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IF IT'S NOT A RUNAWAY, IT'S NOT A REAL GRAND JURY

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I. INTRODUCTION

The doings of American grand juries are notoriously misunderstood and unknown by most sectors of the public.[1] Generally, the grand jury process escapes obscurity only when indictments are made public and when, for whatever reason, grand jury "leaks" are disclosed in the news media.[2] In theory, the grand jury is supposed to act as a check on the government — a people's watchdog against arbitrary and malevolent prosecutions.[3] By and large, however, federal grand juries rarely challenge federal prosecutors.

Today, critics are nearly unanimous in describing the alleged oversight function of modern grand juries as essentially a tragic sham.[4] The Framers of the Bill of Rights would scarcely recognize a grand jury upon seeing the modern version conduct business in a federal courthouse.[5] In modern federal grand jury proceedings, the government attorney is clearly in charge and government agents may outnumber the witnesses by six-to-one.[6]

A "runaway" grand jury, loosely defined as a grand jury which resists the accusatory choices of a government prosecutor, has been virtually eliminated by modern criminal procedure. Today's "runaway" grand jury is in fact the common law grand jury of the past. Prior to the emergence of governmental prosecution as the standard model of American criminal justice, all grand juries were in fact "runaways," according to the definition of modern times; they operated as completely independent, self-directing bodies of inquisitors, with power to pursue unlawful conduct to its very source, including the government itself.[7]

Before the Federal Rules of Criminal Procedure — which made independently-acting grand juries illegal for all practical purposes — grand juries were understood to have broad powers to operate at direct odds with both judges and prosecutors.[8] One recent criminal procedure treatise sums up the inherent inconsistency of the modern grand jury regime:

In theory, the grand jury is a body of independent citizens that can investigate any crime or government misdeed that comes to its attention. *In practice*, however, the grand jury is dependent upon the prosecutor to bring cases and gather evidence. Except in rare instances of a "runaway" grand jury investigation of issues that a prosecutor does not want investigated, the powers of the grand jury enhance the powers of the prosecutor.[9]

Thus, while the grand jury still exists as an institution — in a sterile, watered-down, and impotent form — its decisions are the mere reflection of the United States Justice Department.[10] In practice, the grand jury's every move is controlled by the prosecution, whom the grand jury simply does not know it is supposed to be pitted against.[11]

The term "runaway grand jury" did not appear in legal literature until the mid-twentieth century.[12] The reason for this is that the term would have been inapplicable in the context of previous generations: *every* American grand jury known by the Constitution's Framers would be considered a runaway grand jury under modern criminal procedure. Constitutional framers knew criminal law to be driven by private prosecution and did not contemplate the omnipresence of government prosecutors.[13] Additionally, early American common law placed far more power and investigative judgment in the hands of grand juries than does the criminal procedure of the twentieth century.

Although in 1946 the drafters of the Federal Rules of Criminal Procedure looked with horror at the prospect of grand juries that "could act from their own knowledge or observation,"[14] long-standing common law precedent upholds the power of grand juries to act "independently of either the prosecuting attorney or judge."[15] At common law, a grand jury could freely "investigate merely on [the] suspicion that the law [was] being violated, or even because it want[ed] assurance that it [was] not."[16] In light of the historic independence of the grand jury, the perfidy of the Federal Rules Advisory Committee in limiting the institution through codification can only be seen as willful subversion of well-settled law.[17] A truly independent grand jury — which pursues a course different from the prosecutor — is today so rare that it is an oddity, and a virtual impossibility at the federal level since Rule 6 was codified in 1946.

The loss of the grand jury in its traditional, authentic, or runaway form, leaves the modern federal government with few natural enemies capable of delivering any sort of damaging blows against it.[18] The importance of this loss of a once powerful check on the "runaway" federal government is a focus that has remained largely untouched in the legal literature.

This article examines the historic decrease in the powers of the American grand jury during the twentieth century. It introduces the subject of the grand jury in the context of the constitutional language which invoked it, and then compares the modern application of the institution at the federal level with its common law model.[19] Tracing the historic evolution of the grand jury as an anti-government institution in the English common law until its "capture" by the government in the mid-twentieth century, this article will demonstrate how the role of the grand jury has changed considerably over time. Finally,

this article will argue that the modern loss of "runaway" or independent grand juries is unconstitutional and recommend a restoration of the grand jury's historic powers.

II. THE GRAND JURY'S HISTORIC FUNCTION

The Fifth Amendment to the United States Constitution requires that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."[20] Constitutional framers considered this protection "a bulwark against oppression" due to the grand jury's historic powers to investigate the government and deny government indictments.[21] The grand jury of the eighteenth century usually consisted of twenty-three people acting in secret who were able to charge both on their own (an accusation known as a "presentment") and upon the recommendations of a prosecutor.[22] In addition to its traditional role of screening criminal cases for prosecution, common law grand juries had the power to exclude prosecutors from their presence at any time and to investigate public officials without governmental influence.[23] These fundamental powers allowed grand juries to serve a vital function of oversight upon the government.[24] The function of a grand jury to ferret out government corruption was the primary purpose of the grand jury system in ages past.[25]

THE MODERN GRAND JURY IN COMPARISON

Today's federal grand jury hardly fits the image of a noble and independent body.[26] As a practical matter, it is little more than an audience for summary government presentations.[27] Grand juries in federal courthouses do little more than listen to "a recitation of charges by a government witness."[28] Federal prosecutors, unchecked by a grand jury in its modern misconstruction, can easily obtain whatever result they seek in the grand jury room.[29] They generally call only one witness, a federal agent who summarizes, in hearsay form, what other witnesses (if any) told her.[30] Eyewitnesses, even if available, rarely appear, and the entire presentation of the prosecutor's case may take as few as three minutes.[31]

Even the federal grand jury handbook issued to newly sworn grand jurors reflects the watered down nature of modern grand jury activities.[32] The 1979 version of the handbook assured jurors that "you alone decide how many witnesses" are to appear.[33] Five years later, the updated version of the handbook told jurors "that the United States Attorney would 'advise them on what witnesses' should be called."[34]

"Today, the grand jury is the total captive of the prosecutor," wrote one Illinois district judge, "who, if he is candid, will concede that he can indict anybody, at any time, for almost anything, before any grand jury."[35] Supreme Court Justice William Douglas wrote in 1973 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."[36] At least one scholar has suggested that the problem of grand jury subordination may be so institutionalized that its very structure violates due process.[37] The critics are unanimous in their condemnation of the modern grand jury process as little more than an

elaborate ritual used only to justify by ceremony the decisions of the government. Commentators only disagree on whether to term the grand jury the prosecutors; "indictment mill," "rubber stamp," a "tool" or "playtoy."[38]

STATISTICAL PROOF

According to David Burnham of the Transactional Records Access Clearinghouse ("TRAC"), the statistical evidence "overwhelmingly supports what practicing lawyers have known in an anecdotal way for many years: One of the basic safeguards promised by the Fifth Amendment is a fraud."[39] Describing traditional expressions by federal judges concerning the grand jury as those of "almost mystical faith" — with little basis in reality, Burnham speaks of scores of decisions in which courts have found that Justice Department lawyers lied, cheated, or took other improper actions to win their indictments and convictions, but which courts found did not serve to overpower the grand jury's alleged independence.[40] "The grand jury as an institution is worshipped for being something it is not," according to Burn-ham, "a group of citizens capable of confronting an assistant U.S. Attorney over matters of the law or sufficiency of evidence."[41] Another writer has described grand jury subpoenas and indictments as "essentially unilateral decisions by prosecutors."[42]

According to TRAC, of 785 federal grand juries in 1991, grand jurors voted against the prosecutor in only sixteen of the 25,943 matters presented to them, a rate of 99.9% agreement.[43] Even the remaining one tenth of one percent, according to Burnham, might exaggerate a grand jury's independence, due to prosecutors deliberately "throwing" a couple of prosecutions, such as the possibly disingenuous 1991 "investigation" of Virginia Senator Charles Robb on widespread allegations of illegal tape recording of a political rival.[44]

Even the Justice Department has tacitly conceded that there is almost no such thing as grand jury independence. A 1983 report by its Office of Development, Testing and Dissemination concluded that the imbalance of power between the courts and prosecutors on one hand and the grand jury on the other "makes grand jury effectiveness largely dependent on the good will and ethics of the courts and prosecutors."[45] The Justice Department report shrugged off this criticism, however, asserting that prosecutors have little incentive for promoting unsound indictments since they have the burden of preparing for trial. "Indeed," claimed the report, "the incidence of guilty pleas and verdicts following indictment may be seen as evidence of the ultimate effectiveness of the grand jury process."[46]

Despite this self-serving confidence by the government, the vast majority of disinterested observers view grand jury effectiveness as completely subject to the direction of federal prosecutors. As one scholar put it, "[t]he notion that grand juries do not eliminate weak cases is now so well accepted that it is difficult to find any recent scholarly support to the contrary."[47]

But while critics of the grand jury process are many, few point to any clearly articulable reasons to explain why the grand juries of the past were so much better at resisting the will of the prosecutor than those of today.[48] Some authorities place the blame on federal prosecutors and argue that Congress should expressly prohibit them from misleading grand juries by withholding exculpatory information or from using illegally seized information to gain grand jury indictments.[49] Others point to the modern grand jury's lack of investigative tools and call upon Congress to provide grand juries with their own investigative staff and resources.[50] Other sources, such as the American Bar Association, have pointed to modern grand jury instructions as a major source of grand jury subordination, and argue that instructions should be altered to emphasize to grand jurors their independence and their co-equal status in relation to the government.[51]Other authorities have placed the blame squarely upon the Federal Rules of Criminal Procedure, which provide no clear avenue for the exercise of traditional grand jury powers.

III. ORIGINS

The grand jury is first known to have existed in 1166, when the Norman kings of England required answers from local representatives concerning royal property rights.[52] In its early centuries, the grand jury evolved into a body of twelve men who presented indictments at the behest of private individuals or the prosecutor of the King.[53] The Magna Carta provided that individuals had the right to go before a grand jury to be charged of their crimes.[54] As trial by a jury of twelve replaced trial by ordeal, the grand jury became a body of twelve to twenty-three men, which is closer to the way it is set up today, acting as ombudsmen between the King's officials and royal subjects.[55]

SECRECY ADOPTED IN 1681

By 1681, the English grand jury adopted the rule of secrecy which allowed it to function out of the sight of the King's prosecutors or other intemeddlers. It was secrecy that provided the grand jury with its greatest power as an independent populist body, equipped with an oversight power on the government. Thus was born the grand jury in its primal, plenary sense. It was a group of men who stood as a check on government, often in direct opposition to the desires of those in power. Eulogized by Coke and Blackstone, the grand jury crossed the Atlantic as one of the fundamental foundations of common law in the American colonies.[56]

The development of grand juries in America was similar to that of England, with a few exceptions. The English colonies in America were crucibles for popular anti-monarchical ideology. The grand jury was the *initiator* of prosecutions, acting "in several of the colonies as spokesmen for the people . . . and [as] vehicles for complaints against officialdom."[57] Indeed, in America, the grand jury originally *began* as a defense against the monarchy, and was arguably even more independent than the English grand jury of the 1600s.[58] American grand juries initiated prosecutions against corrupt agents of the government, often in response to complaints from individuals.[59]

Crossing the Atlantic Ocean with the first English colonists, the notion of the grand jury as an indispensable arm of law enforcement became entrenched. Grand juries in their "runaway" sense were a bedrock foundation of the English common law that was inherited by the American justice system.[60] Grand jurors in New Plymouth colony were charged "to serve the King by inquiring into the abuses and breaches of such wholesome laws and ordinances as tend to the preservation of the peace and good of the subject."[61] In early Connecticut, grand jurors were specifically mandated to report any breaches of the laws they knew of in their jurisdiction.[62] In Massachusetts, grand jurors had to appear at least once yearly before their county courts to disclose "all misdemeanors they shall know or hear to be committed by any person."[63] These grand jurors had a duty to report offenses in their communities that came to their attention, to personally investigate suspected wrongdoing, and to question anyone whose behavior seemed suspicious.[64]

In the early American experience, the grand jury became more a part of local government than it had apparently ever been in England. A grand jury in Virginia in 1662 was part of the country system, which meant that they would meet two times a year "to levy taxes and oversee spending, supervise public works, appoint local officials, and consider criminal accusations."[65] Connecticut grand juries were levying taxes and conducting local government work by the middle of the 1700s.[66] A similar active role in local government was assumed by grand juries in the Carolinas, Georgia, Maryland, New Jersey, and Pennsylvania, all of which had sufficient independence to publicly announce dissatisfaction with government.[67]

The grand jury that the drafters of the Bill of Rights knew was no doubt more powerful than any known in England. Indeed, the actions of grand juries figured prominently in the beginnings of the Revolution. In 1765, a Boston grand jury refused to indict Colonists who had led riots against the Stamp Act.[68] Four years later, as tensions intensified, a Boston grand jury indicted some British soldiers located within the city boundaries for alleged crimes against the colonists, but refused to treat certain colonists who had been charged by the British authorities for inciting desertion in a like manner.[69] A Philadelphia grand jury condemned the use of the tea tax to compensate the British officials, encouraged a rejection of all British goods, and called for organization with other colonies to demand redress of grievances.[70]

Contrary to the modern situation where secrecy is court imposed and aimed at aiding the prosecutor in gaining an indictment, these grand juries embraced secrecy as an inherent power of their own, independent of any other governmental institutions. Indeed, colonial grand juries became sounding boards for anti-British sentiment. They functioned as patriotic platforms and propaganda machines, constantly condemning the British government and encouraging individuals to support the effort of independence.[71] "In some instances," according to commentators, "the calls to arms were sounded by the grand jurors themselves; in others, the sparks came from patriotic oratory by the presiding judges in their charges to the grand jury."[72]The public proclamations of these grand juries were drastically different from anything we know today; they were often circulated in local and national newspapers in an effort to "fuel the revolutionary fire."[73]The process for receiving private testimony, outside the presence of the court officials,

remained a common practice for a century after the grand jury was enshrined in the Bill of Rights.[74] Throughout the 19th century, grand juries often acted on their own initiative in the face of opposition from a district attorney. It was just such a grand jury that probed and "toppled the notorious Boss Tweed and his cronies" in New York City in 1872. Without the prosecutor's assistance, the Tweed grand jury independently carried out its own investigation in a district that had otherwise been very loyal to Tweed.[75]

In 1902, a Minneapolis grand jury on its own initiative hired private detectives and collected enough evidence to indict the mayor and force the police chief to resign.[76] This same grand jury virtually governed the city until a new administration could be hired. Similar events occurred in San Francisco five years later, when a grand jury indicted the mayor and replaced him.[77]

But beginning about 1910 or so, the grand jury ceased to operate so independently. As the government began to regulate the grand jury more and more, the grand jury became "captured." 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 a part of "normal" grand jury operations. While previously the prosecutor often did not get a case until after indictment, now he was frequently allowed to present evidence before the grand jury personally. By the turn of the twentieth century, according to one commentator, "with the prosecutor inside the grand jury room, the purposes of grand jury secrecy were no longer apparent."[78]

As the grand jury slowly lost its full historic purpose, grand juries became resigned to a minute corner of the American justice system. American grand juries ceased to initiate their own investigations. "Dramatic, sometimes violent confrontations between grand juries and prosecutors, politicians, legislatures, even within the grand juries themselves, became largely things of the past by about the 1930's."[79]

During this period of the grand jury's slow decline in the states, *federal* grand juries became, ironically, *more* important. Although federal grand juries had been a rather obscure element of American criminal procedure before the twentieth century, they stood poised to explode in importance due to the increase of federal criminal jurisdiction by the turn of the century.[80] The growing importance of federal grand juries came at the precise historic moment when state models for grand juries were becoming more and more limited. In fact, because federal grand jury practice looked by necessity to state grand juries as models for federal procedure, the resulting model for federal grand jury proceedings was actually a mere shell of the model intended by the Framers.[81]

From the ratification of the Bill of Rights in 1789, up until and to some extent beyond its codification in the Federal Rules of Criminal Procedure, a Federal grand jury practice went for the most part unregulated by statute.[82] This was due to the limited constitutional jurisdiction of the federal government, and to the scarcity of federal statutes governing criminal justice, a domain traditionally reserved to the states.[83] In its traditional form, the citizen grand jury had come to be seen as an inefficient, unnecessary

and possibly dangerous phenomenon.[84] Ultimately, a combination of judicial activism, executive contempt and legislative apathy left the federal grand jury weakened and contained before it had a chance to truly roam free.[85]

1946 ENACTMENT OF THE FEDERAL RULES

In 1946, the Federal Rules of Criminal Procedure were adopted, codifying what had previously been a vastly divergent set of common law procedural rules and regional customs.[86] In general, an effort was made to conform the rules to the contemporary state of federal criminal practice.[87] In the area of federal grand jury practice, however, a remarkable exception was allowed. The drafters of Rules 6 and 7, which loosely govern federal grand juries, denied future generations of what had been the well-recognized powers of common law grand juries: powers of unrestrained investigation and of independent declaration of findings. The committee that drafted the Federal Rules of Criminal Procedure provided no outlet for any document other than a prosecutor-signed indictment. In so doing, the drafters at least tacitly, if not affirmatively, opted to ignore explicit constitutional language.[88]

IV. THE LOST PRESENTMENT POWER OF THE GRAND JURY

The Fifth Amendment to the United States Constitution requires that no person shall be held to answer for a capital or otherwise infamous crime except by a *presentment* or indictment of a grand jury.[89]

What all authorities recognize as a "presentment," however, has been written out of the law and is no longer recognized by the federal judiciary.[90]

A presentment is a grand jury communication to the public concerning the grand jury's investigation. It has traditionally been an avenue for expressing grievances of the people against government.[91] In early American common law, the presentment was a customary way for grand juries to accuse public employees or officials of misconduct.[92] While an "indictment" was normally thought to be invalid without the signature of a government prosecutor, a presentment required no formal assent of any entity outside the grand jury. In early America, a presentment was thought to be an indictment without a prosecutor's signature and a mandate to a district attorney to initiate a prosecution.[93]

According to Professor Lester B. Orfield, who served as a member of the Advisory Committee on Rules of Criminal Procedure, the drafters of Rule 6 consciously decided that the term "presentment" should not be used in the Rules — even though the term appears in the Constitution.[94] "Retention," wrote Orfield, "might encourage the use of the 'run-away' grand jury as the grand jury could act from their own knowledge or observation and not only from charges made by the United States attorney."[95]

A presentment is generally drafted from the knowledge and findings of the jurors themselves, rather than a prosecutor, and signed individually by each juror who agrees with it. A presentment at common law stood public with or without approval of a

prosecutor or court. In the early days of the Republic, the Attorney General hinted that a federal prosecutor was obliged to indict upon the presentment by the grand jury.[96] Thus, Rule 6 represented a monumental — and deliberate — change of grand jury practice.[97] Orfield's peculiar use of the term "runaway" grand jury in the committee notes may mark both the advent of this term into the legal lexicon[98] and the loss to history of true grand jury independence.[99]

With the Federal Rules, the grand jury was drastically altered, in what can only be seen as an immense assault on the grand jury as an institution, if not an absolute *coup d'etat* upon it. The rule drafters deliberately pigeonholed the citizen grand jury into a minor role of either approving or disapproving of a prosecutor's actions. With the enactment of Rule 6, the federal government's undeclared war on the grand jury was almost won. What remained of the federal grand jury as a free institution was left to the federal courts to whittle away even further.

The federal courts were quick to uphold the federal rules when it came to deciding matters relating to the grand jury. In almost cyclical logic, the federal courts have claimed in near unison that presentments accusing unindicted persons of crime cannot be allowed, absent judge or prosecutor approval, "past unchallenged practice" notwithstanding.[100] Thus, hundreds of years of grand jury jurisprudence was overthrown by codification.[101]

Justification for hobbling grand juries in this manner was based on the argument that those who are accused in grand jury documents are denied due process rights that the courts have a duty to protect.[102] It was argued that allowing the continuance of common law grand jury powers would expose countless persons — many of them government agents — to unanswerable accusations in the public eye.[103] Protecting public officials from public scorn thus won out over upholding the traditional powers of federal grand juries. Numerous avenues for innocent persons to fight such accusations are available.[104] Nevertheless, courts during the latter twentieth century have appeared to uniformly adopt the "protect people from grand jury accusations" rationale for barring the federal grand juries from issuing presentments.[105]

Another aspect of the grand jury's lost powers that has received little consideration in the legal literature is that of grand jury's loss of power to turn on the government and publicly exonerate a suspect. With curtailment of the grand jury's power to accuse without prosecutorial sanction also came curtailment of the grand jury's power to formally and publicly exonerate. This loss of power also serves the interests of modern government by allowing a prosecutor to resubmit a matter to a new grand jury, a practice which almost always can produce a true bill eventually — even against a ham sandwich.[106]

One principle example in American history of a political persecution that was exposed by the presentments of grand juries is the almost unbelievable story of Aaron Burr.[107] After what can only be described as a bizarre political career,[108] Burr found himself disliked by both the Federalists and the Republicans.[109] The United States Attorney for Kentucky, a staunch Federalist aligned with his own party's strongest rival President

Jefferson, moved that a grand jury be summoned to consider charges against Burr for his alleged attempt to involve the United States in a war with Spain.[110] This grand jury from Republican-dominated Kentucky returned an "ignoramus bill," declining to indict Burr on the evidence.[111] Going even further, the grand jury issued a written declaration directed to the court in which they declared that Burr failed to exhibit "any design inimical to the peace and well-being of the country."[112]

A second grand jury was indubitably spurred by Jefferson himself.[113] The second proceeding convened in Mississippi Territory to consider similar treason charges against Burr relating to his expedition down the Mississippi River.[114] It was alleged that Burr intended to capture New Orleans, a city of nine thousand people protected by a thousand United States soldiers, using sixty *unarmed* men in ten boats.[115] The Mississippi grand jury not only declined to indict Burr in the affair, but returned presentments which clearly labeled the government's attempted charges as a vindictive prosecution.[116] The presentment concluded that "Aaron Burr *has not been guilty of any crime or misdemeanor* against the laws of the United States or of this Territory."[117] Furthermore, the grand jury declared that the arrests of Burr and his co-travelers had been made "without warrant, and . . . without other lawful authority,"[118] and represented a "grievance destructive of personal liberty."[119] In resounding condemnation, the grand jury pronounced its regret that "the enemies of our glorious Constitution" had rejoiced at the attempted persecution of Aaron Burr and expressed the opinion that such prosecutorial misconduct "must sap the vitals of our political existence, and crumble this glorious fabric in the dust."[120]

The grand jury's presentment power was thus used not only to accuse wrongdoers when government prosecutors refuse to do so, but to publicly *declare the innocence* of a targeted suspect in the very face of opposition by the prosecution. Ironically, the Mississippi grand jury was a "runaway" by today's standards. Nevertheless, a grand jury acting in such way offered preciously the type of protection envisioned by the Framers when they included the institution in the Bill of Rights as a check on the power of the government.[121]

Even more enlightening in comparison with the canons of modern criminal procedure, the Mississippi grand jury's presentment included a bold *attack* on the prosecution itself — an occurrence scarcely imaginable today. It was thus the grand jury's power over *its presentments*, rather than its indictments, that made it so fearsome. The effectiveness of early American grand juries in ferreting out the shortcomings of public officials "can be gauged from the long lists of grand jury presentments" of early America.[122] "Very little escaped the attention of the grand jurymen,"[123] which even took notice of the failures of town councils to provide stocks or a whipping post to punish offenders.[124]

V. CONCLUSION

The enactment in 1946 of the Federal Rules of Criminal Procedure has greatly decreased the power of federal grand juries. While widely thought of as a gift to defense attorneys at the time,[125] the codification of grand jury practice into Rule 6 of the Federal Rules of

Criminal Procedure has largely confined the grand jury to its present state of impotence and has done little to protect defendants from the modern "runaway" federal government. Present federal grand jury practice, which forbids grand jurors from issuing presentments without consent of a federal prosecutor, is unconstitutional and violative of the historical principles on which the creation of the grand jury was premised.

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1. *See, e.g.*, STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 696 (5th ed. 1996) (reprinting New Jersey's model grand jury instructions which contain the open acknowledgment of this: "Citizens in general have only a vague idea of what a grand jury is and what its functions are."); *see also* Susan W. Brenner & Gregory G. Lockhart, FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE 2 (1996) ("Surprisingly, given the power it wields, the grand jury, is an often-overlooked and little understood phenomenon in American law.").

2. Only occasionally does the public become privy to criticisms of the grand jury process. A recent source of popular unrest concerning the grand jury process surrounded the 1998 impeachment of President Bill Clinton for perjury and obstruction of justice offenses. Other noteworthy criticism of the process involved former Labor Secretary Raymond Donovan, who was acquitted on fraud charges, *see* Ray Jenkins, Editorial, *He Could Indict the Easter Bunny*, BALTIMORE SUN, January 29, 1996, at 7A, *available in* 1996 WL 6602238, and when 23 Colorado grand jurors went public in 1992 to complain that a United States Attorney's indictment did not properly reflect their views, *see Editorial: The Eternal Flats Grand Jury The Issue: Should Jurors Be Allowed to Release Their Report? Our View: Yes, At Least In Part If Not In Full*, ROCKY MOUNTAIN NEWS, July 7, 1997, at 40A. Former Texas governor John Connally also bitterly criticized the system after his indictment — followed by swift acquittal — on charges that as Secretary of the Treasury he took bribes from lobbyists. *See* Jenkins, *supra*. Donovan was widely quoted after his acquittal as asking, "Where do I go to get my reputation back?" *Id*.

3. *See, e.g.*, Wood v. Georgia, 370 U.S. 375, 390 (1962) (describing the operation and purpose of the grand jury).

4. *See* Fred A. Bernstein, Note, *Behind the Gray Door: Williams, Secrecy, and the Federal Grand Jury*, 69 N.Y.U. L. REV. 563, 578 (1994) (stating that commentators disagree only on what to call the grand jury: "indictment mill," "rubber stamp," "tool," or "playtoy" have all been suggested).

5. Modern grand jury proceedings are normally conducted in the grand jury room, but at common law they could be conducted in private houses or other places for protection of the witnesses. *See, e.g.*, United States v. Smyth, 104 F. Supp. 283, 300 (N.D. Cal. 1952); United States v. Gilboy, 160 P. Supp. 442, 458-59 (M.D. Pa. 1958). However, modern grand jury charges tend to limit this power, or even overtly conceal it from the grand jurors. *See, e.g.*, Louis E. Goodman, *Charge to the Grand Jury*, 12 F.R.D. 495, 499-501 (N.D. Cal. 1952) (arguing against such freedom of movement and ordering the grand jury to "hold its meetings and conduct its investigations and deliberations in quarters provided by the Court and in no other places").

6. *See* Tony Mauro & Kevin Johnson, *Grand Jury 'Very Lonely' For Witnesses*, USA TODAY, March 3, 1998, at 1A (stating that during Independent Prosecutor Kenneth Starr's grand jury proceedings against President Clinton, there were up to a "half-dozen" government attorneys and staff people sitting opposite the witness).

7. *See* CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES & CONCEPTS 546 (3d ed. 1993) (stating that the grand jury has authority to act as a "watchdog" over government operations).

8. *See* FED. R. CRIM. P. 7(c)(l) (requiring that all indictments be "signed by the attorney for the government"). *See also id.* Advisory Committee Note 4 explaining Subdivision (a) of the same Rule (stating that grand jury "presentments," or non-government-approved accusations, "are obsolete, at least as concerns the Federal courts").

9. MARVIN ZALMAN AND LARRY SIEGEL, CRIMINAL PROCEDURE: CONSTITUTION AND SOCIETY 643 (2d ed. 1997) (emphasis added).

10. *See* Stuart Taylor, Jr., *Taking Issue: Enough of the Grand Jury Charade*, LEGAL TIMES, May 18, 1992, at 23 (describing grand jury subpoenas and indictments as "essentially unilateral decisions by prosecutors").

11. If the Fifth Amendment grand jury right has any purpose at all, it is to place a check on the prosecutorial power of the federal government. *See* Hale v. Henkel, 201 U.S. 43, 61 (1906) ("[Grand juries] are not appointed for the prosecutor or for the court; they are appointed for the government and for the people . . . .") *overruled in part sub nom.* Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964). Unfortunately, modern grand jury practice tends to *assume* the existence of some affinity between the attorneys for the government and the grand jurors they present their cases to.

12. This writer has sought in vain to trace the term to its origins. Nothing about "runaway" grand juries appears in legal dictionaries, Supreme Court opinions, or any major legal encyclopedia. The first widely disseminated mention of the term "runaway grand jury" appears to be Professor Orfield's references to the term by the Advisory Committee's Reporter in 1946. *See infra* note 14 and accompanying text. The case law is similarly sparse of references to "runaway" grand juries until recently. *But see* United States v. Worcester, 190 F. Supp. 548, 559 (D. Mass. 1960) (stating rather imaginatively

that "[a] grand jury can roam almost at will. It often does. What else is meant by the phrase 'a runaway grand jury'?"); Fields v. Soloff, 920 F.2d 1114, 1118 (2d Cir. 1990) (stating that "runaway" grand juries existed in the 1930s in New York); *In re* Martin-Tragona, 604 F. Supp. 453, 459-60 (D. Conn. 1985) (admonishing that "'[r]unaway grand juries'. . . may have a certain romantic allure, but federal law leaves little or no room for that species of romance"); United States v. Procter & Gamble Co., 174 F. Supp. 233, 236 (D.N.J. 1959) (mentioning that a "runaway" grand jury is an unusual situation).

See also the discussion of "runaway" grand juries in the book, MARVIN E. FRANKEL & GARY NAFTALIS, THE GRAND JURY: AN INSTITUTION ON TRIAL 107-116 (1977) and the discussion in the widely-consulted hornbook WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 631 (2d ed. 1992) (stating that "it takes a most unusual case for a grand jury to act as a "runaway" and indict notwithstanding the prosecutor's opposition).

13. *See infra* notes 71-84 and accompanying text.

14. *See* Lester B. Orfield, *The Federal Grand Jury*, 22 F.R.D. 343, 346 (1959).

15. *See, e.g.*, United States v. Williams, 504 U.S. 36, 49 (1992) (citation omitted) (emphasis omitted); Note, *Powers of Federal Grand Juries*, 4 STAN. L. REV. 68, 69 (1951) ("The grand jury was appointed to protect community welfare, not merely to aid prosecutor or court.").

16. *See Williams*, 504 U.S. at 48 (citing United States v. R. Enters, Inc., 498 U.S. 292, 297 (1991).

17. Prior to the 20th Century, the grand jury itself was often the initiator of investigations and conducted their activities in both shield and sword functions essentially the same way. *See* BRENNER & LOCKHART, *supra* note 1, at 26.

18. *See generally* DAVID BURNHAM, ABOVE THE LAW: SECRET DEALS, POLITICAL FIXES AND OTHER MISADVENTURES OF THE U.S. DEPARTMENT OF JUSTICE *passim* (1996) (stating that the U.S. Justice Department now operates with few structural limitations and has become increasingly unaccountable).

19. Properly speaking, the Fifth Amendment right to indictment applies only to the federal government. The right to indictment by grand jury is one of the only provisions of the Bill of Rights that has not been incorporated to the States by the Supreme Court. The Supreme Court first rejected incorporation of the right in *Hurtado v. California*, 110 U.S. 516, 538 (1884) and has reaffirmed its holding in subsequent decisions.

A few examples of practices and cases involving state grand juries are included in this paper for illustration. In general, however, this paper will concentrate on federal grand juries. Grand jury practice varies so widely among the states that it is difficult to provide

a comprehensive treatment of that topic in this comment. *See* BRENNER & LOCKHART, *supra* note 1, at 2.

20. U.S. CONST, amend. V.

21. WHITEBREAD & SLOBOGIN, *supra* note 7, at 546. Historically, the grand jury was regarded as a primary security for the innocent against malicious and oppressive persecution. *See* Wood v. Georgia, 370 U.S. 375, 389-391 (1962).

22. *See* 1 ORFIELD'S CRIMINAL PROCEDURE UNDER THE FEDERAL RULES 392 (Mark S. Rhodes ed., 2d ed. 1985) [hereinafter ORFIELD'S];

Under the Constitution the grand jury may either present or indict. Presentment is the process whereby a grand jury initiates an independent investigation and asks that a charge be drawn to cover the facts if they constitute a crime. Since the grand jury may present, it may investigate independently of direction by the court or the United States Attorney. Proceeding by presentment is now obsolete in the federal courts. *Id*.

Orfield's noted that "the common law powers of a grand jury include the power to make presentments, sometimes called reports, calling attention to actions of public officials, whether or not they amounted to a crime." *Id*. at 392 n.16 (citing *In re* Grand Jury 315 F. Supp. 662 (D. Md. 1970).

23. *See, e.g*., Hale v. Henkel, 201 U.S. 43, 64 (1906) (recognizing that common law authority stood for the proposition that "none but witnesses have any business before the grand jury, and that the solicitor may not be present, even to examine them"). Although widespread practice in the federal system had been to allow a government attorney to present evidence to the grand jury, this was by no means a steadfast rule.

24. *See* WHITEBREAD & SLOBOGIN, *supra* note 7, at 546 (stating that the grand jury had the ability to both investigate the government and to deny a government indictment).

25. *See* ORFIELD'S, *supra* note 22, at 389; *In re* Special February 1975 Grand Jury, 565 F.2d 407 (7th Cir. 1977); United States v. Smyth, 104 F. Supp 283, 288 (N.D. Cal. 952). When functioning properly, the grand jury is supposed to be an ever-present danger to tyranny in government. *See* ARTHUR TRAIN, THE PRISONER AT THE BAR 128 (1926) (stating that the grand jury filled a need as a barrier between the powerful and the weak and as a tribunal before which the weak could accuse the powerful of their wrongs).

26. *See* Fred A. Bernstein, Note, *Behind the Gray Door: Williams, Secrecy, and the Federal Grand Jury*, 69 N.Y.U. L. REV. 563, 563-623 (1994).

27. Bernstein, 69 N.Y.U. L. REV. at 622.

28. *Id*. at 623.

29. For statistical evidence of grand jury capture, *see infra* notes 39-47 and accompanying text.

30. *See* Note, 69 N.Y.U. L. REV. at 577.

31. *Id*. at 577-78.

32. *Id*. at 578-89 (stating that the procedural decline of the grand jury has occurred as the federal system was straining to keep up with an increasing number of criminal prosecutions).

33. *Id*. at 578.

34. *Id*. at 578-79.

35. William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174 (1973).

36. United States v. Dioniso, 410 U.S. 19, 23 (1973) (Douglas, J., dissenting).

37. *See* Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1-78 (1996).

38. *See* Note, 69 N.Y.U. L. REV. at 578.

39. BURNHAM, *supra* note 18, at 359.

40. *Id*.

41. *Id*.

42. Taylor, *supra* note 10, at 23.

43. BURNHAM, *supra* note 18, at 360. Although statistics like this are impressive, it should be noted that statistics alone cannot adequately measure the effectiveness of grand juries in screening prosecutions effectively. One critic of statistical approaches has pointed out a number of problems with using numbers of true bills to describe grand jury ineffectiveness:

[E]ven a brief reflection shows how unhelpful these figures are. That grand juries nearly always return true bills may indeed demonstrate that jurors simply approve whatever charges the government submits, but it could also show that grand juries are a great success. A review of the prosecutor's decisionmaking leading up to the request for an indictment shows why.

Federal prosecutors know that virtually all of their charging decisions must be approved by the grand jury. Thus, in deciding which charges to bring, the prosecutor must determine not only which accusations can be proven at trial, but also which accusations will result in an indictment. If we assume that prosecutors as a group will normally decline to present charges to a grand jury that they think will be rejected, we would expect that prosecutors would submit only those cases that are sufficiently strong to survive a grand jury's review. Thus, *regardless* of whether the grand jury is serving as an effective screen, we would expect a high percentage of the cases presented to lead to indictments.

Indeed, contrary to the suggestion of critics, there would be cause for concern if grand juries *refused* to indict in a high percentage of cases.

44. Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused,* 80 CORNELL L. REV. 275-76 (1995). BURNHAM, *supra* note 18, 360.

45. U.S. DEPT. OP JUSTICE, NATIONAL INSTITUTE OP JUSTICE: OFFICE OF DEVELOPMENT, TESTING AND DISSEMINATION, GRAND JURY REFORM: A REVIEW OF KEY ISSUES 21 (1983).

46. *Id*. at 22.

47. Leipold, 80 CORNELL L. REV. at 269.

48. Statistical figures showing a higher prevalence of grand jury reluctance to follow the government in ages past are almost nonexistent. However, a table of felony arrests in New York County between 1900 and 1907 found on page 111 of the 1926 book *The Prisoner at the Bar* by Arthur Train provides some rare illumination. In those seven years, some 5,214 out of 57,241 people were arrested by the police on felony charges whom New York state grand jurors decided not to indict. Interestingly, the rate of indictment rose significantly in those seven years. *See* TRAIN, *supra* note 25, at III.

49. The National Association of Criminal Defense Lawyers, for example, has promoted a grand jury "bill or rights" to be enacted by Congress, which would include these and other reforms. See Gerald B. Lefcourt, *High Time For A Bill of Rights For the Grand Jury,* 22 APR CHAMPION 5 (Apr., 1998). Lee Hamel, a former federal prosecutor in Houston, has gone even further by suggesting that Congress should specifically make it a crime for the prosecution to mislead a grand jury by such conduct as withholding exculpatory evidence. Lee Hamel, *Prosecutorial Responsibility,* TEXAS LAWYER, June 15, 1992, at 13.

While the U.S. Attorneys' Manual specifically provides for an internal policy to present exculpatory evidence to the grand jury, *See* DEPARTMENT OF JUSTICE, U.S. ATTORNEYS' MANUAL, 9-11.233, no binding statutory or case law now imposes a legal obligation. The enactment of such legislation enforceable upon government attorneys would not seem to infringe on the rights and powers of the grand jury. *But see*

BRENNER & LOCKHART, *supra* note 1, at 18 (stating that such a limitation on the prosecutor may implicate the separation of powers if it is considered to interfere with the exercise of the executive function). *See id*. ("[I]t remains to be seen whether Congress can be persuaded to review allegations of prosecutorial misconduct, and, if so, whether such intervention would violate the separation of powers.").

50. In some state jurisdictions, including California and South Carolina, grand juries can hire experts such as accountants to assist them in conducting special investigations, especially where the activities of public officials are being investigated. *See* U.S. DEPT. OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, MONOGRAPHS: GRAND JURY REFORM: A REVIEW OF KEY ISSUES 23 (1983).

51. *See* ABA GRAND JURY POLICY AND MODEL ACT 5, 11 (2d ed. 1982) (enunciating in Principle No. 22 the duty of court to give written charge to jurors completely explaining their duties and limitations).

52. BRENNER & LOCKHART, *supra* note 1, at 4.

53. *Id*.

54. *Id*.

55. *Id*.

56. *Id*. at 289-90 (citations omitted).

57. *See* FRANKEL & NAFTALIS, *supra* note 12, at 10.

58. *See* Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 9 (1996).

59. *See id;* Note, *Powers of Federal Grand Juries*, 4 STAN. L. REV. 77 (1951). [T]he grand jury developed at a time of small rural communities, when the government had not yet assumed responsibility for enforcing the criminal law. Private persons could initiate prosecutions. The grand jury ensured that privately instituted proceedings would not go forward until a representative body of men of the neighborhood had checked the facts and found a reasonable basis for prosecution.

60. Note, 4 STAN. L. REV. at 77.

In 1906 the United States Supreme Court dealt with the question of whether grand juries could be restricted from straying into investigations of issues not formally presented to them by prosecutors. *See* Hale v. Henkel, 201 U.S. 43 (1916). The Court held that it was "entirely clear . . . under the practice in this country," that grand jurors may proceed upon either their own knowledge or upon the examination of witnesses brought before them, "to inquire for themselves whether a crime cognizable in the court has been committed."

Hale, 201 U.S. at 65. Thus, in some respects, the "runaway" grand jury, though not given such a name at the time, has been upheld by the nation's highest court. It is therefore debatable whether the modern Federal Rules of Criminal Procedure, which have limited federal grand jury action since 1946, are constitutional. *See infra* notes 87-128 and accompanying text (discussing the constitutionality of Rules 6); *See also* FRANKEL & NAFTALIS, *supra* note 12, at 111 (mentioning that Rule 6's language "sounds like an inescapable and unambiguous barrier to the grand jury's proceeding without an attorney. . . . [b]ut people learned in the law have seen means of escaping and possibly overriding barriers that appear insurmountable at first. While the barriers here still stand, the debate may not be over.").

61. *See*, Hale, 201 U.S. at 63 (citations omitted).

62. *Id*.

63. *Id*.

64. *Id*.

65. *See* Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 10 (1996).

66. Kadish, 24 FLA. ST. U. L. REV. at 10.

67. *Id*. at 10-11.

68. *See* FRANKEL & NAFTALIS, *supra* note 12, at 11.

69. *Id*.

70. *Id*.

71. *Id*. at 12.

72. *Id*.

73. *Id*.

74. Richard Calkins, *The Fading Myth of Grand Jury Secrecy*, 1 J. MARSHALL J. PRAC. & PROC. 18, 19 (1967).

75. *See* FRANKEL & NAFTALIS, *supra* note 12, at 15.

76. *Id*.

77. *Id*.

78. *See* Fred A. Bernstein, Note, *Behind the Gray Door: Williams, Secrecy, and the Federal Grand Jury*, 69 N.Y.U. L. REV. 563, 596 (1994).

79. *See* FRANKEL & NAFTALIS, *supra* note 12, at 15.

80. In the federal system, the powers of the grand jury have never been as broad as those known by colonial pre-Revolutionary grand juries for a variety of reasons. First, the federal government itself was historically one of very limited criminal jurisdiction, so the call for federal grand juries was not as common or strong as at the state level.

Second, the fact that federal cases tend to involve crimes that are more complex than those of state prosecutions made independence of individual grand jurors over the area of expertise less likely. *See* BRENNER & LOCKHART, *supra* note 1, at 18. Also, federal grand juries were traditionally distanced from the sort of "public affairs" investigations into community life that drew the attention of state grand juries. *Id*. at 53.

81. While the Grand Jury Clause of the Fifth Amendment invokes the "Grand Jury," nothing in the text provides any indication as to just what a grand jury is or what type of grand jury is required. This meaning must be garnered from the common law. *See* United States v. Warren, 26 F. Supp. 333, 334 (E.D.N.Y. 1939).

But *which* common law? Is the grand jury as required by the Fifth Amendment the common law grand jury known in the colonies in 1776? In England in 1776? In the United States when the Bill of Rights was ratified in 1789? When Englishmen landed in America in 1606? After all, the grand jury is a 900 year-old institution, whose operation has changed greatly over the centuries. *See generally* Helene E. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701 (1972). For that matter, grand jury operation differed greatly by region, both in England and her colonies, throughout the Seventeenth and Eighteenth Centuries, *See* Goodman v. United States, 108 F.2d 516, 518 (9th Cir. 1939) (stating that grand jury practice has developed in widely divergent ways partly due to local custom). Thus, any attempt to pin down "grand jury law" to a single era and venue would simultaneously defy the common law traditions of other eras and venues. Another problem is that the "common law" meant very little if anything in federal jurisdiction because common law crimes were not recognized in federal courts. *See, e.g.*, United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 33 (1812).

The question of what common law to apply where the Constitution called for a common law interpretation was problematic to American jurists concerning a wide variety of topics for an entire generation after separation from the mother country. *See generally* LAWRENCE M. FRIEDMAN, A HISTORY OP AMERICAN LAW 110-15 (2d ed. 1985). While some early American courts routinely consulted English decisions, others went so far in the opposite direction as to prohibit the reading of English authority in their courtrooms. *Id*. at 111-12. Due to the paucity of published American case reports, more English than American cases were cited in American reports for a generation after Independence. *Id*. at 112. Nonetheless, by the middle of the 19th century there developed

a truly distinctive common law system in the United States. *Id*. at 113 (stating that the first generation of American jurists created a "separate language of law within the family founded in England").

For these reasons, federal grand jury practitioners must look in many respects to the practice in the states, because state grand juries provide a more unbroken chain of inheritance to the common law than do those administering federal law. Federal courts have differed as to the scope of the federal grand jury's powers. It has been said that Congress has not defined those powers, or exact limitations on them. Application of Texas Co., 27 F. Supp. 847, 850-51 (E.D. Ill. 1939); *See also* ORFIELD'S, *supra* note 22, at 286 (noting that "[i]n 1809 Chief Justice Marshall, sitting as a circuit justice, stated that there was no act of Congress conferring on federal courts the power to summon grand juries, or describing their powers").

The Chief Judge of the Second Circuit observed that the constitutional grand jury was one that was intended to operate substantially like its English progenitor. United States v. deary, 265 F.2d 459, 460 (2d Cir. 1959) (stating that the grand jury "has remained as free of court-made limitations and restrictions as it was in England at the time the Fifth Amendment was adopted"). Yet the practice in grand jury proceedings in the United States deviates in many ways from that known in England. *See generally* Hale v. Henkel, 201 U.S. 43 (1906). This is especially true in the finding of bills of indictment. Thus, by English colonial standards, the modern federal grand jury would seem to be unconstitutional. *But see* ORFIELD'S, *supra* note 22, at 390 (suggesting that "the grand jury has remained as free of court-made limitations and restrictions as it was in England at the time the Fifth Amendment was adopted").

82. *See In re* Grand Jury, 315 F. Supp. 662, 673 (D. Md. 1970) ("Federal statutes are silent on the relationship which is to exist between a Federal Grand Jury, the District Court which summons it, and the United States Attorney's office in the District. From 1789 to the present, Congress has made no definitive statement concerning Grand Jury powers.").

83. While the Fifth Amendment right to indictment by grand jury extends only to federal criminal prosecutions, numerous states provide for similar rights in their state constitutions. Notably, however . . . the rules governing state grand juries vary tremendously. *See* BRENNER & LOCKHART, *supra* note 1, at 2 (noting that "[G]rand jury practice varies so widely among the states that it is neither possible nor practical to provide a comprehensive treatment of that topic in this volume."). *See also* Susan W. Brenner, *The Voice of the Commonity: A Comparison of Federal and State Grand Juries*, 3 VA. J. SOC. POL'Y L. 67 (1995) (discussing state grand jury practices).

84. Critics of unbridled grand juries may cite a wealth of historical precedent to support their position. For example, overzealous and overreaching grand juries figured prominently in the era of the Sedition Acts. The Federalists, marshals and judges who totally controlled the judicial branch of government — blatantly packed panels with sympathizers and allowed offensive, political charges to be delivered to these grand

juries. *See* Schwartz, 10 AM. CRIM. L. REV. at 723. The famous impeachment proceedings against United States Supreme Court Justice Samuel Chase were in part initiated because of Chase's habit of turning grand jury charges into Federalist harangues. *Id*. at 727-28. Still, the failure of the grand jury to act as a check on government persecution during this period can be attributed more to misuse and abuse of the grand jury process than to the failure of the institution itself. Grand juries were impaneled improperly, for an improper purpose, and were charged improperly. *Id*. at 732 (stating that "such blatantly biased panels could hardly have afforded the safeguard which grand jurors were sworn to provide" and that "some of the nation's founders indulged in chicanery designed to circumvent the protective barrier in order to crush their opponents"). Even after the end of the Sedition Act hysteria, the anti-Federalists aligned with President Thomas Jefferson abused the grand jury process in pursuit of their hated Federalist opponents. *Id*. (recounting that soon after his election as President, Thomas Jefferson "sullied his own reputation as the defender of the people's liberties" by relying on the misuse of grand juries to conduct a "personal vendetta against his enemy, Aaron Burr"). Initially, Aaron Burr was completely exonerated by two separate grand juries in two separate states before finally being indicted by a Republican-packed grand jury in Jefferson's home state of Virginia on charges that he "lev[ied] war upon the United States." *Id*. at 738. A trial jury ultimately acquitted Burr, under the judicial supervision of none other than John Marshall. *Id*.

85. The Populist era of the early 20th Century saw some attempts to revitalize the grand jury. During that period, ex-jurors acted to protect the grand jury's powers by forming associations. The Grand Juror's Association of New York was founded in 1912, and began publishing *The Panel*, a pro-grand jury periodical, in 1924. Chicagoans founded the Grand Juror's Federation of America in 1931, and associations apparently sprang up in other localities. *See* Renee B. Lettow, *Reviving Federal Grand Jury Presentments*, 103 YALE L.J. 1333, 1342 n.50 (1994).

86. Codification thrived as a trend in American law during the latter part of the 19th and the early part of the 20th Centuries. *See* FRIEDMAN, *supra* note 81, at 391-411. Criminal procedure, however, posed difficulties to would-be codifiers that other areas of American law did not, due primarily to constitutional considerations. *Id*. at 401 (noting the 5th Amendment grand jury requirement was a nuisance to those who sought to codify federal criminal procedure).

87. *See* FED. R. CRIM. P., INTRODUCTION, PROCEDURES FOR THE CONDUCT OP BUSINESS BY THE JUDICIAL CONFERENCE COMMITTEES ON RULES OF PRACTICE AND PROCEDURE, 1:1: p. vii

Each Advisory Committee shall carry on 'a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use' in its particular field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary. *Id*.

88. *See* Lettow, 103 YALE L.J. at 1334 (suggesting that the power of presentment is a constitutional right of grand juries).

89. U.S. CONST. amend. V states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, or in the Militia, when in actual service in time of War or public danger. U.S. CONST. amend. V.

90. *See* ADVISORY COMMITTEE NOTE 4, FED. R. CRIM. PRO. 7(a) ("Presentment is not included as an additional type of formal accusation, since presentments as a method of instituting prosecutions are obsolete, at least as concerns the Federal courts."). A few voices in the federal judiciary, however, have ignored this language and allowed for "presentments" or unapproved statements of federal grand juries to stand public regardless of the will of federal prosecutors. For a discussion of this issue, see Phillip E. Hassman, Annotation, *Authority of Federal Grand Jury To Issue Indictment Or Report Charging Unindicted Person With Crime Or Misconduct*, 28 A.L.R. FED. 851 (1976).

91. *See* ORFIELD'S, *supra* note 22, at 392 n.16 (noting that "[t]he common law powers of a grand jury include the power to make presentments . . . calling attention to actions of public officials, whether or not they amounted to a crime).

92. *See* Hassman, 28 A.L.R. FED. at 854-57.

93. However, on occasion, grand juries have used the term "presentment" to indicate what is commonly a grand jury report, or a statement to the court regarding some matter but which neither recommends indictment nor initiates any prosecution. *Id*. at 853 n.2.

94. Lester B. Orfield, *The Federal Grand Jury*, 22 F.R.D. 343, 346 (1958).

95. Orfield, 22 F.R.D. at 346.

96. *See* Renee B. Lettow, *Reviving Federal Grand Jury Presentments*, 103 YALE L.J. 1333, 1339 (1994).

97. *In re* Grand Jury, 315 F. Supp. 662, 673 (D. Md. 1970) ("The Advisory Committee note does not indicate that the quoted provision was intended to change existing practice, although of course the Rule has the effect of law.").

98. *See* ORFIELD, *supra* note 12 at 346 (discussing the question of where the term "runaway grand jury" originated).

99. It must be noted that the capture of the grand jury's presentment power has never faced direct Supreme Court review as to its constitutionality. The words of United States

Supreme Court Justice Hugo Black, when dissenting from the decision to enact the Federal Rules of Criminal Procedure, are particularly relevant:

Whether by this transmittal the individual members of the Court who voted to transmit the rules intended to express approval of the varied policy decisions the rules embody I am not sure. I am reasonably certain, however, that the Court's transmittal does not carry with it a decision that the amended rules are all constitutional.

FED. R. CRIM. P., ORDERS OF THE SUPREME COURT OF THE UNITED STATES ADOPTING AND AMENDING RULES, ORDER OF FEB. 28, 1966 (Black, J., dissenting). For a thoughtful law review note on the constitutionality of Rule 6, *see* Lettow, 103 YALE L.J. at 1333.

100. Phillip E. Hassman, Annotation, *Authority of Federal Grand Jury To Issue Indictment Or Report Charging Unindicted Person With Crime Or Misconduct*, 28 A.L.R. FED. 851, 857 (1976).

101. Ironically, a common argument during times when presentments were common was that presentments were too trivial. *See, e.g.*, TRAIN, *supra* note 25, at 126 (stating that "[a]n examination of the long list of presentments on file in the office of the clerk of Court of General Sessions [of New York]" shows only the consumption of many working hours, with only the most fleeting of effect on the public).

[I]n general it may be said that the only effect of a grand jury's meddling with these things is to detract from the dignity of its office and the importance of the work which it and it alone can lawfully do.

The lay reader will naturally be led to inquire why this archaic institution which it costs so much time and money to perpetuate, which causes so much unnecessary inconvenience to witnesses and offers so many technical opportunities for delay, which frequently is ineffective and officious, and for the most part concerns itself with the most trivial matters only, should not be abolished ....

102. *Id*. at 126-27.

A carefully considered overview of these issues can be found in the 1976 A.L.R. Annotation by Phillip E. Hassman. Hassman, 28 A.L.R. FED. 851.

103. *Id*. at 856 (noting that one argument for allowing accusatory presentments is that the public employee and official is "the most frequent target" and "must be prepared to accept investigation and exposure").

104. Offended persons may, for example, challenge the statements of a presentment by filing a motion to expunge the grand jury report, by a libel action against the grand jurors or the United States Attorney, or possibly through the federal civil rights statutes. *Id*. at 857-58.

105. *See, e.g., In re* Grand Jury Proceedings, 813 F. Supp. 1451 (1992).

106. The effect of a public presentment exonerating a suspect on any future proceedings by the government against the same target is difficult to gauge. The effect of a public presentment expressing a finding that the government has improperly pursued a case against a person before the grand jury might well serve the interests of justice.

The ham sandwich reference is a tribute to Judge Sol Wachtler, a former high court judge of New York, who coined the legendary criticism of grand juries: "Any prosecutor who wanted to could indict a ham sandwich." Tony Mauro & Kevin Johnson, *Grand Jury 'Very Lonely' For Witnesses*, USA TODAY, March 3, 1998, at 2A:3. This flippant semi-truism has been popularized by observers of grand jury law and is often repeated — only half jokingly — by commentators.

107. After fatally wounding Alexander Hamilton in a pistol duel in 1804, Aaron Burr traveled West to either restore his lost political clout or sabotage the new nation in spite (historians continue to differ over the question). *See* Helene E. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 733-34 (1972) (briefly summarizing Burr's efforts either to sever those states and territories west of the Allegheny Mountains from the Union or to put more land under American domination through an eventual attack on Mexico).

108. Indeed a political career that culminated in the *murder* of one of the United States' principle Founding Fathers, Alexander Hamilton, while Burr was vice president. Schwartz, 10 AM. CRIM. L. REV. at 733.

109. Schwartz, 10 AM. CRIM. L. REV. at 734. (stating that "the destruction of any possibility of Burr's returning to a place of power on the political scene was one issue on which the two parties agreed").

110. *Id*.

111. *Id. at* 734-35 (stating that the people of Kentucky did not resent Burr because of his murder of Hamilton and in fact supported Burr in his contentions with the "hated Federalist [, United States Attorney] Daviess").

112. *Id*. at 735 (quoting from J. COOMBS, THE TRIAL OF AARON BURR FOR TREASON, xix (1864)).

113. Jefferson is said to have been so determined to see Burr "hanged as a traitor [that] he was ready to abandon all constitutional" constraints in the process. *See* DAVID WALLECHINSKY & IRVING WALLACE, THE PEOPLE'S ALMANAC #2 171 ((1978):

[Jefferson] not only announced his opinion that Burr was guilty before the jury could consider the case, but he attempted to bribe witnesses with promises of presidential

pardons if only they would testify against Burr. Concerning this case, Jefferson was the author of this incredible statement: "There are extreme cases when the laws become inadequate even to their own preservation, and where the universal resource is a dictator, or martial law." *Id*.

114. Schwartz, 10 AM. CRIM. L. REV. at 735.

115. *Id*.

116. *Id*.

117. *Id*. (emphasis added).

118. *Id*.

119. *Id*.

120. *Id*. at 735-36. The presentment read, in pertinent part:

The grand jury of the Mississippi Territory, on a due investigation of the evidence brought before them, are of opinion that Aaron Burr has not been guilty of any crime or misdemeanor against the laws of the United States or of this Territory, or given any just cause of alarm or inquietude to the good people of same. The grand jurors present, as a grievance, the late military expedition, unnecessarily, as they conceive, fitted out against the person and property of the said Aaron Burr, when no resistance had been made to the civil authorities.

The grand jurors also present, as a grievance destructive of personal liberty, the late military arrests, made without warrant, and, as they conceive, without other lawful authority; and they do sincerely regret that so much cause has been given to the enemies of our glorious Constitution to rejoice at such measures being adopted, in our neighboring Territory, as, if sanctioned by the Executive of our country, must sap the vitals of our political existence and crumble this glorious fabric in the dust. *Id*.

121. Even in Aaron Burr's case, the power and duplicity of the Executive finally won out over the independence of early American grand juries. After twice failing to garner a grand jury indictment against Aaron Burr, the Jefferson Administration moved venue to Virginia, "stronghold of Jefferson, Madison and Monroe." Schwartz, 10 AM. CRIM. L. REV. at 736. Rutgers Law Professor Helene Schwartz wrote: "Perhaps at no other period in his public career did Jefferson so disgrace himself as he did in his continued but futile efforts to permanently dispose of Aaron Burr. 'All of his professions as apostle of "individual rights" were sunk in the abyss of Burr.'" *Id*. (quoting W. McCALEB, NEW LIGHT ON AARON BURR 99 (1963)).

The Virginia grand jury, packed with Republicans, returned true bills of indictment against Burr and his alleged co-conspirators charging that they had levied war on the United States. *Id*. The matter then was sent to a trial jury, which acquitted Burr.

122. *See* EDGAR J. McMANUS, LAW AND LIBERTY IN EARLY NEW ENGLAND: CRIMINAL JUSTICE AND DUE PROCESS 1620-1692 (1993).

123. McMANUS, *supra* note 122, at 63.

124. *Id*.

125. *See* BRENNER & LOCKHART, *supra* note 1, at 188 (noting that one commentator described the rule as a "wide change" in prior law, which had made access to grand jury materials virtually impossible for defense attorneys).