapplicable to grand jury proceedings.[69] As a result, grand jurors can consider and base an indictment on evidence that is either illegally seized or deemed hearsay.[70]

After receiving all of the evidence, grand jurors retire in private, without the prosecutor, to determine whether or not to indict.[71] If at least twelve grand jurors decide to indict,[72] a true bill[73] is issued and becomes valid upon the signature of the prosecutor.[74] If fewer than twelve grand jurors agree on an indictment, a no true bill is issued; but the prosecutor may resubmit the evidence to a different grand jury.[75] There are four

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[64] *Id.* § 9-11.151; United States v. Mandujano, 425 U.S. 564 (1976); *see also* United States v. Williams, 504 U.S. 36, 49 (1992) ("We have twice suggested, though not held, that the Sixth Amendment right to counsel does not attach when an individual is summoned to appear before a grand jury, even if he is the subject of the investigation.").

[65] *See also* Joseph Gary Trichter & Peter W. Lewis, *The Grand Jury, Putative Grand Jury Witnesses and the Right to Limited Counsel—A Historical Overview and a Modest Proposal*, 20 S. TEX. L.J. 81 (1979); White, *supra* note 36.

[66] *Mandujano*, 425 U.S. at 606 (Brennan, J., concurring); *see also* Mary Emma Hixson, *Bringing Down the Curtain on the Absurd Drama of Entrances and Exits—Witness Representation in the Grand Jury Room*, 15 AM. CRIM. L. REV. 307 (1978).

[67] Simmons, *supra* note 8, at 23 ("The overwhelming majority of states and the federal government do not give the defendant any right to testify on his own behalf.").

[68] *See* Misner, *supra* note 4.

[69] Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL'Y. & L. 67, 83 (1995) ("Except for the law governing privileges, federal grand juries operate unconstrained by the Federal Rules of Evidence.").

[70] United States v. Calandra, 414 U.S. 338 (1974); Costello v. United States, 350 U.S. 359 (1956).

[71] FED. R. CRIM. P. 6(f).

[72] *Id.*

[73] A "true bill" is a written instrument signifying that the grand jury has found sufficient evidence to issue an indictment. BLACK'S LAW DICTIONARY 1546 (8th ed. 2004).

[74] United States v. Cox, 342 F.2d 167, 172 (5th Cir. 1965).

[75] United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); *see also* U.S. DEP'T OF JUST., *supra* note 62, § 9-11.120(A) (stating that the same matter "should not be presented

possible outcomes of the grand jury session: (1) indictment or true bill, (2) no true bill, (3) discharge or expiration without action,[76] or (4) submission of a report to the court. As noted previously, grand juries usually conclude by issuing an indictment.[77]

Throughout the entire process, the prosecutor serves not only as the director of the grand jury proceeding, but also as the gatekeeper of information to the grand jury.[78] The prosecutor determines the order of the evidence,[79] requests that the court issue subpoenas,[80] questions the witnesses,[81] and drafts the charges. In addition, during their eighteen months of service, grand jurors meet at the discretion of the prosecutor.[82] Most importantly, at least for the purposes of this Article, the prosecutor provides legal advice to the grand jurors.[83]

In theory, the prosecutor is responsible for providing neutral legal advice to the grand jurors, but this does not always happen.[84] The

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to another grand jury . . . without first securing the approval of the responsible U.S. Attorney").

[76] DOYLE, *supra* note 54, at CRS-40 (defining "declination" as a case in which the grand jury investigates, but the prosecutor never presents charges and instead declines further action).

[77] Chebium, *supra* note 29.

[78] Leipold, *supra* note 2, at 315 n.254 ("This power to control the investigation in turn minimizes the jurors' ability to screen.").

[79] Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 423 (2001).

[80] The subpoenas are valid anywhere in the United States and last as long as the grand jury continues its criminal investigation. The prosecutor can issue a subpoena without prior authorization from the grand jury. *Constitutional Rights and the Grand Jury: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 106th Cong. 53-68 (2000) (statement of Peter Henning, Professor of Law, Wayne State University School of Law) ("The key to the grand jury's investigatory power is the authority to issue subpoenas that require the recipient to turn over evidence and appear before the grand jury to testify, on pain of criminal contempt if there is no basis for a refusal to comply."); *see also* Decker, *supra* note 1.

[81] While the prosecutor generally questions the witness, the grand jurors may also ask questions. Admin. Office of the U.S. Courts, Handbook for Federal Grand Jurors, http://www.uscourts.gov/jury/grandhandbook.pdf (last visited Nov. 15, 2008).

[82] FED. R. CRIM. P. 6(g); Brenner, *supra* note 69, at 82 ("The fact that grand juries meet at the direction of prosecutors further entrenches both the appearance and reality that grand juries serve largely as prosecutorial adjuncts.").

[83] United States v. Sells Eng'g, 463 U.S. 418, 430 (1983) (stating that the role of the prosecutor as legal advisor stems from the common law); *see also In re* Dist. Att'y of United States, 7 F. Cas. 745, 745 (C.C.W.D. Tenn. 1872) (No. 3925); United States v. Reed, 27 F. Cas. 727, 734 (C.C.N.D.N.Y. 1852) (No. 16,134).

[84] The inability of some prosecutors to provide neutral or impartial legal advice may be due in part to a lack of supervision or direct oversight. *See, e.g.*, United States v. Van Engel, 15 F.3d 623, 626 (7th Cir. 1993) ("The increase in the number of federal prosecutors in recent years has brought in its train problems of quality control.").

prosecutor is under no legal duty to provide such counsel.[85] Besides providing advice on legal issues, the prosecutor on occasion is called upon to answer the non-legal questions of grand jurors.[86] The prosecutor, however, is not permitted to testify before the grand jury.[87] Furthermore, courts have held that the prosecutor should only discuss those facts already in the record; to do otherwise makes her an unsworn witness before the grand jury and violates both rules regulating the conduct of attorneys and Federal Rule of Criminal Procedure 6(d).[88]

Understandably, determining when the prosecutor actually testifies before the grand jury is difficult. Apparently, the key point in drawing the distinction is whether the prosecutor places her credibility on the line.[89] If asked for an opinion, the prosecutor should tell the grand jurors that her opinion is personal in nature and not binding on the grand jury.[90] But, as noted in the Grand Jury Legal Advisor Survey, prosecutors can circumvent this entire issue by providing off-the-record information to grand jurors.[91]

As described above, the modern day grand jury has devolved to such an extent that prosecutors, not grand jurors, control every aspect of the process save for voting on the actual indictment. As a consequence, many question the usefulness or necessity of the grand jury and whether it still serves its intended function of being the voice of the community.[92] Those grand juries that do attempt to exercise some measure of authority are quickly labeled as "runaway."[93] However, this was not always the case.

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[85] United States v. Lopez-Lopez, 282 F.3d 1 (1st Cir. 2002).

[86] United States v. Sears, Roebuck & Co., 719 F.2d 1386, 1393 (9th Cir. 1983).

[87] United States v. Gold, 470 F. Supp. 1336, 1351 (N.D. Ill. 1979); United States v. Treadway, 445 F. Supp. 959, 962-63 (N.D. Tex. 1978).

[88] United States v. Hogan, 712 F.2d 757 (2d Cir. 1983); United States v. Birdman, 602 F.2d 547, 551-55 (3d Cir. 1979).

[89] United States v. Blitz, 533 F.2d 1329, 1344-45 (2d Cir. 1976).

[90] United States v. McKenzie, 678 F.2d 629, 633-34 (5th Cir. 1982).

[91] GJLA Survey, *infra* app. A, question 7 ("[T]he prosecutor wanted to tell jokes and make the Grand Jury expect to get information confirming that they were right in voting for a true bill after the fact and tried to do other inappropriate actions off the record.").

[92] Barker v. Fox, 238 S.E.2d 235, 236 (W. Va. 1977) ("[T]he grand jury serves as the voice of the community in calling forth suspected criminals to answer for their alleged misdeeds."); Braun, *supra* note 27, at 915; Brenner, *supra* note 69, at 82; 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, 628 (1998) ("It uses its voice to inform the prosecutor of when he is going too far by not returning the requested indictment."). For a discussion about reconfiguring grand juries by neighborhoods or zip codes to better reflect the views of the community, see Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2378-80 (2008).

[93] Roger Roots, *If It's Not a Runaway, It's Not a Real Grand Jury*, 33 CREIGHTON L. REV. 821, 821-22 (2000).

Historically, the grand jurors, not the prosecutor, directed and controlled the grand jury proceeding, and grand juries were widely seen as independent—in some instances too much so.[94]

III. THE GRAND JURY'S FLUCTUATION BETWEEN DEPENDENCE AND INDEPENDENCE

A. EARLY HISTORY OF THE GRAND JURY

The grand jury's historical roots can be traced back to Greece, Scandinavia, and the Saxons; however, most associate the modern grand jury with King Henry II and the Grand Assize of Clarendon.[95] King Henry II forced local English barons to accept the Assize[96] of Clarendon in 1166 in an effort to exert his influence while simultaneously reducing the power of those around him.[97] Prior to the Assize of Clarendon, most criminal charges were brought by private individuals, the church, or local barons.[98]

The Assize of Clarendon and later the Assize of Northampton (in 1176) established an early judicial system in which judges traveled to different areas of England to "call upon twelve knights of the hundred or, if there are no knights . . . twelve free and lawful men . . . to assemble and 'by their oath' identify potential criminal suspects."[99] The importance of these early grand juries to the local citizens cannot be underestimated. An indictment during this time was tantamount to conviction, as petit jury trials were not in existence[100] and defendants instead faced trial by ordeal, which

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[94] *See, e.g.*, the indictment of Congressman Samuel Cabell in 1797 for criticizing the President's foreign policy. Comment, Brewster, Gravel, *and Legislative Immunity*, 73 Colum. L. Rev. 125, 127 n.23 (1973).

[95] Wayne L. Morse, *A Survey of the Grand Jury System (Part I)*, 10 OR. L. REV. 101, 102-09 (1931).

[96] The term "assize" literally means "to sit together." BLACK'S LAW DICTIONARY, *supra* note 73, at 131. "Assize" evolved (a) to designate the decree or statute that ordered the group to assemble; (b) to refer to the assemblage itself; and finally (c) to identify the court, time, or place where the trial judges assembled throughout the countryside to hear cases. *Id.*

[97] GEORGE J. EDWARDS, THE GRAND JURY 7 (Founds. Of Criminal Just. Ed., AMS Press 1973) (1906).

[98] RALPH ADAM FINE, ESCAPE OF THE GUILTY 8 (1986). The private prosecution of crimes was abolished in England in 1819. *See* Simmons, *supra* note 8; *see also* Helene E. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701, 703, 707 (1972).

[99] DOYLE, *supra* note 54, at 5 n.4; *see also* Leipold, *supra* note 2, at 281 n.103 ("The sheriff or private parties could still present alleged crimes to the jury for consideration." (citation omitted)).

[100] Simmons, *supra* note 8, at 7-8 ("The trial jury itself is a direct descendant of the grand jury in both an ideological and an institutional sense, since the institution of the trial jury evolved out of the grand jury over six hundred years ago.").

might require the defendant to stick her hand in boiling water and sustain no injury, or avoid drowning without swimming when placed in a lake, in order to prove innocence.[101]

While these initial grand juries acted on their own and issued indictments based on, among other things, personal knowledge, there should be no misunderstanding about their role; they were tools of the government.[102] The king, who was the beneficiary of all fines and forfeitures that resulted from indictments, highly encouraged the grand jurors to indict a certain number of suspects.[103] Those who failed to meet these quotas were themselves fined.[104] The grand jury did not make a name for itself as an independent body and protector of the citizenry until approximately 500 years later, during the trials of the Earl of Shaftesbury and Stephen Colledge.[105] These two early cases demonstrated that with the power to indict comes the power not to indict.

In 1681, King Charles II wanted to try the Earl of Shaftesbury and his acolyte, Stephen Colledge, for treason.[106] Charles, who was trying to reestablish the Catholic Church of England, viewed both pro-Protestant men as impediments to this goal.[107] The judge in Lord Shaftesbury's case gave the following grand jury charge, which illustrates the pressure being applied by the king: "[L]et me tell you, if any of you shall be refractory, and will not find any bill, where there is a probable ground for an accusation, you do therein undertake to intercept justice; and you thereby make yourselves criminals and guilty, and the fault will lie at your door."[108] Yet, despite these ominous and threatening instructions, the Protestant grand jurors of London, who did not necessarily share the views of either the king or the judge, initially refused to indict both men for treason.

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[101] Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1, 7 n.37 (1996).

[102] Schwartz, *supra* note 98, at 710 ("Henry's grand jury was not intended to be a protector of the people . . . . The thrust of Henry's grand jury was to effectuate his desire for absolutism by rendering powerless the traditional baronial courts and by weakening the ecclesiastical courts, to say nothing of the added benefit . . . to the royal treasury."); *see also* Leipold, *supra* note 2, at 281 n.103 (noting that jurors were required to report members of their communities that were "accused or generally suspected" of various crimes).

[103] Simmons, *supra* note 8, at 6.

[104] *Id.*

[105] *Id.* at 8.

[106] *Id.*

[107] *Id.*

[108] Schwartz, *supra* note 98, at 717.

Some question the significance of the Shaftesbury and Colledge cases because of their ultimate outcomes.[109] Colledge was indicted by a second grand jury and eventually executed, while Shaftesbury fled the country and lived his remaining years in exile in Holland.[110] However, the larger point is that regardless of the end result, this was a watershed moment because for the first time in history, a group of citizens used the grand jury system to stand up to and defy the government.[111] Sir John Somers, the Lord Chancellor of England and a close friend of Shaftesbury, summed up this view when he 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."[112]

The bold and autonomous acts of these early English grand jurors were facilitated by the fact that the prosecutor generally did not enter the grand jury room.[113] The prosecutor only served the government and did not offer legal advice to the grand jurors.[114] Thus, whether by choice or necessity, grand jurors made decisions and came up with answers on their own. One may ultimately conclude that a correlation exists between the interactions of grand jurors and prosecutors and the ability of grand juries to function independently. This early display of self-sufficiency and independence helped elevate the stature of grand juries within the community.[115]

This initial admiration displayed by the English for grand juries, however, was not long lasting. As would later occur in the United States, grand juries over time fell out of favor with the public.[116] Many in England began to view them as corrupt and inefficient, and efforts mobilized to

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[109] Washburn, *supra* note 92, at 2343 n.39 ("Thus, instead[] of being symbolic of the grand juries' independence, Schwartz suggested that the Colledge and Shaftesbury cases are actually indicative of the grand juries' vulnerability to politics."); *see also* Simmons, *supra* note 8, at 8 ("The full history of the Shaftesbury case presents a more complex picture.").

[110] Simmons, *supra* note 8, at 9-10.

[111] *Id.* at 10.

[112] LEVY, *supra* note 23, at 64.

[113] Roger T. Brice, *Grand Jury Proceedings: The Prosecutor, the Trial Judge, and Undue Influence*, 39 U. CHI. L. REV. 761, 765 n.24 (1972); Richard Calkins, *The Fading Myth of Grand Jury Secrecy*, 1 J. MARSHALL J. PRAC. & PROC. 18, 18-19 (1967).

[114] EDWARDS, *supra* note 97, at 127 ("At common law the grand jurors conducted the examination of witnesses themselves, not permitting the attorney for the crown to enter the room, and receiving their instructions as to the law directly from the court."); Brice, *supra* note 113.

[115] Simmons, *supra* note 8, at 8.

[116] 2 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 139-40 (John Bowring ed., Edinburgh, W. Tait 1843).

abolish them.[117] These efforts were aided by the fact that, unlike the United States, England had no constitutional considerations to worry about when deciding whether to forego the grand jury entirely.[118] Thus, by 1933, England had all but abandoned the use of grand juries, save for limited exceptions; even those were eliminated by the Criminal Justice Act of 1948.[119]

B. ROLE OF THE PROSECUTOR

Upon arrival in this country around 1635, the prosecutor, like in England, had a limited role in the grand jury process.[120] In fact, grand jurors, who had very broad powers, could actually exclude prosecutors from the grand jury room.[121] This in turn led citizens to view grand juries as their very own Inspectors General or ombudsmen, whose actions touched upon every aspect of society.[122] This distinction between the roles of grand jurors and prosecutors also served to increase the public's confidence in the process as a whole. Few saw grand juries as an arm of the prosecution.[123] In fact, most thought just the opposite.[124]

Prosecutors were not relied upon or needed, for the most part, because American grand jurors, like those in England, were familiar with the people and the issues appearing before them. Investigations could commence merely on the personal knowledge of the grand juror.[125] Further, many of

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[117] *Id.* (noting that early critic Jeremy Bentham, like his contemporary Robert Peel, argued that the grand jury was corrupt, inefficient, and the tool of the wealthy).

[118] For a broad discussion of England's abandonment of the grand jury, see Nathan T. Elliff, *Notes on the Abolition of the English Grand Jury*, 29 J. CRIM. L. & CRIMINOLOGY 3, 4-14 (1938); Albert Lieck, *Abolition of the Grand Jury in England*, 25 J. AM. INST. CRIM. L. & CRIMINOLOGY 623, 623 (1934).

[119] Elliff, *supra* note 118, at 3 ("The obituary of the English grand jury might well read: 'Born in 1166 to increase accusations of crime, lived to be termed the palladium of justice, and died in 1933 of inutility on a wave of economy.'").

[120] EDWARDS, *supra* note 97, at 100 ("The view was taken in the early history of Federal courts that grand juries, on their own motion institute all proceedings whatsoever.").

[121] United States v. Wells, 163 F. 313, 324 (D. Idaho 1908) ("The rights of the defendants are to be measured by the grand jury system as it existed and was understood at the time of its adoption. At the common law the prosecutor had no right to attend the sessions."); Roots, *supra* note 93, at 833 ("The practice of allowing a prosecutor to investigate crime allegations and then present his evidence for indictment before the grand jury became routine and evolved into such standard practice that by the end of the nineteenth century it had become part of 'normal' grand jury operations.").

[122] LEVY, *supra* note 23, at 65-66, 68.

[123] *See* Simmons, *supra* note 8, at 7.

[124] *Id.*

[125] Blair v. United States, 250 U.S. 273, 282 (1919).

these early grand jurors were highly educated for the time period.[126] In comparison, most of the prosecutors at that time had limited training and familiarity with the law and thus were not necessarily helpful in determining whether sufficient probable cause existed to issue an indictment.[127] Shortly after the turn of the twentieth century, however, the situation began to change.[128]

First, because of the dramatic population increase in the United States, especially in the urban areas, many grand jurors were no longer familiar with the people appearing before them or the communities they represented. In the words of one late twentieth century commentator, "[G]rand jurors today lack the intimate knowledge of community activity possessed by grand jurors of pre-urban society."[129] This period also ushered in the creation of the professional prosecutor's office staffed by individuals trained in the law.[130] In addition, federal criminal law greatly expanded to include statutes that did more than just protect direct federal interests.[131] As a result, grand jurors started to handle crimes that were far more complex and issues that went well beyond the general knowledge of the layperson.[132] Where before grand jurors dealt with assaults, homicides, and robberies, in which they had at least a rudimentary understanding of the crime, they now

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[126] June Barbara Kress, Rise to the Challenge: Federal Grand Jury Repression, Resistance, and Reform, 1970-1973 (June 16, 1978) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with Law Library, University of Illinois, Urbana-Champaign); *see also* Ronald F. Wright, *Why Not Administrative Grand Juries?*, 44 ADMIN. L. REV. 465, 475 (1992) ("In other colonies, the grand jurors were selected by the local sheriff or the court, and tended to be the 'substantial men' of the area.").

[127] "The earliest prosecutor would have certainly been a minor court character . . . . These low-budget courts, with no trained bar, would not serve the purpose of a growing nation." Gerard "Chuck" Rainville, *The District Attorney in America: An Evolution*, PROSECUTOR, Nov.-Dec. 2006, at 32, 34.

[128] Wright, *supra* note 126, at 483 ("Towards the end of the nineteenth century, the case against the grand jury began to highlight the superior competence of the professional prosecutor."); Fred A. Bernstein, Note, *Behind the Gray Door:* Williams, *Secrecy, and the Federal Grand Jury*, 69 N.Y.U. L. REV. 563, 575 (1994) ("In fact, prior to the twentieth century, the investigative grand jury was a remarkably independent institution.").

[129] Brice, *supra* note 113, at 764.

[130] Congress established the DOJ in 1870, with a budget of only $50,000, and the Bureau of Investigation in 1908, which eventually became the FBI in 1924. *See* Brenner, *supra* note 69, at 72 ("This drive to eliminate the institution, or reduce its importance, was prompted by a belief that grand juries were unnecessary due to the emergence of 'professional criminal prosecutor[s].'").

[131] NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 5-6 (2d ed. 1993).

[132] *Id.*; *see* Brenner, *supra* note 69, 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 legal and factually complex offenses.").

had crimes involving mail fraud, false claims, and the Mann Act that were not normally seen in everyday community life or familiar to the average grand juror.[133]

Grand jurors responded to these challenges by requesting assistance. Specifically, grand jurors wanted a staff to help them perform their duties.[134] These requests, for the most part, were denied.[135] Instead, courts allowed prosecutors, who now had far more legal training and the increased confidence of the people, to appear before and aid the grand jurors.[136] Eventually, prosecutors started presenting cases to the grand jury where previously they only received the case after an indictment had been issued.[137] This arrangement flourished and grew until today, as previously discussed, the prosecutor participates in every aspect of the grand jury proceeding, save for actually voting on the indictment itself.[138]

In certain respects, an enhanced role for the prosecutor in the grand jury process was to be expected and may be viewed as a natural consequence of a matured legal system that had grown increasingly complex.[139] It does not necessarily follow, however, that the increased presence of the prosecutor required the usurpation of the grand jurors' decision-making powers. Other steps could have been taken to counterbalance these changes, such as providing grand jurors with a staff or, at the very least, a GJLA. Reliance upon and use of the GJLA would have greatly decreased grand juror dependency on the prosecutor. Instead, the executive branch reconfigured the balance of power in the grand jury room to greatly favor the prosecutor, at the expense of the autonomy the grand jury enjoyed at common law—a move accomplished with the assistance of both Congress and the courts.[140]

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[133] *Id.*

[134] Roots, *supra* note 93, 829.

[135] *See infra* Part V.

[136] *See, e.g.*, United States v. Huston, 28 F.2d 451, 452 (N.D. Ohio 1928) (allowing prosecutors to assist with the presentation of evidence); *In re* Crittenden, 6 F. Cas. 822 (C.C.D. Ky. 1878) (No. 3,393a); Charge to Grand Jury, 30 F. Cas. 992 (C.C.D. Cal. 1872) (No. 18,255); EDWARDS, *supra* note 97, at 127 ("It is the general custom at the present day in all jurisdictions to permit the district attorney to attend the grand jury."); Roots, *supra* note 93; Bernstein, *supra* note 128, at 596.

[137] EDWARDS, *supra* note 97, at 110 ("The right of the district attorney to prefer a bill of indictment to the grand jury upon his official responsibility and without leave of court is now firmly established both in the Federal Courts . . . ."); *see also* United States v. Fuers, 25 F. Cas. 1223 (C.C.W.D. Pa. 1870) (No. 15,174).

[138] *Supra* Part II.

[139] United States v. Linton, 502 F. Supp. 861, 865 (D. Nev. 1980) ("The passive role of the modern grand jury is perhaps an inevitable function of our complex urban society.").

[140] Bernstein, *supra* note 128, at 579 ("The indicting grand jury's collapse could not have occurred without the Supreme Court's acquiescence.").

C. ROLE OF CONGRESS

Historically, Congress has paid sparse attention to grand juries. In the last sixty plus years, aside from codifying the Federal Rules of Criminal Procedure, Congress has done very little by way of changing the grand jury process or structure. Instead, Congress has relied on the courts to ensure that grand juries operate effectively.[141] However, as discussed *infra*, that may not be an available option in the future.[142]

The most significant legislative change with respect to the grand jury occurred when Congress, desiring uniformity in federal criminal law, passed the 1946 Federal Rules of Criminal Procedure.[143] These new rules codified federal criminal common law, but did not include the grand jury's traditional presentment power, which had allowed grand juries to bring charges on their own.[144] Although not widely practiced at the time, this right of presentment is recognized in the Fifth Amendment and had always been available to federal grand juries until 1946.[145] With the loss of this power, grand jurors became entirely dependent on the prosecutor to bring charges, for without her signature the indictment could not go forward.

A few legal commentators and early judicial opinions have suggested that the codification of the Federal Rules did not completely remove the common law right of the grand jury's presentment power.[146] However, for all practical purposes, the rules and the subsequent case law interpreting them effectively ended grand jury presentments.[147] Some have suggested reinstatement of the presentment power as one way to restore grand jury independence.[148] While this would indeed allow grand jurors to operate more on their own, such action is fraught with unintended negative consequences, especially in cases where the Assistant U.S. Attorney

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[141] Fouts, *supra* note 12, at 340 ("Despite these proposals, there have been few steps taken by Congress.").

[142] *See infra* Part III.D.

[143] *See* Richard H. Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?*, 55 COLUM. L. REV. 1103, 1106 (1955); Renée B. Lettow, *Reviving Federal Grand Jury Presentments*, 103 YALE L.J. 1333, 1341 (1994).

[144] Hale v. Henkel, 201 U.S. 43, 60 (1906) (defining a presentment as "a notice taken by a grand jury of any offense from their own knowledge or observation, without any bill of indictment laid before them."); Lettow, *supra* note 143, at 1343; *see also supra* note 24.

[145] U.S. CONST. amend. V.

[146] *See* Kuh, *supra* note 143; Lettow, *supra* note 143; *see, e.g.*, United States v. Zarattini, 552 F.2d 753, 756-57 (7th Cir. 1977); *In re* April 1956 Term Grand Jury, 239 F.2d 263, 268-69 & nn.7-8 (7th Cir. 1956).

[147] Sharon LaFraniere, *The Grand Jury That Couldn't*, WASH. POST, Nov. 10, 1992, at A1 (discussing the frustration of a grand jury that wanted to bring an indictment, but was not presented with one by the prosecutor).

[148] *See generally* Lettow, *supra* note 143.

completely disagrees with the indictment. An example of this occurred during the 1960s when a southern grand jury, contrary to the wishes of the Assistant U.S. Attorney, returned an indictment against nonviolent civil rights demonstrators.[149]

Despite numerous opportunities, Congress has done little to mitigate the grand jury's loss of its presentment power, repeatedly failing to pass any significant legislation to empower grand jurors. The one notable exception is the enactment of a law requiring grand jury proceedings to be transcribed.[150] Arguably, however, this law had more to do with safeguarding the grand jury process and preserving the testimony of the prosecutor's witnesses than strengthening the position of grand jurors.

As previously stated, grand jurors for the most part remained off the congressional radar screen[151] until the 1970s, when allegations of grand jury politicization and misuse were widely circulated.[152] These accusations led to the introduction of numerous bills in Congress that, if enacted, would have dramatically changed grand jury operations.[153] Congress also held several hearings on grand juries during this period.[154] In the end, however, very little was done to correct problems with the grand jury process.[155]

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[149] United States v. Cox, 342 F.2d 167 (5th Cir. 1965).

[150] Order Amending Federal Rules of Criminal Procedure 6. The 1979 Advisory Committee Notes to Rule 6(e)(1) state that the transcribing or recording of grand jury proceedings ensures that: (1) the defendant will be able to later impeach a government witness at trial with a prior inconsistent statement made before the grand jury; (2) the testimony received by the grand jury will be trustworthy; (3) potential prosecutorial abuses are restrained; and (4) evidence will be available for the prosecutor at trial. H.R. DOC. NO. 96-112, at 66-69 (1979).

[151] It took the Senate 185 years following the ratification of the Bill of Rights to hold its first hearing on grand juries in 1976.

[152] Many scholars have suggested that the Nixon Administration, which was a strong advocate of the grand jury, abused the process for political purposes. David J. Fine, Comment, *Federal Grand Jury Investigation of Political Dissidents*, 7 HARV. C.R.-C.L. L. REV. 432, 442 (1972); *see also* Michael E. Deutsch, *The Improper Use of the Federal Grand Jury: An Instrument for the Internment of Political Activists*, 75 J. CRIM. L. & CRIMINOLOGY 1159, 1180-83 (1984); Frank J. Donner & Eugene Cerruti, *The Grand Jury Network: How the Nixon Administration Has Secretly Perverted a Traditional Safeguard of Individual Rights*, NATION (N.Y.), Jan. 3, 1972, at 5.

[153] Grand Jury Reform Act of 1976, S. 3274 96th Congress (1976); Sullivan & Nachman, *supra* note 30, at 1047 ("The 95th Congress considered several different reform bills, 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.").

[154] *See, e.g.*, *Hearings Before the Subcomm. on Immigration, Citizenship, and Int'l Law of the H. Comm. on the Judiciary*, 94th Cong. 2d. Sess. 277 (1976).

[155] This is demonstrated by the steady stream of bills introduced in Congress concerning grand jury reform. Sullivan & Nachman, *supra* note 30, at 1048. For example, in the 105th Congress, a bill was introduced to provide a right to assistance of counsel in the grand jury room, basic legal instructions to grand jurors, presentation of exculpatory information, and

When Congress eventually decided to act on grand jury legislation, it passed bills to strengthen the prosecutor's hand by loosening the rules on secrecy and who may receive grand jury information.[156] In 1977, for example, despite widespread reports of the government using grand juries for improper purposes, Congress redefined the phrase "attorney for the government" to aid the prosecutor's reliance on outside experts.[157] In 1985, Congress again allowed prosecutors to disclose evidence presented to the grand jury to "any government personnel . . . that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law" in another effort to improve the flow of grand jury information to those working with the prosecutor.[158] Most recently, Congress passed the USA PATRIOT Act, which permits prosecutors to disclose grand jury information concerning the agents and activities of foreign nations to federal, state, local, tribal, and foreign officials without prior court approval.[159]

While not a major development with respect to grand jury independence, loosening of the rules on secrecy is nonetheless relevant to this Article. Grand juries are privy to evidence that others, including law enforcement, are not.[160] Some prosecutors, now less restrained by the requirements of secrecy, may be more tempted to exploit the grand jury process, for example, releasing information to other governmental entities.[161] This in turn makes grand jury witnesses more hesitant to testify and less truthful when doing so, thereby diminishing the information

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access to certain grand jury transcripts by the defendant. Grand Jury Reform Act of 1998, S. 2289, 105th Cong. 2d Sess. (1998). The bill, however, never left committee.

[156] *See also* Kadish, *supra* note 101, at 13 (explaining that "[w]ith the shroud of secrecy came independence from the king").

[157] Simmons, *supra* note 8.

[158] FED. R. CRIM. P. 6(e)(3)(A)(ii).

[159] *Id.* § 6(e)(3)(D); *see also* Sarah Sun Beale & James E. Felman, *The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA Patriot Act's Changes to Grand Jury Secrecy*, 25 HARV. J.L. & PUB. POL'Y 699 (2002); Jennifer Collins, *And the Walls Came Tumbling Down: Sharing Grand Jury Information with the Intelligence Community Under the USA Patriot Act*, 39 AM. CRIM. L. REV. 1261 (2002); Lori E. Shaw, *The USA PATRIOT Act of 2001, The Intelligence Reform and Terrorism Prevention Act of 2004, and the False Dichotomy Between Protecting National Security and Preserving Grand Jury Secrecy*, 35 SETON HALL L. REV. 495 (2004).

[160] *See supra* note 1.

[161] United States v. Sells Eng'g, 463 U.S. 418, 432 (1983) ("If prosecutors in a given case knew that their colleagues would be free to use the materials generated by the grand jury for a civil case, they might be tempted to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in the civil suit, or even to start or continue a grand jury inquiry where no criminal prosecution seemed likely.").

received and relied upon by grand jurors in determining whether to issue an indictment.[162]

From the abuses of the Nixon Administration to the Whitewater scandal of the Clinton Presidency,[163] Congress's response to public criticism of the grand jury has followed a similar pattern: introduce legislation to fundamentally change the grand jury process, hold hearings, and then pass bills that do little more than augment the grand jury's ability to conduct investigations.[164] While Congress has taken measures to strengthen the grand jury's utility as a sword wielded by the prosecutor, it has done little to strengthen the shield. Congress's inertia or lack of interest in improving the shield has led individuals interested in reform to look towards the courts. However, as discussed next, the courts are moving in the opposite direction both directly and indirectly.[165]

D. ROLE OF THE COURTS

1. Indirect

Grand juries, while mentioned in the Bill of Rights, are not specifically discussed in Articles I through III of the United States Constitution.[166] Thus, there is an ongoing and unsettled debate about where exactly grand juries fit within the three branches of government, if at all. Some believe that grand juries belong in the executive branch because of their

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[162] *Id.* ("If a witness knows or fears that his testimony before the grand jury will be routinely available for use in governmental civil litigation or administrative action, he may well be less willing to speak for fear that he will get himself into trouble in some other forum.").

[163] *Constitutional Rights and the Grand Jury: Hearing Before the H. Subcomm. on the Judiciary*, 106th Cong. 2d Sess. (2000); Frederick P. Hafetz & John M. Pellettieri, *Time to Reform the Grand Jury*, 23 CHAMPION 12, 12 (1999), *available at* http://www.nacdl.org/public.nsf/ChampionArticles/19990112?OpenDocument ("From Linda Tripp to Betty Currie, the parade of witnesses into and out of federal courthouses in Arkansas, Virginia, and the District of Columbia became regular fare on the nightly news . . . . [T]he spotlight of [public] scrutiny came to shine upon some cobwebbed components of the American legal system, first and foremost among them the grand jury.").

[164] Fouts, *supra* note 12, at 340; *see also* Craig S. Lerner, *Legislators as the "American Criminal Class": Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599, 614 (2004) (discussing generally Congress's role with respect to grand juries).

[165] Susan P. Koniak, *When Courts Refuse to Frame the Law and Others Frame It to Their Will*, 66 S. CAL. L. REV. 1075, 1106 (1993) ("In recent years the Supreme Court has shown little interest in bolstering institutions like the grand jury that are designed to check the government's ability to transform force into law.").

[166] U.S. CONST. art. I-III.

investigatory power and close connection to the prosecutor.[167] Others place grand juries outside all three branches of government.[168] Most commentators, however, consider grand juries part of the judiciary[169] because courts summon the grand jurors, swear them in, and provide the initial charge.[170] Furthermore, the court, not the prosecutor, actually issues the grand jury subpoenas and enforces them.[171] Finally, the court has the power to discharge the grand jury at any time.[172]

Proper placement of the grand jury within the governmental framework is key to securing accountability and oversight.[173] Situating grand juries within the executive branch strengthens their use as an investigatory tool, but diminishes the grand jury's role as a protector against unfounded criminal prosecutions.[174] In contrast, assigning the grand jury to the judicial branch ensures that it is able to function as more than just an arm of the prosecutor. Furthermore, this approach reduces the chances of prosecutorial misconduct, a problem, as noted by the dissent in *United States v. Williams*, that is not relegated to petit trial proceedings.[175]

Placement of grand juries in the judiciary minimizes prosecutorial misconduct because it, *inter alia*, provides courts greater justification for exercising their supervisory power. Courts have relied upon this power to correct flawed indictments or problems occurring within the grand jury

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[167] *In re* Grand Jury Proceedings, 486 F.2d 85, 90 (3d Cir. 1973) ("[Grand juries] are for all practical purposes an investigative and prosecutorial arm of the executive branch of government.").

[168] United States v. Williams, 504 U.S. 36 (1992).

[169] *See* Levine v. United States, 362 U.S. 610, 617 (1960) ("[The] grand jury is an arm of the court . . . ."); Brown v. United States, 359 U.S. 41, 49 (1959) ("[The grand jury is] an appendage of the court . . . .").

[170] JODY GEORGE ET AL., HANDBOOK ON JURY USE IN THE FEDERAL DISTRICT COURTS 73 (1989).

[171] FED. R. CRIM. P. 17.

[172] Korman v. United States, 486 F.2d 926, 933 (7th Cir. 1973).

[173] SUSAN BRENNER & LORI SHAW, FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE 17 (2d ed. 2006) ("The issue is important because it implicates the extent to which the grand jury is amenable to control by the branches that are 'described in the first three Articles' of the Constitution . . . ."); Kuckes, *supra* note 26, at 1274 ("The fight was an important one because it directly addressed the degree to which the courts could regulate grand jury proceedings.").

[174] Bernstein, *supra* note 128, at 571-72.

[175] 504 U.S. 36, 60-61 (1992) (Stevens, J., dissenting) ("Like the Hydra slain by Hercules, prosecutorial misconduct has many heads. . . . [It has not] been limited to judicial proceedings: The reported cases indicate that it has sometimes infected grand jury proceedings as well."); *see also* Peter F. Vaira, *The Role of the Prosecutor Inside the Grand Jury Room: Where is the Foul Line?*, 75 J. CRIM. L. & CRIMINOLOGY 1129 (1984); Elizabeth G. McKendree, Note, United States v. Williams*: Antonin's Costello—How the Grand Jury Lost the Aid of the Courts as a Check on Prosecutorial Misconduct*, 37 HOW. L.J. 49 (1993).

room.[176] This ability of the court to intercede even without direct constitutional or statutory authority was first seen in *McNabb v. United States* and later applied to grand juries.[177] The Court in *McNabb*, rather than rely on the Fifth Amendment, justified the exclusion of a defendant's coerced confession by asserting its own supervisory authority over matters appearing before it.[178]

The *McNabb* Court determined that "[j]udicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence."[179] Later Supreme Court decisions have also pointed to a need to ensure the integrity of judicial proceedings.[180] In describing the application of the supervisory power to grand juries, Professor Henning states that "[e]xercising supervisory power over conduct before the grand jury filled a gap in the constitutional protections applicable during an investigation that allowed courts to adopt what were, in essence, ethical rules to overcome constitutional silence."[181] When applied, supervisory power should not unduly infringe on the legitimate prerogatives of either the grand jury or the prosecutor.[182]

Unfortunately, the courts, starting with *Costello v. United States*, have become increasingly reluctant to apply their supervisory power to activities occurring within the grand jury room.[183] In *Costello*, the defendant urged the Court to use its supervisory power to create a rule allowing him to challenge the sufficiency of the indictment due to a lack of "adequate or competent evidence."[184] The defendant argued that this was necessary because his indictment was based entirely on hearsay testimony.[185] The Supreme Court ruled against the defendant and refused to use its supervisory power, finding that "[n]o persuasive reasons are advanced for establishing such a rule." Furthermore, the Court stated that it wanted to

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[176] Rebecca Ann Mitchells, Note, *Supervisory Power Meets the Harmless Error Rule in Federal Grand Jury Proceedings*, 79 J. CRIM. L. & CRIMINOLOGY 1037 (1988).

[177] McNabb v. United States, 18 U.S. 332 (1943); *see also* Costello v. United States, 350 U.S. 359 (1956).

[178] *McNabb*, 18 U.S. at 332.

[179] *Id.* at 340.

[180] United States v. Mechanik, 475 U.S. 66, 74 (1986).

[181] Peter J. Henning, *Prosecutorial Misconduct in Grand Jury Investigations*, 51 S.C. L. REV. 1, 14 (1999). Several early cases applied this doctrine to grand jury proceedings. *See, e.g.*, *In re* Grand Jury Proceedings, 486 F.2d 85, 93 (3d Cir. 1973); United States v. Esteppa, 471 F.2d 1132 (2d Cir. 1972).

[182] United States v. Chanen, 549 F.2d 1306, 1313 (9th Cir. 1977).

[183] 350 U.S. 359, 363 (1956).

[184] *Id.* at 364.

[185] *Id.* at 359.

limit the number of formalities for a process "in which laymen conduct their inquiries unfettered by technical rules."[186]

In addition to serving as the catalyst for the demise of the application of the supervisory authority to grand juries, there are other reasons why *Costello* is problematic for those interested in greater grand jury independence. Some interpret the ruling as the Court denying grand jurors "the opportunity to put the government to its proof."[187] In other words, by allowing an indictment based entirely on hearsay statements, the government is no longer required to put forward a prima facie case that the individual in question more likely than not committed the crime. This concern gains greater currency when one realizes that the indictment, once issued, is a powerful tool in getting defendants to plead guilty even if innocent.[188]

Another consequence of relying on hearsay to obtain an indictment is that most grand jurors generally do not have legal training and are unfamiliar with the term *hearsay* and its legal ramifications. The prosecutor has no duty to tell grand jurors that certain evidence is hearsay or inadmissible.[189] Thus, absent instructions from the judge or the GJLA, grand jurors may never know that the testimony given at the grand jury hearing, which they rely on to issue an indictment, may be inadmissible at trial.

After *Costello*, the Supreme Court continued to limit the instances in which the supervisory power could be employed in the context of grand juries. In *United States v. Hasting*, the Court held that in matters not involving constitutional claims, the defendant must first show actual prejudice before the Court's supervisory authority may be applied.[190] Actual prejudice was defined in *Bank of Nova Scotia v. United States* as those "violation[s that] substantially influenced the grand jury's decision to indict, or if there is 'grave doubt' that the decision to indict was free from the substantial influence."[191] Although the *Hasting* and *Bank of Nova Scotia* rulings worked to further chip away at the courts' ability to oversee the grand jury process, they did not mark the low point for grand jury

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[186] *Id.* at 364.

[187] Bernstein, *supra* note 128, at 579.

[188] Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293, 311 (1975).

[189] *Costello*, 350 U.S. at 363.

[190] 461 U.S. 499 (1983). With respect to constitutional claims, race and gender are two clear-cut examples where one can presume prejudice. Vasquez v. Hillery, 474 U.S. 254, 263 (1986) (providing an example of race); Ballard v. United States, 329 U.S. 187, 195 (1946) (providing an example of gender).

[191] Bank of Nova Scotia v. United States, 487 U.S. 250, 256 (1988) (quoting United States v. Mechanik, 475 U.S. 66, 78 (1986)).

independence and the application of the supervisory power—that came later in *United States v. Williams*.

In *Williams*, the Court not only further weakened the supervisory power doctrine, but also placed grand juries outside the direct control of the judiciary. The *Williams* Court held that "[b]ecause the grand jury is an institution separate from the courts . . . as a general matter at least, no such supervisory judicial authority exists" save for situations involving those "few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions."[192] While the *Williams* Court settled the issue of whether the prosecutor had any duty to present exculpatory information to the grand jury (she doesn't),[193] it left many other questions unresolved.[194]

For instance, where exactly does one place the grand jury after *Williams*? For all intents and purposes, the *Williams* Court appeared to believe grand juries belong in their own separate fourth branch of government;[195] however, the Court does not articulate how that branch would operate under our current system of checks and balances. As for the issue of when supervisory authority may be applied, the *Williams* decision adds little clarity or guidance. Instead, the Court merely stated that supervisory authority is reserved for situations involving violations of "clear rules." Yet, what those "rules" are is not entirely apparent.[196]

By both limiting and obfuscating the application of the supervisory authority, the courts have indirectly decreased grand juror independence. If the grand jury is indeed a separate branch of government that is beyond the protections (limited as they may be) of the judiciary, there is little to prevent the executive branch from completely controlling the grand jury

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[192] United States v. Williams, 504 U.S. 36, 46-47 (1992) (citing *Mechanik*, 475 U.S. at 74).

[193] *Id.* at 54 ("[I]t would run counter to the whole history of the grand jury institution to permit an indictment to be challenged 'on the ground that there was inadequate or incompetent evidence before the grand jury.'"); *see also* 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 (2000).

[194] *See* U.S. DEP'T OF JUST., *supra* note 62, § 9-11.233; *see also id.* § 9-11.20 (directs prosecutors to present exculpatory information); Ali Lombardo, Note, *The Grand Jury and Exculpatory Evidence: Should the Prosecutor Be Required to Disclose Exculpatory Evidence to the Grand Jury?*, 48 CLE. ST. L. REV. 829, 830 (2000).

[195] Admin. Office of the U.S. Courts, *supra* note 51. This view is perpetuated in the model grand jury instructions provided by the Administrative Office: "The Grand Jury is an independent body and does not belong to any branch of the government." *Id.*

[196] Some believe the rules apply almost exclusively to grand jury secrecy. Bernstein, *supra* note 128, at 623 n.46.

and usurping its powers.[197] It was the courts' supervisory authority and willingness to provide oversight that curbed prosecutorial misconduct and abuse of the grand jury process.[198] One can hardly expect the executive branch to police itself, and as discussed *supra*, Congress has demonstrated little interest in ensuring that grand juries function properly.[199]

2. Direct

In addition to the above-mentioned indirect measures, the Supreme Court has acted directly to erode grand jury independence through its Administrative Office (AO). Created in 1939, the AO is charged with implementing the policies of the Judicial Conference including overseeing the administration of U.S. courts.[200] As part of its duties, the AO provides model grand jury instructions to all ninety-four United States district courts.[201] These modern-day instructions, although far from those used during the time of Lord Shaftesbury when grand jurors were basically directed to reach certain decisions, have over time gradually evolved to favor the prosecutor at the expense of grand jurors and those being investigated by the grand jury.[202] As a result, defendants with increased frequency have challenged the constitutionality of these instructions. Two of the more noteworthy cases addressing this issue appeared recently in the Ninth Circuit, *United States v. Marcucci* and *United States v. Navarro-Vargas*.[203]

The defendants in *Marcucci* and *Navarro-Vargas* argued that the grand jury instructions as promulgated by the AO and provided by district court judges to grand jurors constituted an unlawful interference into the grand jury's traditional discretionary powers.[204] In *Marcucci,* the

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[197] Hafetz & Pellettieri, *supra* note 163, at 13 ("Without any meaningful judicial supervision of prosecutorial conduct in the grand jury, any check on misconduct is in reality left to the prosecutor's own sense of fairness and proper behavior in the grand jury.").

[198] Bernstein, *supra* note 128, at 589 ("Miscarriages of justice become more likely as the restraints on prosecutorial overreaching, another issue the *Williams* decision ignored, are weakened.").

[199] Fouts, *supra* note 12, at 339 ("[R]emoving 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.").

[200] Admin. Office of the U.S. Courts, Frequently Asked Questions, http://www.uscourts.gov/faq.html (last visited Nov. 15, 2008).

[201] Admin. Office of the U.S. Courts, *supra* note 81.

[202] *See supra* note 110.

[203] United States v. Marcucci, 299 F.3d 1156 (9th Cir. 2002); United States v. Navarro-Vargas (*Navarro II*), 408 F.3d 1184, 1187 (9th Cir. 2005) (*Navarro-Vargas I* was United States v. Navarro-Vargas, 367 F.3d 896 (9th Cir. 2004)).

[204] *Navarro II*, 408 F.3d at 1187-88; *Marcucci*, 299 F.3d at 1159.

defendants argued that the grand jury instructions as currently written failed to inform grand jurors of their right to refuse to indict even where there is sufficient probable cause.[205] As discussed above, grand juries have long had this common law right, which was one reason for their early popularity and inclusion in the Bill of Rights.[206]

According to Judge Hawkins, who dissented in *Marcucci,* grand jurors are traditionally viewed as the "'conscience of the community'—a function that partakes far more of judgment and discretion than of the narrow ministerial role of merely weighing the evidence to determine probable cause that the challenged instruction assigns to them."[207] The majority of the Ninth Circuit's three-judge panel, however, saw it differently. In a plain reading of the Fifth Amendment, they determined that "the Constitution contains no language requiring the grand jury to be told that it can refuse to indict if probable cause is found."[208] The court also determined that the AO instructions which stated that the grand jurors "*should* vote to indict" if probable cause is found 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."[209]

Three years after *Marcucci*, the AO-created grand jury instructions were again challenged in the Ninth Circuit. In *United States v. Navarro-Vargas*, the defendants argued that it was unconstitutional for the judge, pursuant to the grand jury instructions, to instruct the grand jurors not to consider the wisdom of criminal laws or the actual punishment when

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[205] Admin. Office of the U.S. Courts, *supra* note 51. The relevant portion of the *Marcucci* grand jury instructions, which were based on the Model Grand Jury Charge, is as follows:

> To return an indictment charging an individual with an offense, it is not necessary that you find that individual guilty beyond a reasonable doubt. You are not a trial jury and your task is not to decide the guilt or innocence of the person charged. 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 person being investigated committed the offense charged. 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 belief that the person being investigated is probably guilty of the offense charged.

Id. ¶ 25 (emphasis added).

[206] YOUNGER, *supra* note 9.

[207] *Navarro-Vargas I*, 367 F.3d at 901 (quoting *Marcucci*, 299 F.3d at 1168-69 (Hawkins, J., dissenting)).

[208] *Marcucci*, 299 F.3d at 1160; *see also Navarro-Vargas I*, 367 F.3d at 899-900.

[209] *Marcucci*, 299 F.3d at 1164; *see also Navarro II*, 408 F.3d at 1204-06.

determining whether to indict.[210] Following the precedent set by *Marcucci* and the subsequent case of *United States v. Adams*, which broadly interpreted *Marcucci*, the Ninth Circuit ruled against the *Navarro-Vargas* defendants and upheld the instructions.[211] Like that in *Marcucci*, the dissent in *Navarro-Vargas I*, written by Judge Kozinski, is a strong, well-reasoned response noting that the instructions as written deprived grand juries of their right to "mak[e] similar political judgments about which laws deserve vigorous enforcement and which ones do not . . . ."[212] Furthermore, the dissent noted that "[i]n acting as the community's conscience, the grand jurors must decide whether conduct that appears to fall within the prohibitions of a particular statute does indeed merit criminal punishment."[213]

Others have also argued that the holding in *Navarro-Vargas* appears to contradict *Williams* (barring additional rules on grand jury procedures) in that it imposes an "impermissible rule of procedure" forbidding grand jurors from questioning the wisdom of laws or the defendant's punishment.[214] Interestingly, the courts appear more than willing to impose new rules on the grand jury when those rules strengthen the power of the prosecutor.

In their dissents, both Judges Kozinski and Hawkins relied on the language of *Vasquez v. Hillery*, the lone bright spot for those looking to the courts to restore independence to grand jurors.[215] The *Vasquez* Court took a

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[210] Admin. Office of the U.S. Courts, *supra* note 51. The relevant portion of the *Navarro-Vargas* grand jury instructions, which were based on the Model Grand Jury Charge, was as follows:

> 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 determined by Congress and not by you.
>
> Furthermore, when deciding whether or not to indict, you should not consider punishment in the event of conviction.

Id. ¶¶ 9-10.

[211] *Navarro-Vargas I*, 367 F.3d at 898 ("In *Adams* the defendant challenged his indictment based on the propriety of the model charge at issue in this case and in *Marcucci*. The *Adams* court read *Marcucci* broadly as holding that the model charge did not impermissibly infringe on the grand jury's independent exercise of its discretion." (citations omitted)).

[212] *Id.* at 901 (Kozinski, J., dissenting).

[213] *Id.* at 901-02.

[214] *Id.* at 899. In addition, some argue that the *Navarro-Vargas* holding as applied to grand juries considering capital cases is unconstitutional. K. Brent Tomer, Ring *Around the Grand Jury: Informing Grand Jurors of the Capital Consequences of Aggravating Facts*, 17 CAP. DEF. J. 61, 74 (2004) ("This charge is a misstatement of federal law, at least insofar as death penalty cases are concerned.").

[215] *Marcucci*, 299 F.3d 1156, 1168 (9th Cir. 2002).

very expansive view of the role of grand juries and found that "[t]he 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 . . . ."[216] Ultimately, this view led the *Vasquez* Court to strike down a defendant's indictment because it was issued by a racially tainted grand jury. Unlike other judicial decisions involving grand juries,[217] the *Vasquez* Court went beyond mere rhetoric and took corrective action to ensure that grand jurors could act independently.[218]

After reading *Marcucci* and *Navarro-Vargas I* and *II*, one comes away with the feeling that if grand jurors remained in the dark about the full breadth of their role and responsibilities, the courts would not necessarily view that as a problem.[219] However, this lack of knowledge of the grand jury's historical and common law functions is exactly what undermines the grand jurors' ability to act independently of the prosecutor. One legal commentator noted, "[W]ithout an understanding of its power, how can the grand jury really assert itself?"[220] By not informing grand jurors about their full authority, the instructions work to turn the grand jury into a paper tiger—in stark contrast with its historical role as a safeguard against government oppression.[221]

IV. IMPORTANCE OF GRAND JURY INDEPENDENCE

As demonstrated by Parts II and III of this Article, it is abundantly clear that grand jurors have indeed lost their ability to function independently.[222] This loss was due to the actions or inactions of all three branches of government. The issue now becomes: does the loss of grand jury independence matter? Some commentators are perfectly willing to accept the increased amount of control exercised by the prosecutor over the

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[216] Vasquez v. Hillery, 474 U.S. 254, 263 (1984).

[217] After reading many grand jury cases, one senses a disconnect between what the Court believes and what actually occurs on a daily basis in the grand jury room. *United States v. Dionisio* represents one of the few times when the Court provides an honest assessment of the grand jury's performance: "The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor . . . ." 410 U.S. 1, 17 (1972).

[218] Some have questioned the reach of *Vasquez* with respect to cases where race is not an issue.

[219] Kuckes, *supra* note 26, at 1314 (2006) ("The majority's instinctive reaction against this conclusion is revealed most fully in its warning about the risks of giving grand jurors what Judge Hawkins terms a 'full disclosure' instruction.").

[220] Lewis, *supra* note 16, at 52.

[221] *Vasquez*, 474 U.S. at 263-64.

[222] Sullivan & Nachman, *supra* note 30, at 1049.

grand jury, arguing that prosecutors, with their background and legal training, are in a better position to determine who to investigate and indict than grand jurors.[223] They cite several reasons why an independent grand jury is unnecessary and point to the problems that can arise with a runaway[224] or overly independent grand jury.[225]

The primary argument against providing grand jurors increased independence focuses on the idea that because grand jurors serve for only eighteen months and rarely, if ever, have a legal background,[226] they are incapable of making a legal determination.[227] Therefore, such decision-making like whether probable cause exists should be left to the prosecutor.[228] This belief, however, is refuted by the everyday practice of the American criminal legal system. For example, petit jurors regularly make beyond reasonable doubt determinations, which are legal in nature. Petit jurors do not have any more legal training than grand jurors and, for the most part, have far less legal experience than grand jurors, whose jury service is generally much longer.[229]

The experience that grand jurors gain during their eighteen months of service should not be underestimated. According to one former GJLA, "Experienced grand jurors get a sense of this [lack of probable cause] and no bill the weak cases, but again they must be experienced."[230] Another former GJLA stated, "In general however, the jurors are well aware of what

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[223] *See* United States v. Mechanik, 475 U.S. 66, 70 (1985); Antell, *supra* note 28, at 155 ("The work of examining and collating documents interviewing witnesses, [and] analyzing discordant evidence . . . require[s] the application of skills and techniques which are totally outside the knowledge of the average grand juror.").

[224] Roots, *supra* note 93.

[225] United States v. Cox, 342 F.2d 167, 172 (5th Cir. 1965) (addressing an instance where grand jurors attempted to indict civil rights protesters contrary to the advice of the prosecutor).

[226] "On the rare occasion that a member of the grand jury has independent knowledge of the legal system, . . . it is not necessarily viewed as positive." Phyllis L. Crocker, *Appointed but (Nearly) Prevented from Serving: My Experiences as a Grand Jury Foreperson*, 2 OHIO ST. J. CRIM. L. 289, 300 (2004).

[227] *But see* Illinois v. Gates, 462 U.S. 213, 231 (1983) ("Perhaps the central teaching of our decisions bearing on the probable cause standard is that it is a practical, nontechnical conception. In dealing with probable cause, . . . we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." (quoting Brinegar v. United States, 338 U.S. 160, 175-76 (1949))); *see also* Kuckes, *supra* note 26, at 1312 ("[A] probable cause determination was not regarded as a purely judicial function, as it is today . . . .").

[228] Antell, *supra* note 28, at 155; Leipold, *supra* note 2.

[229] FED R. CRIM. P. 6(g).

[230] GJLA Survey, *infra* app. A, question 10.

is sufficient, except at the beginning of their service term when they tend to trust whatever the prosecutor presents."[231]

Those who continue to doubt the ability of grand jurors to determine the existence of probable cause state further that at a petit jury trial: (1) the adversarial process has fleshed out the issues bringing to light the conflicting facts, and (2) jurors are able to make legal determinations because they have received instructions prior to deliberating.[232] However, these claims do not always ring true; some defendants make no arguments at trial and rely simply on the prosecutor's inability to prove her case beyond a reasonable doubt.[233] In other instances, the prosecution and defense counsel are of such varying legal abilities that the important facts are never fully addressed. Worse yet, some defendants represent themselves and do a very poor job.[234] While petit jurors receive instructions from both the prosecutor and the judge, grand jurors can, and do, receive similar instructions.[235] For example, the U.S. Attorney's Manual recommends that prosecutors give grand jurors the same jury instructions as petit jurors, but substitute "probable cause" for "beyond a reasonable doubt" where applicable.[236]

This argument concerning a lack of legal expertise also presupposes that the only role of the grand jury is to make probable cause determinations.[237] As pointed out in *Vasquez* (and throughout its early use in this country), the grand jury has broad discretionary power to shape

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[231] GJLA Survey, *infra* app. A, question 7.

[232] Leipold, *supra* note 2, at 296-97.

[233] Consider, for example, the trial of Jose Padilla. Nation in Brief/Florida, *Padilla Defense Rests Case*, L.A. TIMES, Aug. 8, 2007, at A15 ("Throughout 53 days of trial, Jose Padilla's defense lawyers contended that prosecutors had not proven that their client was part of a conspiracy to support terrorist groups . . . . [T]hey rested their case, without calling a witness or putting on evidence for Padilla.").

[234] Maureen Groppe, *Justices Consider Mentally Ill Defendants' Rights*, INDIANAPOLIS STAR, Mar. 27, 2008, at A4 (discussing the Supreme Court's acceptance of *Indiana v. Edwards*, "[Justice] Breyer said the study suggests to him that Edwards is part of a small subclass of disturbed defendants who may do badly representing themselves.").

[235] CRIMINAL DIV., U.S. DEP'T OF JUSTICE, FEDERAL GRAND JURY PRACTICE 27 (William J. Corcoran ed., 1993). However, grand jurors don't always receive adequate instructions from the prosecutor. *See, e.g.*, United States v. Kenny, 645 F.2d 1323 (9th Cir. 1981). One legal commentator has recommended releasing the transcripts of all the grand jury legal instructions by the prosecutor to ensure that the indictment is not flawed. Benjamin E. Rosenberg, *A Proposed Addition to the Federal Rules of Criminal Procedure Requiring the Disclosure of the Prosecutor's Legal Instructions to the Grand Jury*, 38 AM. CRIM. L. REV. 1443 (2001).

[236] CRIMINAL DIV., U.S. DEP'T OF JUSTICE, *supra* note 235, at 27.

[237] Kuckes, *supra* note 26, at 1302 ("The grand jury was celebrated, historically, not for its narrow ability to apply a legal standard to the facts, but for its broad power to decide not to charge despite overwhelming evidence.").

criminal charges and to not indict at all even if a conviction can be obtained.[238] Grand jurors tell prosecutors when they have gone too far or are overreaching.[239] For this to occur, grand jurors must go beyond merely determining the existence of probable cause and also decide whether the charges reflect the views and beliefs of the community as a whole.[240] Neither a law degree nor legal training is necessary to determine that issuing an indictment in certain circumstances offers little benefit to society.[241] Dependent grand jurors are generally unable to even take the steps necessary to get to this point. In contrast, independent grand jurors can and do impart the interests and concerns of the community from which they come through the questioning of witnesses, the prosecutor, the evidence, and ultimately the indictment itself.[242]

This need for community input during the grand jury process is even more acute at the federal level for two reasons. First, crimes traditionally tried by the state are now more likely to be handled by the federal government.[243] Second, unlike at the state level where citizens can vote out the local district attorney as a way to demonstrate their displeasure with how crimes are or are not being prosecuted, the U.S. Attorney is not an elected position.[244] Thus, if local residents are upset with how the U.S. Attorney handles criminal charges, they have little recourse save voicing their opinion during the grand jury proceedings.

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[238] YOUNGER, *supra* note 9.

[239] Sullivan & Nachman, *supra* note 30, at 1053 ("[T]he grand jury gives the prosecutor a feel for how the case will appear to a petit jury. The grand jury's reaction may lead the prosecutor to re-evaluate the evidence supporting a particular case."); *see also* Wright, *supra* note 126, at 470 ("Another monitoring function of the grand jury arose where the prosecutor overreached . . . .").

[240] Vasquez v. Hillery, 474 U.S. 254, 263 (1985); LEROY D. CLARK, THE GRAND JURY: THE USE AND ABUSE OF POLITICAL POWER (1975); Brenner, *supra* note 69, at 130 (stating that the purpose of societal input into the grand jury process is to "inject[] the community's notions of morality and justice into the charging process").

[241] Simmons, *supra* note 8, at 49 (illustrating this point by stating that "during times of high crime rates, grand juries are more likely to accept [a defendant's argument that he was carrying an illegal handgun for protection] and dismiss the case, even though there are no legal grounds for doing so," but "[d]uring times of relatively low crime, grand juries will usually reject such an argument and indict the defendant").

[242] Brenner, *supra* note 69, at 100 (discussing the importance of grand jury independence, Professor Brenner writes that "[i]ndependence, in turn, leads to a more influential, accurate, and legitimate community voice in the judicial process").

[243] John S. Baker, Jr., *State Police Power and the Federalization of Local Crime*, 72 TEMP. L. REV. 673, 674 (1999).

[244] Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 249 (1980) ("[T]he federal prosecutor is not an elected official, and is not subject to popular political pressures, although he may be removed by the President.").

One final benefit of community input is the infusion of new ideas and people into criminal justice decision-making. Local citizen participation in grand juries keeps the process free from the biases of government service.[245] Granted, grand jurors serve with their own prejudices, but these prejudices generally reflect the society from which they are drawn rather than being derived from having prosecuted or adjudicated one too many cases.[246] Yet, despite this critical role played by citizens in the federal criminal justice system, fewer opportunities are available to them to shape or influence the process.[247] The grand jury survives as one of the last remaining avenues where they can actually express their views with respect to the prosecution of federal laws.

Besides pointing to a lack of legal expertise, proponents of the status quo argue that grand juror independence is unnecessary because prosecutors have little incentive for promoting unsound indictments,[248] and in those instances where they do occur, they are resolved at trial.[249] This argument is suspect for several reasons. First, it downplays the seriousness and significance of the indictment alone, as if a defendant's reputation is quickly restored at the conclusion of the trial court proceedings.[250] Former

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[245] United States v. Navarro-Vargas, 408 F.3d 1184 (9th Cir. 2005); *see also* CLARK, *supra* note 240, at 108 ("Lay citizen involvement in government institutions is an important ingredient when it can prevent government agencies from hardening into bureaucracies that operate only on their own internal dynamic . . . .").

[246] Another legal commentator has argued that the GJLA will enhance community justice by informing "the grand jury of available lesser charges . . . . Under this approach, the grand jury procedure would be transformed from a review of the prosecutor's proposed charges to a more interactive process permitting grand jurors to participate in formulating the charges." Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 398 (2002).

[247] Consider, for example, the government's fast track plea agreement deal in which the defendant waives her right to indictment, trial, and appeal. United States v. Ruiz, 536 U.S. 622 (2002).

[248] One need only look at the 2006 rape indictments obtained against the Duke Lacrosse players to see that prosecutors have various motives and reasons for bringing forward flawed cases. Duff Wilson, *Lawyer Says Two Duke Lacrosse Players Are Indicted in Rape Case*, N.Y. TIMES, Apr. 17, 2006, at A23; *see also* Leipold, *supra* note 2, at 268 ("[O]verwork, political pressure, laziness, and malice can prompt a prosecutor to bring ill-considered charges against innocent people or excessive charges against those who committed lesser crimes."). *But see* Collins, *supra* note 159, at 1275 ("The fact that a case will be reviewed by a grand jury at a minimum causes a prosecutor to engage in some internal screening to discard those cases that for whatever reason run a serious risk of being no-billed by a grand jury.").

[249] Leipold, *supra* note 2, at 311 n.232 ("The Supreme Court has ruled that a fair trial is sufficient to protect defendants from prejudice caused by most errors committed in the grand jury process."); Sullivan & Nachman, *supra* note 30, at 1058.

[250] *See* Hafetz & Pellettieri, *supra* note 163, at 13 ("[I]n the time period between indictment and trial, the accused may suffer ruinous consequences to his reputation and

Secretary of Treasury Raymond Donovan summed this up aptly when, after his acquittal, he inquired, "Where do I go to get my reputation back?"[251] As noted in *United States v. Serubo*, "the handing up of an indictment will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo."[252] One legal commentator has stated that "[i]n the public's mind an indictment often carries a presumption of guilt; it can cause economic harm and damage to reputation even if the defendant is later acquitted at trial."[253]

Second, few indictments actually lead to trials, as most defendants accept plea bargains.[254] Justice Stevens noted this reality when he wrote, "A grand jury indictment is just as likely to be the 'final step' in a criminal proceeding and the 'sole occasion' for public scrutiny as is a preliminary hearing."[255] Thus, it is erroneous to believe that the trial court will remedy errors left uncorrected during the grand jury proceeding. In fact, just the opposite is true. When you combine the high number of plea bargains with the secrecy in which the grand jury operates, errors are more likely to go undiscovered and repeated—resulting in further degradation of the criminal justice system.[256] Increased plea bargaining also results in fewer instances where the prosecutor actually has to prove her facts.[257] This leads to a

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employment from which he may never recover even if acquitted." (citing Gentile v. Nevada, 501 U.S. 1030 (1991))).

[251] Roots, *supra* note 93, at 821 n.2 (citation omitted); *see also* Cassidy, *supra* note 193, at 403 ("[T]here 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.").

[252] United States v. Serubo, 604 F.2d 807, 817 (3d. Cir. 1979).

[253] Leipold, *supra* note 2, at 268.

[254] In fiscal year 1999, only 6% of all federal criminal prosecutions were disposed of by trial. U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR U.S. ATTORNEYS, U.S. ATTORNEYS' ANNUAL STATISTICAL REPORT 14 (2000).

[255] Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 26 (1986) (Stevens, J., dissenting); *accord* NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, REPORT OF COMMISSION TO REFORM THE FEDERAL GRAND JURY (2000), *available at* http://www.nacdl.org/public.nsf/freeform/grandjuryreform?opendocument ("[T]he grand jury has in effect become the body of last resort for many accused in the federal criminal justice system.").

[256] Bank of Nova Scotia v. United States, 487 U.S. 250, 264-65 (1988) (Marshall, J., dissenting) ("Because of the strict protection of the secrecy of grand jury proceedings, instances of prosecutorial misconduct rarely come to light.").

[257] The average federal plea bargaining rate is 96.3%. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 426-27 tbl.5.24, *available at* http://www.albany.edu/sourcebook/. The average state rate is 95%. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2000, at 450 tbl.5.46, *available at* http://www.albany.edu/sourcebook/. For an overall discussion of the gradual increase of plea bargaining, see Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 119-25 (1999).

tendency to do less and not more with respect to thoroughly investigating and presenting evidence.[258]

Finally, and arguably most importantly, an independent grand jury is more likely to do a better job of preventing flawed indictments from going forward by serving as a better screening mechanism.[259] To some, this improvement presupposes that a prosecutor-dependent grand jury is problematic.[260] Those opposed to changing the current grand jury system argue that a high grand jury indictment rate (99%) does not necessarily mean that a significant number are flawed, but rather demonstrates that the prosecutor is doing her job correctly.[261] This assertion is difficult to either prove or disprove due to all the factors involved in the final disposition of a criminal case.[262]

Isolated reports of low conviction rates for certain categories of crimes post indictment were reported in congressional testimony about the Nixon Administration's Department of Justice's Internal Security Division. For example, the Internal Security Division indicted over 400 so-called dissidents during the early to mid 1970s, but less than 15% were ultimately convicted.[263] However, as stated previously, no one can say precisely whether the lack of convictions was due to the initial indictments being unwarranted. Still, the 99% overall indictment rate should give one concern about how much time and effort grand jurors actually expend in

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[258] Bernstein, *supra* note 128, at 569 n.35 ("Likewise, since the young prosecutors and defense lawyers . . . are almost never required to prove their facts, they are encouraged to be lax about learning them in the first place." (quoting CRIMINAL COURTS COMM. OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, SAVING THE CRIMINAL COURT: A REPORT ON THE CASELOAD CRISIS AND THE ABSENCE OF TRIAL CAPACITY IN THE CRIMINAL COURT OF THE CITY OF NEW YORK 15 (1983))); GJLA Survey, *infra* app. A, question 10 ("The administration of the prosecutor's office must have an overriding policy ensuring adequate police investigation before the case is taken to the Grand Jury. Usually the fault lies with less than adequate police work causing the garbage in garbage out result.").

[259] Leipold, *supra* note 2, at 306.

[260] *Id.* at 278 (arguing that these statistics alone are insufficient to determine how effective grand juries function); Sullivan & Nachman, *supra* note 30, at 1062-63.

[261] Leipold, *supra* note 2, at 276 ("[T]here would be cause for concern if grand juries refused to indict in a high percentage of cases." (emphasis omitted)). *But see* E-mail from former federal grand juror to Susan Brenner, Professor of Law, University of Dayton School of Law (Aug. 10, 2001), *available at* http://campus.udayton.edu/~grandjur/recent/juror2.htm [hereinafter E-mail to Susan Brenner] ("The fact that we were able to return one non-true bill during the entire period bespeaks volumes as to how the system is slanted toward the prosecution . . . ."). Professor Brenner maintains a web site devoted to understanding and learning about the grand jury process. Federal Grand Jury, http://campus.udayton.edu /~grandjur/fedj/fedj.htm (last visited Nov. 15, 2008).

[262] Leipold, *supra* note 2, at 274 ("Stated differently, there is simply no easy, objectively verifiable way to determine when the grand jury is succeeding . . . .").

[263] Sullivan & Nachman, *supra* note 30, at 1049 n.11.

evaluating the evidence that comes before them. This point is further highlighted by the boasts of one prosecutor who claims that her indictment record is "15 individuals in 45 minutes."[264]

Regardless of the overall percentage of flawed indictments that exist, preventing them from going forward is important because once issued the indictment is difficult to correct, at least when the defendant wishes to do so. As a threshold matter, most defendants are not even aware of any problems with their indictment due to the rules of secrecy associated with grand juries. Absent hearing information from witnesses, as the other participants in the grand jury process are sworn to secrecy, a defendant must generally obtain a grand jury transcript to determine whether any impropriety occurred during the grand jury session. A defendant may obtain transcripts through several different procedures; the key is to get them early, prior to the start of trial.

At the trial stage, the defendant, pursuant to the Jencks Act, should receive all prior relevant statements of the prosecution's witnesses, to include those made at the grand jury proceeding.[265] Also, in accordance with the requirements of *Brady v. Maryland*, the defendant should receive all exculpatory evidence, including statements presented to the grand jury.[266] However, the aforementioned evidence may or may not exist, since the prosecutor is not required to provide exculpatory information to the grand jury and can obtain an indictment simply by relying on hearsay statements.[267]

If the defendant finds an error in the grand jury testimony after receiving information under either the Jencks Act or *Brady*, it is generally too late to make much of a difference. The defendant can file a motion to dismiss the indictment, but the trial judge generally defers ruling on such motions until the conclusion of trial, when they normally become moot.[268] Furthermore, courts, for the most part, have refused to create any additional basis for interlocutory appeal of indictments believed to be flawed.[269]

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[264] Bernstein, *supra* note 128, at 573 (citation omitted).

[265] 18 U.S.C. § 3500 (2006); *see also* FED. R. CRIM. P. 26.2; Jencks v. United States, 353 U.S. 657 (1957).

[266] 373 U.S. 83, 87 (1963). Pursuant to *Brady*, prosecutors must provide exculpatory evidence to defendants before trial upon demand.

[267] Costello v. United States, 350 U.S. 359, 363 (1956).

[268] Rosenberg, *supra* note 235, at 1444 ("[P]ost-trial challenges to alleged improprieties occurring in the grand jury are often deemed moot because the trial ends either in an acquittal, in which case no appeal is taken, or in a conviction, in which case the challenges are considered moot in light of the conviction.").

[269] *See, e.g.*, Midland Asphalt Corp. v. United States, 489 U.S. 794 (1989).

In the alternative, a defendant can file a pre-trial motion to dismiss the grand jury indictment and, under Federal Rule of Criminal Procedure 6(e)(3)(E)(ii), gain access to the grand jury transcripts.[270] However, because of the presumption of regularity in grand jury proceedings,[271] the defendant has the burden of first showing a "particularized need" for the transcripts.[272] To meet the particularized need standard, a defendant must establish that "particularized and factually based grounds exist to support the proposition that irregularities in the grand jury proceedings may create a basis for dismissal of the indictment."[273]

Similar to the trial situation discussed above, defendants here are in a "catch-22" because the factually-based grounds are generally only found in the transcripts, which the defendant has not seen.[274] Supposing the defendant is able to finally obtain the transcripts, she must then demonstrate justification for dismissal of the indictment and show actual prejudice unless she raises a constitutional violation.[275] Finally, when dismissing a grand jury indictment, the court generally relies on either its supervisory power or the Due Process Clause.[276]

As demonstrated by this long and somewhat confusing process, defendants cannot easily gain access to grand jury transcripts, much less correct any error that occurs in the indictment itself. Thus, it is of prime importance to ensure that everything be done on the front end to prevent problems from occurring in the grand jury room.[277] Independent, as opposed to dependent, grand jurors are more likely to ensure that happens.

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[270] FED. R. CRIM. P. 6(e)(3)(E)(ii).

[271] Hamling v. United States, 418 U.S. 87, 139 n.23 (1974).

[272] Standards vary among the circuits if it is the witness who is requesting her own grand jury testimony. *See In re* Sealed Motion, 880 F.2d 1367 (D.C. Cir. 1989).

[273] United States v. Abcasis, 785 F. Supp. 1113, 1119 (E.D.N.Y. 1992). Consider, however, a proposal by Professor Hughes to change the standard in certain instances from a "particularized need" to a "substantial need." Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 VAND. L. REV. 573, 670 (1994).

[274] United States v. Roethe, 418 F. Supp. 1118, 1119 (E.D. Wis. 1976) (noting Justice Gordon's statement: "I appreciate the defendant's dilemma: he wants the grand jury minutes to prove his claim, but he cannot see the minutes until he demonstrates a right to see them.") A defendant can also ask the judge to review the grand jury transcripts *in camera*.

[275] *See supra* note 190.

[276] United States v. Kilpatrick, 821 F.2d 1456, 1475 (10th Cir. 1987) (noting that due process dismissal may be based on the Fifth Amendment Due Process Clause or upon the court's inherent supervisory powers and that the prosecutor's knowing use of perjured testimony is an example of dismissal based on Due Process grounds (quoting United States v. Pino, 708 F.2d 523, 530 (10th Cir. 1983); United States v. Kennedy, 564 F.2d 1329 (9th Cir. 1977))). It should be remembered that the Court, as discussed in Part III, *supra*, has greatly reduced the application of the supervisory doctrine to grand juries.

[277] Rosenberg, *supra* note 235.

Independent grand juries can better root out weak or incorrect indictments because they are more engaged in the process and less inclined to passively accept what the prosecutor tells them.[278] Instead of relying on the prosecutor's summary questioning or willingly accepting hearsay evidence, an active, independent grand jury will dig deeper and ask questions, which in turn requires the prosecutor to bring better evidence to persuade the grand jurors. Passive grand jurors, on the other hand, are more apt to simply accept what the prosecutor tells them, which leaves the process ripe for abuse and increases the likelihood that a flawed indictment will go forward.[279]

Yet, even if one remains somewhat skeptical or even completely unconvinced about the ability of an independent grand jury to protect targets, adequately reflect the views of the community, or to improve the screening of cases, one must still acknowledge that just the perception of grand juror autonomy will go a long way in improving the public's view of the criminal justice system.[280] When people see grand jurors as completely dependent on the prosecutor and unable to think or act on their own, or—worse yet—the entire process as just a formality, they lose confidence in the legal system, regardless of the ultimate outcome of a case.[281] This concern is heightened by the secrecy associated with grand jury proceedings.[282] People have a tendency to assume the worst when things are done behind closed doors and not readily transparent.[283] An

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[278] Lanni, *supra* note 246, at 398 (discussing the benefits of a GJLA: "Under this approach, the grand jury procedure would be transformed from a review of the prosecutor's proposed charges to a more interactive process permitting grand jurors to participate in formulating the charges.").

[279] Gregory W. Bowman, Note, *United States v. Williams, 112 S. Ct. 1735 (1992)*, 83 J. CRIM. L. & CRIMINOLOGY 718, 742 (1993) ("The added discretion given to the prosecution [by *Williams*] may lead to . . . grand juries that, because they are less informed, are less accurate in determining probable cause.").

[280] Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 202 (1983) ("To perform its dispute-resolution function effectively, American criminal procedure must provide a mechanism that settles the conflict in a manner that induces community respect for the fairness of its processes as well as the reliability of its outcomes. From this instrumentalist perspective, the most important consideration is how the process appears to the community. Given this definition of legitimation, criminal procedure need not in fact consistently respect these fair process norms, but it must create the appearance of doing so.").

[281] *Id.*

[282] Jeffrey H. Bayless, *Grand Jury Reform: The Colorado Experience*, 67 A.B.A. J. 568, 571 (1981) ("When the mystery leaves so does much of the fear and distrust . . . .").

[283] Bernstein, *supra* note 128, at 570 ("'A consequence of grand jury secrecy is that neither the courts, nor Congress, nor, especially, the public, can gauge how the institution is being used.'" (quoting MARVIN FRANKEL & GARY NAFTALIS, THE GRAND JURY: AN INSTITUTION ON TRIAL 125 (1977))); *see also* Schmidt v. United States, 115 F.2d 394, 397

independent as opposed to a dependent grand jury will go a long way in reducing these concerns and reestablishing public confidence in the process.[284]

V. HISTORICAL AND CURRENT USE OF THE GRAND JURY LEGAL ADVISOR (GJLA)

Parts II-IV of this Article demonstrate that grand jurors do not act independently of the prosecutor. This in turn prevents the grand jury from properly functioning. The next question becomes: what is the best way of changing the status quo to restore the model grand jury? Most reform measures turn the grand jury into an arbiter of guilt or innocence[285] or, in the words of Professor Kuckes, "'judicialize' the indictment process."[286]

One proposal that would go a long way in restoring grand juror autonomy without necessarily creating a confrontational relationship or preliminary trial is the GJLA. While the GJLA requires minor changes to the Federal Rules of Criminal Procedure,[287] it does not fundamentally alter the traditional role of the grand jury like many other reform proposals. In addition, the rationale behind the GJLA, to provide grand jurors impartial legal advice, is neither new nor untried.

(6th Cir. 1940) (Sanborn, J., dissenting) (quoting McKinney v. United States, 199 F. 25, 31 (8th Cir. 1912)) (Many have problems with secret legal proceedings: "The secrecy of any judicial procedure is a tempting invitation to the malicious, the ambitious, and the reckless to try to use it to benefit themselves and their friends and to punish their enemies. If malicious, ambitious, or over-zealous men, either in or out of office, may with impunity persuade grand juries without any legal evidence, either by hearsay testimony, undue influence, or worse means, to indict whom they will, and there is no way in which the courts may annul such illegal accusations, the grand jury, instead of that protection of 'the citizen against unfounded accusation, whether it comes from government or be prompted by partisan passion, or private enmity'* * * which it was primarily designed to provide, may become an engine of oppression and a mockery of justice.").

[284] GJLA Survey, *infra* app. A, question 7 ("I think it was helpful to have a neutral party giving advice to the grand jury.").

[285] The fear of transforming grand juries into mini-trials has been a repeatedly raised concern of the Supreme Court. United States v. Calandra, 414 U.S. 338, 349-50 (1974); United States v. Dionisio, 410 U.S. 1, 17 (1973); Costello v. United States, 350 U.S. 359, 363 (1956).

[286] Kuckes, *supra* note 26, at 1311.

[287] FED. R. CRIM. P. 6(d)(1) ("The following persons may be present while the grand jury is in session: attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device."). This Rule would need to be amended to include the GJLA.

A. HISTORICAL OVERVIEW

One of the earliest recorded cases involving the grand jurors' use of outside legal counsel is *United States v. Kilpatrick.*[288] In *Kilpatrick*, the defendant successfully moved to quash his indictment because the grand jury that indicted him received advice and assistance from an examiner of the Department of Justice.[289] The *Kilpatrick* court held that "[n]o other person has a right to give a grand jury an opinion on questions of law which affect the rights of individuals or society."[290] This early setback, however, did not stop future grand jurors from seeking help in fulfilling their duties. In addition to requesting outside legal counsel, grand jurors sought assistance from accountants, clergymen, and private prosecutors.[291] As previously discussed in Part III, grand jurors eventually received additional legal help from the prosecutor.

During the 1930s, when grand juries faced increased calls for their abolition, several grand jury societies were formed to tout the usefulness and benefits of the grand jury.[292] One such society, the Grand Juror's Association of New York, went so far as to publish its own magazine, *The Panel.*[293] This bimonthly magazine, described as "a militantly pro-grand jury periodical,"[294] included one of the first ever public calls for providing grand juries with legal advisors. In other parts of the country, similar organizations sprung up to highlight the importance of grand juries. In Chicago, the Better Government Association published a pamphlet for state grand jurors instructing them that they "may consult their own attorneys or anyone else regarding any matter which may be brought before them."[295] Ultimately, the recommendations of *The Panel* were not implemented; however, American grand juries, unlike their English counterparts, survived

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[288] 16 F. 765 (C.C. W.D.N.C. 1883).

[289] *Id.*

[290] *Id.* at 770; *see also* Schiappa, *supra* note 32, at 334 n.132. For further discussion on the history of grand jury staff, see Wright, *supra* note 126.

[291] In one interesting case, a grand jury was told that hiring its own detective violates public policy. Burns Int'l Detective Agency v. Doyle, 208 P. 427, 429 (Nev. 1922). Most of these early cases dealt with individual grand jurors, not the court or government, acting in a personal capacity hiring outside experts. For more discussion on this topic, see Wright, *supra* note 126.

[292] Some of these associations are still around in one version or another. *See, e.g.*, California Grand Juror's Association Homepage, http://cgja.org/ (last visited Nov. 15, 2008).

[293] *See, e.g.*, Robert Appleton, *Special Counsel for Grand Juries: Pros and Cons of Association's Plan*, 8 THE PANEL 1 (1930).

[294] YOUNGER, *supra* note 9, at 228.

[295] *See also* ELMER DAVIS, THE GRAND JURY: ITS POWERS AND DUTIES IN RELATION TO THE OFFICIAL'S OATH OF OFFICE PUBLIC CONTRACTS—GRAFT 3 (1931).

the 1930s. They did so by indicting several notorious criminals and playing a central role in "racket busting."[296]

The GJLA idea was resurrected in the 1950s by then-Senator Richard Nixon when he introduced S. 2086 in the 82nd Congress. Among other things, the bill amended Title 18, Chapter 215 of the United States Code to give grand juries "special counsel and investigators."[297] In discussing Senator Nixon's proposed legislation, one law review article mentioned that it would allow grand juries to continue the "inquiry . . . without the district attorney."[298] Like many other bills about the grand jury, this one never left committee.[299] This time period also saw renewed interest in giving state grand juries access to counsel.[300] For example, in his seminal book *The People's Panel,* Richard D. Younger recommended allowing grand jurors "separate counsel if they see fit."[301]

Two decades after proposing S. 2086, President Nixon was again the catalyst for renewed attention to the GJLA.[302] This time, however, commentators were interested in the GJLA because they viewed it as a tool to protect targets from meritless charges, rather than as an instrument for enhancing the investigative function of grand juries. Many argued that implementing the GJLA would decrease the possibility of politicization or manipulation of the grand jury process.[303] Leroy D. Clark, in his book *The Grand Jury*, advocated the replacement of the prosecutor with a special prosecutor if enough grand jurors desired such an additional measure of independence. Another advocate for the GJLA, Professor Braun, suggested that the legal advisor take on a broader judicial role and provide legal advice to both grand jurors and witnesses testifying before the grand jury.[304]

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[296] YOUNGER, *supra* note 9, at 235.

[297] S. 2086, 82d Cong. 1st Sess. (1951). S. 2086 authorizes the appointment of special counsel and investigators to assist grand juries in the exercise of their powers.

[298] Comment, *Powers of Federal Grand Juries*, 4 STAN. L. REV. 68, 75 (1951).

[299] Lettow, *supra* note 143, at 1345 n.60.

[300] Harold W. Kennedy & James W. Briggs, *Historical and Legal Aspects of the California Grand Jury System*, 43 CAL. L. REV. 251, 262-64 (1955).

[301] YOUNGER, *supra* note 9, at 243.

[302] Sullivan & Nachman, *supra* note 30, at 1047 ("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.").

[303] Fine, *supra* note 152.

[304] Braun, *supra* note 27, at 916; *see also* Lewis, *supra* note 16, at 64 ("The array of necessary reforms to enhance independence would include, at the least, (1) additional resources, such as independent legal counsel . . . ." (footnote omitted)); James A. Clark, Case Note, *Johnson v. Superior Court, 539 P.2d 792 (1975)*, 27 CASE W. RES. L. REV. 580, 600 (1977) ("The grand jury should be provided with special, independent counsel for advice on the myriad of legal matters that confront it."). More recently, Professor Susan

B. HAWAII

To date, the GJLA has been effectively used by both the military and the State of Hawaii. On November 7, 1978, Hawaii ratified the following amendment:

> Whenever a grand jury is impaneled, there shall be an independent counsel appointed as provided by law to advise the members of the grand jury regarding matters brought before it. Independent counsel shall be selected from among those persons licensed to practice law by the supreme court of the State and shall not be a public employee. The term and compensation for independent counsel shall be as provided by law.[305]

Since the amendment was not self-executing, actual implementation did not occur until June 6, 1980, when the Governor of Hawaii signed the grand jury counsel into law.[306] The amendment is placed, appropriately enough, in Article I, Section 11 of the Hawaiian Constitution.[307]

Counsel for the grand jury are appointed by the state's chief justice, serve one-year terms, and are available to advise the grand jury on any legal matters that arise during the proceeding.[308] In addition to answering questions, the Hawaii GJLA also conducts legal research for the grand jurors.[309] The GJLA need not be physically present in the grand jury room during testimony, but should be reasonably available to the grand jurors when needed.[310] Finally, appointment of the GJLA in no way creates any substantive rights for the defendant.[311]

From all indications, the use of the GJLA in Hawaii has been a success. The Hawaii GJLA has been celebrated in numerous law review articles,[312] and the GJLA Survey results in Appendix A demonstrate that many believe the GJLA improves the Hawaii grand jury process. Each respondent to the GJLA Survey indicated that his service as GJLA aided grand jurors in performing their duties. For example, one former GJLA stated, "There have been cases where my physical presence during the presentation seemed to clean up the questions from the prosecutor and

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Brenner has also recommended using the GJLA, stating that it will greatly increase grand jury independence. Brenner, *supra* note 69, at 73.

[305] HAW. CONST. art. I, § 11.

[306] For a legislative history of the bill, see State v. Kahlbaum, 638 P.2d 309 (Haw. 1981); BRENNER & SHAW, *supra* note 173, § 27:6, at 381.

[307] HAW. CONST. art. I, § 11.

[308] HAW. REV. STAT. ANN §§ 612-51, -53, -57 (LexisNexis 2007).

[309] *See* GJLA Survey, *infra* app. A, question 1.

[310] *Kahlbaun*, 638 P.2d at 317.

[311] State v. Pendergrass, 633 P.2d 1113, 1115 (Haw. 1981).

[312] Brenner, *supra* note 69, at 73; Beall, *supra* note 92, at 619.

answers by the police witness."[313] Another former GJLA stated that "[g]rand jury counsel helps guide [the grand jurors] and is there as a resource for them to use."[314]

Unfortunately, for a variety of reasons, the Hawaii GJLA has not been implemented in other jurisdictions. First, very few people, outside of those who practice in Hawaii, even know about this unique advisor.[315] This could be due in large part to Hawaii's physical separation from the other contiguous states or the fact that since the Hawaii grand jury system runs well, few people take notice of it. In contrast, the grand jury process is not running smoothly in other parts of the country and thus receives a lot of attention.[316] Second, there is also the political reality of changing criminal laws. Some view the GJLA as a possible impediment to the prosecutor, which, as discussed *infra*, is not necessarily true.[317] Thus, elected officials, ever concerned about public opinion, may not want to be seen supporting something that is perceived as defendant-friendly.

C. MILITARY

While Hawaii is the only state to regularly use the GJLA, it is not the only jurisdiction to do so, as the military has relied on GJLAs for several decades.[318] The military, although not bound by the Fifth Amendment's

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[313] *See* GJLA Survey, *infra* app. A.

[314] GJLA Survey, *infra* app. A.

[315] GJLA Survey, *infra* app. A, question 8 ("I don't believe there is much public exposure so not much of any opinion is formed."). At a March 2008 George Washington University Law School roundtable on grand juries attended by experts in the field, including federal judges, professors, and practitioners, very few were familiar with the GJLA concept.

[316] *See, e.g.*, Leonard B. Boudin, *The Federal Grand Jury*, 61 GEO. L.J. 1 (1973); George H. Dession & Isadore H. Cohn, *The Inquisitorial Functions of Grand Juries*, 41 YALE L.J. 687 (1932); Field, *Federal History, Functions, Duties and Powers of Federal Grand Juries*, 20 PITT. L.J. 22 (1982); Seymour Gelber, *A Reappraisal of the Grand Jury Concept*, 60 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 24 (1969); Richard E. Gerstein & Laurie O. Robinson, *Remedy for the Grand Jury: Retain but Reform*, 64 A.B.A. J. 337 (1978); Jerome Hall, *Analysis of Criticism of the Grand Jury*, 22 J. CRIM. L. & CRIMINOLOGY 692 (1932); Morse, *supra* note 95; Lester B. Orfield, *The Federal Grand Jury*, 22 FED. RULES DECISIONS 343 (1958); Bruce H. Schneider, *The Grand Jury: Powers, Procedures, and Problems*, 9 COLUM. J.L. & SOC. PROBS. 681 (1973); Michael Tigar & Madeline R. Levy, *Grand Jury as the New Inquisition*, 50 MICH. ST. BAR J. 693 (1984); Jon Van Dyke, *The Grand Jury: Representative or Elite?*, 28 HASTINGS L.J. 37 (1976); Lewis Poindexter Watts, Jr., *Grand Jury: Sleeping Watchdog or Expensive Antique?*, 37 N.C. L. REV. 290 (1959); Matthew Zwerling, *Federal Grand Juries v. Attorney Independence and the Attorney-Client Privilege*, 27 HASTINGS L.J. 1263 (1976).

[317] *See infra* Part VI.

[318] Some states like Kansas appoint special counsel to grand juries on an ad hoc basis if the grand jurors request such counsel. Diane Carroll, *Two Lawyers to Aid Grand Jury Inquiry*, KAN. CITY STAR, Dec. 21, 2007, at B4.

Grand Jury Clause, has a pre-trial screening procedure, the Article 32 investigation.[319] Any service member who faces a general court-martial (the highest level court-martial in the military) must be provided, unless the right is waived, an Article 32 investigation.[320] Many, especially the news media, compare Article 32 investigations to grand jury proceedings.[321] However, these investigations contain components of both the grand jury and the preliminary hearing,[322] similar in many ways to the one-man grand jury employed by the state of Michigan.[323] For instance, unlike a grand jury that is made up of between sixteen and twenty-three grand jurors, an Article 32 investigation has only one person, the Investigating Officer (IO).[324] Another variance concerns how grand juries and Article 32 hearings operate. The IO directs the Article 32 investigation, whereas grand jurors normally follow the lead and directions of the prosecutor.[325]

While military attorneys may serve as IOs in some high-profile criminal cases, most individuals who fulfill this temporary duty have no legal training at all.[326] Thus, IOs are assigned legal counsel to assist them in understanding the evidence presented during the Article 32 investigation.[327] Where grand jurors rely on each other or the prosecutor for guidance or clarification, the IO has ready access to a detached, neutral,

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[319] DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE 317 (4th ed. 1996).

[320] *Id.* at 317-18.

[321] Christopher Ruddy, *Haditha Marines Still Need Your Help*, HAW. REP., Feb. 29, 2008, http://www.hawaiireporter.com/story.aspx?52943651-5e80-44ee-b7c3-0ae7a879c5fe ("[T]hey were under Article 32 investigation—the military equivalent of a grand jury hearing."); *Soldier Accused of Killing Medics, Pouring Acid on Their Bodies*, STARS & STRIPES, Mar. 6, 2008, http://www.stripes.com/article.asp?section=104&article=53098 ("[T]he next step would be an Article 32 hearing, the military equivalent of a grand jury . . . ."); David Wallace, *Military Justice on Trial: More Protections for Accused than in Civilian System*, NORTH COUNTY TIMES, Aug. 19, 2006, http://www.nctimes.com /articles/2006/08/21/perspective/20_36_378_19_06.txt ("An Article 32 is the functional equivalent of a civilian grand jury . . . ."); Jane Gross, *Justice in the Military Has Its Reasons*, N.Y. TIMES, Mar. 1, 1998, at 16 ("The pretrial review in the military, comparable to a civilian grand jury, is the Article 32 hearing . . . .").

[322] United States v. Schaffer, 12 M.J. 425, 430 (C.M.A. 1982) ("[A]n Article 32 investigation is akin to a grand jury indictment or a preliminary examination, not a brother but a cousin.").

[323] MICH. COMP. LAWS §§ 767.3-.6 (West 2000).

[324] SCHLUETER, *supra* note 319, at 319-20.

[325] *Id.* at 326-27.

[326] Dewey C. Gilley, Jr., *Using Counsel to Make Military Pretrial Procedure More Effective*, 63 MIL. L. REV. 45, 69 (1974) ("The Army generally uses a non-lawyer officer as the investigating officer.").

[327] Larry A. Gaydos, *A Comprehensive Guide to the Military Pretrial Investigation*, 111 MIL. L. REV. 49, 62 (1986).

and knowledgeable attorney whose only interest is serving the IO.[328] In fact, the IO should take all advice from the legal advisor since any ex parte information about the charges from a biased source is presumed prejudicial.[329]

An additional difference between Article 32 investigations and grand jury proceedings is the role of the defendant and her defense counsel. In an Article 32 investigation, the defendant and her counsel have the right to attend and provide evidence.[330] Generally, however, the defense neither speaks (except to offer possible objections) nor offers evidence during an Article 32 investigation.[331] Instead, most defense attorneys use the investigation as an additional method of discovery.[332]

After receiving all of the evidence at the Article 32 investigation, the IO, like grand jurors, retires in private to determine the disposition of the case.[333] While the IO relies heavily on the legal advisor throughout the Article 32 process, the determination of whether probable cause exists to recommend a court-martial rests with the IO.[334] Once the IO has made a decision on the disposition of the charges, she forwards her

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[328] *Id.* ("The investigating officer must get all his or her legal advice from a neutral legal advisor."). "Neutral legal advisor" usually means any counsel other than the prosecution or defense. *See* United States v. Grimm, 6 M.J. 890, 896 (C.M.R. 1979) (explaining that neutral legal advisor means someone other than an individual involved in the prosecutorial function); JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL, pt. 2, at § 405(d)(1) (2005).

[329] This presumption can be rebutted by either the prosecution or the defense. United States v. Brunson, 15 M.J. 898, 901 (C.M.R. 1982) ("The Court concluded that the matter was one requiring a presumption of prejudice so as to make reversal obligatory in the absence of clear and convincing evidence to the contrary.") (setting aside findings and sentence where investigating officer conducted numerous ex parte discussions with prosecution); United States v. Payne, 3 M.J. 354, 357-58 (C.M.A. 1977) ("Upon examination of this record under this presumption, we determine that this Article 32 investigating officer's actions, although improper, do not require reversal, as the presumption was overcome through the testimony of Major Payne at trial and other matters presented by the government." (footnote omitted)).

[330] SCHLUETER, *supra* note 319, at 322.

[331] R. Peter Masterton, *The Defense Function: The Role of the U.S. Army Trial Defense Service*, 2001 ARMY LAW. 1 ("The defense may present evidence in defense . . . . However, presenting defense evidence gives the government the opportunity to discover the defense case. As a result, the defense often presents little or no evidence . . . .").

[332] *Id.*; *see also* Homer E. Moyer, Jr., *Procedural Rights of the Military Accused: Advantages over a Civilian Defendant*, 22 ME. L. REV. 105, 116 (1970) ("The [A]rticle 32 pretrial investigation obviously operates as an effective discovery device in all general courts-martial . . . .").

[333] SCHLUETER, *supra* note 319, at 328.

[334] *Procedural Guide for Article 32(b) Investigating Officer*, DEP'T OF THE ARMY PAMPHLET 27-17 (Dep't of the Army, Washington, D.C.) Sept. 16, 1990, *available at* http://www.army.mil/usapa/epubs/pdf/p27_17.pdf.

recommendation in writing to the commanding general[335] who has final approval on whether charges go forward.[336]

Due to the many safeguards employed by the Article 32 process, including the legal advisor for the IO, many jurists and scholars believe that it provides greater procedural rights and protections than the grand jury.[337] Yet, surprisingly, few if any reformers suggest remodeling the grand jury system after its military quasi-counterpart. This may be in part due to a misunderstanding of and unfamiliarity with the military legal system,[338] including an inability to draw accurate comparisons and/or a mistaken belief that members of the Armed Forces receive fewer pre-trial procedural rights than civilians.[339] While applying Article 32 in its entirety to the civilian criminal legal system may be difficult, certain components, such as the IO's legal advisor, would be very beneficial if implemented.

VI. GJLA PROPOSED BY THIS ARTICLE

This Part explores the GJLA model proposed by this Article. The GJLA suggested here would be appointed by a magistrate judge and in many ways replicate the military and Hawaii models. In addition to appointing the GJLA, the magistrate judge would be responsible for settling any disputes between the GJLA and the prosecutor and if necessary could remove the GJLA for cause. The actual number of GJLAs assigned to any district court

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[335] The commanding general is normally also the General Court Martial Convening Authority. This individual is rarely if ever an attorney. However, she makes the ultimate determination with respect to whether a service member will face a court-martial.

[336] SCHLUETER, *supra* note 319, at 328.

[337] Talbott v. United States *ex rel.* Toth, 215 F.2d 22, 28 (D.C. Cir. 1954) ("[Articles 32 and 34] seem to afford an accused as great protections by way of preliminary inquiry into probable cause as do requirements for grand jury inquiry and indictment."); Moyer, *supra* note 332; William A. Murphy, *The Formal Pretrial Investigation*, 12 MIL. L. REV. 1, 10 (1961) ("Article 32 investigation provides greater safeguards for an accused during pretrial investigation than the Federal Rules of Criminal Procedure provide for defendants charged under federal law.").

[338] *Kennedy v. Louisiana* serves as a good example of how even the U.S. Supreme Court is unaware of certain military laws. 128 S. Ct. 2641 (2008); *see* Linda Greenhouse, *Justice Dept. Admits Error in Not Briefing Court*, N.Y. TIMES, July 3, 2008, http://www.nytimes.com/2008/07/03/us/03scotus.html ("Justice Kennedy's conclusion about the absence of federal law was mistaken. Not only did Congress add child rape to the military death penalty in 2006, but President Bush, in an Executive Order last September, added the new provision to the current version of the Manual for Courts-Martial.").

[339] Gaydos, *supra* note 327, at 83 ("Because the Article 32 pretrial investigation is *sui generis*, having no exact counterpart in any civilian criminal jurisdiction, courts have struggled to define the precise nature of the proceeding." (footnote omitted)). With the ending of the draft and the creation of the "All Volunteer Military," fewer segments of the overall general population are familiar with military justice.

would be apportioned relative to the number of cases that specific court handles.

While it may initially appear that the GJLA would work at the bequest of the magistrate judge, her main job would be to support grand jurors in their determination of whether to issue an indictment. The GJLA's duties would include researching and responding to questions posed by grand jurors. If the question is fact-based, the GJLA would advise the grand juror to direct it to the witnesses testifying or request that additional witnesses be called.[340] If the question is of a legal nature, then the GJLA should feel free to address it.

Due to the type of questions normally answered by the GJLA, a background in criminal law would be highly beneficial, although not an employment requirement. While some former GJLAs felt that it was "necessary to have a criminal law background," others felt that "it was not necessary as long as you spent some time preparing and learning the basics of criminal law."[341] However, membership in the state bar where the grand jury is held would be an employment requirement as the GJLA must be familiar with the local ethics rules.

As stated previously,[342] the primary purpose of the GJLA is to aid grand jurors with the indictment process. Thus, the GJLA would not advise witnesses testifying before the grand jury about their rights. Nor would the GJLA present evidence or counter what the prosecutor says unless it is a clear misstatement of the law. Furthermore, there would be no duty for the GJLA to present exculpatory evidence. In fact, the issue of exculpatory evidence would normally only come up if raised by the grand jurors themselves.

Following the model used in Hawaii,[343] the proposed GJLA would serve for one or two-year terms, as opposed to the ad hoc rotating system used by the military.[344] By using a fairly long consecutive term of service, the GJLA, like the grand jurors they advise, will gain more experience. As indicated by the GJLA Survey, some attorneys, despite their legal education

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[340] GJLA Survey, *infra* app. A, question 2 ("There were times when the jurors were asked fact related questions, and counsel suggested more questions of the witnesses could be asked."). The GJLA must avoid answering fact-based questions because then she may find herself with the same problems that confront the prosecutor on this issue. *See supra* note 87.

[341] The quoted material is from GJLA Survey, *infra* app. A, question 4.

[342] *See supra* notes 40-47.

[343] *See supra* note 305.

[344] In the author's personal experience and observations, as a military attorney, the duty of the Article 32 legal advisor was an additional assignment that normally rotated among the attorneys in the office.

and training, were still not fully prepared, at least initially, to assist the grand jurors.[345]

Unlike in the case of Hawaii and the military, the proposed GJLA would be present during all grand jury proceedings.[346] In the GJLA Survey, several respondents remarked about the importance of being in the room at all times when the prosecutor presented her case. For example, one former GJLA stated that "our simple presence in the room probably helped somewhat since the prosecutors knew someone was watching them."[347] Another respondent said, "I realized that it was important to have Grand Jury Counsel present in the room during the presentation."[348] Furthermore, by having the GJLA attend every grand jury session, the likelihood of delays, a normal concern whenever you add another individual to a deliberation process, is greatly decreased.

A. DISADVANTAGES

Like most reform proposals, the GJLA is not a panacea for every problem plaguing the grand jury. For instance, the GJLA is powerless to stop issues that may arise outside of the grand jury room, such as prosecutorial "office interviews."[349] Furthermore, while the GJLA can answer grand juror questions, she will not be responsible for training grand jurors on their specific duties. Lack of such training is an often-repeated concern and more directly relates to the type of instructions provided to grand jurors by the judge upon initial empanelment.[350] Moreover, this training issue is equally, if not more, applicable to petit jurors. As indicated by the GJLA Survey, grand jurors, unlike petit jurors, get "on the job training" as they hear more and more cases

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[345] GJLA Survey, *infra* app. A, question 10 ("A three-hour training session with a resource manual would be great. I ended up creating a binder of useful information (cases, memos, statutes, etc.) that was then passed to the new guys coming on board.").

[346] State v. Kahlbaun, 638 P.2d 309 (Haw. 1981) (holding that the grand jury counsel need not be at all times present in the grand jury room during the grand jury hearing). The military, at least in the author's personal experience, did not require the legal advisor to be always present—just readily available.

[347] GJLA Survey, *infra* app. A, question 7.

[348] GJLA Survey, *infra* app. A, question 6.

[349] *See* James F. Holderman & Charles B. Redfern, *Preindictment Prosecutorial Conduct in the Federal System Revisited*, 96 J. CRIM. L. & CRIMINOLOGY 527 (2006); Leipold, *supra* note 2, at 305 ("When witnesses are subpoenaed they are often interviewed by the prosecutor before testifying; when documents are produced, they are first reviewed by the prosecution and put into a manageable form before being presented . . . .").

[350] Antell, *supra* note 28, at 155 ("Who can believe that even a moderately complex inquiry can be managed by twenty-three untrained people . . . ? The work of examining and collating documents, interviewing witnesses, analyzing discordant evidence, all these require the application of skills and techniques which are totally outside the knowledge of the average grand juror.").

during their eighteen months of service.[351] With this experience comes the ability to better perform their duties.[352]

Some also assume that another disadvantage of the GJLA is added time to the indictment process because of increased questions by grand jurors. This assumption, however, is not supported by the evidence. The GJLA Survey, although far from determinative of each grand jury experience, indicates that the process is not significantly slowed by grand juror questions.[353] This is because, for the most part, GJLAs receive few questions and when they do, the answers are generally immediately provided, which further illustrates the importance of having the GJLA present in the grand jury room during the presentation of evidence.[354] Moreover, these same questions, if not addressed by the GJLA, would fall in the lap of the prosecutor.

Another issue to consider with respect to time is the likelihood of an increased number of grand jury sessions. It is highly likely that fewer defendants will waive their right to a grand jury if they know it is going to be conducted by independent, as opposed to dependent, grand jurors. Also, there is a real possibility that the prosecutor, knowing that the GJLA will be present, may take more time to prepare her case.[355] Assuming the above-mentioned to be true, any additional time added on the front end will not necessarily result in lengthening the overall time it takes to adjudicate a criminal case. The more thorough the initial screening, the higher the likelihood that weak cases are weeded out earlier rather than later, after they have soaked up time and resources.

In conclusion, the disadvantages of the GJLA are superficial in nature and far outweighed by the many advantages that this reform will confer upon the grand jury.

B. ADVANTAGES

When discussing the positive attributes of the GJLA, one is immediately drawn to the concept of increased grand juror independence. This is because independence, as discussed previously, is a necessary

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[351] *See* GJLA Survey, *infra* app. A, question 7 ("In general however, the jurors are well aware of what is sufficient, except at the beginning of their service when they tend to trust whatever the prosecutor presents."); question 9 ("When the jurors first start service they have no idea what to do and therefore go with the flow—side with the authority figure, namely the prosecutor.").

[352] *See supra* notes 231-33.

[353] *See* GJLA Survey, *infra* app. A, question 1.

[354] *See id.*

[355] GJLA Survey, *infra* app. A, question 7 ("Although most cases returned True Bills, the fact that we had the system would be a sufficient check because prosecutors would not bring a case to the grand jury unless they were fairly certain they had sufficient evidence.").

ingredient for a properly functioning grand jury.[356] The GJLA facilitates grand juror autonomy through a variety of ways. First and foremost, the GJLA serves as an alternative source of legal information, thereby decreasing grand juror reliance on the prosecutor.[357] With another attorney present, grand jurors will be less inclined to just accept what the prosecutor is saying at face value and more likely to question it or at least seek a second opinion.

While it is true that grand jurors can rely on their own personal knowledge to make decisions, they generally have a very limited understanding of federal criminal law, particularly with respect to complex crimes such as violations of RICO.[358] Thus, they are dependent on the only attorney (the prosecutor) in the room for information and guidance. According to Professor Brenner, "There is a direct correlation between the jurors' ability to exercise independent judgment and their dependence on prosecutors."[359] This idea was also seen in early colonial grand juries where grand jurors, familiar with the issues, were able to operate independently without the prosecutor.[360]

Some believe that placing another attorney in the grand jury room could lead the grand jurors to simply transfer their dependence.[361] That is to say, the same reliance and reverence grand jurors display towards the prosecutor could be shown to the GJLA.[362] While this may happen, it is far less likely because the prosecutor will still be present and if necessary serve as a counterweight. If it does occur, this would be similar to what happens at the petit trial with judges. Arguably, most feel more comfortable if the petit jurors showed greater deference to the judge rather than the prosecution or defense, because theoretically speaking the judge should not be vested in the final outcome,

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[356] Other GJLA advantages were discussed in Part IV of this Article, *supra*.

[357] See, for example, E-mail to Susan Brenner, *supra* note 261:

> I wonder sometimes whether the prosecutor's interpretation of a law is always the best one. For example, if there is a section of the law that is overbroad, and the prosecutor interprets it to cast the widest possible net, can a grand jury interpret the law a bit more narrowly, and vote accordingly?

[358] *See* United States v. Kleen Laundry & Cleaners, 381 F.Supp. 519, 521 (E.D.N.Y. 1974).

[359] Brenner, *supra* note 69, at 122.

[360] *See supra* notes 120-26; *see also* Kuckes, *supra* note 27, at 33 n.183

[361] Wright, *supra* note 126, at 516.

[362] United States v. Gramolini, 301 F. Supp. 39, 41 (D.R.I. 1969) (discussing Fed. R. Crim. P. 6(e)(1) and 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."); DEBORAH DAY EMERSON, GRAND JURY REFORM: A REVIEW OF KEY ISSUES 31-32 (1983).

only in the fact that the proper procedures were followed. The same holds true for the GJLA.

In addition, the GJLA works to diminish the unhealthy rapport established between the prosecutor and grand jurors—a relationship promoted in many ways by the prosecutor.[363] According to the GJLA Survey, some "prosecutor[s] wanted to tell jokes" to the grand jurors to help create a sort of team-like atmosphere.[364] This type of unprofessional environment diminishes the importance attached to the proceedings, making those involved lose sight of the seriousness of being criminally indicted.[365] Furthermore, toning down this relationship between prosecutors and grand jurors decreases the likelihood that grand jurors will issue indictments simply because the prosecutor is a friend or appears helpful.[366]

C. BENEFITS TO THE PROSECUTOR

While it appears at first glance that the GJLA provides few to no benefits to the prosecutor, upon closer examination it becomes clear that this is not entirely the case. First, informed grand jurors are better able to screen cases and alert prosecutors to those that may result in a not guilty verdict at trial.[367] Independent and engaged grand jurors allow the prosecutor to test and see how different legal theories work with the public. Thus, in practice, the grand jurors serve as the prosecutor's mock petit trial jurors.[368] In fact, some grand juries have gone so far as to correct or drastically improve the prosecutor's case.[369] This does not occur with

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[363] *See* U.S. Dept. of Justice, *Antitrust Litigation Handbook*, IV-1, http://www.usdoj.gov/atr/public/guidelines/206826.pdf (last visited Nov. 15, 2008) (discussing the initial meeting with DOJ attorneys and grand jurors: "This meeting also provides an opportunity for the staff to begin to develop a rapport with the grand jurors . . . .").

[364] GJLA Survey, *infra* app. A, question 7.

[365] *Supra* notes 250-53.

[366] *See* Brenner, *supra* note 69, at 73 ("[P]rosecutors learned to further enhance grand jury dependence by developing a rapport with them.").

[367] Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 503 (1980) ("In close or controversial cases, some prosecutors may use the grand jury's reaction to its evidence to make [the] prediction [whether a conviction is likely].").

[368] See, for example, E-mail to Susan Brenner, *supra* note 261:

> One prosecutor who came before us several times plainly admitted that he loved to go before the grand jury since not only could he polish up his case but more importantly, the [grand] jury raised questions and issues that he himself had not considered. For him, it was a win-win situation . . . . Again we were helping the prosecution rather than the accused.

[369] *Id.* ("As one indictment was being read to us, all was in perfect order except the prosecution had the crime taking place in the wrong county. A grand juror pointed this out and the correction was made.").

passive grand jurors or those that do not think beyond that which is presented to them by the prosecutor.[370]

Second, the use of the GJLA greatly reduces the ethical quandary that many prosecutors find themselves in when trying to balance their roles of representing the government and providing legal advice to grand jurors.[371] In case of conflict, the latter responsibility should trump; however, as most can imagine, this is not always the case.[372] By giving up the hat of legal advisor, the prosecutor lowers the chances of committing ethical misconduct—a scenario that has become much more likely to occur with the passage of the McDade Act.[373]

The McDade Act requires federal attorneys to not only be in compliance with the ethical rules of the bar in which they are admitted, but also the jurisdiction where they are currently practicing.[374] Because of the national jurisdiction of the DOJ, some prosecutors may be practicing in states where they are not admitted and thus unaware of local ethics rules.[375] In contrast, the proposed GJLA must be a member of the local bar and thus should have a good understanding of the applicable ethics rules. The GJLA, as opposed to the prosecutor, will be better able to ensure that all are in compliance with those rules and thus decrease the likelihood of ethical missteps.

Putting the McDade Act aside for a moment, there are other potential problems awaiting a prosecutor who is forced to wear two hats in the grand jury room. For example, the Model Rules of Professional Conduct prohibit attorneys from acting as advocates and witnesses in the same proceeding.[376] This can easily occur when the prosecutor, instead of answering grand juror questions based on facts that are already in the record, starts to testify or

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[370] Brice, *supra* note 113, at 764 (arguing that the grand jury's reliance upon professional investigatory agencies and the prosecution to gather evidence has increased efficiency in investigation and decision-making, but has also made the modern grand jury a generally more passive instrument than its precursors).

[371] *See* Brenner, *supra* note 69, at 92 ("Permitting prosecutors to serve both as advocates and as 'neutral' grand jury advisors presents the ultimate conflict of interest—one with huge ramifications for grand jury independence."); Brice, *supra* note 113, at 765 ("[T]he prosecutor's dual role creates an inherent conflict of interest.").

[372] United States v. Ciambrone, 601 F.2d 616, 628 (1979) ("[T]he prosecutor has the dual role of pressing for an indictment and of being the grand jury's adviser. In case of conflict, the latter duty must take precedence.").

[373] *See* 28 U.S.C. § 530(B) (2000).

[374] *Id.*

[375] Federal government attorneys are not required to be admitted to the state bar where they are practicing if working for the U.S. Government. Ethical Standards for Attorneys for the Government, 28 C.F.R. § 77.2 (2008); *see also* U.S. CONST. art. VI, cl. 2.

[376] MODEL RULES OF PROF'L CONDUCT R. 3.7 (cent. ed. 2008), *available at* http://www.abanet.org/cpr/mrpc/rule_3_7.html (last visited Nov. 15, 2008).

introduce new facts. As discussed *supra*, the prosecutor can cross this line very easily.[377] If she has, she subjects herself to disciplinary action by the state bar and now becomes an unauthorized person whose continued presence before a grand jury violates Rule 6(d).[378] With the GJLA and not the prosecutor providing advice to grand jurors, the likelihood of the this scenario occurring is greatly reduced.

Finally, and probably most important to the DOJ, the GJLA can help with Hyde Amendment claims. In 1997, Congress passed the Hyde Amendment to allow those who were unsuccessfully criminally prosecuted by the federal government to file a civil suit against the government to recoup attorneys' fees.[379] To bring this action, the defendant must have been the prevailing party in the underlining criminal prosecution.[380] However, the Hyde Amendment does not permit defendants to recover just because a jury or judge finds in their favor in the prior criminal charge.[381] Rather, the defendant must show that the government's original prosecution was in bad faith, frivolous, or vexatious.[382]

To date, there have been several successful Hyde Amendment claims brought against the DOJ.[383] In addition to the obvious unwanted negative publicity, the DOJ has strongly defended these claims because the money to pay the attorneys' fees assessed is not drawn from the General Treasury, but rather directly from the DOJ budget.[384] When responding to Hyde Amendment claims, the DOJ has argued that the grand jury indictment alone is sufficient proof for the court to deny the recovery of attorneys' fees.[385] The DOJ asserts that the indictment voted on and approved by lay grand jurors unaffiliated with the government demonstrates that the prosecutor was substantially justified in bringing the initial criminal charges. Not surprisingly, courts have routinely rejected the government's

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[377] *See supra* notes 89-90.

[378] United States v. Ogden, 703 F.2d 629, 637 (1983); United States v. Civella, 666 F.2d 1122, 1127 (1981).

[379] Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (codified as amended at 18 U.S.C. § 3006A (2006)).

[380] *Id.*

[381] United States v. Reyes, 16 F. Supp. 2d 759, 761 (S.D. Tex. 1998).

[382] 18 U.S.C. § 3006A.

[383] United States v. Holland, 34 F. Supp. 2d 346 (E.D. Va. 1999); United States v. Gardner, 23 F. Supp. 2d 1283 (N.D. Okla. 1998).

[384] 18 U.S.C. § 3006A.

[385] *Holland*, 34 F. Supp. 2d at 365 n.30; *Gardner*, 23 F. Supp. 2d at 1293. Both cases cite H. R. REP. NO. 105-405 (1997) (Conf. Rep.), *reprinted in* 1997 U.S.C.C.A.N. 3033, 3045, which states, "[C]onferees understand that a grand jury finding of probable cause to support an indictment does not preclude a judge from finding that the government's position was vexatious, frivolous or in bad faith."

position, finding instead that because the grand jury is so subservient to the prosecutor, an indictment alone is insufficient grounds for dismissal of a Hyde Amendment claim.[386]

The court might take a different view of the government's position, however, if the grand jury had its own GJLA. In that situation, the prosecutor could argue that she was substantially justified in bringing the initial prosecution because she has an indictment from a grand jury that did not receive legal instructions or advice from her, but rather a neutral attorney. By having the GJLA present during the grand jury proceedings, the government's defense of a Hyde Amendment action will be greatly strengthened because the indictment itself has greater credibility.

VII. CONCLUSION

The grand jury, throughout its approximately 900-year history, has seen its reputation ebb and flow. When acting independently, the grand jury is at its high-water mark. That, unfortunately, is not the case today or in the recent past. The reason for the grand jury's unpopularity is readily apparent. The prosecutor, due to the actions or inactions of all three branches of government, now completely dominates grand juries. This has led many people to become disenchanted with the entire process. In fact, some are going so far as to call for abolishing the grand jury, like in England.[387] For a variety of reasons, we should look to reform instead of outright elimination.[388] That is to say, we need to make the changes necessary to ensure that the grand jury has the tools it needs to properly operate.

One such tool is the GJLA, which, if implemented, would work to resurrect the grand jury's shield while still allowing grand jurors, prosecutors, and witnesses to perform their traditional functions. The GJLA is not a new or unproven idea. In fact, it has been around for decades and successfully used in Hawaii, as indicated by the GJLA Survey, and in the military. Also, contrary to the false assumptions of some, the GJLA can benefit the prosecutor without unduly slowing down the indictment process.

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[386] *Id.*

[387] Campbell, *supra* note 25, at 178; *see also* Richard M. Calkins, *Abolition of the Grand Jury Indictment in Illinois*, 1966 U. ILL. L.F. 423; James P. Whyte, *Is the Grand Jury Necessary?*, 45 VA. L. REV. 461 (1959).

[388] Many fear the precedent-setting act of amending the Bill of Rights. Leipold, *supra* note 2, at 321 n.274.

APPENDIX A

GRAND JURY LEGAL ADVISOR SURVEY[389]

1. On average, how many questions were you asked by grand jurors during an individual session? Were the questions mostly legal or non-legal? What did you do if you didn't know the answer?

Most questions were procedural and non-legal.[390]

I was asked roughly five questions per session, on average.

Two questions was the average.

By far the questions were legal issues concerning definitions, such as accomplice liability.

Questions were always legal. In all but one instance I knew the answer and the one time I did not know I offered to find the answer.

2. Was the prosecutor present during your response to grand juror questions? Did the prosecutor ever try to answer the questions of grand jurors?

The prosecutor was not present during my response.

Yes, the prosecutor was present. Perhaps on rare occasions, the prosecutor would add additional comments after my advice had been given.

There were times when the jurors were asked fact related questions, and counsel suggested more questions of the witnesses could be asked.

The prosecutor was always present.

3. Did you ever correct statements made by the prosecutor? If yes, did you do so on your own or after prompting or questioning from the grand jurors?

No.

I don't recall ever correcting the prosecutor.

Counsel was not in the presentation room normally. Thus, the correction would be made pursuant to juror question.

The prosecutor used to try and give extra information after a true bill was returned and the Grand Jury began to get used to this practice, so I and another Grand Jury Counsel told the prosecutor to stop this practice or we would be sure it was reported by the court reporter.

4. Did you have a criminal law background before serving as a grand jury legal advisor? Is it necessary to do the job?

Certainly it would help.

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[389] The GJLA Survey was sent out to former Hawaii GJLAs on August 1, 2007.

[390] For the sake of brevity, I have not included every response received from those who participated in the GJLA Survey.

No significant criminal law background. It was not necessary as long as you spent some time preparing and learning the basics of criminal law.

Yes and yes, absolutely.

Yes, it is necessary to have a criminal law background.

5. How many separate grand jury proceedings did you advise?

I did two a month for twelve months, plus one or two special sessions.

I believe I did it for a year, and the sessions were probably about 2-3 times a month, so roughly 24-30 sessions.

I think I did this for four years worth averaging twice a month for about eight cases per session.

6. Upon completion of your service did your views on the grand jury change or remain the same?

Remained about the same.

Same.

They changed.

I realized it was important to have Grand Jury Counsel present in the room during the presentation.

7. Upon completion of your service did you view the grand jury as a sufficient check on prosecutorial power? If yes, why? If not, why?

Although most cases returned True Bills, the fact that we had the system would be a sufficient check because prosecutors would not bring a case to the grand jury unless they were fairly certain they had sufficient evidence.

I think it was helpful to have a neutral party giving advice to the grand jury. So while it was not an adversarial situation where the independent counsel advocated on behalf of anything, our simple presence in the room probably helped somewhat, since prosecutors knew someone was watching them.

Note that as a practical matter the function ended up being more of an ombudsman for the lay jury members, just explaining terms and procedures to them.

In general however, the jurors are well aware of what is sufficient, except at the beginning of their service when they tend to trust whatever the prosecutor presents.

Yes, because the prosecutor wanted to tell jokes and make the Grand Jury expect to get information confirming that they were right in voting for a true bill after the fact and tried to do other inappropriate actions off the record.

8. How is the job of grand jury legal advisor viewed in the legal community of Hawaii?

Somewhat prestigious as grand jury counsel is appointed by the court.

I think most people in the legal community know that it's not that big of a deal.

I don't believe there is much public exposure so not much of any opinion is formed.

It is highly regarded.

9. Do you think that the grand jury legal advisor is or is not helpful to grand jurors?

Grand Jury Counsel helps guide them and is there as a resource for them to use.

I would say that it is helpful.

It is helpful. There have been cases where my physical presence during the presentation seemed to clean up the questions from the prosecutor and answers by police witnesses.

Grand jury counsel would be most helpful to combat overzealous prosecutors. When the jurors first start service they have no idea what to do and therefore go with the flow-side with the authority figure, namely the prosecutor.

It is essential, but the right attorney must be selected.

10. How could the Hawaii Grand Jury process be improved?

The administration of the prosecutor's office must have an overriding policy ensuring adequate police investigation before the case is taken to the Grand Jury. Usually the fault lies with less than adequate police work causing the garbage in garbage out result.

Probably by making standardized instructions or procedures. Let the counsel know what references should be used and/or what model instructions can be used.

A three-hour training session with a resource manual would be great. I ended up creating a binder of useful information (cases, memos, statutes, etc.) that was then passed to the new guys coming on board.

Experienced grand jurors get a sense of this and no bill the weak cases, but again they must be experienced.

To get around the inexperience factor, perhaps the new jurors should be mixed in with the experienced ones.