

PROPONENT TESTIMONY OF PHILLIP COSBY SUPPORTING **SB 58**
State Director, American Family Action of Kansas and Missouri
Kansas House Judiciary Committee March 2020

Pg. 3 Line 39-42 “ *The person who filed the citizen-initiated petition and whose name, address and phone number appear on the face of each petition shall be immune from civil liability for any good faith conduct under this article.* ”

**We the people are the rightful masters of both Congress and the courts... Lincoln
All political power is inherent in the people”...KS Constitution 1959**

Three types of Kansas Grand Juries; K.S.A.22-3001

- (a) **Grand Jury ordered by district judges** – No history of use
 - (b) **Grand Jury by District or County Attorney** – Authority granted in 2014
 - (c) **Grand Jury by Citizen-Initiated Petition** –1887 - 133 years ago
- **May 2008 - The citizen-initiated grand jury process was ruled Constitutional**
- *KANSAS SUPREME COURT – No. 99,951; 99,972; 100,042 Sedgwick County*
 - **June 2019 - Reaffirmed** (*No. 118,410 Douglas County ,IN THE COURT OF APPEALS OF THE STATE OF KANSAS ...* “**When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language**”... “**Shall means shall**” also; *General allegations are sufficient for petition*

“...a citizen’s grand jury is convened to investigate criminal activity involving government or a perceived failure of the prosecutor or system to charge or investigate a particular person or entity...” KANSAS COUNTY AND DISTRICT ATTORNEYS ASSOCIATION MAGAZINE – *The Kansas Prosecutor* – “**Gimme A Grand Jury**”- Winter 2010 Jan Satterfield, Butler County Attorney

Of the three, the Citizen-Initiated Grand Jury (CGJ) by petition is the oldest and closest to the original intent chiseled in the 5th amendment U.S. Constitution as a restraining mechanism for abuse by institutional power. The CGJ chafes against such phrases as “prosecutorial discretion” and “administrative relief”. What sounds true?

A natural tension is present with institutional power when citizens pursue an independent grand jury remedy. Resorting to a grand jury by petition implies at the very least that someone in authority is not doing their job. Worse yet: corruption, indifference, collusion, bias, a wink and a nod...are of grave concern.

The original Grand Jury checks the Kings abuse and indifference to the law. Prosecutors who diminish it to an engine for administrative efficiencies is a sham. The CGJ is purposed as a feared, independent investigative tool. Grand Juries have devolved into efficient prosecutorial instruments. This citizen-initiated power constraining legacy is inextricably linked to Colonial America, the Bill of Rights. British Common Law, the Magna Carta and Ancient Greece.

Judicial Immunity- In the performance of their duties - Rules Adopted by the Kansas Supreme, Court Rule 223 **Immunity**. U.S. District Court, District of Kansas Rule 83.6.12 (f) Complaints, reports, or testimony in the course of disciplinary proceedings under these rules are deemed to be made in the course of judicial proceedings. All participants are entitled to judicial immunity and all rights, privileges, and immunities afforded public officials and other participants in actions filed in the courts of Kansas.

Prosecutors Absolute Immunity – In the performance of their duty. Supreme Court of the State of Kansas *NO. 85,499 Dale E. McCormick v. Cynthia J. Long, Deputy District Attorney* – “2. **Prosecutors have absolute immunity** for activities intimately associated with the judicial phase of the criminal process...” and “acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial...are entitled to the **protections of absolute immunity**.” *Buckley v. Fitzsimmons, 509 U.S. 259, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993)* **Qualified Immunity** also protects government officials from lawsuits.

***** No Immunity Language exists for “First Witness” ***** – In the performance of the statutory directive; K.S.A. 22-3001 (4) (B) The person filing the citizens' petition filed in this court **must be the first witness** you call for the purpose of presenting evidence and testimony as to the subject matter and allegations of the petition. **An immunity from civil lawsuits provides statutory “plain language” shielding the “first witness”.**

Litigation is a certainty. The Kansas courts will at some future date examine and rule on the point of “first witness” immunity, as a result of a civil suit against the citizen who filed the petition. **“Unambiguous” “Plain” language of immunity to the first witness accuser would settle the question of legislative intent.** It is superior that the legislature writes law as opposed to a future judicial ruling deciding an immunity right, or not.

**WHO IS RESTRAINED IN THE BILL OF RIGHTS?
WHO IS THE FINAL ARBITER OF POWER? WHO DID THE FOUNDERS
ULTIMATELY TRUST AND DISTRUST?**

Thomas Jefferson. “I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education...”

Patrick Henry - “The Constitution is not an instrument for the government to restrain the people, it is an instrument for the people to restrain the government – lest it come to dominate our lives and interests.”

This sword cuts both ways. The Citizens Grand Jury’s purpose was never to serve as the lapdog of power but a watchdog ...

Kansas is not inventing the Citizen-Initiated Grand Jury process; Kansas is leading in reinstating a usurped, neglected foundational historical constitutional mandate.

We the people... A Government of, by and for the people” ... ”

*Article 3 of the Kansas Bill of Rights...
the Peoples Right to Petition the Government for a Redress of Grievances.*

K.S.A. 22-3001 GRAND JURIES (c) Citizen-Initiated Grand Jury by Petition	
(c) (1)	summoned 60 days after petition presented, 100 plus 2%
c2	person filing petition information, reasonable specific, sufficient general allegations
c3	Form of petition
c4	Judges instructions to grand jury
A	Instructions
B	Person filing the petition is the First Witness (UNINTENDED CONSEQUENCE) remedy is immunity
B	Right to appeal judges decision to not summon a grand jury
C	May employ special counsel after hearing the person who filed the petition - 1st witness
D	Summoning of witnesses
E	Witness guidelines
F	Witness request to testify
G	No bill or True Bill
d	Random summing of jury ; person who filed the petition will be allowed to hear instructions
22-3002	Selection objections, examination, second drawing of final 15 also random K.S.A. 43-107
22-3003	Oaths
22-3004	Presiding juror and deputy presiding juror
22-3005	General charge to investigate in private
22-3006	Grand Jury has all authority to investigate within concerns of petition
22-3007	Duty of Prosecution attorney ; when and if requested ; if necessary
22-3008	Witness Immunity
22-3009	Witness right to counsel ; counsel is present
22-3010	Who may be present and when
22-3011	Indictment, procedure , request that Attorney General prosecute
22-3012	Secrecy of proceedings and disclosure
22-3013	Discharge and excuse
22-3014	Witness fees
22-3015	Amendment of indictment ; (c) CGJ not subject to prosecutors application
22-3016	Removal of judge upon a majority vote
25-3601(f)	Grand Jury Petition format instructions stand apart from other types of petition form instructions in statutes
43-107	Second drawing of final 15 grand jury members, like the first drawing, is a random process

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

† ROGER ROOTS

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 Burnham, "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]

¹ 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 precisely 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)(1) (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. 1952). 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. OF JUSTICE, NATIONAL INSTITUTE OF 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 of 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 OF 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 Community: 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 OF 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).

*****SAMPLE*** Petition to the District Court of Resolve County, Kansas**

The undersigned qualified electors of the County of Resolve and State of Kansas hereby request that the District Court of Resolve County, within 60 days after the filing of this petition, cause a grand jury to be summoned in the county to investigate alleged violations of law, Kansas Statute 21-6401, Promoting Obscenity at the _____ Adult Superstore 1234 Wayward Road, Resolve, Kansas.

It is alleged that, in Resolve County, Kansas, an ongoing business, commonly known as the _____ Adult Superstore, doing business at 1234 Wayward Road , Resolve, Kansas violated and continues to violate K.S.A. 21-6401, Promoting Obscenity by recklessly distributing, presenting, exhibiting, possessing or advertising obscene materials and devices, promoted to emphasize their prurient appeal, to-wit: books, magazines, videos, devices, novelties and other such materials that the average person applying contemporary community standards would find patently offensive and taken as a whole, a reasonable person would find that the material or performance lacks serious literary , educational, artistic, political or scientific value and to perform such duties as may be authorized by law.

Signature	Print Name	Address	City/Zip	Optional
				Email Address
1				
2				
3				
4				
5				
6				
7				
8				
9				
10				
Carrier's Signature	Carrier's Name	Address	City/Zip	Email Address

I, _____, have signed above as the carrier of this petition and do verify upon the oath that each of the signers on this petition is the genuine signature of the person whose name it purports to be and that each signer believes that the statements in this petition are true.

Page _____ of _____

Return petitions to:
John Q. Citizen, Petitioner
5678 Good Faith Road
Resolve, KS 678910

For questions call: 785-*-******

1955

Grand Jury Under Attack, The--Part I

Richard D. Younger

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THE GRAND JURY UNDER ATTACK

1

Part One

RICHARD D. YOUNGER

The author is Assistant Professor of History in the University of Houston, Texas. He was formerly Instructor in the Milwaukee Extension Division of the University of Wisconsin. His interest in the Grand Jury began when he was a student in law in the University. What intrigued him particularly was the question why about one half of our states have abandoned it. The article following is an abbreviation of Dr. Younger's doctor's thesis entitled *A History of the Grand Jury in the United States* which he presented to the University of Wisconsin in partial fulfillment of the requirements for the degree of Doctor of Philosophy.

Part three under this title, the final portion of Professor Younger's contribution, will be published in our next number.—EDITOR. E'

As Justice James Wilson took his place at the front of the hall of the Philadelphia Academy, he was clearly pleased to see that so many cabinet officers, members of Congress, and leaders of Philadelphia society had braved the winter weather to attend his weekly law lecture. This was the Justice's second winter of lecturing as Professor of Law in the newly established College of Philadelphia. His course had been a tremendous social success. The first series opened auspiciously December 15, 1790 before a distinguished audience which included President and Mrs. Washington. Among his fellow lawyers, however, Wilson's discourses had been received with reserved acclaim. Many resented his severe criticism of Blackstone, while others felt disturbed by his ultra-Federalist views.

Justice Wilson's topic for discussion this evening was the jury, and he began with an analysis of the role of the grand jury in American law. He rejected summarily the views of those persons who would restrict the grand jury to the consideration of matters laid before them by the public prosecutor or given them in charge by the court. He stated that such a concept presented "a very imperfect view of the duty required of grand jurors." Their oath assigned no limit to their area of inquiry save their own diligence. Wilson stated that he saw in the grand jury more than a body set up merely to seek out law violators. He viewed it as an important instrument of democratic government, "a great channel of communication between those who make and administer the laws and those for whom the laws are made and administered." Elaborating upon his statement, the Justice pointed out that all the operations of government and all its officers came within the view of grand juries, giving them an unrivaled ability to suggest public improvements and expose corruption in government.¹

Justice Wilson was not the first American jurist to express such views regarding the grand jury. Almost ten years earlier Judge Francis Hopkinson of Philadelphia

¹ BIRD WILSON (ed.), *THE WORKS OF JAMES WILSON* (Philadelphia, 1804), II, 365-367; CHARLES WARREN, *THE HISTORY OF THE AMERICAN BAR* (Boston, 1911), 347; *THE DICTIONARY OF AMERICAN BIOGRAPHY* (20 vols., New York, 1928-1936), XX, 330.

had denounced judicial encroachment upon juries. He too stated that from the terms of their oath, there was "no bound or limit set to any number or sort of persons of whom they are bound to inquire." However, Hopkinson denied that judges could impose directions upon grand jurors.² Early in 1793 Secretary of the Treasury Alexander Hamilton had instructed customs officials to report to him all infractions of the neutrality laws. Thomas Jefferson protested vigorously against this unwarranted invasion of the province of grand juries. He objected to giving government officials authority to act as criminal informers and pointed out that the advantage of inquests was that "a grand juror cannot carry on a systematic persecution against a neighbor whom he hates because he is not permanent in the office."³ If the grand jury were to serve as an instrument of the people it was necessary that any private citizen have the right to go before a grand inquest. In 1794 Attorney General of the United States William Bradford announced that it was not necessary for persons to approach a grand jury through a committing magistrate.⁴

In spite of these pronouncements, however, not all jurists were certain that independent grand juries were a good thing. Judge Alexander Addison of Pennsylvania feared that danger lay in giving jurors too free a hand in their investigations. In a charge delivered in 1792 he went on record as favoring restrictions upon grand juries. Judge Addison cautioned the jurors that they could act only when a matter came within the actual knowledge of one of them, or when the judge or district attorney submitted an indictment for their consideration. They could investigate matters of public importance only if the judge charged them to do so. Such a restricted view of jury powers prohibited them from summoning witnesses on their own initiative and indicting persons on the basis of testimony received. It had the effect of placing these juries almost entirely under the control of the court.⁵

Restrictions imposed by courts were not the only means by which the juries were deprived of their powers of investigation. In Connecticut, through long practice, it had almost ceased to exist as an investigating body. Each town in the state still elected two persons each year to serve as jurors, but they no longer met as a body unless summoned by a court. Indictment by a full jury was mandatory only in case of crimes punishable by death or life imprisonment. In all other cases it became the practice for individual jurors or the district attorney to sign a complaint when they received information of a crime. Grand jurors in Connecticut tended to become informing officers with an annual term of office, possessed of the authority to make complaints individually, a power which they did not have at common law. As a result of such a system, they met infrequently as a body and through disuse lost most of their broad powers of initiating investigations.⁶

² THE MISCELLANEOUS ESSAYS AND OCCASIONAL WRITINGS OF FRANCIS HOPKINSON (Philadelphia, 1792), I, 207-208.

³ Letter from Thomas Jefferson to Edmund Randolph, May 8, 1793, PAUL L. FORD (ed.), THE WORKS OF THOMAS JEFFERSON (New York, 1904), VII, 316-318.

⁴ Letter from Attorney General Bradford to the Secretary of State, February 20, 1794, OPINIONS OF THE ATTORNEY GENERAL OF THE UNITED STATES, I, 22.

⁵ ALEXANDER ADDISON, REPORTS OF CASES IN THE COUNTY COURTS OF THE FIFTH CIRCUIT (Washington, 1800), Part II, 37-46.

⁶ STATUTES OF CONNECTICUT (1784), 94, (1808), 371-372; DWIGHT LOOMIS and J. GILBERT CALHOUN (eds.), THE JUDICIAL AND CIVIL HISTORY OF CONNECTICUT (Boston, 1895), 172-173.

OPPOSITION OF REFORMERS

The grand jury also became the target of those who denounced the institution in the name of reform. In England, Jeremy Bentham, the great codifier and legal reformer, struck out at the grand inquest as "an engine of corruption" which was "systematically packed" on behalf of the upper classes. He charged that juries in Britain had become assemblies composed almost exclusively of gentlemen, "to the exclusion of the Yeomen." In addition to its misuse, Bentham opposed it on grounds of efficiency. As a utilitarian, he had little patience with a body composed of "a miscellaneous company of men" untrained in the law. He believed that a professionally trained prosecutor could perform the functions of a grand jury with far greater efficiency and with less expense to the people and less bother to the courts.⁷

Bentham's reform proposals received wide circulation in the United States and led American legal scholars to reassess the value of the grand jury. Some came to the conclusion that public indifference and apathy seriously impaired its usefulness. They blamed juries themselves for criticism because they frequently neglected to conduct investigations into the conditions of prisons, roads, bridges and nuisances within the community.⁸ Edward Livingston, prominent Jeffersonian, became a disciple of Bentham in the United States and an ardent advocate of codification. In 1821 the state of Louisiana commissioned him to revise and codify its criminal laws. The procedural provisions of the completed Livingston Code confined grand juries to passing upon indictments submitted to them. They could only determine whether persons had violated penal laws of the state, but would have no power to initiate presentments or express their opinions on other matters. Livingston would limit judges to a mere statement of the law when addressing the jury, ruling out all remarks of a political nature.⁹ These restrictions incorporated in the proposed Louisiana Code met the whole-hearted approval of Chancellor James Kent of New York, in spite of the fact that he disapproved of codification. The New York jurist and law professor congratulated Livingston on the section of his code which severely limited grand jury activity, stating, "I am exceedingly pleased with the provision confining grand juries to the business of the penal law and not admitting any expression of opinion on other subjects."¹⁰

While a few American legal scholars were hoping to curb the inquisitorial powers of the jury, a western court spoke out forcefully in favor of very broad powers for grand inquests. In 1829 a grand jury in St. Louis, Missouri embarked upon an investigation of gambling in the community. They summoned a great many witnesses, questioned them on a wide variety of subjects, and indicted various persons on the basis of this testimony. Several of those indicated asked the court to quash the

⁷ JEREMY BENTHAM, *THE ELEMENTS OF THE ART OF PACKING, AS APPLIED TO SPECIAL JURIES* (London, 1821), 14-28; JOHN BOWRING (ed.), *THE WORKS OF JEREMY BENTHAM* (Edinburgh, 1843), II, 139-140, 171.

⁸ *Cottu On English Law*, *NORTH AMERICAN REVIEW* (October, 1821), XIII, 347.

⁹ *THE COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE* (New York, 1873), I, 372, II, 249-250.

¹⁰ Letter from James Kent to Edward Livingston, February 17, 1826, *Two Letters of Chancellor Kent*, *AMERICAN LAW REVIEW* (April 1878), XII, 485; JOHN T. HORTON, *JAMES KENT, A STUDY IN CONSERVATISM* (New York, 1939), 171.

indictments on the grounds that the jurors had exceeded their authority by engaging in a "fishing expedition" with no particular offense in mind. The Supreme Court of Missouri, however, upheld the jurors and declared that to hold otherwise "would strip them of their greatest utility and convert them into a mere engine to be acted upon by circuit attorneys or those who might choose to use them."¹¹ Chief Justice Lemuel Shaw of Massachusetts echoed the sentiments of the Missouri court concerning the need for independent grand jury action. He told members of a Massachusetts inquest that they alone, because of the method of their selection and the temporary nature of their authority, were "beyond the reach of fear or favor, or of being overawed by power or seduced by persuasion."¹² Justice Joseph Story of the United States Supreme Court took a different position, however. In an article written in 1831 for Francis Lieber's *Encyclopaedia Americana*, he described a grand jury as acting only "at the instigation of the government." Story made no mention of jurors acting independently of the court or initiating investigations on their own.¹³

In England, criticism of the jury begun by Bentham continued to attract support and gradually bore fruit in the form of proposals to abolish the system entirely. Robert Peel was one of the first to suggest that a responsible public prosecutor should be appointed in its place.¹⁴ Suggestions that Parliament do away with the institution in England led both defenders and attackers to present their cases to the public. A citizen writing to the London *Times* under the name, "an admirer of grand juries," praised them as protectors of liberty and warned that it would take a bold man to bring a bill into Parliament to abolish them. An answering letter, signed "a Middlesex Magistrate" advocated a Parliamentary inquiry into the exorbitant expenses of grand juries. The writer expressed satisfaction that the proposals for abolition were gaining ground.¹⁵ In 1834 and again in 1836 Parliamentary resolutions to curtail their use aroused interest in English legal circles, but they were not successful.¹⁶

Agitation for abolition of the grand jury in the United States did not gain ground as rapidly as in England, but in at least one state prosecution on an information rather than on an indictment received encouragement. In Vermont, the state constitution did not specifically guarantee the right to indictment by a grand jury in all criminal cases. As a result, many lesser crimes came to trial at the instance of the public prosecutor. In 1836 the defendant in a criminal trial challenged this procedure and claimed that the state had violated the fifth amendment of the United States Constitution by prosecuting him on an information. The Supreme Court of Vermont held that the restrictions imposed by the fifth amendment applied only to the federal government and not to the states, and that the states were free to abolish the juries entirely insofar as the federal constitution was concerned.¹⁷

¹¹ *Ward vs the State*, 2 *Missouri* 120 (1829).

¹² *Chief Justice Shaw's Charge to the Grand Jury*, *THE AMERICAN JURIST* (July 1832), VIII, 216.

¹³ FRANCIS LIEBER (ed.), *ENCYCLOPAEDIA AMERICANA* (Philadelphia, 1831), VIII, 284; FRANK FRIEDEL, *Francis Lieber*, *NINETEENTH-CENTURY IDEALIST* (Baton Rouge, 1947), 69.

¹⁴ *Grand Juries*, *JURIST* (London) (June 1827), I, 190-202; PETER LAURIE, *THE USE AND ABUSE OF GRAND JURIES* (London, 1832), 5.

¹⁵ Letters to the Editor, London *TIMES*, December 23, 30, 31, 1833; September 2, 1834.

¹⁶ *Proposed Abolition of the Grand Jury*, *THE LEGAL OBSERVER* (London), (December 13, 1834), IX, 129; (April 30, 1836), XI, 492.

¹⁷ FRANCIS N. THORPE (ed.), *THE FEDERAL AND STATE CONSTITUTIONS* (Washington, 1909), VI, 3740; *State vs Keyes*, 8 *Vermont* 57 (1836).

RESTRICTING GRAND JURY POWERS

In 1837 the grand jury of Sullivan County, Tennessee initiated a sweeping investigation into illegal gambling in their community and in the course of the probe summoned a large number of persons to testify. A state law empowered the jurors to summon witnesses to investigate "illegal gaming." Among the indictments returned by the grand jury, based upon testimony of witnesses, was one for betting on an election. The Supreme Court of Tennessee quashed the indictment and warned future juries that they did not possess "general inquisitorial powers" and could call witnesses only where specifically authorized by law. The Court held that betting on elections could not be construed as "illegal gaming."¹⁸ Several years later, jurors of Maury County, Tennessee indicted a master for permitting his slave to sell liquor. The inquest learned of the incident from a witness they had summoned to testify on another matter. Again the Tennessee Supreme Court restricted the power of the jury to act independently and held that indictments had to be based upon the actual knowledge of one of the panel members.¹⁹

In Cincinnati the newly appointed federal judge, Timothy Walker, expressed the same restricted view. In 1842 he told a jury, "Your sole function is to pass upon indictments. The term presentment confers no separate authority. . . . Yet in some states advantage has been taken of a similar expression to convert a grand jury into a body of political supervisors." Walker was not a newcomer to western legal circles. He studied under Joseph Story at Harvard and went to Cincinnati in 1830. There he organized a law school, founded the *Western Law Journal* and became an ardent advocate of legal reform.²⁰

Two years after Timothy Walker read his restrictive charge in Cincinnati, the question of powers came up in Pennsylvania. In May, 1844 the convention of the Native American Association in Philadelphia ended in a series of destructive riots when Irish groups attempted to break up their meeting. The Governor called out the state militia after mobs had burned several buildings. At this point, Charles J. Jack, a member of the Native American group, addressed a letter to the grand jury then in session, protesting that the call for troops was an attempt to crush the Native Americans by military force. When he learned of the letter, Judge Anson V. Parsons of the Philadelphia Court of Quarter Sessions cited Jack for contempt and declared that it was an "indictable offense" for a private individual to communicate with a grand jury. Furthermore, Parsons announced that jurors were officers of the court under its legal direction and that only the court could convey information and instructions to them.²¹

The following year a Philadelphia grand jury informed the court that one of its members had charged Richard L. Lloyd and Benjamin E. Carpenter, members of the city Board of Health, with stealing public funds. The jurors asked the court to call witnesses and order the Board of Health to produce its books. Judge Edward

¹⁸ State vs Smith, 19 *Tennessee* 99 (1838).

¹⁹ State vs Love, 23 *Tennessee* 255 (1843).

²⁰ *Charge Delivered by T. Walker*, *WESTERN LAW JOURNAL* (May 1844), I, 337-338; *Obituary of Timothy Walker*, *THE LAW REPORTER* (April, 1856), XVIII, 708.

²¹ *Commonwealth ex rel Jack vs Crans*, 3 *PENNA LAW JOURNAL* 443 (1844).

King refused the request, stating that grand jurors could not proceed to investigate a matter unless the judge gave it to them in charge or the district attorney brought it to their attention. He told the jurors that they were free to initiate presentments only where all of the facts of the offense were known to one of their number. The policy announced by Pennsylvania courts, of severely limiting inquisitorial activities, was entirely foreign to the traditional concept of jury powers. Under the common law, juries had the authority to inquire into all violations of the law in their county and to summon before them all persons who could give them information.²²

Sentiment in favor of limiting the juries gained favor. In 1846 Congress made the summoning of federal grand juries discretionary with the presiding judge. Previously such a jury had attended every session of the federal district and circuit courts. Under the new law the federal marshal would not summon a panel unless the judge ordered him to do so.²³

Judicial rulings restricting the independence of grand juries found ready acceptance among several American legal scholars. Francis Wharton, recognized authority in the field of criminal law, noted with approval the decisions of the Tennessee and Pennsylvania courts making grand inquests mere adjuncts of the court. Wharton stated that the value of grand juries depended upon the political tendencies of the age. While they may have been important at one time as a barrier to "frivolous prosecutions" by the state, in the United States they were more useful as restraints upon "the violence of popular excitement and the malice of private prosecutors." If they were necessary at all, Wharton thought it was to serve as a means of protecting established institutions from the actions of the people. He did not see in the grand jury a means of increasing popular participation in government such as James Wilson had envisioned.²⁴

Edward Ingersoll, prominent reforming member of the Pennsylvania Bar, published an essay on grand juries in 1849 in which he condemned the institution as incompatible with the American constitutional guarantee of freedom. Ingersoll approved limitations placed upon their investigating activities because he believed that their secrecy and power to indict upon the knowledge of their own members, without additional evidence or witnesses, was "at variance with all modern English theory of judicial proceeding." He declared that inquests, if retained at all, should be limited to passing upon cases where the defendant had already had a preliminary hearing before a committing magistrate.²⁵

The same year in which Edward Ingersoll denounced the grand jury system as

²² *In the matter of the Communication of the grand jury in the case of Lloyd and Carpenter*, 5 PENNA LAW JOURNAL 55 (1845); GEORGE H. DESSON AND ISADORE H. COHEN, *The Inquisitorial Functions of Grand Juries*, YALE LAW JOURNAL (March 1932), 695.

²³ STATUTES AT LARGE OF THE UNITED STATES (1846), IX, 72; JOURNAL OF THE UNITED STATES SENATE (1845-1846), 495-496; JOURNAL OF THE HOUSE OF REPRESENTATIVES (1845-1846) 1241-1242.

²⁴ FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES (Philadelphia 1857), 227-234.

²⁵ EDWARD INGERSOLL, THE HISTORY AND LAW OF THE WRIT OF HABEAS CORPUS WITH AN ESSAY ON THE LAW OF GRAND JURIES (Philadelphia, 1849), 47; THE DICTIONARY OF AMERICAN BIOGRAPHY, IX, 467.

dangerous to freedom, the Code Commissioners of New York presented to the legislature of that state their draft of a proposed code of criminal procedure. Headed by David Dudley Field, long a proponent of legal reform and codification, the Commissioners left no doubt as to their position on the question of the grand jury. They referred to jury service as a burdensome duty and stated flatly that they would have recommended complete abolition of the institution in New York, had it not been for guarantees contained in the state constitution. The Commissioners did the next best thing, however, and advised the legislators that "limits must be placed to the extent of its powers and restraint must be placed upon their exercise." The New York legislature did not adopt the proposed criminal code, nor did it heed the advice of the commissioners to curtail their power.²⁶

EFFORTS TO ABOLISH THE GRAND JURY

While sentiment in favor of restricting the grand jury gained strength in American legal circles, in England a strong movement developed to abolish the institution entirely. By the mid-nineteenth century a large number of Englishmen shared Jeremy Bentham's views. In February, 1848 the Mayor and Aldermen of Southampton petitioned the House of Commons to do away with all grand juries. Later in the same year, jurors attending the Central Criminal Court in London recommended abolition of the institution and sent a copy of their resolution to the Secretary of State for the Home Department. In 1849 grand juries of both the Central Criminal Court and the Middlesex sessions announced their opposition to the system. Such recommendations were not altogether surprising. Many English judges were in the habit of calling attention to the uselessness of the system in their jury addresses.²⁷

W. C. Humphreys, a prominent English law reformer, stated that it was a potential menace to the country because it assisted rather than suppressed crime. In a pamphlet entitled, "Inutility of Grand Juries," Humphreys joined the crusade for their abolition.²⁸ Other members of the English bar followed suit. The committing magistrate of Old Bailey prison declared that the grand jury was the "first hope" of the criminal because it afforded "a safe medium for buying off a prosecution and is often resorted to for that purpose." Writing to the *London Times* under the name "Billa Vera," another lawyer claimed that intelligent and respectable jurors were "ashamed and disgusted" with their functions. He also revealed that the Corporation of the City of London had appointed a committee to investigate grand juries and it had uncovered evidence "decidedly hostile to the system."²⁹ Following this barrage of criticism, Lord J. Jervis, Attorney General of England, introduced a bill in Parliament to nullify the power of grand juries sitting in the metropolitan

²⁶ New York Constitution of 1846, Article VI, sec 24; *FOURTH REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADING, CODE OF CRIMINAL PROCEDURE* (1949), 37, 128.

²⁷ *JOURNAL OF THE BRITISH HOUSE OF COMMONS* (1847-1848), CIII, 265; *ACCOUNTS AND PAPERS OF THE HOUSE OF COMMONS* (1847-1848), LI, 211; (1849), XLIV, 1; *HANSARD'S DEBATES*, 3d Series, CXXXXV, 1426.

²⁸ W. C. HUMPHREYS, *Inutility of Grand Juries*, reviewed in *THE SOLICITOR'S JOURNAL AND REPORTER* (London) (April 1857), I, 326.

²⁹ *LONDON TIMES*, January 9, 1849.

police districts. Under the Attorney General's proposal, a jury could not indict a person until he had had a preliminary hearing before a police court magistrate. But despite support from English jurists and lawyers, the measure failed to pass Parliament.³⁰

Concentrated efforts in England to do away with the institution were not lost upon leaders in American legal circles. In February, 1850 the *United States Monthly Law Magazine* reported the progress of the movement in England, and commented editorially that it hoped American judges would follow the example of those in Britain and take an active stand against the institution. The editorial asked American newspapers "to keep the matter before the public until a similar bill shall be before our legislative bodies, and passed."³¹

Opposition to the grand jury moved from the courts and the pages of the law journals and textbooks to the floors of the state constitutional conventions for the first time in 1850. In that year conventions met in three states to revise existing constitutions and in each of them abolition of the grand jury became an important issue. In Michigan the Committee on the Bill of Rights reported to the convention at Lansing that it had struck out the provision guaranteeing the right to indictment by a grand jury in all criminal cases. When delegate Samuel Clark moved to restore the provision, the line of battle was drawn and a sharp debate ensued. Clark admitted that abuses may have crept into the system but he contended that these could easily be corrected. He warned that complete reliance upon public prosecutors would be "a dangerous innovation." James Sullivan, an attorney, answered Clark and maintained that no district attorney could possibly be more arbitrary or dangerous than a secret *ex parte* body which held its sessions "like the inquisition of the star chamber." He dwelt long on the average juror's complete ignorance of the law and pointed to the great expense of maintaining such a useless institution. The convention voted to strike out the grand jury guarantee, but abolitionist forces pressed for a constitutional provision specifically doing away with it. A majority of the delegates were unwilling to go to that extent, however, and left the question for the legislature to decide.³²

At Indianapolis the Indiana constitutional convention also became the scene of a struggle regarding the future of the grand jury. As in the Michigan convention, delegates were sharply divided. Some hailed it as an essential bulwark of liberty, while others denounced it as a "remnant of the barbaric past." Anti-jury forces worked for a constitutional provision doing away with the system, but the best they could get in the face of determined opposition was a clause authorizing the legislature "to continue, modify, or abolish" it at any time. Indiana became the first state to include such a provision in its constitution.³³

Opponents of the grand inquest were less successful in the Ohio constitutional convention than they had been in Michigan and Indiana. B. P. Smith, an attorney

³⁰ LONDON TIMES, April 14, 1859; HANSARD'S DEBATES, 3d Series, CXXXXV, 1426.

³¹ UNITED STATES MONTHLY LAW MAGAZINE (February 1850), I, 200.

³² REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION TO REVISE THE CONSTITUTION OF THE STATE OF MICHIGAN (Lansing, 1850), 27, 54, 84-85, 202-219.

³³ JOURNAL OF THE CONVENTION OF THE STATE OF INDIANA TO AMEND THE CONSTITUTION (Indianapolis, 1851), 28, 60, 116, 964.

from Wyandot County, proposed substituting the information for the indictment, but only a handful of anti-jury men supported him. They pointed to the arbitrary nature of grand jury powers and pictured them as an unnecessary tax burden, but all to no avail. A majority of those present favored retaining the institution, and the revised Ohio Constitution made indictment by a grand jury mandatory in all criminal prosecutions.³⁴

In Tennessee, where judicial decisions had successfully restricted inquisitorial powers, the Supreme Court in 1851 reaffirmed its policy. But not all courts saw fit to restrict grand juries. New York followed the broad rule adhered to in Missouri and allowed the juries freer rein in their inquiries. In the federal courts, however, they tended to become more and more an arm of the court. In 1856 as part of an economy measure, Congress empowered federal judges to discharge jurors when in their opinion such action would best serve the public interest.³⁵

In the following year, delegates met at Salem, Oregon to draft a constitution for statehood. David Logan, a member of the territorial bar, tossed the question of the grand jury into the lap of the convention with a resolution to replace the institution with professional prosecutors. Logan reviewed in detail the origin and history of the grand inquest and argued that conditions which had once made the institution necessary no longer existed. He urged Oregon to take the lead in getting rid of the system and predicted that it would be only a matter of time before most other states followed suit. George H. Williams, Territorial Chief Justice, came to its defense, emphasizing its peculiar suitability in a frontier area such as Oregon. He admitted that, like most newly opened areas, Oregon had more than its share of lawlessness. Many "desperadoes" had come to the territory from the gold fields of California. In view of such conditions, the Chief Justice favored a secret method of entering complaints as a means of protecting citizens from possible reprisals. He explained to the convention that many persons refused to make complaints before justices because it might cost them their property or even their lives. Former Territorial Chief Justice Matthew P. Deady also joined the fight to save the grand jury. Logan accused those judges and lawyers who defended it of holding on to outmoded legal machinery merely because they were familiar with the system, and placed them in the same class with those persons who stood against popular election of judges. Anti-jury forces failed to secure the outright abolition of the grand inquest, but they did get a constitutional provision empowering the legislature to nullify the system at any time.³⁶

White its opponents in America worked through state constitutional conventions, anti-jury forces in England kept up their pressure to get Parliament to strip inquests of all power. Attorney General Sir Frederic Thesiger introduced such a bill in 1852,

³⁴ REPORT OF THE DEBATES AND PROCEEDINGS OF THE OHIO CONSTITUTIONAL CONVENTION, 1850-1851 (Columbus, 1851), II, 328-329.

³⁵ Glenn vs the State, 31 *Tennessee* 19 (1851); *The People vs Hyler*, 2 PARKER CRIMINAL REPORTS (New York) 566 (1855); STATUTES AT LARGE OF THE UNITED STATES (1856), XI, 50; THE CONGRESSIONAL GLOBE 34 Congress, 1st and 2d session, (1856), 1671-1675, 2161, 2181.

³⁶ CHARLES H. CARY (ed.), THE OREGON CONSTITUTION AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857 (Salem, Oregon, 1926), 197, 212-215.

1854, and again in 1857. Each time he sought to convince his colleagues that the grand jury was useless in large cities in view of improved methods of police investigation. Sir Frederic pointed out that many of the jurors themselves look upon their job as a fruitless one. After the proper judicial urgings, juries in the metropolitan district of London had presented themselves year after year as "an impediment to the administration of justice." In spite of all efforts, the Attorney General could not work up sufficient enthusiasm among members of Parliament to persuade them to curtail use of the institution.³⁷ However, the question continued to provoke heated discussion in English legal circles. On December 20, 1858 T. Chambers, a solicitor, read a paper before the Juridical Society of London on the future of the grand jury. He opposed tampering with the institution and expressed a fear that, like many other modern reforms, the effect would be to "withdraw the people from the tribunals and replace them by officials." He also warned that justice should not be made to "rush through professional and official conduits," but should be passed upon by the people themselves. In the discussion following Chambers' paper, several members took vigorous exception to his position and insisted that increased efficiency would follow if "a professional inquiry" replaced the grand jury. The debate did not end that evening. As late as April, 1859 a letter to the *London Times* answered Chambers with the complaint that inquests too often encroached upon the duties of the trial jury and performed unnecessary work. Although they were unable to secure complete abolition, English opponents attained some measure of success when Parliament enacted the Vexatious Indictments Law in July, 1859. Thereafter, private citizens had to present certain cases to a police magistrate who would then determine whether the person could go before a grand jury.³⁸

In the United States anti-jury forces made their first attempt to abolish the system by legislative action in Michigan in 1859. The state constitution no longer guaranteed the right to a grand jury indictment, leaving the legislature free to act in the matter. The judiciary committee of the Michigan Assembly heartily endorsed a plan to end the use of inquests and issued a scathing report, characterizing the grand jury as "a crumbling survivor of fallen institutions . . . more akin to the star chamber." Led by Alexander W. Buell, a Detroit attorney, the committee called upon the state to discard an institution dangerous to individual liberty. They bemoaned the lack of learning of most jurors and the inability of the courts to control the direction of their investigations. The committee referred to the "wholesome" curbs which Pennsylvania courts had placed upon grand juries, but they feared that such decisions would be difficult to enforce and would not prove a satisfactory solution to the problem of lay interference. The committee's vigorous report proved effective in rallying legislative support for a bill abolishing the grand jury in Michigan. In February, 1859 the legislature provided that all crimes be prosecuted upon the information of a

³⁷ HANSARD'S DEBATES, 3d Series, (1852), CXX, 806; (1852), CXXII, 1115; (1857), CXXXV, 1425-1426; LONDON TIMES, July 12, 1854.

³⁸ T. CHAMBERS, *On the Institution of the Grand Jury*, JURIDICAL SOCIETY PAPERS (1858), II, 120, 126-127; SOLICITOR'S JOURNAL AND REPORTER (December 25, 1858), III, 135; LONDON TIMES, April 15, 1859; HANSARD'S DEBATES, 3d Series, (1859), CLII, 1046.

district attorney. Only a judge could summon a grand jury for purposes of an investigation.³⁹

Anti-jury forces in neighboring states watched with interest the success of their brethren in Michigan. In Wisconsin they drew encouragement and sought to use the example of Michigan as an opening wedge in a campaign to rid their own state of the hated institution. The *Milwaukee Sentinel* published with approval the Michigan legislative report and attacked grand juries editorially as cumbersome and expensive "instruments of private malice." Legislative action alone would not be sufficient to abolish the grand inquest in Wisconsin. The people would have to be educated to oppose the system, because they would have to approve any constitutional amendment.⁴⁰

While its opponents in Wisconsin awaited the next session of the legislature to propose a constitutional amendment, the fourth constitutional convention for the Territory of Kansas met at Wyandotte in the summer of 1859. Three previous constitutions drawn up at Topeka, Lecompton and Leavenworth had each included a provision guaranteeing the right to indictment by a grand jury in all "capital or otherwise infamous crimes." The Wyandotte convention adopted the Ohio constitution as its model, but the Committee on the Bill of Rights omitted the article referring to the grand jury and gave no reason for its action. In a territory deeply engrossed in the slavery controversy, this blow at popular government went unchallenged. Five years later it was comparatively easy to put a bill through the Kansas legislature providing that grand juries were not to be called unless specially summoned by a judge.⁴¹

When the Wisconsin legislature convened in 1860, Senator Robert Hotchkiss proposed and the Senate adopted a resolution asking the Judiciary Committee to investigate the expediency of abolishing the system. Madison and Milwaukee newspapers hailed this as "a good omen of reform." The Madison *Evening Patriot* urged immediate abolition and sounded the rallying cry, "Down with the old rotten fabric." The Senate Committee reported favorably on a constitutional amendment. When the resolution reached the floor for debate several senators questioned the power of states to tamper with the grand jury in view of the fifth amendment to the United States Constitution. Only a series of anonymous letters appearing in the *Milwaukee Sentinel* came to the defense. The writer, who signed himself "Invariable," predicted that "gross injustice and oppression on the one hand and bribery on the other" would inevitably follow if prosecution was left at the mercy of one man. The Wisconsin Senate passed the resolution calling for a constitutional amendment, but its action went for nothing when the Assembly buried the resolution in committee.⁴²

³⁹ *Report of the Judiciary Committee of the House of Representatives on recommending the passage of the bill to provide for the trial of offenses upon information, Michigan House Document No. 4 (1859); MICHIGAN HOUSE JOURNAL (1859), 237; Michigan Senate Journal (1859), 567; LAWS OF MICHIGAN (1859), No. 138, sec. 1, 7.*

⁴⁰ *MILWAUKEE SENTINEL*, February 1, 12, 1859.

⁴¹ *ARIEL E. DRAPIER, PROCEEDINGS AND DEBATES OF THE KANSAS CONSTITUTIONAL CONVENTION (Wyandot, Kansas, 1859), 68, 288, 676-678; LAWS OF KANSAS (1864), Ch. 64, sec. 1, 7.*

⁴² *MADISON (Wisconsin) EVENING PATRIOT*, January 17, 1860; *MILWAUKEE SENTINEL*, February 1, 12, 1859; November 30, 1859; January 19, 30, February 17, 1860; *MONROE, WISCONSIN STATES*

In Canada, the Upper Canada Law Journal, representing the sentiments of the Toronto Bar, took notice of the movement in England and the United States. The Canadian *Journal* reprinted English attacks upon the grand jury and went on record for abolition of an institution "which affords great facilities for gratifying private malice." This opinion received legislative approval in 1860 when the Canadian Legislative Council passed a bill to end the use of inquests in the Recorders' Courts of Upper Canada.⁴³

In July, 1864 foes of the inquest made a concerted effort to end its use in Nevada. The convention framing a constitution for statehood became the scene of a bitter dispute, but jury protagonists finally convinced the delegates that a popular tribunal was better fitted than a public prosecutor to handle the problems of law enforcement on the frontier. Nevada came into the Union in 1864 under a constitution which guaranteed the right to indictment by a grand jury.⁴⁴

In 1864 while Americans were engaged in a cruel Civil War, John N. Pomeroy, Professor of Law at New York University, applauded the fact that the grand jury remained in the United States as "an insuperable barrier against official oppression." Its value had become more apparent in the light of arbitrary arrests and military government of wartime. Pomeroy stated with satisfaction that "the innovating hand of reform has not as yet touched the long-established proceedings in criminal actions . . . the grand jury (is) carefully preserved by our national and state constitutions."⁴⁵ However, the professor's conclusions were more hopeful than realistic. Agitation had already begun in some states to follow the lead of Michigan and abandon use of the institution, while in Illinois, Indiana, Oregon and Kansas the legislatures were free of all constitutional restrictions in the matter. In Pennsylvania and Tennessee judicial decisions had seriously curtailed the initiative of grand juries. American legal scholars had long ago joined the crusade, many of them insistent that they had survived all possible usefulness. Abroad in England and Canada, the two other principal common law countries, they were under heavy attack.

Part Two

1865-1917

In the decade following the Civil War, efforts to abolish use of the grand jury in the United States assumed almost epidemic proportions. The rash of post-war conventions to frame and revise state constitutions gave opponents of the institution an opportunity to be heard. Legal and governmental theorists, speaking in the name of progress, had long inveighed against the grand jury as a relic of the barbaric past; too inefficient and time-consuming for an enlightened age. They conceded that inquests may at one time have been necessary safeguards against royal despotism,⁴⁶

RIGHTS, April 20, 1859; WISCONSIN SENATE JOURNAL (1860), 43, 71, 277; WISCONSIN HOUSE JOURNAL (1860), 407; Madison, WISCONSIN STATE JOURNAL, January 16, February 15, 17, 18, 1860.

⁴³ UPPER CANADA LAW JOURNAL (March 1859), V, 21-52; (December 1860), VI, 274-275; JOURNALS OF THE LEGISLATIVE ASSEMBLY OF CANADA (1860), 77, 82, 415.

⁴⁴ OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF NEVADA 1864 (San Francisco, 1866), 24, 60, 196-198.

⁴⁵ JOHN N. POMEROY, AN INTRODUCTION TO CRIMINAL LAW (New York, 1864), 126.

⁴⁶ ELLIOT ANTHONY, *Origins of Grand Juries*, CHICAGO LEGAL NEWS (October 17, 1868), I, 20-21.

but the need for such protection no longer existed in the United States. A few individuals cautioned that a free government might require even more checks than a despotism, but progress seemed to be the enemy of the grand inquest and many states abandoned the system in its name.

In Wisconsin opponents resumed their pre-war campaign to abolish the institution. They pointed to the speed and ease with which prosecutors accused offenders in Michigan where the grand inquest was dead. In contrast they pictured Wisconsin juries as "secret conclaves of criminal accusers, repugnant to the American system."⁴⁷ Assemblyman A. J. Turner introduced a resolution in January, 1869 to amend the state constitution to rid the state of grand juries. Although a majority of the Judiciary Committee favored delay in the matter, a minority group issued a vigorous report denouncing the system and brushed aside all opposition. In the Senate as in the Assembly, anti-jury forces painted a black picture of the institution and took advantage of their superior unity of purpose to gain the support of doubtful senators. Defenders advised caution but the spirit of advancement and reform swept away their objections. Governor Lucius Fairchild approved the joint resolution when it passed both houses of the legislature in 1869⁴⁸ and again in 1870.⁴⁹ The question then became one for the people of Wisconsin to decide. Apathy and indifference marked the campaign which followed as interest in state and local candidates overshadowed the proposed amendment. A few Democratic newspapers conducted editorial campaigns against abolition of the grand jury, charging that it was a Republican measure, but they made little headway. The *Grant County Herald* announced that a Republican scheme to get control of criminal prosecutions lay behind the amendment. The *Milwaukee News* warned that killing the grand jury was "another step onward in the concentration of power," a process which the recent war had hastened. It cautioned against destroying a popular institution which might be necessary to oppose tyranny of the federal government.⁵⁰ In answer to such attacks, proponents of the amendment assumed the pose of reformers, struggling to rid the state of "an expensive, unjust system."⁵¹ In the referendum on November 7, 1870 the people of Wisconsin voted overwhelmingly for reform and the grand jury ceased to exist in the state except when specially summoned by a judge.⁵²

While opponents of the grand jury in Wisconsin were struggling to rid their state

⁴⁷ MILWAUKEE SENTINEL, May 3, 1867; January 23, February 17, 1868; WISCONSIN STATE JOURNAL, January 22, 1868; JANESVILLE (Wisconsin) GAZETTE, February 19, 1868.

⁴⁸ WISCONSIN ASSEMBLY JOURNAL (1869), 39, 400-440, 565, 944; WISCONSIN SENATE JOURNAL (1869), 526, 600; WISCONSIN STATE JOURNAL, February 19, 25, March 5, 1869; MILWAUKEE SENTINEL, March 1, 1869; GENERAL LAWS OF WISCONSIN (1869), Joint resolution no. 7, p. 270; Letter from E. Steele to Governor Lucius Fairchild, November 28, 1868, FAIRCHILD MSS, Wisconsin State Historical Society.

⁴⁹ WISCONSIN ASSEMBLY JOURNAL (1870), 535; WISCONSIN SENATE JOURNAL (1870), 67; GENERAL LAWS OF WISCONSIN (1870), Ch. 118.

⁵⁰ LANCASTER, Wisconsin GRANT COUNTY HERALD, October 25, 1870; MILWAUKEE NEWS, October 30, 1870; November 5, 1870; MILWAUKEE SENTINEL, November 17, 1870.

⁵¹ WISCONSIN STATE JOURNAL, October 17, 1870; OSHKOSH (Wisconsin) CITY TIMES, November 2, 1870.

⁵² MILWAUKEE SENTINEL, January 9, 1871; *Wisconsin Constitution of 1849, Article I, sec. 8, as amended.*

of the hated institution, their compatriots in Illinois won a partial triumph. They succeeded in getting the constitutional convention in Springfield in 1870 to give the legislature the power to abolish the system. Such a procedure avoided any direct referendum on the matter.⁵³ Shortly after adoption of the new constitution, a special legislative committee urged the legislators to exercise their new authority and eliminate "so thoroughly despotic and subversive" an institution. Petitions approved the committee's advice, but the legislature failed to act on the proposal.⁵⁴

In England the year 1872 saw partial success crown the thirty year struggle to eliminate the grand jury. Parliament provided that grand juries would no longer be used in the London metropolitan district except when summoned by a magistrate.⁵⁵

There followed in the United States a series of constitutional conventions in which the question of retaining the grand jury system became an important issue. Delegates assembled at Charleston, West Virginia in 1872 refused to be swayed by talk of progress and voted down proposals to turn all criminal prosecution over to public officials.⁵⁶ Advocates of reform were more successful in the Ohio constitutional convention, where they deleted the guarantee of a grand jury indictment in all criminal cases. Ohio retained the institution, however, when the people refused to approve the new constitution.⁵⁷ In Missouri, in contrast to most states, grand juries actually strengthened their authority, with a direct constitutional mandate to investigate all officials having charge of public funds at least once a year.⁵⁸ Anti-jury forces fared better in the western conventions. The Nebraska constitution of 1857 allowed the legislature to "abolish, limit, change or amend" the grand jury system. Ten years later the legislators exercised this power and inquests became extinct in another state.⁵⁹ In 1876 Colorado followed the lead of Nebraska and put the matter up to the legislature which abolished grand juries shortly after.⁶⁰ The California constitution of 1879 allowed prosecution of criminal offenses upon the information of a prosecutor, but it also stipulated that grand juries be called in each county at least once a year.⁶¹ Western areas were more receptive to proposals to streamline their judicial machinery. In the South, the Radicals made no attempt to eliminate grand juries in the

⁵³ DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF ILLINOIS, 1869-1870 (Springfield, 1870), 176, 202, 1569-1573; Illinois Constitution of 1870, Article II, sec. 8.

⁵⁴ *Reports of the Special Committee on the Grand Jury System, Reports to the General Assembly of Illinois* (1873), IV; JOURNAL OF THE SENATE OF ILLINOIS (1873), 300.

⁵⁵ 35 & 36 VICTORIA c. 52 (August 6, 1872).

⁵⁶ JOURNAL OF THE CONSTITUTIONAL CONVENTION ASSEMBLED AT CHARLESTON, WEST VIRGINIA (Charleston, 1872), 37, 58.

⁵⁷ PROCEEDINGS AND DEBATES OF THE THIRD CONSTITUTIONAL CONVENTION OF OHIO (Cleveland, 1873-1874), I, 113, 191; II, 1737.

⁵⁸ DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875 (Columbia, 1930-1945), I, 264-265; MISSOURI CONSTITUTION OF 1875, Article II, sec. 12; Article XIV, sec. 10.

⁵⁹ FRANCIS N. THORPE (ed.), *The Federal and State Constitutions* (Washington, 1909); IV, 2362, Nebraska Constitution of 1875, Article I, sec. 10; LAWS OF NEBRASKA (1885), Ch. 108, sec. 1.

⁶⁰ PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION FOR THE STATE OF COLORADO (Denver, 1907), 115, 198-200; Colorado Constitution of 1876, Article II, sec. 8, 23; LAWS OF COLORADO (1883), 160-161.

⁶¹ *Debates and Proceedings of the Constitutional Convention of the States of California* (Sacramento, 1880), 81, 150-151, 308-315; STATUTES OF CALIFORNIA (1881), sec. 9, p. 71.

constitutions which they drafted. When the Southern Bourbons came to write new constitutions they did not even consider eliminating an institution which had proved so useful in the Reconstruction period in opposing an unfriendly central government.

JUDICIAL RESTRICTIONS

Paced by the twin slogans of economy and efficiency, enemies of the grand jury had successfully ended its use in many states and curtailed it in others. However, the constitutional convention and the legislature were not the only means used to attack the system. Some judges were able to make serious inroads on grand jury powers to initiate and conduct investigations independently of the court. In Tennessee the supreme court reinforced its position that inquests could summon witnesses only where specifically authorized by a specific law. Pennsylvania courts reaffirmed the very restrictive rule which limited juries to an investigation of matters known to one of its members or suggested to them by the judge or the prosecutor. Individual citizens were not free to go before a grand jury nor could jurors summon witnesses whom they believed could assist them in their inquiries. Any attempt by a private individual to circumvent this ruling could be punished as contempt of court.⁶²

In the federal courts, as in most states, grand juries had always been free to subpoena any and all witnesses upon their own initiative. Chief Justice Salmon P. Chase urged jurors, convening in West Virginia in August, 1868, to call before them and examine fully government officials or any other persons who possessed information useful to them. He warned them, "You must not be satisfied with acting upon such cases as may be brought before you by the district attorney or by members of your body."⁶³ In view of Chief Justice Chase's statement of the broad rule prevailing in the federal courts, it was indeed a strange doctrine which Justice Stephen Field announced in August, 1872. Justice Field was the brother of the well-known legal reformer and codifier, David Dudley Field, who had tried his best to eliminate use of the grand jury in New York. Justice Field told a federal jury at San Francisco, California that it should limit its investigations to such matters as fell within their personal knowledge or were called to their attention by the court or the prosecuting attorney. He warned them in particular against delving into political matters unless instructed to do so. If neither the judge nor the prosecutor placed a matter before them, Justice Field observed, "it may be safely inferred that public justice will not suffer if the matter is not considered by you." He reminded the jurors that the type of government which existed in the United States did not require the existence of a grand jury as a protection against oppressive action by the government. The restrictive charge of Justice Field excluded private persons from the grand jury room and curtailed the freedom of action of jurors. It represented an effort to subordinate the grand jury to the wishes of the judge and prosecutor. As such, it contradicted accepted practice in the federal and English courts, as well as a great majority of the state courts.⁶⁴

⁶² *Harrison vs State*, 44, *Tennessee* 195 (1867); E. H. STOWE, *Charge to the Grand Jury*, PITTSBURGH REPORTS, III, 174 (1869); *McCullough vs Commonwealth*, 67 PENNA STATE REPORTS 30.

⁶³ Grand jury charge delivered by Chief Justice Chase, 30 FED CAS 980 (1868).

⁶⁴ Grand jury charge delivered by Justice Field, 30 FED CAS 993 (1872); SEYMOUR D. THOMPSON and EDWIN G. MERRIAM, *A TREATISE ON THE ORGANIZATION, CUSTODY AND CONDUCT OF JURIES, INCLUDING GRAND JURIES* (St. Louis, 1872), 668-672.

Not all American jurists desired to narrow the scope of grand jury activity, however. In Silver City, Idaho Territory, Judge H. E. Prickett solicited jurors to investigate all official misconduct and neglect of duty. He told members of the jury that they possessed full authority to call and examine all governmental officials or any other person in the community.⁶⁵ Federal District Judge Walter Q. Gresham told jurymen at Indianapolis in 1878 that attempts to protect persons for political reasons should not prevent them from making a full investigation of a matter, but instead should inspire them with additional determination to bring the person to justice.⁶⁶ Although Field's voice was only one among many, the doctrines which he enunciated found favor with legal scholars and members of the bar who had long advocated placing the grand jury more completely under the control of the court. Francis Wharton, authority on criminal law, who had often advocated such a course, magnified the importance of Field's statements and attached great weight to them. In spite of the fact that Field stood completely alone in his statement of the "new" federal rule, Wharton wrote in 1889, "This is the view which may now be considered as accepted in the United States courts and in most of the several states." As proof of the latter, he cited Pennsylvania and Tennessee decisions, the only states having such a rule. In drawing his conclusion, Wharton accepted as the majority viewpoint a position which coincided closely with his desire to reduce the grand jury to a position of subservience.⁶⁷

In 1881 New York state finally adopted the Code of Criminal Procedure prepared by David Dudley Field in 1849. However, to the great disappointment of those who had assisted in its preparation, the legislature dropped the requirement that a preliminary hearing before a judge was necessary before a grand jury could return an indictment. Not only did the New York legislators see fit to leave the grand jury unfettered, but they included a provision requiring all inquests to make particular inquiry into official corruption and misconduct.⁶⁸

In the West, however, anti-jury forces continued to win victories. In a special referendum held in Iowa in November, 1884 the people voted to amend the state constitution to give the legislature authority to abolish grand juries completely.⁶⁹ For many years, persons advocating that states abandon the indictment in criminal proceedings had felt plagued by those who pointed to the fifth amendment of the United States Constitution as standing in the way. Although state and federal courts had frequently stated that the guarantee of the right to an indictment in the fifth amendment applied only to the federal government, the matter invariably came up for debate at constitutional conventions. With the adoption of the fourteenth amendment, there were those who insisted that the phrase "due process of law" included the right to indictment by a grand jury. As early as 1872 the Wisconsin Supreme Court decided that the fourteenth amendment did not prevent states from ceasing to use the indictment, but the question remained a point of controversy

⁶⁵ SILVER CITY AVALANCHE (Idaho Territory), May 12, 1877.

⁶⁶ *In re Miller*, 17 *Fed Cas* 295 (1878).

⁶⁷ FRANCIS WHARTON, *CRIMINAL PRACTICE AND PLEADING* (Philadelphia, 1889), 227-235.

⁶⁸ *FOURTH REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADING* (1849), xxxiv; *NEW YORK CODE OF CRIMINAL PROCEDURE* (1881), Ch. 2, sec. 260-261.

⁶⁹ THORPE, *FEDERAL AND STATE CONSTITUTIONS*, II, 1157, Amendment to Article I, sec. 11, Iowa constitution.

until the United States Supreme Court settled it in 1884. The test case arose in California when Joseph A. Hurtado challenged his murder conviction on the ground that he had come to trial on an information rather than a grand jury indictment. The high court gave the judicial green light to states which desired to get rid of the grand inquest. Citing the Wisconsin decision with approval, the justices announced that "due process of law" included any system of prosecution which preserved liberty and justice and was not limited to indictment by a grand jury. Justice John M. Harlan's vigorous dissent stated the case for those who believed that indictment by a jury of his neighbors was the right of every American citizen.⁷⁰

CRITICISM OF THE GRAND JURY SYSTEM

Criticism of the grand jury in legal circles continued to grow in the United States in the 1880's. Seymour D. Thompson and Edwin G. Merriam in their *Treatise on the Organization, Custody and Conduct of Juries* came out against the system and stated that the praise deserved by a few juries had been "quite undeservedly accorded to the institution itself."⁷¹ In 1886 Eugene Stevenson, a New Jersey public prosecutor, condemned the grand jury as an arbitrary, irresponsible, and dangerous part of government which long ago should have come "within the range of official responsibility." He much preferred the efficiency and decisiveness of a public prosecutor, observing, "It is difficult to see why a town meeting of laymen, utterly ignorant both of law and the rules of evidence should be an appropriate tribunal. The summoning of a new body of jurors at each term insures an unflinching supply of ignorance." As a parting blow, Stevenson declared that no sane statesman or legislator "would ever dream of creating such a tribunal" if it did not already exist.⁷²

Later in the same year members of the American Bar Association heard David Dudley Field reiterate the demand for the efficiency of the expert in judicial proceedings. Field pointed out that the best civilization was the result of division of labor, where each person became an expert in his own specialty. The jury system, Field observed, ignored the benefits to be derived from specialization, largely because of "superstitious veneration."⁷³ Demands that an expert replace a tribunal composed of representative citizens may have had some basis on the ground of efficiency, but it also reflected a fear of democracy on the part of many who advocated the change. Most authors hid their distrust of the people behind charges of "star chamber" and "secret inquisition" leveled at grand juries. Professor Francis Wharton, however, made little effort to hide his apprehension regarding grand juries. Writing in 1889, he observed that their value shifted with the political tendencies of the age. At a time when excessive authority threatened, "then a grand jury, irresponsible as it is, and springing from the people, is an important safeguard of liberty." However, Wharton emphasized that when "public order and the settled

⁷⁰ Rowan vs State, 30 Wisconsin 129 (1872); Hurtado vs California, L10 U.S. 516 (1884).

⁷¹ THOMPSON AND MERRIAM, 569.

⁷² EUGENE STEVENSON, *Our Grand Jury System*, THE CRIM LAW MAGAZINE (December 1886), 713-714, 719; EDWARD Q. KEASBEY, *THE COURTS AND LAWYERS OF NEW JERSEY* (New York, 1912), III, 95.

⁷³ TITUS M. COON (ed.), *SPEECHES, ARGUMENTS AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD* (New York, 1890), III, 208-211.

institutions of the land are in danger from momentary popular excitement, then a grand jury, irresponsible and secret, partaking without check of the popular impulse, may through its inquisitorial powers become an engine of great mischief to liberty as well as to order."⁷⁴ But not all legal scholars and jurists saw inquests as a potential threat to the ruling group in government and society. Justice Samuel F. Miller, sitting on the United States Supreme Court, challenged the argument that inquests were of value only when there was danger of oppression at the hands of a despotic monarch. He emphasized their importance in protecting citizens from charges brought by irresponsible and arbitrary prosecutors.⁷⁵

ABOLISHING GRAND JURIES IN WESTERN STATES

The year 1889 witnessed the admission of the six "Omnibus" states into the Union. Opponents of the grand jury emerged completely victorious from the constitutional conventions which prepared them for statehood. Idaho, Montana and Washington abolished the grand inquest completely except for special occasions, while North Dakota, South Dakota and Wyoming left the question up to their legislatures. In the Idaho convention the expense of the juries, particularly in thinly settled areas, provided a potent argument in winning delegates to the cause of abolition. Anti-jury leaders claimed that the average indictment cost the people \$600 to \$1,000 and they predicted savings amounting to thousands of dollars each year if inquests ceased to exist. There was no lack of defenders, however, who warned against handling politicians the power of accusation and stressed the need of a people's body to investigate local officials. In spite of their efforts, the proponents of efficiency and economy prevailed in Idaho.⁷⁶ Delegates attending the Montana convention at Helena in the heat of July, 1889 faced the same decision. Rallying around the slogan, "Let Montana cut the thread that binds us to the barbarous past," advocates of abolition posed as reformers and attacked the grand inquest as an outmoded and even dangerous institution. They cited Wisconsin as a model to pattern after. Defenders of the jury opposed hasty action as a step in the direction of centralization, by removing one of the important barriers "which serves to protect the rights of the citizen against the government." Despite such protests, a majority of the Montana delegates favored eliminating the grand jury in their state.⁷⁷ It met the same fate on the floor of the Washington constitutional convention. In the three other new states, the stories were similar. Promises of economy and lower taxes prevailed against warnings not to kill a democratic institution. Legislatures in North Dakota, South Dakota and Wyoming did not hesitate to exercise their prerogative, and grand juries ceased to exist within their borders.⁷⁸

⁷⁴ WHARTON, 227.

⁷⁵ *Ex Parte Bain*, 121 U.S. 1 (1886).

⁷⁶ PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO (Caldwell, Idaho, 1912), 260-270, 2050.

⁷⁷ PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF MONTANA (Helena, Montana, 1921), 100-105, 112-114, 251.

⁷⁸ THORPE, VII, 3975, Washington Constitution of 1889, Article I, sec. 25, 26; PROCEEDINGS AND DEBATES OF THE FIRST CONSTITUTIONAL CONVENTION OF NORTH DAKOTA (Bismarck, 1889), 364-365; SOUTH DAKOTA CONSTITUTIONAL DEBATES (Huron, South Dakota, 1907), II, 11, 131; JOURNAL

It became increasingly clear to Americans who wished to curb or eliminate the grand jury that getting rid of the institution by law or constitutional amendment offered the best chance of success. In spite of Wharton's efforts, state and federal courts were reluctant to adopt Stephen Field's new restrictive doctrine. In March, 1891 the Supreme Court of Maryland ruled that grand juries could initiate any type of prosecution, regardless of how the case came to their attention. To deny it such powers, the Maryland court insisted, would make juries useless and mere tools of the court and prosecutor. Justice David Brewer spoke the mind of the United States Supreme Court when he announced that accepted practice in America allowed grand juries to investigate any alleged crimes "no matter how or by whom suggested to them."⁷⁹

ATTACKS UPON THE GRAND JURY

Concentrating their efforts on eliminating the grand jury entirely, members of the bar emphasized the danger of lay interference in judicial matters and called for efficiency in administering justice.⁸⁰ Speaking before the annual convention of the Ohio State Bar Association in July, 1892 Justice Henry B. Brown of the United States Supreme Court proposed eliminating the grand inquest as a means of simplifying criminal procedure. He saw in public prosecutors a far more efficient means of bringing offenders to trial.⁸¹ O'Brien J. Atkinson, Michigan attorney, told members of the Michigan State Bar Association that he could not conceive of any condition where a grand jury would be desirable "or where its secret methods would not be productive of evil." He warned those states which had not followed Michigan's lead in abolishing the institution, that an accusing body with power to pry into public and private affairs in a secret manner could become a grave threat to liberty in America.⁸²

In January, 1896 the Territorial Bar Association of Utah met in convention at Salt Lake City. Territorial leaders were preparing themselves for another try at statehood and the forthcoming constitutional convention was uppermost in their minds. In his presidential address, J. G. Sutherland recommended that grand juries be eliminated after statehood, to be replaced by special prosecutors. Sutherland denounced inquests as useless, oppressive, and expensive and proclaimed that social and political changes in the United States had made them "undesirable as well as unnecessary."⁸³ The President of the Utah Bar Association got his wish a month

AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF WYOMING (Cheyenne, 1893), 716, 726; LAWS OF NORTH DAKOTA (1890), Ch. 71, sec. 1, 9; LAWS OF WYOMING (1890), Ch. 59, Sec. 1, 14; LAWS OF SOUTH DAKOTA (1895), Ch. 64, sec. 1, 9.

⁷⁹ *Blaney vs State*, 74 *Maryland* 153 (1891); *Frisbie vs United States*, 157 *U.S.* 160 (1894).

⁸⁰ *Grand Juries*, *THE LAW TIMES* (July 18, 1891), LXXXXI, 205.

⁸¹ *Address by Justice Brown*, *PROCEEDINGS OF THE OHIO STATE BAR ASSOCIATION* (July 1892), XIII, 42-43.

⁸² *Address of O'Brien J. Atkinson to the Michigan State Bar Association*, *MICH. L. JOUR.* (September 1894), III, 259, 260, 266.

⁸³ *REPORT OF THE SECOND ANNUAL MEETING OF THE TERRITORIAL BAR ASSOCIATION OF UTAH* (1895), 12-14.

later when the Utah constitutional convention adopted his proposal and abolished all grand juries except when summoned by a judge.⁸⁴

Opponents of the grand jury in all sections of the United States maintained their pressure to turn criminal prosecution over to experts. In 1897 C. E. Chipfield told members of the State's Attorneys Association of Illinois that the average grand juror possessed few of the qualifications essential to their duties. Lack of legal training, he contended, led jurors to "wander through time and eternity in a curious way," often allowing hard luck stories to influence their deliberations. Chipfield called for an end to the institution, and he implored, "In the name of progress which is inevitable, I invoke . . . the abolition of that relic of antiquity, the twin sister of the inquisition, the grand jury in Illinois."⁸⁵ Charles P. Hogan used the same line of attack when he took the opportunity of his presidential address to urge members of the Vermont Bar Association to oppose the grand inquest. Characterizing it as "a cumbersome and expensive piece of legal machinery," he announced that there was no reason why it should continue to exist "in this enlightened and progressive age." Hogan suggested discarding the grand jury as the English had discarded the ordeal and trial by fire.⁸⁶

Vigorous and frequently vituperative attacks launched by legal leaders in the name of progress and reform helped discredit the grand jury in the eyes of the American people. Constant comparison with the inquisition and the star chamber aimed to pave the way for abandoning the institution. Reformers had their way in Oregon where in 1899 the legislature exercised the privilege given it in the state constitution and substituted the information for the indictment in criminal proceedings.⁸⁷ The following year citizens of Missouri approved overwhelmingly⁸⁸ amendments relinquishing grand jury duties to district attorneys. In California, however, where grand juries in San Francisco had gained a reputation as enemies of municipal corruption, in November, 1902 the people rejected a proposed constitutional amendment to end use of grand inquests entirely.⁸⁹ In November, 1904 residents of Minnesota approved abolishing the system in their state. The referendum on the constitutional change evoked very little discussion and went almost completely unnoticed in the excitement of a presidential election year.⁹⁰

At a time when public confidence in the grand jury was wavering under the barrage of abuse and the cries for reform, there were few persons who saw the institution as a potent instrument of the people. Judge Harman Yerkes of Pennsylvania,

⁸⁴ PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION FOR THE STATE OF UTAH (Salt Lake City, 1898), 313.

⁸⁵ C. E. CHIPFIELD, *The Abolition of the Grand Jury*, THE AMER. LAWYER (October 1897), V, 488-490.

⁸⁶ CHARLES P. HOGAN, *The Grand Jury System*, Reports of the Vermont Bar Association (1898), V, 85-99.

⁸⁷ LAWS OF OREGON (1889), sec. 1, 100, p. 99-100.

⁸⁸ WALTER F. DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS (Baltimore, 1910), 322, Amendment to the Missouri Constitution.

⁸⁹ DODD, 297, AMENDMENT TO THE CALIFORNIA CONSTITUTION.

⁹⁰ DODD, 320, *Amendment to the Minnesota Constitution*; MINN. JOUR., October 28, 1904.

however, retained the belief that grand juries could provide a means of extending democratic control of government. In September, 1901 he told jurors of Bucks County that bodies such as theirs, representing the people of the community, were not outmoded or useless. In times of great public peril or in the event of deep-seated abuses, Judge Yerkes observed, "the divided yet powerful and also combined responsibility of the secret session of the grand jury . . . has worked out great problems of reform and correction." He pointed out that abolition of the grand inquest would leave the accused citizen completely at the mercy of "an unjust or unwise judge or district attorney," or subject to contrivances of an unscrupulous prosecutor. Judge Yerkes dispelled the often repeated idea that because the United States was not ruled by a tyrannical king, grand juries had ceased to be necessary as guardians of individual liberty. He explained that tyrants even more irresponsible than the despots of old sought to dominate local, state and national governments. Giant business monopolies restless of legal restraints and party bosses who did not hesitate to break judges and create courts took the place of tyrannical monarchs as a danger to freedom in the United States. Against such ruthless forces Judge Yerkes saw grand juries as powerful agencies of the people, challenging business or boss domination of government. At a time when many legal scholars advised abandoning the grand inquest as an archaic relic of the past, the Pennsylvania judge saw what they had failed to see, that there were enemies of freedom in America which demanded the watchful eye of the grand jury if the American people were to control their government.⁹¹

In 1904 a Philadelphia grand jury challenged the sixty year old Pennsylvania rule that it could not initiate investigations unless the judge or the district attorney had given their approval. Members of the jury told Judge William W. Wiltbank they had evidence that certain constables in Philadelphia were using their official position to extort money from newly arrived immigrants. To obtain additional information they asked the judge to summon witnesses in the matter. He not only upheld the Pennsylvania rule and denied their request, but in doing so stated that victims of the extortion racket could not even go before the grand jury and tell their stories unless the court or the prosecutor saw fit to ask for an investigation.⁹² Pennsylvania remained in the minority on the question, however, as federal and most state courts continued to follow the common law rule which endowed grand juries with broad powers to begin investigations.⁹³

Annual meetings of bar associations in the various states continued to serve as excellent platforms from which to enlist support against the grand jury system. In July, 1905 the Committee on Law Reform of the Iowa Bar Association recommended and the association adopted a resolution calling for prosecution upon information. Judge M. J. Wade of Iowa City sought to ridicule members who did not fall into line when he stated tartly, "There are some persons in this world who are wedded to antiquity, revel in cobwebs, and they simply worship whiskers." Judge Wade tempted his colleagues, saying, "Let us do away with a few things and maintain the

⁹¹ *Charge to the Grand Jury of Bucks County, Pennsylvania*, PENNSYLVANIA COUNTY REPORTS (1901), XXIV, 164-165.

⁹² *In re alleged Extortion Cases*, 13 DISTRICT REPORTS OF PENNA 180 (1904).

⁹³ *People ex rel Livingston vs Wyatt*, 186 *New York* 383 (1906), *Hale vs Henkel*, 201 *U.S.* 43 (1905).

law for the benefit of the lawyers who are to convict guilty men."⁹⁴ Justice Brown of the United States Supreme Court reiterated his dissatisfaction with the grand jury system in an address to the American Bar Association in 1905. In January, 1906 George Lawyer, Albany attorney, challenged members of the New York State Bar Association to rid their state of grand juries. To continue to countenance such an institution, he warned, was to concede that under a republican form of government the liberties of the individual were in danger just as they had been under a despotism of the dark ages. Lawyer denounced the "arbitrary power" which inquests exercised to inquire into and criticize the acts of public officials. He insisted that under the American form of government the people "require no shield to protect them from the state's aggressions."⁹⁵

Opponents of the grand jury system did not have their way entirely. They suffered occasional reverses in their effort to drive the institution from the American legal system. Delegates who met at Guthrie, Oklahoma in 1906 to frame a constitution for statehood agreed to abolish regular sessions of the grand inquest, but they did not wish to leave the question of summoning a jury entirely up to the local judges. The Oklahomans did what no other Americans had ever done. They provided that the people could call a grand jury when they thought it was necessary. The signatures of one hundred resident taxpayers in a county were sufficient to launch an investigation.⁹⁶ In January, 1908 William S. U'Ren, Charles H. Cary, and other Progressive leaders advocated a return to the grand jury system in Oregon as a part of their program to increase popular control of the government. They made use of the initiative petition to bring the question of a constitutional amendment before the people of Oregon. The referendum evoked little debate. Opponents of the amendment accused grand juries of being responsible for long delays in justice, while Progressive leaders replied with the charge that the information system enabled district attorneys to use criminal prosecutions for political purposes. On June 1, 1908 after nine years without them, residents of Oregon voted two to one to restore the grand jury in their state.⁹⁷ In New Mexico as well as in Oregon, the people expressed themselves in favor of retaining control over criminal prosecutions. At public hearings conducted by the Committee on the Bill of Rights of the Constitutional Convention in 1910, popular opinion overwhelmingly favored keeping the grand jury. As a result, New Mexico became one of the few western states to summon inquests regularly to attend its courts.⁹⁸ In Arizona a different story unfolded. Even as a territory it had abandoned the grand jury. The Constitutional Convention did not consult the wishes of the people, but voted to continue the practice of substituting an expert prosecutor for a body of representative citizens.⁹⁹

⁹⁴ PROCEEDINGS OF THE IOWA STATE BAR ASSOCIATION (1905), XI, 58, 141.

⁹⁵ GEORGE LAWYER, *Should the Grand Jury System be Abolished?* REPORT OF THE NEW YORK STATE BAR ASSOCIATION (January 1906), XXIX, 29-43.

⁹⁶ THORPE, VII, 4274, *Oklahoma Constitution*, Article II, sec. 17.

⁹⁷ PORTLAND OREGONIAN, May 26, 1908; CHARLES H. CARY (ed.), *The Oregon Constitution and Debates of the Constitutional Convention* (Salem, Oregon, 1926), 444; ALLEN H. EATON, *The Oregon System* (Chicago, 1912), 70, 166.

⁹⁸ PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF NEW MEXICO (Albuquerque, 1910), 82-85, 197.

⁹⁹ MINUTES OF THE CONSTITUTIONAL CONVENTION OF ARIZONA (Phoenix, 1911), Article II, sec. 20; Article VI, sec. 6.

Gradually, critics of popular participation in judicial proceedings shifted the basis of their public opposition. They ceased to state boldly that the people should not interfere in matters for which they had no training. Such statements had an unpleasant, undemocratic ring and actually might rally support for the hated institution. Instead they began to stress the waste of time and money which grand juries entailed. H. N. Atkinson, Houston lawyer, told members of the Texas Bar Association that "a useless and unnecessary piece of legal machinery" cost Texas counties between \$100,000 and \$200,000 each year, in addition to taking men away from their homes and businesses to do work "which one man can do just as well."¹⁰⁰ Aaron Hahn of Cleveland repeated this argument in urging the 1912 Ohio Constitutional Convention to eliminate the grand jury from that state.¹⁰¹ In England a Parliamentary Commission composed of judges and legal experts studied the causes of delay in English courts. In 1913 they reported that the grand jury system "uselessly puts the country to considerable expense and numerous persons to great inconvenience." The Commissioners regarded the grand inquest as "little more than an historically interesting survival" which had "outlived the circumstances from which it sprung and developed." They recommended that Parliament take action to eliminate it from the English court system. Not all British jurists agreed that grand juries no longer served a useful purpose, however. Judge L. A. Atherly-Jones of the London City Court warned those who sought reform at the expense of popular government that "the bold hand of the innovator" should not touch those institutions which guard personal liberty.¹⁰² Americans who opposed grand juries commented approvingly on the English report. The *New Jersey Law Journal* predicted that it would be only a question of time before they would cease to exist in every state in the Union.¹⁰³

In June, 1915 William Howard Taft appeared before the Judiciary Committee of the New York Constitutional Convention and took the occasion to press home an attack upon the grand jury system. Drawing upon his experience as a judge, the ex-President criticized it as a "bulky and costly" institution which served only to relieve district attorneys of responsibility for prosecutions. He heartily endorsed the movement to substitute a legal expert for an unwieldy body of laymen. The New York convention considered several proposed amendments limiting the use of grand juries but they did not adopt them.¹⁰⁴ However, not all persons familiar with the work of grand juries believed they were too costly and cumbersome. Edward Lindsey, of the American Institute of Criminal Law, hailed their broad inquisitorial powers as an essential part of judicial machinery which was in constant use to secure in-

¹⁰⁰ H. N. ATKINSON, *The Useless Grand Jury*, LAW NOTES (September 1911), XV, 109-110.

¹⁰¹ JOURNAL OF THE CONSTITUTIONAL CONVENTION OF OHIO (Columbus, 1912), 55.

¹⁰² *Second Report of the Royal Commission on Delay in the King's Bench Division, Reports of Commissioners to the House of Commons* (London, 1914), XXXVII, 22; LONDON TIMES, January 6, 8, 10, 1914; BOSTON EVENING TRANSCRIPT, January 17, 1914.

¹⁰³ *Editorial Notes*, NEW JERSEY LAW JOUR. (April 1914), XXXVII, 97-98; *Evils of the Grand Jury System*, LAW NOTES (February 1914), XVII, 218.

¹⁰⁴ NEW YORK TIMES, June 12, 1915; *Judge Taft and the New York Constitutional Convention*, VIRGINIA LAW REGISTER (July 1915), I (N.S.), 226; *Revised Record of the Constitutional Convention of New York* (Albany, 1915), I, 221-22.

formation otherwise unobtainable. Lindsey pointed out that prosecutors and police departments were at best feeble substitutes for the powerful grand inquest.¹⁰⁵

Although Lindsey defended the grand jury against those who would have destroyed it, in doing so he adopted the criteria used by its critics. He sought to justify the institution on the grounds of efficiency. On this point the grand jury was particularly vulnerable. Few persons familiar with its operations would have denied that a prosecuting officer could move more rapidly and with greater singleness of purpose. It remained for a layman well experienced in the work of the grand jury to defend it as a valuable and democratic agency of the people. Publisher George Haven Putnam recognized that inquests could be slow and unwieldy bodies which frequently tried the patience of judges and prosecutors, but he did not believe it was fair to judge the institution solely on that basis. Democracy did not necessarily mean efficiency. It meant a careful concern for the rights of persons who had been arrested as well as the ability of citizens to initiate investigations of abuses in government and make officials responsible to them. After serving on grand juries in New York City over a period of thirty-five years, Putnam became convinced that no other institution provided such a degree of popular participation in government. He openly challenged the advice of ex-President Taft, announcing, "There is no other way citizens can bring criticism directly to bear upon public officials." Putnam saw grand juries as more than mere law enforcement agencies. He recognized that during their term of office the jurors acted as the representatives of the people of the county and in that capacity could call before them all public officials, high or low. When such bodies ceased to sit, the cause of popular government had suffered a severe blow. In 1915 Putnam and other laymen who were convinced of the necessity of preserving the institution in America organized the Grand Jury Association of New York County, made up of persons who had served on grand juries. They sought to publicize the importance of the grand inquest to democratic government and to blunt the attack long waged against lay interference in judicial matters.¹⁰⁶

The period from the Civil War to the First World War witnessed many attempts in the United States to abolish the grand jury. Armed with the persuasive arguments of efficiency and economy, advocates of reform achieved their most spectacular successes in western United States.¹⁰⁷

¹⁰⁵ EDWARD LINDSEY, *Functions of the Grand Jury*, JOUR. OF THE AMER. INST. OF CRIM. LAW AND CRIMINOL. (June 1913), IV, 169-171.

¹⁰⁶ GEORGE H. PUTNAM, MEMORIES OF A PUBLISHER (New York, 1915), 310-313; GEORGE H. PUTNAM, *Grand Jury of the County of New York*, ANNALS (March 1914), LII, 37-55; NEW YORK TIMES, February 28, 1930.

¹⁰⁷ Only Texas, California, Oregon and New Mexico summoned grand juries regularly.

1955

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Richard D. Younger

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THE GRAND JURY UNDER ATTACK. III

RICHARD D. YOUNGER

Parts I and II of Professor Younger's contribution have been published in our preceding number—Volume 46, number 1 (May–June, 1955).—EDITOR.

Early in 1917, grand juries ceased to sit in England. Pressure of a life and death struggle with Germany led Parliament to suspend them for the duration of the war. Although the noise of battle hushed all but a few critics of the move, there were Englishmen who saw the paradox in fighting for democracy abroad while restricting it at home. They suggested that even a democratic government such as Britain's might need the strong check against arbitrary rule which grand juries provided. However, such protests lost out to cries of a manpower shortage. The issue of a war emergency enabled English legal reformers to accomplish what they had been unable to do in the name of efficiency and economy; To kill the grand jury. They succeeded in taking criminal prosecutions out of the hands of citizen panels, and in giving them to magistrates expert in the law.¹

In spite of the remarkable showing of grand juries in combatting municipal corruption and their proven value in regulating corporations, American legal reformers hailed the British action as a step in the right direction. They attributed the move to Parliamentary fear that the power of the indictment might become an instrument of oppression in the "hands of an inflamed populace." Opponents of the grand jury in the United States warned that suspension of English juries had come just in time to avoid a "flood of indictments" against pacifists and persons of German extraction. In England, however, officials expressed the fear that grand juries would refuse to indict persons arrested by the government.²

Legal reformers in the United States were unable to turn the war to their advantage as their counterparts had done in England. American entry into the first World War in April 1917, temporarily ended efforts to abolish grand juries. But, opponents both in the United States and England resumed their agitation following the War. In America, they sought to persuade additional states to abandon its use, while in England they fought to make the temporary suspension permanent. In January 1920, Assemblyman Louis A. Cuvillier introduced a resolution in the New York legislature to amend the state constitution to eliminate grand juries. The American Judicature Society advised delegates attending the Illinois Constitutional Convention in 1920, that grand juries were of little value except to delay the courts. The Society warned that time was the most important element in criminal justice. The State's Attorney's Association of Illinois agreed wholeheartedly and made a plea for abolition

¹ PARLIAMENTARY DEBATES, 5th Series, (1917), LXXXXV, 380, 736, 1086–1097; LONDON TIMES, January 3, 8, 29, 30, February 13, 14, 15, 17, March 29, 1917.

² NEW YORK TIMES, January 22, February 20, 1917; MINOR BRONOUGH, *Shall the Grand Jury Be Abolished?* LAW NOTES (January 1922), XXV, 187.

of the grand jury system. However, delegates remained unmoved and refused to sacrifice the citizen's panel to the experts. In Massachusetts Judge Robert Wolcott of Cambridge reiterated the appeal for judicial efficiency. In October 1921 he told members of the State Bar Association, that abolishing the grand jury was one means of ending congestion in criminal courts, but his statement did not go unchallenged. Former district attorney Arthur D. Hill of Boston protested against a system of criminal law which eliminated "the popular element" and told prosecutors that they could learn a great deal from working with grand jurors.³

Wartime suspension of grand juries in England ended in December 1921, but solicitors and magistrates throughout the island requested Parliament to make the order permanent. The London *Times* supported the campaign characterizing grand inquests as expensive and inefficient, but drew a host of replies in defense of the system. Judges as well as laymen objected to eliminating the panels of citizen accusers. Judge L. A. Atherly-Jones praised their wholesome influence and warned that justice was already too tightly controlled by "an official and professional class." Sir Alexander Wentworth Macdonald, a layman, declared that a group of non-professional men should stand above judges and courts. However Lord Justice J. Eldon Bankes agreed with most jurists, that grand juries were of little value in reviewing the work of experienced magistrates. In spite of charges of inefficiency, however, Parliament refused to extend the suspension order and citizen investigators resumed their traditional place at English courts.⁴

In the United States, as in England, opposition increased. In March 1922 the New York County Association of the Criminal Bar announced that it planned a vigorous state wide campaign to abolish the institution. Former district attorney Robert Elder called upon public prosecutors to take the initiative in replacing the "inefficiency, ignorance and traditional bias" of grand jurors, and Judge Thomas Crain of New York supported the movement. Testifying before the Committee of Law Enforcement of the American Bar Association, he observed that "a judge or some other man learned in the law" should participate in grand jury hearings. In Minnesota attorney Paul J. Thompson urged his state to adopt the Wisconsin system of prosecution upon the order of a district attorney. In 1922 Judge Roscoe Pound and Felix Frankfurter conducted a survey of criminal justice in Cleveland and added the weight of expert testimony to those who sought to eliminate use of grand juries. Pound and Frankfurter reported that juries were inefficient and unnecessary, since trial courts were quite capable of protecting Americans against executive tyranny.⁵

³ NEW YORK TIMES, January 24, 1920; *Grand Jury Reform*, JOUR. OF THE AMER. JUDICATURE SOC. (October 1920), IV, 77-80; *Proceedings of the Illinois Constitutional Convention* (Springfield, 1921), II, 1929, 1941, 1944, 1948; *Report of the Annual Meeting of the Massachusetts Bar Association*, MASS. LAW QUAR. (January 1922), VII, 27-29.

⁴ LONDON TIMES, October 24, 28, 1921; January 3, 4, 9, 10, 11, 13, 1922; THE LAW TIMES, January 7, 14, 1922, CLIII, 1-2, 17.

⁵ NEW YORK TIMES, March 15, 19, 1922; JOUR. OF THE AMER. BAR ASSOC. (June 1922), VIII, 326; PAUL J. THOMPSON, *Shall the Grand Jury In Ordinary Criminal Cases be Dispensed With In Minnesota?* MINN. LAW REV. (June 1922), VI, 616; ROSCOE POUND AND FELIX FRANKFURTER, *CRIMINAL JUSTICE IN CLEVELAND* (Cleveland, 1922), 176, 211-212, 248.

THE GRAND JURY ASSOCIATION

Professional opposition to the inquest of the people did not go unchallenged, however. In 1924 the Grand Juror's Association of New York began publication of the *Panel*, a militantly pro-grand jury periodical. Through its pages, former grand jurors, judges, and prosecutors made clear the importance of the institution. The Association urged grand juries to exercise their full powers as representatives of the people and fought all attempts to make them mere agents of the court. As a result of its efforts grand juries took on a new importance for many citizens.⁶ But, at the same time, a series of crime surveys conducted by criminologists and sociologists sought to impress upon the American people the futility of having a panel of laymen enter a field about which they knew nothing. Crime commissions in Minnesota and New York both recommended broader powers for district attorneys to institute prosecutions. After careful study, experts surveying conditions in Illinois reported that grand juries handicapped prosecutors and delayed justice. In 1928, drafters of the American Law Institute's model Code of Criminal Procedure advised that all prosecutions be begun by information. Only one grand jury a year should meet in each county. They based their recommendation on advantages of speed, economy, and efficiency.⁷ In 1929, Professor Raymond Moley of Columbia University approved increased powers for prosecutors and characterized grand jury investigations as cumbersome and ineffective. Judge Roscoe Pound went even further and warned that inquests of the people constituted "a power needing check."⁸

CRIME SURVEYS

In 1928 the Social Science Research Council commissioned Professor Moley to make a survey to obtain accurate information on the relative efficiency of grand juries and public prosecutors. He and his staff compared criminal justice in three states (in which procedure was on information) with three others in which an indictment was required. Dean Wayne L. Morse of the University of Oregon conducted a poll of judicial opinion. Early in 1931 Moley and Morse released a summary of their findings. They concluded that the evidence showed public prosecutors to be "more efficient, economical and expeditious" than panels of citizen accusers. Moley contended that most grand juries were content to "rubber-stamp" the opinions of the district attorney and thus served to relieve prosecutors of their rightful responsibilities. The Moley survey focused public attention upon the weaknesses of the grand jury system but in so doing, it took into account only the tangible factors in criminal proceedings: speed, economy of operation, and percentage of convictions. Supporters of the jury system refused to agree that efficiency alone was an adequate criterion for justice under a democratic government. For criminal justice deals with people

⁶ ROBERT APPLETON, *What Is An Association*, PANEL (January 1928), VI, No. 1, 1; *Grand Jury Association Notes Its Twenty-Fifth Anniversary*, PANEL (May-June 1937), XV, 15.

⁷ *Report of the Minnesota Crime Commission*, MINN. LAW REV. (January 1927), XI, Supplement, 30; *Report of the Crime Commission, New York Legislative Document No. 23* (1928), VI, 167; THE ILLINOIS CRIME SURVEY (Chicago, 1929), 218, 298-299; AMER. LAW INST. CODE OF CRIMINAL PROCEDURE (1928), sec. 113-114.

⁸ RAYMOND MOLEY, *POLITICS AND CRIMINAL PROSECUTION* (New York, 1929), 127-128; ROSCOE POUND, *CRIMINAL JUSTICE IN AMERICA* (New York, 1930), 109, 186-187.

and the number and speed of convictions does not necessarily indicate a superior system.⁹

Proponents of the grand jury rushed to answer Professor Moley. John D. Lindsay, a former New York district attorney, reminded the experts of what they seemed to have forgotten: that "the grand jury is the public and they have a right to investigate any evil condition of a criminal nature." United States District Attorney George Z. Medalie warned that the grand jury "breathes the spirit of the community" as no prosecutor could ever do.¹⁰ Others charged Moley with bias in interpreting his statistics and drew vastly different conclusions from the survey data. They maintained that grand juries were far from being "rubber-stamps" and caused little delay in criminal trials.¹¹

Shortly after Professor Moley made his findings public, the commission headed by George W. Wickersham submitted its recommendations on law enforcement to President Hoover. They advised abolishing grand juries on the ground that they served no useful purpose and impeded criminal courts. Thinking only in terms of efficiency, the commission viewed the grand jury as a "mitigating device and opportunity for escape" for criminals.¹²

SUCCESS OF GRAND JURIES

While experts in the United States flayed the system for its inefficiency, their English counterparts continued their efforts to abolish it. The depression came to their aid as the war had done in 1917, and made arguments of economy very appealing. In January 1930 the Lord Chief Justice observed that grand juries no longer served any useful function. Other jurists followed suit and called for an end to expensive juries in view of "the grave national emergency." Gradually, anti-jury forces impressed upon the depression-pinched English people the fact that great savings in tax money could be expected if they abandoned the system.¹³ A Commission of the House of Commons studied the matter and reported in favor of eliminating grand juries. The commissioners emphasized the burden of jury duty and the great expense of the system. Parliament accepted the recommendations of the special commission and abolished grand juries in England, effective September 1, 1933.

⁹ RAYMOND MOLEY, *The Initiation of Criminal Prosecutions by Indictment or Information*, MICH. LAW REV. (February 1931), XXIX, 403-431; WAYNE L. MORSE, *A Survey of the Grand Jury System*, OREG. LAW REV. (February, April, June 1931), X, 101-160, 217-257; 295-365.

¹⁰ *Analysis of the Moley Survey*, PANEL (March-April 1931), IX, No. 2, 14; JOHN D. LINDSAY, *Grand Juries As The People, A Reply To Professor Moley*, PANEL (March-April 1931), IX, No. 2, 1; GEORGE Z. MEDALIE, *Grand Juries Value*, PANEL (March-April 1931), IX, No. 2, 16.

¹¹ Excellent and thorough criticisms of Professor Moley's conclusions may be found in: JEROME HALL, *Analysis of Criticism of the Grand Jury*, JOUR. OF CRIM. LAW AND CRIMINOL. (January 1932), XXII, 692-704; GEORGE H. DESSON, *Indictment To Information*, YALE LAW JOUR. (December 1932), XXXXII, 163-193.

¹² *Report on Prosecution of the National Commission on Law Observance and Enforcement* (1931), 34, 124.

¹³ Lord Hewart *On Grand Juries*, THE SOLICITOR'S JOUR. (January 25, 1930), LXXIV, 47; *Suspension of the Grand Jury System*, THE LAW TIMES (October 3, 1931), CLXXII, 252; *Grand Juries and Quarter Sessions*, LAW TIMES (January 23, 1932), CLXXIII, 61-62; *Grand Juries*, LAW TIMES (March 5, 1932), CLXXIII, 166.

Magistrates and others throughout the island who disliked seeing an end to the system, awoke only in time to deliver panegyrics over the corpse. During the spring and summer of 1933 they expressed their displeasure in grand jury charges and filled the columns of the *Times* with protests, but all to no avail. Professor W. S. Holdsworth castigated "the bureaucrats of Whitehall . . . and the lawyers who think with them" for establishing their own form of tyranny over the nation. It was only natural, Holdsworth observed, that they "should instinctively dislike anything which independently safeguards liberty." A national emergency finally accomplished what legal reformers had tried to do for over a century. The grand jury in England "succumbed to an acute onset of depression."¹⁴

Grand juries themselves contributed greatly to the campaign to revitalize the institution. Their spectacular exploits captured the public imagination and led citizens of city after city to use this weapon against government by corruption. Americans could not help seeing the importance of having panels of citizen investigators when they watched a fearless grand jury in action. In April, 1933, a panel of citizens in Atlanta, Georgia, threatened to indict the county commissioners if they did not institute reforms. Judge John D. Humphries, speaking for the five judges on the Atlanta bench, rebuked the jurors for departing from their duties. He reminded them that they were mere agents of the court and would be "as helpless as a body of citizens meeting on a street corner" without the power of the court behind them. The jurors rebelled and demanded a new prosecutor and judge to work with, but the court denied their request. Before they adjourned, however, the jurymen indicted the county commissioners and appointed five citizens to conduct a thorough probe of the Municipal and Superior Courts and report to the next grand jury. The attack of Atlanta judges upon the powers of the local grand jury led residents to organize a grand juror's association to encourage future panels to uphold their rights.¹⁵

In October, 1933, a Cleveland, Ohio grand jury began a probe of the city police department. Led by its energetic and fearless foreman, William Feather, the panel spent three months in investigation and issued a report which shocked the people of Cleveland. The jurymen announced that the entire city had been intimidated by union racketeers who received protection from city officials. They denounced law enforcement officers and declared that the local criminal court "neither merits nor receives the respect or confidence of the people." The jurors noted that the talent of the prosecutor's office was well "below par" and they chided the Cleveland Bar Association for its lack of concern in the matter. Before concluding its report, the grand jury reminded jurors throughout the state of Ohio that they, too, could initiate independent investigations. The succeeding Cleveland grand jury began a thorough inquiry into the defunct Guardian and Union Trust Companies. Indictments

¹⁴ *Report of the Business of the Courts Committee, House of Commons Reports, (1932-1933), X, 14-19; London TIMES, March 9, 16, April 27, May 24, 27, June 14, 20, 28, July 5, 13, August 3, 1933; 23 & 24 Geo. V, c. 36 (1933), The Administration of Justice Act; ALBERT LEICK, Abolition of the Grand Jury in England, JOUR. OF CRIM. LAW AND CRIMINOL. (1935), XXV, 623-625.*

¹⁵ *ATLANTA CONSTIT., April 15, 19, 20, 21, 22, 25, 28, 29, 1933; CHARLES H. TUTTLE, Grand Juries By Exercising Their Initiative Can Put Fear Into Criminals and Unfaithful Public Servants, PANEL (March-April 1933), XI, 13; PHIL C. MCDUFFIE, Fulton County, Georgia Grand Jurors Assert Independence, PANEL (November-December 1933), XI, 31.*

followed against officers of both for fraud. In October, 1934, citizens of Cleveland followed the example of those in Chicago and Atlanta and organized a grand juror's association to preserve the rights of their investigative body.¹⁶

In New York, it took a fighting body of grand jurors to combat the hampering tactics of city officials and to mobilize public opinion for a thorough investigation of rackets. The March, 1935, grand jury took up a probe of policy rackets begun by a predecessor. It soon broke with District Attorney William C. Dodge and began summoning its own witnesses. Foreman Lee Thompson Smith took charge of the inquiry and demanded that the District Attorney appoint a special prosecutor. Racketeers threatened jurors and their investigators but they continued their work. When Dodge and the panel could not agree, the jurors asked the court to discharge them and they appealed to Governor Herbert Lehman to summon an extraordinary grand jury and appoint a special prosecutor.¹⁷ Governor Lehman named Thomas E. Dewey as special racket prosecutor and summoned a new panel to convene September 5, 1935. During the next four months the special jury examined over five hundred witnesses as they investigated racketeering in labor unions and trade and protective associations. In December 1935 the panel returned twenty-nine indictments, reporting that control over racketeering in New York City centered in the hands of a dozen or so major criminals who extorted millions from the city each year. A second extraordinary grand jury took up the racket probe in January, 1936. It uncovered a \$12,000,000 prostitution racket and put vice lord Charles "Lucky" Luciano and his lieutenants on the road to prison. When the court discharged the panel in August, 1936, after seven months of service, it had broken the back of organized racketeering in New York City.¹⁸ Persons all over the United States followed the exploits of Prosecutor Dewey and his "racket busting" grand juries.

The example of New York gave a tremendous impetus to the work of laymen trying hard to revitalize the system. Beginning in September, 1937, a Philadelphia grand jury conducted a seventeen month crusade against vice and racketeering patterned after the Dewey investigations. In May, 1938, the jurors charged 107 persons with gambling and prostitution and accused police officials of accepting bribes to give immunity to criminals. The panel called for immediate dismissal of forty-one police officers on grounds of inefficiency and dishonesty. The jurors reported to the people of Philadelphia again in August, 1938, and charged city and county officials with a "criminal conspiracy" to protect crime and vice. In September they indicted Mayor S. Davis Wilson, on twenty-one counts, of misbehavior in office and failure to suppress crime. But the Mayor managed to have the indictments quashed

¹⁶ CLEVELAND PLAIN DEALER, October 10, 14, 24, November 3, December 22, 1933; February 2, April 3, 14, October 23, 1934; *Ohio Grand Jury Report Starlles Country*, PANEL (January-February 1934), XII, 11; WILLIAM FEATHER, *Foreman Tells Why Criminals Fear Action By Grand Jury*, PANEL (March-April 1934), XII, 17.

¹⁷ NEW YORK TIMES, March 12, June 4, 5, 7, 9, 11, 1935; ROBERT B. WILKES, *A History Making Grand Jury*, PANEL (September-October 1935), XIII, 1.

¹⁸ NEW YORK TIMES, December 27, 1935; July 1, August 11, 1936; L. SETON LINDSAY, *Extraordinary Grand Juries*, PANEL (March 1936), XIV, No. 1, 3; *Dewey Grand Jury Strikes At Rackets*, PANEL (May-June 1936), XIV, No. 2, 6; *Grand Juries Active in Presentments To Court*, PANEL (November-December 1936), XIV, No. 3, 4.

on a technicality. In order to prevent further exposures by the grand jury, state officials withdrew financial support and the Philadelphia court discontinued the investigation. The jurors charged that the move was but "the culminating act of a long continued opposition which has crippled our work," and they appealed directly to the state Supreme Court which allowed them to continue their inquiry. Free to go ahead once more, the panel lashed out at the District Attorney, accusing him of using the vice investigation for political purposes. The jurymen demanded a complete reorganization of the Philadelphia police department, including dismissal of incompetent officers and reapportionment of police districts to end the influence of politicians. They concluded their work in March, 1939, by re-indicting Mayor Wilson, accusing him of permitting vice and crime to flourish, while he issued blasts of meaningless words.¹⁹

Investigations in other communities advertised effectively the capabilities of an alert grand jury, also. In Buffalo, New York, a special panel exposed bribery and fraud in the municipal government. Seventeen city officials faced trial for perjury and bribery. A Miami, Florida, inquest found that bribery had played an important part in establishing electric rates for their city, and they indicted Mayor Robert R. Williams, several councilmen, and other municipal officials. After a two month investigation of city affairs, the jurors condemned the police department for protecting criminals and criticized a newly instituted program to refund the city debt. Members of the jury did not cease to be concerned after they completed their work. As private citizens they inaugurated a recall movement which eventually removed Mayor Williams from office. At Greensboro, North Carolina, a grand jury initiated an inquiry into a primary election. In spite of determined opposition from the court, it discovered and reported many irregularities to the people.²⁰

Opposition to investigations frequently developed when grand juries threatened to expose prominent officials and upset the balance of political power. In April, 1938, Pennsylvania politicians were engaged in a heated primary election struggle. Dissident elements within the Democratic party leveled charges of corruption and fraud against the Democratic administration of Governor George H. Earle. The district attorney at Harrisburg petitioned for a special grand jury investigation and the Court of Quarter Sessions summoned a panel. Governor Earle took to the radio and in an address to the people of Pennsylvania charged that the proposed probe was "a politically inspired inquisition, to be conducted by henchmen of the Republican State Committee." Two days before the inquiry was to begin, the Attorney General asked the state Supreme Court to restrain the grand jury from beginning an investigation but, the high court declared that it had no such power. The panel prepared to convene early in August. On July 22, 1938, when it appeared that the administration had exhausted all efforts to block the inquiry, Governor Earle summoned an extraordinary session of the state legislature "to repel an unprecedented judicial invasion of the executive and legislative branches of our

¹⁹ NEW YORK TIMES, February 6, May 5, 14, August 18, November 20, 24, December 2, 28, 1938; March 2, 3, April 7, 1939; Shenker vs Harr, 332 *Penna State Reports* 382 (1938); Commonwealth vs Hubbs, 137 *Penna Superior Court* 229 (1939).

²⁰ NEW YORK TIMES, January 9, 11, 18, 25, February 2, April 15, 1938; March 2, 1939; FRANK C. MILLER JR., *Grand Juries—Independent Investigations*, N. C. LAW REV. (1938), XVII, 43.

government." Three days later, he stood before the law makers and warned them that "the Inquisition and the Bloody Assizes . . . stand as grim reminders of judicial tyranny." The Governor charged the judges and the District Attorney with abusing their authority and asked the legislature to look into their conduct. He then requested legislation to block the threatened grand jury probe.

The Democratic legislators rushed through a retroactive law suspending all investigations of public officials once the House of Representatives had taken jurisdiction and begun an inquiry. They also empowered the Attorney General to supersede any district attorney. A House committee launched an immediate investigation, but the court impounded all evidence awaiting the grand jury. Again the matter went to the Supreme Court. In October, 1938, it declared unconstitutional the law restricting investigations and reminded the legislators that they could not abolish the grand jury.²¹

The example of public officials going to any length to prevent a panel of citizens from investigating, led New Yorkers to strengthen their grand jury system. Rallying behind the slogan, "What happened in Pennsylvania can happen here," the constitutional convention meeting at Albany in 1938 made certain that the grand jury would remain the people's shield against official corruption. A new clause added to the state constitution provided that inquiries into official misconduct could never be suspended by law. In addition, all public officers summoned before grand juries had to testify without immunity or be removed from office.²² Pennsylvania's Governor Earle failed in his attempt to dictate to grand juries. Shortly after his defeat at the hands of the state Supreme Court, a panel of citizens investigated the state government and indicted Secretary of Highways Roy E. Brownmiller on charges of using \$600,000 in state funds for political purposes.²³

The Pennsylvania lesson did not go unheeded in other states. Citizen's groups in Washington in June, 1941, succeeded in getting the state legislature to approve a constitutional amendment making one grand jury a year mandatory in each county. In addition, the amendment would bar prosecuting attorneys from advising grand juries. Special prosecutors conducted a vigorous campaign against the proposals and managed to defeat them in a referendum held in November, 1941. Citizens of Missouri were more successful. The convention which met in 1943 to revise the state constitution inserted a specific provision that the power of grand juries to investigate misconduct in public office should never be suspended.²⁴

The growth of dictatorship abroad and United States entry into the second World

²¹ NEW YORK TIMES, July 26, August 8, 11, 1938; *Dauphin County Grand Jury Investigation*, 332 Penna State Reports 290, 342 (1938); *Laws of the General Assembly of Pennsylvania, Extraordinary Session* (1938), 18-19, *Legislative Interference With the Grand Jury*, HARV. LAW REV. (1938), LII, 151-153; *Power of the Legislature to Suspend Grand Jury Investigations*, COL. LAW REV. (December 1938), XXXVIII, 1493-1501.

²² NEW YORK TIMES, August 8, 11, 1938; JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK (Albany, 1938), 248; Article I, sec. 6, of the New York Constitution as revised in 1938.

²³ *Commonwealth vs Brownmiller*, 141 Penna Superior Court 107 (1940).

²⁴ *Session Laws of the State of Washington* (1941), 436-437; EWEN C. DINGWALL, *Independent Grand Juries Opposed In Washington State*, NAT. MUNIC. REV. (June 1941), XXX, 374; *Journals of the Constitutional Convention of Missouri* (Jefferson City, 1944), III, 13.

War convinced many thinking Americans that institutions which protected the rights of the people were not outmoded. Fear of executive tyranny and infringement of individual liberty gave a new importance to the inquest of the people. Those who had previously called for abolition of the grand jury for reasons of economy and efficiency now remained strangely silent. They did not reply when Governor Dewey denounced "the bright young theorists, the fuzzy minded crackpots and others of less idealistic purpose who would like to see the grand jury abolished;" or when Judge Francis Martin of New York dismissed charges that juries were rubber-stamps, "as the rantings of inexperienced and highly theoretical professors." With war and other threats to freedom close at hand, mere efficiency made less appeal. It became apparent to many persons that the grand jury was more than a means of bringing individuals to trial. It was an integral part of the American democratic government.²⁵

GRAND JURIES IN A DEMOCRATIC GOVERNMENT

Successful as grand juries have been in speaking out against abuses, there still remain threats to their existence as the spokesman of the people. Opponents of the grand jury in New York put a bill through the state legislature in 1946 prohibiting juries from making presentments or otherwise censuring persons for misconduct which did not constitute a crime. The Grand Jury Association of New York, metropolitan newspapers and civic and business groups conducted a vigorous campaign to have Governor Dewey veto the measure. They pointed out that the grand jury was the only local body which could effectively reprimand lax and indifferent public officials. Requests to veto the bill poured into Albany. In his veto message, Governor Dewey warned legislators that the power of grand juries should not be impaired and that they should remain "the bulwark of protection for the innocent and the sword of the community against wrongdoers."²⁶

Legislative restrictions upon grand juries are not the only threat to their survival. Legislative investigating committees have intruded upon the work of the grand inquest and have tended to replace them. The rules of evidence and other traditional safeguards which control the deliberations of a grand jury do not exist to protect witnesses before Congressional committees. Federal Judge Simon H. Rifkind reminded New York grand jurors in 1947 that legislative investigators constituted "a dangerous tendency" which juries could combat only by increased attention to their responsibilities.²⁷ In 1950 the grand jury of Merrimack County, New Hampshire, investigated a large public utility company. At the conclusion of the probe a committee of the state legislature sought to question the jurors on their deliberations. Members of the panel refused to testify however, and the state Supreme Court

²⁵ THOMAS E. DEWEY, *Grand Jury, The Bulwark of Justice*, PANEL (May 1941), XIX, 3; FRANCIS MARTIN, *Grand Jury Must Be Just, Free and Fearless*, PANEL (May 1941), XIX, 8; LAMAR HARDY, *Grand Juries*, PANEL (November 1941), XIX, No. 2, 5; H. L. McCLINTOCK, *Indictment by a Grand Jury*, MINN. LAW REV. (January 1942), XXVI, 153-176; MARTIN H. WEYRAUCH, *Grand Jury, A Bulwark Against Tyranny of Dictatorship*, PANEL (December 1942), XIX, No. 2, 5; FRANK S. HOGAN, *Advice to Grand Jurors in the Present World Crisis*, PANEL (March 1942), XX, No. 1, 3.

²⁶ NEW YORK TIMES, March 3, 14, 15, 19, 27, April 4, 1946.

²⁷ NEW YORK TIMES, October 8, 1947.

upheld them. It warned the law makers that they had no power to interrogate grand jurors regarding their investigations.²⁸

Legislative investigators are not alone in encroaching upon the field of grand juries. In some states experts have already supplanted citizen panels for inquiries into official misconduct. This has been accomplished by setting up substitutes to take over the tasks normally performed by grand juries. Three states, Michigan, New Hampshire and Connecticut have created "one man grand juries" consisting of a magistrate empowered to launch investigations, summon witnesses and return indictments. This innovation has followed as a logical step in the process of excluding the people from law enforcement activities. In other states, legislatures have given judges powers similar to those of a grand jury, enabling them to conduct "John Doe" hearings to determine whether crimes have taken place. However efficiently magistrates may exercise their newly acquired authority, it is not in line with democratic procedure to destroy an investigating body composed of representative citizens and then delegate its broad inquisitorial powers to public officials.²⁹

Abolition of the grand jury leaves a void in local government which can be filled only by increasing the authority of judges and prosecutors. Substitution of a preliminary hearing by a committing magistrate has found the judge lacking in authority to perform properly the functions of a grand jury. Magistrates possess no power to launch investigations where specific charges have not been made. The system of giving district attorneys the authority to bring the persons to trial upon an information places too much power in the hands of the prosecution. In addition, under the information system the broad inquisitorial powers of the grand jury are lost. A prosecuting attorney may inquire into wrongdoing, but he lacks subpoena powers to compel the attendance of witnesses and the production of documents. Grand juries on the other hand may issue their own subpoenas for witnesses and records. They may cite recalcitrant witnesses for contempt and bring perjury charges against persons who refuse to tell the truth. They hear all testimony in secret and may indict or refuse to indict as they see fit. No power can influence them and panel members cannot be sued for libel for material contained in presentments or indictments. In most states which have abandoned the grand jury, it is held in reserve at the call of a judge, for instances of widespread violation of the law. But when this is done the procedure for summoning a grand jury is soon forgotten. Panels which must be specially called by a judge are not readily available to the people.³⁰

The work of grand juries may be improved by selecting competent individuals to serve as jurors. It is important that political faction within a community do not dominate the selection of grand jurors and use panels for partisan purposes. In some

²⁸ *Opinion of the Justices*, 96 N.H. 530 (1950).

²⁹ PLENY W. MARSH, *Michigan's One Man Grand Jury*, JOUR. OF THE AMER. JUDICA. SOC. (December 1924), VIII, 121-123; WILLIAM P. LOVETT, *One Man Grand Jury In Action*, NAT. MUNIC. REV. (June 1944), XXXIII, 292-294.

³⁰ MORDECAI KONOWITZ, *The Grand Jury As An Investigating Body of Public Officials*, ST. JOHN'S LAW REV. (April 1936), X, 219-294; WILLIAM FEATHER, *Foreman Tells Why Criminals Fear Action by Grand Jury*, PANEL (March-April 1934), XII, 17; GEORGE H. DESSION AND ISADORE H. COHEN, *The Inquisitorial Functions of Grand Juries*, YALE LAW JOUR. (March 1932), XXXXI, 687-712.

states jury commissioners have replaced sheriffs and other officials in choosing grand juries and they have done much to remove the procedure from politics. In New York City, county jury boards maintain a list of persons qualified to serve on grand juries. Any citizen may ask to be included on the list, but the board attempts to obtain a representative cross section of the community.³¹

It is not enough to secure capable individuals to serve on grand juries. They must also be persons who understand their great responsibility and realize their tremendous powers for good. Jurors who perform their work in a routine and superficial manner betray the public interest and reflect upon the institution as a whole. They must take the initiative and remain independent of both court and prosecutor. They should not wait for the district attorney to lay cases before them. Judges have been partly to blame for grand jurors not understanding the extent of their powers. Many judges have intimated to juries that they were limited to considering matters suggested to them by the court or the prosecutor. They often fail to inform jurors of their power to launch investigations on their own initiative. Such practices have made many grand juries unwitting rubber stamps. Unless juries know and exercise their powers in the public interest and refute the arguments of those who wish to abolish them, they will sacrifice the confidence of the American people.³²

As an instrument of discovery against organized and far reaching crime, the grand jury has no counterpart. But, in spite of its broad investigating powers, legislation is needed in most states to strengthen the people's weapon by giving grand juries greater freedom to act. They often find themselves in the embarrassing position of being dependent upon the police department for evidence and the public prosecutor for legal advice. Juries should have the authority to employ investigators, expert accountants and separate counsel if they see fit.³³ In large cities regular grand juries are frequently kept too busy with routine criminal matters to have sufficient time to supervise the conduct of public officials. Where this is true it would be a tremendous advance in the fight against racketeering and corruption to have special panels meet at stated intervals to guard against abuses in government.

If Americans are to take full advantage of the opportunity offered them by their grand juries, to make government more responsible, every citizen must know what grand inquests are and what they can do. Toward this end, associations of grand jurors have conducted vigorous educational campaigns and alert juries have demonstrated their value. But, there is a need for more widespread information on the importance of the institution to democratic government, to counteract the preachings of those who would restrict or abolish the people's panel. In states which have abandoned the grand jury, few persons realize the importance of their loss.³⁴

Today, the most important aspects of the grand jury are its democratic control

³¹ MANUAL FOR GRAND JURORS IN THE CITY OF NEW YORK (New York, 1948), 4-6.

³² E. J. DAVIS, *Grand Jurors Federation of America*, PANEL (May-June 1932), X, 30-31; *The Grand Jury*, JOUR. OF CRIM. LAW, CRIMINOL. AND POL. SCI. (May-June 1953), XXXIV, 64.

³³ *Grand Jury Contracts*, MINN. LAW REV. (December 1922), VII, 59; JOUR. OF CRIM. LAW, CRIMINOL. AND POL. SCI., XXXIV, 61-62.

³⁴ The educational program of the Association of Grand Jurors of New York County is set forth in PANEL (February 1950), XXIV, 5; See also C. C. MASON, *Value and Importance of Grand Juries*, ALA. LAW. (October 1950), XI, 473-477.

and its local character. Governmental power has to a large extent replaced all other threats to democracy in the United States. The increasing centralization of governmental authority and the growth of a huge bureaucracy in no way responsible to the people, has made it vitally necessary to preserve the grand jury. It often serves as the citizen's only means of checking on political appointees or preventing illegal compulsion at the hands of zealous law enforcement officials. At a time when centralization of power in Washington has narrowed the area of democratic control, grand juries give the people an opportunity to participate in government and make their wishes known. In 1951, the Kefauver Crime Investigating Committee warned Americans not to rely upon the central government to control racketeering and organized crime in the United States. The Committee advised the people to use their local grand juries to attack conditions in their own communities.³⁵ Citizen panels have demonstrated repeatedly in the past that they could protest effectively in the name of the people against centralized authority. Today, grand juries remain potentially the strongest weapon against big government and the threat of "statism."

³⁵ THIRD INTERIM REPORT OF THE SPECIAL COMMITTEE TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMMERCE, *Senate Report No. 307 82* Congress, 1 session (1951), 3.