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## GRAND JURIES GONE WRONG

By Roger Roots\*

### ABSTRACT

*The shameful state of contemporary federal grand jury practice has attracted the attention of many scholars. Today's grand juries (especially at the federal level, but no less so in most states)<sup>1</sup> offer little or no check on government power, and no longer protect Americans from improper or unnecessary prosecutions. Although a number of reforms have been suggested over the years, the author suggests that none of them would wholly restore the institution to its constitutional role, design and purpose. This article advocates a bold reformation of Rules 6 and 7 of the Federal Rules of Criminal Procedure so that prosecutors would be barred from participating in grand jury investigations except when expressly invited by a grand jury to do so. This proposal would be most consistent with grand jury practices of the Founding period and the original intent behind the Fifth Amendment's Grand Jury Clause.*

### INTRODUCTION

The ongoing national disgrace that is contemporary federal grand jury practice has attracted the attention of scholars for several decades.<sup>2</sup> Today's federal grand juries fail to provide even a modicum of resistance to the

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

2. See, e.g., Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333 (2008); Judith M. Beall, Note, *What Do You Do with a Runaway Grand Jury?: A Discussion of the Problems and Possibilities Opened up by the Rocky Flats Grand Jury Investigation*, 71 S. CAL. L. REV. 617, 630-32 (1998); Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL'Y & L. 67 (1995); Laurie Buchan, *The Constitutional Rights of Federal and California Grand Jury Witnesses*, 10 S.W.U. L. REV. 895 (1978); R. Michael Cassidy, *Toward a More Independent Grand Jury: Recasting and Enforcing the Prosecutor's Duty to Disclose Exculpatory Evidence*, 13 GEO. J. LEGAL ETHICS 361, 362-63 (2000); Jay A. Christofferson, *Grand Jury Reform: Making Justice Just*, 29 MCGEORGE L. REV. 516 (1998); Gregory T. Fouts, Note, *Reading the Jurors Their Rights: The Continuing Question of Grand Jury Independence*, 79 IND. L. J. 323 (2004); Andrew Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260 (1995); Benjamin E. Rosenberg, "A Proposed Addition to the Federal Rules of Criminal Procedure Requiring the Disclosure of the Prosecutor's Legal Instructions to the Grand Jury," 38 AM. CRIM. L. REV. 1443 (2001); Kathryn E. White, Comment, *What Have You Done with My Lawyer?: The Grand Jury Witness's Right to Consult with Counsel*, 32 LOY. L.A. L. REV. 907 (1999).

government, and serve as a machine of government expansion and caprice. Instead of obstructing and opposing the powerlust of government prosecutors, contemporary grand juries provide their government captors with cover for misconduct and perjury on a massive scale and a means to abuse, threaten and intimidate the American people.<sup>3</sup>

Suspensions that the grand jury process provides no real protection for criminal suspects are borne out by rates of agreement between grand juries and prosecutors. Federal "indictment rates" greater than ninety-nine percent have been reported in some years.<sup>4</sup> In 2001, federal grand juries declined to indict in only 21 cases nationwide.<sup>5</sup> "These numbers suggest that, whatever the reason, the federal grand jury now exercises very little power as a shield between the government and its citizens."<sup>6</sup>

It is also illustrative that in states that allow felony charges<sup>7</sup> to be initiated by either grand juries or public preliminary hearings, prosecutors often choose to present their accusations before grand juries.<sup>8</sup> In close cases, or cases in which vindictive prosecutors seek to pursue their ideological or political enemies, it is "almost always easier to get an indictment [from a grand jury] than to satisfy a judge that there is probable cause."<sup>9</sup> Indeed, in cases where prosecutors are out to frame innocent

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3. See *In re Grand Jury Subpoena of Stewart*, 545 N.Y.S.2d 974, 977 n.1 (N.Y. App. Div. 1989) (noting that skepticism about the grand jury was "...best summarized by the Chief Judge of this state in 1985 when he publicly stated that a Grand Jury would indict a 'ham sandwich.'"). While this observation was made about New York State grand juries, many observers have commented to the same effect about the federal grand jury. See Fouts *supra* note 3, at 329 n. 59. See also Brenner, *supra* note 3, at 67 ("[T]he federal grand jury has become little more than a rubber stamp . . ."); Cassidy, *supra* note 3, at 361 ("The bromide that 'a grand jury would indict a ham sandwich if the prosecutor asked it to' reflects a generally accurate belief that the prosecutor exerts primary control over the flow of information before the grand jury."); Roots, *supra* note 2, at 821 ("[T]he alleged oversight function of modern grand juries [is] essentially a tragic sham.").

4. Fouts, *supra* note 3, at 329-30. In 1984 federal grand juries issued 17,419 indictments, and only 68 no-bills, an indictment rate of 99.6%. *Id.*

5. *Id.* at 330.

6. *Id.*

7. The text of the Fifth Amendment speaks of "capital, or otherwise infamous" crimes as requiring indictment by grand jury. Generally speaking, any felony is an "infamous" crime for purposes of the Amendment. See Marvin Zalman and Larry Siegel, *CRIMINAL PROCEDURE: CONSTITUTION AND SOCIETY*, 641 (2d ed. 1997); see also Lester B. Orfield, *Orfield's CRIMINAL PROCEDURE UNDER THE FEDERAL RULES*, 482-85 (Mark S. Rhodes ed., 2d ed. 1985).

8. Note that the Fifth Amendment Grand Jury Clause remains one of the small handful of rights enshrined in the federal Bill of Rights that has never been incorporated into state practice under the Fourteenth Amendment due process clause by the Supreme Court. See *Alexander v. Louisiana*, 405 U.S. 625, 633 (1971) (Fourteenth Amendment Due Process Clause requires fair trial but does not require state indictment by grand jury); *Hurtado v. California*, 110 U.S. 516, 538 (1884) (Fourteenth Amendment Due Process Clause requires states to proceed by fair charging procedures but not necessarily by grand jury).

9. Fred A. Bernstein, *Behind the Gray Door: Williams, Secrecy, and the Federal Grand Jury*, 69 N.Y.U. L. REV. 563, 569 n.31(1994) (quoting B. Drummond Ayres Jr., *A Grim O.J. Simpson Pleads*

persons, grand jury “investigations” help prosecutors sidestep obvious evidentiary gaps in their cases.<sup>10</sup>

Legal scholarship is disjointed and in disagreement over many points of law, but the assessment that the federal grand jury system has collapsed is held universally.<sup>11</sup> Scholars and professionals quibble only over what to call this procedural step. A “rubber stamp,”<sup>12</sup> a “handmaiden” of prosecutors,<sup>13</sup> a “kangaroo” proceeding,<sup>14</sup> a “mockery,”<sup>15</sup> a “charade,”<sup>16</sup> a “lap dog,”<sup>17</sup> “a tool” of prosecutors,<sup>18</sup> or simply “puppetry”<sup>19</sup> have all been suggested.<sup>20</sup> The American Bar Association, the National Association of Criminal Defense Lawyers, the American Jury Institute and even the U.S. Justice Department have all acknowledged that modern federal prosecutors have much more power over grand jury outcomes than the Constitution’s Framers intended.<sup>21</sup> A number of congressional investigations have also scrutinized the institution, each featuring testimony by numerous witnesses decrying the pathetic state of modern federal grand jury practice.

But despite the ubiquity of scholarly condemnation of present grand jury practice, reformers have failed to do anything that decreases the powers of prosecutors in grand jury chambers. Indeed, the only material grand jury reforms in recent decades have *increased* the government’s power over grand juries.<sup>22</sup> The 2001 USA PATRIOT Act,<sup>23</sup> for example, granted

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“Not Guilty” in *Two Murders*, N.Y. TIMES, June 21, 1994, at A1.).

10. See, e.g., William L. Anderson, *The Duke Non-Crime Hoax at One Year: What Have We Learned?* LewRockwell.com, March 12, 2007 (suggesting that prosecutors in the 2006 Duke lacrosse rape case deliberately sought a grand jury indictment to avoid a preliminary hearing that would have exposed their case as a frame-up).

11. See, e.g., Fouts, *supra* note at 3, 324 (describing the grand jury as “an institution adrift from its historical moorings.”).

12. Rosenberg, *supra* note 3, at 1443.

13. *Federal Grand Jury: Hearing on J.J. res. 46, H.R. 1277 and Related Bills Before the Subcomm. on Immigration, Citizenship, and International Law of the H. Comm. on the Judiciary*, 94th Cong. 643 (1976) [hereinafter *Federal Grand Jury*]

14. *Id.* at 653 (statement of John B. Swainson, Swainson Fitzpatrick Associates).

15. *Id.*

16. *Id.* at 316 (statement of Rep. Charles Rangel).

17. *Id.* at 647 (statement of Patrick Tobin, Washington Representative, International Longshoremen’s and Warehousemen’s Union).

18. *Id.* at 335 (statement of Rep. Mario Biaggi).

19. Stuart Taylor, Jr., *Prosecutorial Puppetry and the License to Rummage*, Conn. Law. Trib., May 18, 1992 at 24 (stating “investigations, subpoenas, and indictments . . . are, in fact, essentially unilateral decisions by prosecutors”).

20. See Washburn, *supra* note 3, at 2333 (stating “[s]cholars regard the grand jury just as doctors regard the appendix: an organic part of our constitutional makeup, but not of much use.”).

21. See Roots, *supra* note 3 (documenting the takeover of grand juries by prosecutors).

22. Although various congressional committees have heard testimony about subversion of the institution, each one went on to approve, sanction and ratify the same or further iniquities in grand jury practice. See *Federal Grand Jury*, *supra* note 14; *Reform of the Grand Jury System: Hearings on H.R.*

greater latitude to government attorneys to make use of grand juries over district lines, and to share grand jury testimony with government attorneys from different agencies.<sup>24</sup>

The judicial branch has likewise assisted more than hindered prosecutors in their grand jury dominance. As Gregory T. Fouts noted in a recent law review article, modern judges pay lip service to grand jury independence “while acquiescing in actions that severely curtail that independence.”<sup>25</sup> One federal judge testified before a congressional subcommittee that he saw his own role as an *assistant to the government* in building cases before grand juries.<sup>26</sup> United States attorneys “need the right,” stated Judge Edward Becker, “to disclose grand jury material to those who would assist them.”<sup>27</sup>

Anecdotal evidence suggests that the numbers of false accusations, exaggerated prosecutions, and wrongful convictions of innocent persons in federal court have grown substantially since the 1970s.<sup>28</sup> Evidence also indicates that prosecutions in the United States have generally become more

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94 *Before the Subcomm. on Immigration, Citizenship, and International Law of the H. Comm. on the Judiciary*, 94th Cong. (1977) [hereinafter *Reform of the Grand Jury System*]. The 1977 hearings began with proposals to carve back the powers of prosecutors before grand juries but ended with a bill that allowed government attorneys to disclose grand jury materials to authorities in other executive branch agencies. Such use of grand jury investigations had theretofore been impeded by holdings in such cases as *In re Holovachka*, 317 F.2d 834 (7th Cir. 1963), *In re April 1956 Term Grand Jury*, 239 F.2d 263 (7th Cir. 1965), and *In re Kadish*, 377 F. Supp. 951 (N.D. Ill. 1974). The resulting rule changes gave even greater power to government. *Federal Grand Jury*, *supra* note 14 at 648 (statement of Patrick Tobin) (“Congress has increased, not checked, the power of prosecutors operating before Federal grand juries.”). The 2001 USA PATRIOT Act, passed in the wake of the 9/11 terrorist attacks, brought even more ability for government lawyers to transfer materials between each other. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter *The Patriot Act*].

23. *The Patriot Act*, *supra* note 23.

24. Section 203(a) of the Patriot Act amended Rule 6 of the Federal Rules of Criminal Procedure to permit disclosures by government attorneys of “matters occurring before” grand juries to other government officials when the matters “involve foreign intelligence or counterintelligence” “in order to assist the official receiving that information in the performance of his official duties.” The Patriot Act § 203(a). The change requires that a disclosure made under the new exception be revealed, under seal, to the court (although no provision gives the court any veto power over a prosecutor’s disclosure). *Id.*

25. Fouts, *supra* note 3, at 325.

26. *Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 95th Cong. 47 (1977) (testimony of Hon. Edward R. Becker, U.S. District Judge, Eastern District of Pennsylvania).

27. *Id.*

28. See generally, WEN HO LEE, *MY COUNTRY VERSUS ME: THE FIRST-HAND ACCOUNT BY THE LOS ALAMOS SCIENTIST WHO WAS FALSELY ACCUSED* (2002) (detailing an outrageous federal prosecution of a scientist for allegedly trading nuclear secrets); ANDREW P. NAPOLITANO, *CONSTITUTIONAL CHAOS: WHAT HAPPENS WHEN THE GOVERNMENT BREAKS ITS OWN LAWS* (2004) (describing several examples of false or meritless federal prosecutions); MICHAEL ZINN, *MAD DOG PROSECUTORS AND OTHER HAZARDS OF AMERICAN BUSINESS* (2003) (giving a chilling account of methods used by federal prosecutors and suggesting no one is safe from unfair prosecution).

trivial and frivolous over time.<sup>29</sup> While there are many reasons for this trend, the collapse of the grand jury as a check on the Justice Department must surely shoulder much of the blame.

#### SOURCES OF GRAND JURY IMPOTENCE

All of this discussion begs certain questions. What accounts for the grand jury's collapse over the past century? Why has this once-proud institution succumbed so completely to government control? More pointedly, what specific reforms *would* solve the problems that plague modern grand jury practice and resuscitate the grand jury as a true check on government power?

Various reform proposals are recurrent in the literature,<sup>30</sup> including proposals to require prosecutors to present grand juries with exculpatory evidence,<sup>31</sup> to require that defense attorneys be available for witnesses,<sup>32</sup> to establish "grand jury counselors" to advise grand juries of their role and powers,<sup>33</sup> to instruct grand juries that they may choose not to indict even if probable cause is shown,<sup>34</sup> and to require prosecutors to disclose their legal instructions to grand juries.<sup>35</sup> But would these proposals, or any of the proposals of the American Bar Association or the National Association of Criminal Defense Lawyers, actually revive the institution? I submit that although the proposals may improve the credibility of contemporary grand juries (they could scarcely hinder it further), they do not strike at the heart of the problem: the mandatory presence of federal (or state) prosecutors in grand jury hearings. The very presence of a government prosecutor in the grand jury's midst betrays and undercuts the two most important functions of grand juries: independent oversight on government and the nullification

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29. See Alex Kozinski and Misha Tseytlin, *You're (Probably) a Federal Criminal*, in *IN THE NAME OF JUSTICE: LEADING EXPERTS REEXAMINE THE CLASSIC ARTICLE "THE AIMS OF THE CRIMINAL LAW"* 43–56 (2009) (stating that federal criminal law has become so large, confusing, and all-encompassing that federal prosecutors can, and do, prosecute virtually anyone they dislike at any time).

30. See Fouts, *supra* note 3, at 340 ("Common proposals have included requiring the prosecutor to disclose exculpatory evidence to the grand jury, creating a 'grand jury counsel' position to reduce the grand jury's reliance on the prosecution, disallowing hearsay testimony before the grand jury, and giving the grand jury more accurate information as to its role and function. Despite these proposals, there have been few steps taken by Congress.")

31. See White, *supra* note 3, at 920 (noting that some jurisdictions do require prosecutors to advise grand juries of exculpatory evidence). See, e.g., CAL. PENAL CODE § 939.71 (West 2009) (mandating production of all exculpatory evidence known to the prosecutor).

32. See White, *supra* note 3 at 920.

33. Brenner, *supra* note 3, at 124–27.

34. Fouts, *supra* note 3, at 326.

35. See Rosenberg, *supra* note 3, at 1445 (proposing a change in rules requiring defendants be given transcripts of the legal instructions given to grand juries by prosecutors).

of inequitable applications of the law.<sup>36</sup> The grand jury was not supposed to be an evaluator of evidence, but an institution whose primary role was to protect citizens from the government regardless of whether such citizens were guilty or innocent according to the law.<sup>37</sup> Thus, a primary goal and purpose of the institution—indeed, *the* primary purpose—was nullification of the laws or their application.<sup>38</sup>

Only a complete withdrawal of the prosecution bar from its present role as master of ceremonies before contemporary grand juries would restore the institution to its constitutional purpose. This proposal would deprive the government of any right to enter a grand jury proceeding except upon grand jury invitation, and any right to control or possess grand jury transcripts until and unless a grand jury possessing such transcripts votes to give custody of such papers to a government prosecutor. This reform would be most consistent with the original intent behind the Fifth Amendment Grand Jury Clause.<sup>39</sup> It would restore grand juries to their originally intended status: as powerful, anti-government entities composed of neighbors and common people protecting public liberty from the government.

#### THE GRAND JURY AS A STRUCTURAL CHECK ON GOVERNMENT POWER

The grand jury originated in the mists of early English common law.<sup>40</sup>

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36. See *United States v. Marcucci*, 299 F.3d 1156, 1161 (9th Cir. 2002) (holding that nullification is the true essence of the grand jury's protections, that is, the grand jury "has unlimited discretion to decide whether to indict even when it finds probable cause"); see also *Hurtado v. California*, 110 U.S. 516, 543 (1883) (Harlan, J., dissenting) ("If a man were to commit a capital offense in the face of all the Judges of England, their united authority could not put him upon his trial; they could file no complaint against him[.] The grand jury alone could arraign him[.]").

Under early American grand jury practice, the instructions and charges of judges could sometimes be disregarded. In 1804, a Georgia Judge named Jabez Bowen Jr. launched into a bitter attack upon slavery while instructing a panel of grand jurors to establish a plan for the gradual emancipation of slaves in the state. See Richard D. Younger, *Southern Grand Juries and Slavery*, 40 J. OF NEGRO HISTORY, 166, 166 (1955). The grand jurors retired without acting on Bowen's instructions, and refused to appear in court the next day. *Id.* The judge found them all in contempt of court and fined them ten dollars each. *Id.* In response, the grand jurors marched into court behind their foreman and presented a statement that accused Judge Bowen of uttering remarks that were "injudicial, insulting to our government and repugnant to the general interests of the country" and accused him of fostering "domestic insurrection." *Id.* at 166–67. Judge Bowen committed the entire panel to jail for contempt of court. *Id.* at 167. A writ of *habeas corpus* was soon issued by other local justices to free the grand jurors, along with a warrant for the arrest of Judge Bowen. The judge spent two weeks in jail and was impeached by the Georgia legislature. *Id.*

37. See White, *supra* note 3, at 917 n. 88 ("Often, the grand jury did not protect 'innocent' people against arbitrary prosecution—it protected individuals who had clearly violated British law by failing to indict them.").

38. See *id.*

39. *Id.* at 917.

40. *United States v. Smyth*, 104 F. Supp. 283, 288 (N.D. Cal. 1952).

The institution's 900-year history<sup>41</sup> makes it one of the oldest elements of Anglo-American criminal justice.<sup>42</sup> The grand jury is older than Anglo-American democracy, older than professional prosecution, older than professional law enforcement,<sup>43</sup> older than codified law,<sup>44</sup> and even older than trial by jury itself.<sup>45</sup> "Anglo Saxon liberty," wrote to Justice Harlan in 1883, "would, perhaps, have perished long before the adoption of our Constitution, had it been in the power of government to put the subject on trial for his life whenever a justice of the peace, holding his office at the will of the Crown, should certify that he had committed a capital crime."<sup>46</sup>

### THE ADVENT OF GRAND JURY TRANSCRIPTS

The advent of stenographic recording of grand jury hearings in the mid-twentieth century brought a major change to American grand jury practice. With stenography came transcripts, and the grand jury shifted from a venue in which the memories of grand jurors were equal to those of prosecutors<sup>47</sup> to one in which prosecutors maintained and controlled access to all grand jury records for their own purposes.<sup>48</sup> The impact of this change cannot be overstated. Prior to the advent of grand jury transcripts, criminal cases

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41. See Note, *Power of Federal Grand Juries*, 4 STAN. L. REV. 68 (1951) (citations omitted).

42. See ARTHUR TRAIN, *THE PRISONER AT THE BAR*, 106 (1926) ("Of all the features of modern criminal procedure, bar only the office of coroner, the grand jury, or 'The Grand Inquest,' as it is called, is the most archaic.")

43. See Roger Roots, *Are Cops Constitutional?* 11 SETON HALL CONST. L.J. 685, 689 (2001) (discussing the birth and development of professional policing and prosecution during the Jacksonian period of the 1830s).

44. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW*, 90–93 (2d ed. 1985) (saying that the American colonies began using codified statutory law for the first time in the English legal system during the eighteenth century in order to combat the "unknowable" nature of extensive case law).

45. See Roots, *supra* note 3, at 822.

46. *Hurtado*, 110 U.S. at 538 (Harlan, J., dissenting).

47. See *People v. O'Neill*, 107 Mich. 556, 561; 65 N.W. 540, 541 (1895) (holding that grand jurors could be later called at a trial to testify whether a trial witness's testimony was inconsistent with the witness's grand jury testimony). It should be noted, however, that some courts in the 1800s held that trial witnesses could not be impeached by their prior grand jury testimony—even if it was clearly remembered by grand jurors. See *State v. Knight*, 43 Me. 11 (1857). Other courts held that grand jurors could be later called to remember specific testimony of witnesses only in cases of perjury. See *Tindle v. Nichols*, 20 Mo. 326 (1855).

48. FED. R. CRIM. P. 6(e)(2) provides:

No obligation of secrecy may be imposed on any person except in accordance with this rule. . . . [T]he following persons must not disclose a matter occurring before a grand jury: (i) a grand juror; (ii) an interpreter; (iii) a court reporter; (iv) an operator of a recording device; (v) a person who transcribes recorded testimony; (vi) an attorney for the government; or (vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

See *In re Grand Jury Proceedings*, 813 F. Supp. 1451 (D. Colo. 1992) (order regarding motion for release of grand jury documents).

began in earnest when cases were handed to prosecutors by grand juries.<sup>49</sup> The presentment or true bill was accompanied by little or no evidentiary packaging and indicated only that the grand jury had determined that probable cause existed to charge a suspect with a crime. Afterward, however, prosecutors held an immense record of sworn testimony—excluded from grand jurors, judges or defendants. Prosecutors could later use the transcripts to sculpt trial testimony by penalizing witnesses who changed their testimony (or more commonly, using the transcripts to threaten defendants, suspects and witnesses). The change brought a substantial advantage to government prosecutors.

Ironically, this shift was foolishly sought by the defense bar<sup>50</sup>—under the false premise that it would ensure accuracy of grand jury witnesses and allow defendants to challenge dishonest testimony.<sup>51</sup> It seems almost comical in retrospect, but defense bar advocates assumed that the mountains of stenographic transcripts from grand jury proceedings would be readily available to them if such a change were implemented.<sup>52</sup> History has shown that the change actually produced a monumental advantage for the government, as it came with a provision stripping the grand jury of its rightful control of the recordings of grand jury testimony, “reporter’s notes, and any transcript prepared from those notes.”<sup>53</sup>

Rule 6(e) of the Federal Rules of Criminal Procedure places all grand jury transcripts in the hands of the U.S. Attorney’s Office, giving the government an awesome power never known under the common law. This control over the transcripts means control over the outcomes of many cases.

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49. See Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 MINN. L. REV. 398, 399–400 (2006) (describing the change toward allowing “defendants” to waive indictment by grand jury as an abandonment of longstanding constitutional and common law principles).

50. See FED. R. CRIM. P. 6 advisory committee’s notes on 1979 Amendments (citing American Bar Association, Report of the Special Committee, 52 F.R.D. 87, 94–95 (1971) (recommending mandatory stenographic recording of all grand jury proceedings) [hereinafter ABA Report]; 1 WRIGHT, FEDERAL PRACTICE AND PROCEDURE—CRIMINAL § 103 (1969) (“The Supreme Court has emphasized the importance to the defense of access to the transcript of the grand jury proceedings. A defendant cannot have that advantage if the proceedings go unrecorded.”) (internal citation omitted).

51. FED. R. CRIM. P. 6(e)(7) (“A knowing violation of Rule 6, or of any guidelines jointly issued by the Attorney General and the Director of National Intelligence under Rule 6, may be punished as a contempt of court.”).

52. See Federal Grand Jury, *supra* note 14, at 658 Hearings before the U.S. House Subcommittee on Immigration, Citizenship, and International Law,” June–August 1976 (discussing H.R. 1277 and other proposals to require stenographic recording of grand jury testimony as a reform to aid defendants); see also Reform of the Grand Jury System, *supra* note 23, at 658 (statement of Prof. Leon Friedman on behalf of the ACLU) (“Another important protection needed is a requirement that all grand jury testimony be recorded and that all grand jury minutes be made available to a defendant”).

53. FED. R. CRIM. P. 6(e)(1).

In recent decades, prosecutors have perfected the practices of granting immunity to selected witnesses, denying it to others, concealing inconvenient testimony or evidence from the public, and generally leveraging facts and accusations into an overwhelming advantage over targeted defendants—all outside the view of judges, defense lawyers and the public. The government's control of the transcripts essentially means that it can prepare for prosecution while keeping hidden all grand jury witnesses who won't assist in convicting a defendant—subject only to certain foggy limitations imposed by the *Brady v. Maryland*<sup>54</sup> decision and the Jencks Act.<sup>55</sup>

Each week in federal courthouses across the country, defense attorneys do battle with judges and prosecutors over the custody of grand jury transcripts. This battle is almost always won by the government.<sup>56</sup> Defense attorneys, not even aware of what is said in the transcripts, can seek access to them only if they make a convincing argument to a federal judge that such materials are needed to prevent an injustice in *another* proceeding.<sup>57</sup> The judges themselves have no easy access to the materials and generally abide by the assurances of government prosecutors that the transcripts show no improprieties.

It is almost certain that such transcripts, if ever amassed in a national library, would speak of prosecutorial misconduct and perjured testimony on a grand scale. We know this because those few recent cases in which grand jury proceedings have been opened up to public scrutiny have revealed a level of misconduct and abuse by prosecutors that can be described only as systematic and pervasive.<sup>58</sup> One federal judge recently wrote that in

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54. *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that constitutional due process requires that prosecutors must provide exculpatory evidence in their custody or possession to defendants upon request).

55. 18 U.S.C. § 3500 (2006). The statute requires that transcripts of testimony of witnesses who will testify at trial be made available to the defense at trial. It is a codification of the Supreme Court's ruling in *Jencks v. United States*, 353 U.S. 657, 672 (1957).

56. Rosenberg, *supra* note 3, at 1444 (“Attempts to review grand jury minutes are routinely denied on the ground that the grand jury's work must be kept secret, sometimes even years after the grand jury in question has disbanded and after all the defendants and testifying witnesses have died.”) (citing *In re Petition of Craig*, 131 F.3d 99 (2d Cir. 1997)).

57. See FED. R. CRIM. P. 6(e)(2); *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979) (requiring that motions for access to grand jury materials be granted only where the movant shows that the material is needed to avoid “a possible injustice in another proceeding, that the need for disclosure is greater than the need for continued secrecy, and that [the] request is structured to cover only material so needed.”).

58. Cf. *United States v. Holstrom*, 246 F. Supp.2d 1101, 1109 (E.D. Wash. 2003) (in which a senior federal district judge candidly recounted that “in the past twenty-three years [the court had] reviewed innumerable transcripts of Grand Jury charges by the prosecution . . .” and had never seen a proper instruction that grand jurors had the right and power to refuse to indict where probable cause was established by the government).

twenty-three years of occasionally examining grand jury transcripts to resolve pretrial motions, he had never once seen a case where prosecutors gave grand juries accurate legal instructions.<sup>59</sup>

In *United States v. Sigma International*,<sup>60</sup> the Eleventh Circuit dismissed an indictment on grounds of prosecutorial abuse for the first time in more than a decade. After two grand juries declined to issue an indictment, the prosecutor dismissed the second grand jury, impaneled a third grand jury, and falsely told the new grand jurors that the previous grand jury had wanted to indict but ran out of time.<sup>61</sup> The prosecutor then placed a lengthy indictment before this third grand jury and told them that little time was available to hear witnesses.<sup>62</sup> Misleading statements about the law were provided to secure the indictment.<sup>63</sup>

In *United States v. Foster* (1997),<sup>64</sup> the Sixth Circuit reversed a conviction because a prosecutor informed counsel for a witness who had testified before a grand jury that if the witness testified for the defense at trial his immunity would be revoked and charges would be filed against the witness. Federal prosecutors attempted to conceal the witness's grand jury testimony from the defendant because it tended to establish the defendant's innocence.<sup>65</sup>

In the case of Sharon Hogge, reported by the *Wall Street Journal* in 1998, the U.S. Justice Department repeatedly employed deception to entice a suspect into testifying before a grand jury by assuring her she was not suspected of any wrongdoing. Later they indicted her along with her employer. During the course of the failed prosecution, Ms. Hogge miscarried twice from the stress of the ordeal, considered suicide, and for the first time in her life, had to start seeing a psychologist.<sup>66</sup>

In another case, Justice Department lawyers coerced witnesses to implicate a businessman in criminal acts although the witnesses did not know the businessman and had repeatedly exonerated him. Prosecutors tore up a witness's immunity agreement and "refreshed the witness's memory"

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59. *See id.*

60. 244 F.3d 841, 843–45 (11th Cir. 2001) (involving a prosecutor who tried in vain to get two grand juries to indict a shrimp company).

61. *See id.* at 858–59.

62. *See id.* at 858–60.

63. *See id.* at 874.

64. *See* 128 F.3d 949, 953–54 (6th Cir. 1997).

65. *Id.* at 954.

66. *See* Ann Davis, *Life in a Federal Prosecutor's Cross Hairs*, WALL ST. J., Mar. 17, 1998, at B1; *Cleared of Army Fraud, Woman Loses Effort to Recover Legal Fees*, WALL ST. J., Mar. 26, 1998, at B13.

until the witness implicated the targeted defendant in a wide-ranging bribery scheme. The grand jury consequently indicted an innocent man for crimes he did not commit.<sup>67</sup>

It was recently revealed that grand jury transcripts from the 1950 case of Julius and Ethel Rosenberg—the biggest espionage case of the Cold War—indicate that Ethel was convicted and executed based on perjured prosecution testimony that contradicted secret testimony before a grand jury.<sup>68</sup> Prosecution witnesses testified at trial that Ethel had typed stolen atomic secrets from notes provided by a prosecution witness, David Greenglass. But the newly released grand jury transcripts indicate that the notes had been in longhand only—in the handwriting of prosecution witness Ruth Greenglass, not Ethel Rosenberg.<sup>69</sup> The transcripts show that the trial testimony that sent Ethel Rosenberg to the electric chair was a fabrication. The Rosenberg transcript release represented only the fourth time in American history that historic grand jury transcripts were released to the public.<sup>70</sup>

It is not at this point easy to imagine how federal grand jury practice could be more favorable to the government.<sup>71</sup> Today's federal prosecutors have blanket immunity from accountability for most of their misconduct<sup>72</sup>

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67. Bill Moushey, *Win at All Costs: When Safeguards Fail*, PITTSBURGH POST-GAZETTE, Dec. 6, 1998, at A1 (discussing a case where a prosecutor threatened a witness into making false statements and tore up an immunity agreement when another witness would not falsely implicate a defendant).

68. See Pete Yost, *Rosenberg Case Transcripts Raise Possibility of Perjury*, USA TODAY, Sept. 12, 2008, available at [http://www.usatoday.com/news/topstories/2008-09-12-2669926209\\_x.htm](http://www.usatoday.com/news/topstories/2008-09-12-2669926209_x.htm).

69. *Id.*

70. See THE NATIONAL SECURITY ARCHIVE, *Rosenberg Grand Jury Files Released*, Sept. 11, 2008, available at <http://www.gwu.edu/~nsarchiv/news/20080911/index.htm>.

71. See, e.g., *United States v. Wander*, 601 F.2d 1251, 1260 (3d Cir.1979) (criticizing but ratifying and upholding grand jury investigation that consisted mostly of “read-backs” of earlier testimony provided to an earlier grand jury); *United States v. Provenzano*, 688 F.2d 194, 200–03 (3d Cir. 1982) (criticizing but approving practice of having a number of grand juries hear testimony which an indicting grand jury uses as a basis for indictment); *United States v. Helstoski*, 635 F.2d 200, 203–06 (3d Cir. 1980) (criticizing but upholding indictment by grand jury which was unable to observe the demeanor of all witnesses who testified).

72. Federal prosecutors are often considered to be responsible for illegally leaking grand jury secrets to the press. See MARVIN E. FRANKEL & GARY P. NAFTALIS, *THE GRAND JURY: AN INSTITUTION ON TRIAL* 24 (1977) (noting that in contemporary experience, government leaks frequently defeat efforts to enforce secrecy); Bernstein, *supra* note 10, at 617; Darryl Van Duch, *Trial By Rumor Rampant, Say Lawyers in Chicago: Judges, Lawyers and Public Officials Are Hiring Counsel to Fend Off Leaks to Media*, NAT'L L.J., Feb. 24, 1997, at A16 (quoting DePaul University Law Professor, Thomas Cavise, saying “[t]here’s a whole culture happening now on how to create and orchestrate the media leak,” and that such leaks are “intricately woven” into the trial strategies of both prosecutors and defense attorneys); see also Editorial, *Stonewall of Silence*, ST. LOUIS POST-DISPATCH, Feb. 11, 1998 at B6 (“A prosecutor can abuse the grand jury process by giving a politician a brass-knuckles beating in the press while hiding behind grand jury secrecy.”). Admissions were made during the Unabomber grand jury proceedings that “government personnel” were responsible for the leaks, although the U.S. Attorney attempted to place most of the blame on agents of the F.B.I. Director Louis Freeh publicly announced

and are often able to sustain indictments even where the indictments have been produced by unlawful procedures.<sup>73</sup> Concurrently, federal prosecutors are in good position to prosecute witnesses and grand jurors for trivial violations of the Rules.<sup>74</sup> The Supreme Court has upheld grand jury indictments based exclusively on hearsay evidence.<sup>75</sup> When an occasional grand juror complains, prosecutors can and do threaten the recalcitrant grand juror with federal prosecution, and the federal courts offer little or no solace to the juror.<sup>76</sup> In complex cases involving multiple defendants,

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that his agency was conducting an investigation into the leaks, but no culprit was ever blamed. See Gale Holland, *Prosecutors Admit Unabomber Leaks 'Government Personnel' Blamed*, USA TODAY, April 19, 1996, at 3A (discussing how occasionally, prosecutors even admit to leaking grand jury secrets). The issue of Federal prosecutors leaking information also became national news during the impeachment investigations of President Clinton by independent counsel Kenneth Starr. Starr was accused of leaking grand jury testimony to the press. Pete Yost, *Clinton's Lawyer Goes on the Offensive*, ASSOCIATED PRESS, June 3, 1997. Similarly, President H.W. Bush made allegations in 1992 that Special Prosecutor Lawrence Walsh was leaking grand jury information about the "Iran-Contra Affair" to the Clinton presidential campaign to aid Clinton's election prospects. See Editorial: *Stonewall of Silence*, ST. LOUIS POST-DISPATCH, Feb. 11, 1998 at B6.

There were constant accusations and denials that the United States Attorney's office was leaking grand jury testimony to the press during the famous Wall Street insider trading investigations of the 1980. See Susan Antilla, *Theories Abound on Who's Leaking Scoops on Scandal*, USA TODAY, June 29, 1987, at 03B. United States Attorney Jay B. Stephens was ordered by a judge in 1993 to explain grand jury leaks in the case of U.S. Representative Dan Rostenkowski. Sam Vincent and Leslie Phillips, *U.S. Attorney Under Fire*, USA TODAY, Feb. 3, 1993, at 04A; see, e.g., Federal Grand Jury, *supra* note 14 at 360-1 (noting that entire chunks of grand jury transcripts have occasionally made their way into the news due to anonymous leaks).

73. See *United States v. Haynes*, 216 F.3d 789, 798 (9th Cir. 2000) (no dismissal of indictment even though prosecutors failed to disclose evidence impeaching a key witness); *United States v. Shane*, 584 F. Supp. 364 (E.D. Pa. 1984) (defendant denied dismissal of indictment although he showed that prosecutors freely transferred material from one grand jury to another without court permission).

74. Grand jurors are far more likely than government personnel to be prosecuted and convicted of causing leaks to the news media. Examples of grand jurors prosecuted for leaking testimony abound. See, e.g., *United States v. Holloway*, 789 F. Supp. 957, 958 (N.D. Ind. 1992), *aff'd*, 991 F.2d 370 (7th Cir. 1993); *United States v. Peasley*, 741 F. Supp. 18, 19 (D. Me.1990). By contrast, consider the Unabomber case, in which government lawyers admitted that "government personnel" leaked details of the investigation to the media, but went unpunished. See Holland, *supra* note 73, at 3A.

75. See *Costello v. United States*, 350 U.S. 359 (1956).

76. One of the more terrifying examples of this occurred in 1995 when one of the grand jurors called to indict Timothy McVeigh for blowing up the Oklahoma City Federal Building went public with information that federal prosecutors were deliberately leading grand jurors away from suspects other than McVeigh and Terry Nichols. See Pat Shannan, *We Told you So: FBI Hides Truth about OKC Bombing*, AMERICAN FREE PRESS, April 11, 2005 available at [http://www.americanfreepress.net/html/truth\\_about\\_okc\\_196.html](http://www.americanfreepress.net/html/truth_about_okc_196.html). The juror, Hoppy Heidelberg, even wrote to the U.S. District Judge overseeing the grand jury with information about the prosecutorial misconduct. Instead of looking into the prosecutors' conduct, however, the judge summarily removed Heidelberg from the grand jury with a letter threatening Heidelberg with prosecution and cumulative punishment if Heidelberg disclosed his information. The letter was "hand-delivered by armed FBI agents who, with a threatening flash of their weapons, demanded that Heidelberg hand over his grand jury notes." *Id.* As McVeigh attorney Steven Jones has written, the government's wrath against Heidelberg helped cover up aspects of a case that probably involved government participation in the blast that killed 168 people in Oklahoma City on April 19, 1995. STEVEN JONES & PETER ISRAEL, OTHERS UNKNOWN (2001); James Ridgeway, *In Search of John Doe No. 2*, MOTHER JONES, July-Aug.

federal prosecutors manipulate and control the entirety of grand jury decision-making by selectively rewarding snitching witnesses, targeting others, and directing plea negotiations behind the scenes. Even when the grand jurors themselves do no investigation at all, prosecutors use the grand juries' broad subpoena powers to ferret out evidence unobtainable by the prosecutors' own search and seizure powers. Finally, prosecutors use the grand jury as a pretrial sounding board before which they practice the delivery of their case, allowing them to discover its strengths and weaknesses before trial.<sup>77</sup>

All of this is inconsistent with the grand jury practice known to the Framers of the Constitution when they debated and ratified the Fifth Amendment Grand Jury Clause.<sup>78</sup> Prior to the mid-nineteenth century, grand juries did not allow government prosecutors to prepare investigations for them.<sup>79</sup> In fact, the common law known to the nation's Founders forbade government prosecutors from venturing into grand jury proceedings at all unless a grand jury desired to speak to one.<sup>80</sup> The New York Supreme Court was explicit in an untitled decision in 1827: "The district attorney

ought not to attend the grand jury for the purpose of examining witnesses, nor for any other purpose, except to advise them upon any question which they may put to him."<sup>81</sup>

The most famous grand jury case known to the Framers (the 1681

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2007 at 54–61 (suggesting a federal grand jury "investigation" into the death of prison inmate Kenny Trentadue was a vehicle for the Justice Department to cover up his murder by government officials); *see also* Federal Grand Jury, *supra* note 14, at 642 (discussing case of grand jury forewoman Harriet Mitchell, who insisted that an FBI agent be recalled to testify in 1971 to answer for his earlier, suspicious testimony. Ms. Mitchell later learned that the U.S. Attorney had dissolved the grand jury before the FBI agent could be recalled, and that the U.S. Attorney was convening a different grand jury—one without Mitchell—to hear the matter).

77. *See* Bernstein, *supra* note 10, at 577 n.83.

78. *See* Federal Grand Jury, *supra* note 14, at 644 (statement of William E. Buffalino) (the grand jury "has become an instrument of oppression and a vehicle of persecution rather than a safeguard of liberty"). That grand jury practice is supposed to adhere to common law understandings recognized at the Founding of the Republic. *See* Mackin v. United States, 117 U.S. 348, 354 (1886) (saying the Fifth Amendment was intended to incorporate Anglo-American common law).

79. Federal Grand Jury, *supra* note 14, at 623 (statement of Rep. Mario Biaggi) ("[G]rand juries received evidence in private, without the participation of the prosecution and defendant.").

80. GEORGE J. EDWARDS, JR., *THE GRAND JURY* 127 (1906) ("At common law the grand jurors conducted the examination of witnesses themselves, not permitting the attorney for the crown to enter the room[.]."). Nor did early grand juries allow defense attorneys to be present among them. Such a proposal—though offered by many modern critics—would have been regarded with great suspicion by the American colonists who ratified the Constitution. *See* Kevin K. Washburn, *Restoring the Grand Jury*, 76 *FORDHAM L. REV.* 2333, 2336–39 (2008) (criticizing the recurring claim that defense attorneys in grand jury proceedings would restore the independence of grand juries).

81. Anonymous, 7 Cow. 563 (N.Y. Sup. Ct. 1827).

English case of Stephen Colledge and the First Earl of Shaftesbury) was explicit in its denunciation of prosecution or defense lawyers seeking to lecture grand juries on the law:

I know not how long the practice in that matter of admitting counsel to a grand-jury hath been; I am sure it is a very unjustifiable and unsufferable one. If the [g]rand-jury have a doubt in point of law, they ought to have recourse to the court, and that publicly, and not privately, *and not to rely on the private opinion of counsel, especially of the king's counsel*, who are, or at least behave themselves as if they were parties.<sup>82</sup>

How did grand juries operate without the presence of a government prosecutor in their midst? For the most part, they conducted business in a closed courtroom or in a closed chamber adjacent to a public courtroom, referring any legal questions to the judge who swore them in.<sup>83</sup> If the grand jury required the services of a district attorney, or wanted to inform a government attorney of evidence, they would hold proceedings in a public courtroom, out in the open, and allow the prosecutor to attend.<sup>84</sup>

In cases where grand juries identified an indictable offense, “the grand jury could not compel prosecution on its own initiative without the concurrence of the executive but could nonetheless use presentments and other reports to publicize to the people any suspicious executive decisions to decline prosecution.”<sup>85</sup>

When former Vice President Aaron Burr was investigated by a federal grand jury in Kentucky, the United States Attorney for the district sought to “attend the grand jury in their room.”<sup>86</sup> This motion—considered “novel and unprecedented” under the grand jury practice of the founding period—was denied.<sup>87</sup> Under the English jurisprudence that preceded the American ratification debates, grand jurors who allowed a prosecutor into the grand jury room were considered to have violated their oaths as grand jurors.<sup>88</sup>

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82. *Remarks on Colledge's Trial*, by Sir John Hawles, Solicitor-General in the Reign of King William the Third, 8 HOWELL STATE TRIALS 724 (1681) (emphasis added).

83. See EDWARDS, *supra* note 81, at 127 (“At common law the grand jurors conducted the examination of witnesses themselves, not permitting the attorney for the crown to enter the room.”). Note that grand juries were by no means bound to hold proceedings in a courthouse. Some grand juries convened at taverns or in the homes of grand jurors. See Roots, *supra* note 2.

84. See EDWARDS, *supra* note 81, at 127 (“In order that the crown officer might know what evidence was given to the grand jury,” grand jurors in some states were required to hear the evidence in open court, “although after so hearing it they were never denied the right to again hear the witnesses in private.”).

85. AKHIL R. AMAR, THE BILL OF RIGHTS 85 (1998).

86. WILLIAM HENRY PERRIN ET AL., KENTUCKY: A HISTORY OF THE STATE 306 (1888).

87. See Helene E. Schwartz, *Demythologizing The Grand Jury*, 10 AM. CRIM. L. REV. 701, 734 (1972).

88. *Id.* at 715–16.

The first American cases that allowed a government attorney of any kind to be present amidst grand juries apparently occurred around the 1820s, although this author has failed to find any published court ruling allowing the practice prior to 1832.<sup>89</sup> In England, the first known case arose in 1794, after the American colonies had split from the Crown.<sup>90</sup> The presence of prosecuting attorneys was initially allowed when grand juries sought out such lawyers to assist them in drafting legal documents.<sup>91</sup> The practice of government attorneys regularly addressing grand jurors crept into grand jury practice during the mid-1800s, as prosecutors graduated from drafting documents to pure advocacy before grand juries.<sup>92</sup> Gradually, American practice evolved to allow government lawyers' presence to answer legal

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89. See *Ex parte Crittenden*, 6 F. Cas. 822 (D. Ark. 1832) (No. 3,393a) (holding that government attorney may be present during the sitting of the grand jury "to conduct the evidence and confer with them" and denying motion by a court attorney to bar a government attorney from the grand jury room); *Charge to the Grand Jury*, 30 F. Cas. 992 (C.C.D. Cal. 1872) (No. 18,255) (holding that government lawyers but not private prosecutors may be present before grand juries); *In re District Attorney*, 7 F. Cas. 745 (C.C.W.D. Tenn. 1872) (No. 3295) (holding that U.S. District Attorney may be present before grand juries and may keep minutes of grand jury evidence, and suggesting it was always this way in recent memory); *United States v. Edgerton*, 80 F. 374 (D. Mont. 1897) (stating district attorneys may be present in grand jury investigations); *Shattuck v. State*, 11 Ind. 473 (1858) (prosecutor may attend, examine witnesses, and advise on matters of law); *Shoop v. People*, 45 Ill. App. 110, 112 (1892) (state's attorney may be present, a practice "which, as we understand, generally prevails . . . [to aid] the grand jury when called upon by them to do so"); *State v. McNinch*, 12 S.C. 89, 94–95 (1879) (allowing solicitor to "go to the grand jury room, at the request of the foreman . . . and instructed him how to write the findings, but [not to be] in the room while the case . . . was under consideration"); *United States v. Cobban*, 127 F. 713 (C.C.D. Mont. 1904) (allowing district attorney to be present before federal grand juries).

90. See EDWARDS, *supra* note 81 at 127 ("In 1794 upon the indictment of Hardy and others for treason, the grand jury requested the attendance of the solicitor for the crown for the purpose of managing the evidence, for which leave of court was first obtained.")

91. See, e.g., *State v. Adam*, 5 So. 30, 31 (La. 1888)

The district attorney is the representative of the public and the legal adviser of the grand jury. They have a right to call upon him for assistance as to the mode of proceeding and on questions of law, although it is undeniable that it would be unlawful for him to participate in their counsel and express opinions on questions of fact. It would not be illegitimate for him to assist them in the examination of witnesses, so as to elicit from them the material or essential facts on which the prosecution necessarily rests.

*Id.*

92. See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 658 (1833) ("An indictment [was] usually in the first instance framed by the officers of the government, and laid before the grand jury."). The grand jury would then hear evidence outside the presence of the government and, "if they are of opinion, that the indictment is groundless, or not supported by evidence, they used formerly to endorse on the back of the bill, 'ignoramus' or we know nothing of it." *Id.* "If the grand jury are satisfied of the truth of the accusation, then they write on the back of the bill, 'a true bill.'" See also *State v. Adam*, 5 So. 30, 31 (La. 1888) (holding grand juries "have a right to call upon [a district attorney] for assistance as to the mode of proceeding and on questions of law, although it is undeniable that it would be unlawful for him to participate in their counsel and express opinions on questions of fact" or "to assist them in the examination of witnesses."). The *Adam* court wrote in 1888 that "[t]he custom is one of long standing"; *Federal Grand Jury*, *supra* note 14, 623 (statement of Rep. Mario Biaggi) (saying the presence of prosecutors before grand juries was initially allowed only to aid grand juries in the drafting of legal documents).

questions, and later to question witnesses.<sup>93</sup>

When the position of government prosecutor first took hold in the American colonies,<sup>94</sup> grand juries and district attorneys existed in something of an awkward cooperation. By the 1830s, “[a]n indictment [was] usually in the first instance framed by the officers of the government,” wrote Joseph Story in his *Commentaries on the Constitution*, “and laid before the grand jury.”<sup>95</sup> The grand jury would then hear evidence outside the presence of the government and, “if they are of opinion, that the indictment is groundless, or not supported by evidence, they used formerly to endorse on the back of the bill, “ignoramus” or we know nothing of it.”<sup>96</sup> “If the grand jury are satisfied of the truth of the accusation, then they write on the back of the bill, ‘a true bill.’”<sup>97</sup>

As the law became more confusing and complicated, the case law gradually allowed government lawyers in the midst of grand juries.<sup>98</sup> By the beginning of the twentieth century, “[it was] the general custom... in all

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93. See *Byrd v. State*, 2 Miss. 247 (1835) (holding that a county attorney is in effect an assistant to the attorney for the state and may lawfully conduct the examination of witnesses before a grand jury); *Franklin v. Commonwealth*, 48 S.W. 986 (Ky.1899) (holding that the district attorney may be present to assist the grand jury in disposing of township applications for bridge appropriations under the Act of April 16, 1870 (P. L. 1199)); *State v. Mickel*, 65 P. 484 (Utah 1901); *State v. Baker*, 33 W. Va. 319, 322, 10 S.E. 639, 640 (1889) (government attorneys may be present in grand jury investigations); *State v. Kovolosky*, 61 N.W. 223 (Iowa 1894) (district attorney or his appointee may be present before grand juries).

94. Investigations by grand juries evolved in England to weigh accusations presented by individuals other than Crown prosecutors. See EDGAR J. MCMANUS, *LAW AND LIBERTY IN EARLY NEW ENGLAND: CRIMINAL JUSTICE AND DUE PROCESS, 1620-1692*, 92 (1993) (saying that in early New England, the persons bringing charges against an accused had to manage the prosecution themselves); see also Stephanie A.J. Dangel, *Is Prosecution A Core Executive Function?* *Morrison v. Olson and the Framers Intent*, 99 YALE L. J. 1069, 1071 (1990). Public prosecutors were used in only a handful of cases in the seventeenth century. *Id.* at 1072 n.19. Rhode Island led the colonies in providing for public prosecutors. The Rhode Island Assembly appointed William Dyre to the office of attorney general in 1650. GENEALOGICAL AND FAMILY HISTORY OF THE STATE OF VERMONT 445 (Hon. Hiram Carelton ed. 1903). With a mandate to prosecute offenders anywhere in the colony, the attorney general could bring prosecutions in the town courts but conducted prosecutions primarily in the General Court of Trials. See generally Mary Sara Bilder, *The Lost Lawyers: Early American Legal Literates and Transatlantic Legal Culture*, 11 YALE L. J. 47, 56–57 (1999). The practice of private prosecutions continued, however, and numerous criminal cases were prosecuted by private citizens. Dangel, *supra*, at 1079. The practice of private prosecution continued throughout the nineteenth century. See, e.g., *In re Price*, 83 F. 830 (C.C.S.D.N.Y. 1897) (criminal prosecution initiated not by government attorney but by complaint by private citizen).

95. STORY, *supra* note 93, at 658.

96. *Id.*

97. *Id.*

98. See, e.g., *Franklin v. Commonwealth*, 48 S.W. 986 (Ky. 1899) (district attorney may be present to assist grand jurors in examining witnesses).

jurisdictions to permit the district attorney to attend the grand jury.”<sup>99</sup> The great grand jury scholar George J. Edwards wrote in 1906 that “the tendency of the modern cases is to hold that it is the ‘right’ of the district attorney to be present to examine the witnesses and conduct the case for the government.”<sup>100</sup>

By the mid-20th century, the custom of allowing a prosecutor to be present at the receipt of testimony was so routine that it was a “commonly accepted right of the state.”<sup>101</sup> The power to exclude the prosecution from the grand jury room altogether had become only a distant memory.<sup>102</sup> A fundamental change had been accepted by the judicial establishment.

In 1946, the drafters of the Federal Rules of Criminal Procedure made this change permanent with Rule 6(d)’s mandate that “[a]ttorneys for the government... *may be present* while the grand jury is in session.”<sup>103</sup> The advisory committee’s notes to the rule declared that it continued the “prior practice”<sup>104</sup> of allowing prosecutors to be present while evidence was being presented to the grand jury.<sup>105</sup> That this “prior practice” had developed only in recent generations and strayed from the practice known to the drafters of the Fifth Amendment was left unstated.<sup>106</sup>

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99. EDWARDS, *supra* note 81, at 128.

100. *Id.* at 129 (*citing, inter alia, In re District Attorney*, 7 F. Cas. 745 (No. 3925) (C.C.W.D. Tenn. 1872)). The U.S. Congress first waded into this issue on June 30, 1906, when it enacted a statute deliberately intended to overturn a District Court ruling that had upheld the common law right of grand jurors to exclude prosecutors from their midst. *See* 40 Cong. Rec. 7913–4 (1906) (in which members of the U.S. Senate indicated that Justice Department attorneys should be allowed to enter and address grand jury hearings despite the then-recent decision, *United States v. Rosenthal*, 121 Fed. 862 (S.D.N.Y. 1903), which quashed an indictment due to the presence of a federal prosecutor in the grand jury room). The statute purporting to overturn the *Rosenthal* ruling was codified at 28 U.S.C. § 515(a) (1906).

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

102. *Id.*

103. *See* Orfield, *supra* note 8; FED. R. CRIM. P. 6(d)(1) (provides a list of who may be present while a grand jury is in session) (emphasis added).

104. Fed. R. Crim. P. 6(d)(1) advisory committees notes on rules.

105. In 1906, United States Supreme Court Justice Brown recognized that earlier authority stood firm that “none but witnesses have any business before the grand jury, and that the solicitor [or government attorney] may not be present, even to examine them.” *Hale v. Henkel*, 201 U.S. 43, 64 (1906). But “[t]he practice in this particular in the Federal courts has been quite to the contrary,” wrote Justice Brown. The *Hale v. Henkel* decision represents the first Supreme Court proclamation of any federal policy regarding the presence of a prosecutor in front of the grand jury.

106. It is difficult to gauge from the documentation available today the exact point when grand jury practice first allowed a prosecutor to be present before a grand jury. During the seventeenth century, it is said, the presence of a prosecutor during proceedings before a grand jury was “viewed with opprobrium.” Schwartz, *supra* note 88, at 715. A leading jurist of the time found the practice to be “very unjustifiable and insufferable.” *Id.* If a grand jury needed legal advice, it was said that it should seek it from the court, rather than “rely upon the private opinion of counsel, especially of the king’s counsel, who are, or at least behave themselves as if they were parties.” *Id.*

In practice, Rule 6(d) had the effect of transforming a privilege of grand jurors into a mandate imposed upon grand jurors.<sup>107</sup> Grand juries went from having the right to have prosecutors help them with investigations to having prosecutors forced on them. The grand jury's historic power to bar prosecutors from its investigations<sup>108</sup> was lost.

Also lost was the awareness of the sound reasons for barring public prosecutors from grand jury investigations. One of the primary functions of grand juries in generations past was to investigate and uncover government corruption and misconduct.<sup>109</sup> Upon identifying government misconduct, grand jurors would issue "presentments"—published reports of findings.<sup>110</sup> As Akhil Amar notes, "the American grand jury in effect enjoyed a roving commission to ferret out official malfeasance or self-dealing of any sort and bring it to the attention of the public at large."<sup>111</sup> "The grand jury's role thus went far beyond oversight of a prosecutor's proposed indictments." "[T]he grand jury had sweeping proactive and inquisitorial powers to investigate suspected wrongdoing or cover-ups by government officials."<sup>112</sup>

One Framers, James Wilson, stated that "All the operations of government, and of its ministers and officers, are within the compass of their view and research."<sup>113</sup> Early grand juries even occasionally investigated and indicted

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107. See Renee B. Lettow, Note, *Reviving Federal Grand Jury Presentments*, 103 YALE L. J. 1333 (1994). But see Note, *Powers of Federal Grand Juries*, 4 STAN. L. REV. 68, 69 (1951) (asserting that Rule 6 of the Federal Rules of Criminal Procedure permits United States Attorneys to be present at all grand jury hearings).

108. EDWARDS, *supra* note 81, at 128 (a district attorney in the grand jury room "retire from the room during [jury] deliberations[.]" (citing *In re* District Attorney U.S., 7 F. Cas. 745 (1872)). Prior to enactment of the Federal Rules of Criminal Procedure in 1946, it was not uncommon for grand juries to affirmatively expel government prosecutors from their investigations. In one famed late example, a 1935 New York state grand jury investigating the prevalence of racketeering, gangsterism and "the suspicious inability of the police and public prosecutors to cope with it" barred regular assistant district attorneys from appearing before it and sought to appoint Thomas Dewey as its "special prosecutor." Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest For Principled Decisionmaking*, 62 BROOK. L. REV. 1, 64 (1996). Failing to appoint Dewey, the grand jury conducted its own investigation without the presence of a supervising prosecutor. *Id.*

109. See FRANKEL & NAFTALIS, *supra* note 73. But see *United States v. Cox*, 342 F.2d 167, 186 (5th Cir. 1965) (Wisdom, J., concurring specially) (arguing that the federal grand jury "earned its place in the Bill of Rights by its shield, not by its sword" and that the grand jury's role as an investigatory body is not grounded in the text of the Fifth Amendment).

110. SUSAN W. BRENNER & GREGORY G. LOCKHART, *FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE* 21–28 (1996). While this "investigative" function has been drastically curtailed in federal grand juries, there is still a provision in federal law for such grand jury investigations.

111. AMAR, *supra* note 86.

112. *Id.*

113. *Id.* (quoting 2 THE WORKS OF JAMES WILSON 537 (Robert Green McCloskey ed., 1967)).

prosecutors.<sup>114</sup>

In a 2000 article, I pointed out that Rule 6 of the Federal Rules of Criminal Procedure, enacted in 1946, is inconsistent with the intent of the Constitution's Framers that grand juries perform an oversight function upon the conduct of government authorities.<sup>115</sup> In fact, Rule 6 stands at odds even with the explicit text of the Fifth Amendment Grand Jury Clause, which mentions "a presentment *or* indictment."<sup>116</sup> The drafters of Rule 6 knew that their rule was in violation of constitutional text and prior precedent, but took it upon themselves to alter grand jury procedure.<sup>117</sup>

Professor Lester B. Orfield's history of the drafting of Rule 6, recounted both in the Federal Rules of Decisions and the multi-volume treatise that bears his name, includes the cryptic comment: "It has become the practice for the United States Attorney to attend grand jury hearings, hence the use of presentments has been abandoned."<sup>118</sup> The connection between the presence of the United States Attorney in the grand jury room and the grand jury's loss of presentment power was thus so close in Orfield's mind that one represented the cause of the other.

While nothing in Rule 6<sup>119</sup> explicitly precludes a federal grand jury from

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114. See Roots, *supra* note 2, at 832–3 (discussing the New York grand jury that investigated prosecutorial corruption and brought down Boss Tweed in the 1870s).

115. *Id.*

116. U.S. CONST. amend. V ("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, when in actual service in time of War or public danger . . .").

117. See Roots, *supra* note 2, at 823–24.

118. 22 F.R.D. 343, 346 (1958); ORFIELD, *supra* note 8, at 258.

119. Fed. R. Crim. P. 6 provides in pertinent part:

(e) Recording and Disclosing the Proceedings.

(1) *Recording the Proceedings.* Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable

returning a presentment,<sup>120</sup> today's federal courts keep grand juries from doing so by broadly interpreting the *secrecy* requirements of the Rules,<sup>121</sup> which prohibit grand jurors from disclosing "matters occurring" before the grand jury.<sup>122</sup> Grand jurors who occasionally seek to release their findings without government approval (as was their right in all American jurisdictions until well into the nineteenth century) are accused of committing a felony.<sup>123</sup>

One can scarcely imagine a more overtly unconstitutional application of a procedural rule, belying, as it does, the plain wording of the Fifth Amendment.<sup>124</sup> The combination of these two modern artifices (prosecutors in grand jury proceedings and the inability of grand jurors to release independent statements) accounts for virtually all of the emasculation of grand juries in contemporary practice. Yet the so-called originalists who dominate today's legal scholarship and jurisprudence have

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recording device. But the validity of a prosecution is not affected by the unintentional failure to make a recording. Unless the court orders otherwise, an attorney for the government will retain control of the recording, the reporter's notes, and any transcript prepared from those notes.

(2) Secrecy.

(A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

- (i) a grand juror;
- (ii) an interpreter;
- (iii) a court reporter;
- (iv) an operator of a recording device;
- (v) a person who transcribes recorded testimony;
- (vi) an attorney for the government; or
- (vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

120. *See* *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965) (discussing the possibility of a presentment). *But see In Re Grand Jury Proceedings, Special Grand Jury 89-2*, 813 F. Supp. 1451, 1462 (D. Colo. 1992) (no federal grand jury can return an indictment without the consent and signature of a federal prosecutor).

121. *See supra* note 121 and accompanying text.

122. Fed. R. Crim. P. 6(e)(2); *see, e.g., In re Grand Jury Proceedings, Special Grand Jury 89-2* (Rocky Flats Grand Jury), 813 F. Supp. 1451 (D. Colo. 1992).

123. FED. R. CRIM. P. 6(e)(7) ("A knowing violation of Rule 6 . . . may be punished as a contempt of court"). Congress has not prescribed penalties for contempt of court, and several courts have come to competing interpretations of the possible sentencing ranges for criminal contempt. *Compare* *United States v. Mallory*, 525 F. Supp. 2d 1316 (S.D. Fla. 2007) (holding that in the absence of a specific statutory sentencing range, criminal contempt is a Class A felony that permits a sentence of up to life in prison), *with* *United States v. Carpenter*, 91 F.3d 1282 (9th Cir. 1996) (looking at the U.S. Sentencing Guidelines and concluding that criminal contempt is similar to the felony of obstruction of justice and punishable accordingly). At common law, criminal contempt was generally described as a misdemeanor.

124. *State v. Fasset*, 16 Conn. 457, 470 (1844) (stating that grand jury secrecy has long been imposed by law, but is often waived in practice by grand jurors themselves in Connecticut and Massachusetts).

scarcely noticed this constitutional heresy.<sup>125</sup>

#### THE CHANGING APPLICATION OF GRAND JURY SECRECY

Since at least 1681, secrecy has been an established aspect of grand jury proceedings.<sup>126</sup> The Fifth Amendment requirement that no person be held for a capital or infamous crime unless on a presentment or indictment of a grand jury<sup>127</sup> has been repeatedly held to imply that such grand jury proceedings be kept confidential from the public.<sup>128</sup> American grand jury practice has generally required grand jurors to swear that they would keep their proceedings secret, upon penalty of contempt of court.<sup>129</sup> The Supreme Court has described the grand jury as an institution whose purposes would be totally frustrated if conducted in the open.<sup>130</sup>

However, the application of grand jury secrecy in modern courts is fundamentally different from the way secrecy worked under the common law. When the Fifth Amendment grand jury clause was ratified in 1791, secrecy was a power of grand jurors—a right to investigate on their own in defiance of the state. This right was first widely recognized in England as early as 1681, in the case of the Earl of Shaftesbury and Steven Colledge, when the King of England and his royal prosecutors sought to prosecute the King’s political and religious rivals for high treason.<sup>131</sup> The King and royal prosecutors demanded that the grand jury proceeding be held in public.<sup>132</sup> The grand jury refused, finally succeeding in questioning witnesses outside

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125. For a detailed discussion of the popularity of originalism among constitutional scholars, see JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 1 (1996) (asserting that the “jurisprudence of original intention” began sparking political controversy in the mid-1980s). Proponents of originalist methods have generally applied them selectively, and have sometimes justified the enlargement of government law enforcement powers rather than advocating carving them back to levels known to the Constitution’s Framers. See, e.g., Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 GONZ. L. REV. 1 (2009) (suggesting that much “originalist” scholarship has been typified by dubious pro-government, anti-civil liberties advocacy in the area of criminal justice).

126. See BRENNER & LOCKHART, *supra* note 111, at 187.

127. U.S. CONST. amend. V (“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, when in actual service in time of War or public danger . . .”).

128. See, e.g., *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218–19 n.9 (1978) (stating “grand jury secrecy was imported into our federal common law and is an integral part of our criminal justice system”).

129. See *id.*

130. Bernstein, *supra* note 10, at 595 (citing *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979)).

131. See FRANKEL & NAFTALIS, *supra* note 73, at 9.

132. *Id.*

the presence of royal prosecutors.<sup>133</sup> After hearing the evidence, the grand jury refused to indict.<sup>134</sup> “With the shroud of secrecy came independence from the King.”<sup>135</sup>

Today’s grand jury practice turns the power of secrecy on its head. Originally used by grand juries for protection from government retribution, secrecy has ironically become an shield for that very form of abuse.<sup>136</sup>

A review of American history reveals that grand juries of the Framers’ era were secret only in their taking of evidence (if the grand jurors so choose) and internal deliberations.<sup>137</sup> An indicted defendant generally had a right to know the identities of those who testified, and in many jurisdictions, all bills issued by grand juries generally had to list the names of all witnesses who appeared on the face or the back of the bills.<sup>138</sup> The public had wide access to grand juries and could scrutinize everything from their composition to their political biases.<sup>139</sup> Grand jury indictments were valid instruments for the initiation of criminal proceedings without the

signatures of government attorneys.<sup>140</sup> Thomas Jefferson wrote in 1793 that “our judges are in the habit of printing their [grand jury] charges in the newspapers.”<sup>141</sup>

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133. *Id.*

134. *Id.*

135. See Mark Kadish, *Behind the Locked door of an American Grand Jury*, 24 FLA. ST. U. L. REV. 1, 13 (1996)

136. See *id.* at 6; Bernstein, *supra* note 10, at 594 (arguing that secrecy now protects the government’s dominion over the grand jury rather than vice versa).

137. See *State v. Hughes*, 1 Ala. Rep. 655 (1840) (involving defendant who knew identities of grand jurors and sought to question them).

138. This rule appears to have waned around the mid-1800s, but cases announcing a relaxation of standards take notice of the original practice. See EDWARDS, *supra* note 81, at 136–37; *Harriman v. State*, 2 Greene 270 (Iowa 1849); *Andrews v. People*, 7 N.E. 265 (Ill. 1886); *Bartley v. People*, 40 N.E. 831 (Ill. 1895). *But see* *United States v. Shepard*, 27 F. Cas. 1056 (C.C.E.D. Mich. 1870); *State v. Scott*, 25 Ark. 107 (1867); *People v. Naughton*, 38 How. Pr. 430 (N.Y. 1870) (all standing for the proposition that an omission of such names on the indictment will not be fatal to be the indictment).

139. One example involves the Virginia grand jury that indicted Aaron Burr after two others had refused to indict him. Under the procedure of the period, Burr was able to scrutinize the jury list and challenge the presence of several grand jurors whom Burr claimed had shown personal animosity toward him in the past. See Schwartz, *supra* note 88, at 737. This of course would be scarcely imaginable today. Also, Burr was able to insist that the grand jury considering his case consider evidence in his favor. See *id.* at 738. Today, of course, the secrecy shroud of federal grand juries prevents suspects from knowing either the composition or the nature of grand jury investigations.

140. See *Hughes*, 1 Ala. Rep. at 656 (stating that the requirement that the attorney general mark all bills of indictment “has long been regarded as merely directory to the attorney general”).

141. Thomas Jefferson to Edmund Randolph, 1793. ME 9:83.

While originally intended to serve the truth-finding function of the grand jury,<sup>142</sup> secrecy is now used to conceal from the public that which the government desires the public not see. “It is sadly ironic,” wrote Judge Campbell, “that the secrecy of the grand jury, the original source of its independence... has through the passage of time been transformed into a shield of the prosecutor, immunizing him from public scrutiny and responsibility for his conduct.”<sup>143</sup>

While many have documented the slow death of the grand jury as an independent institution, few have commented on the relationship between this decline and the capture of the grand jury and its secrecy by the government. Just as the grand jury itself slowly faded into mere ritual, so did the secrecy surrounding it degenerate into a boilerplate procedural rule whose original purposes and implementation have been forgotten. Even a cursory review of the Anglo-Saxon foundations of the grand jury establishes that modern American federal practice has strayed far from its foundations.<sup>144</sup>

#### THE FALSE RATIONALE BEHIND MODERN GRAND JURY SECRECY

One illustration of how far modern secrecy practices have devolved from the Framers’ original intent is the tortured way that modern courts justify grand jury secrecy. In 1931, in a decision that carved out a disclosure exception for oath-sworn stenographers who recorded grand jury proceedings, the federal district court for the District of Maryland listed five reasons for grand jury secrecy:

- 1)To prevent the escape of suspects;
- 2)To insure the utmost freedom to the grand jury in its deliberations;
- 3)To prevent tampering of witnesses;
- 4)To encourage free and untrammelled disclosures by persons who have information; and
- 5)To protect the innocent accused who are exonerated from disclosures before the grand jury.<sup>145</sup>

The *Amazon Industrial* decision became one of the more noteworthy

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142. See BRENNER & LOCKHART, *supra* note 111, at 189 (“[S]ecrecy promotes [truth-finding] by making it easier for a grand jury to elicit evidence from knowledgeable persons, and making it more difficult for interested parties to influence a grand jury’s inquiries.”).

143. William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 178, 180 (1973).

144. See Kathryn E. White, *Comment: What Have You Done with My Lawyer? The Grand Jury Witness’s Right to Consult with Counsel*, 32 LOY. L.A. L. REV. 907, 915 (1999) (citing FRANKEL & NAFTALIS, *supra* note 73, at 9).

145. U.S. v. Amazon Indus. Chem. Corp., 55 F.2d 254, 261 (D. Md. 1931).

district court decisions of the past century, primarily because it dealt at length with the changing complexity of American grand jury hearings and expounded on the recording of testimony, a major development at the time. The five stated reasons for grand jury secrecy, apparently drawn from the mind of Judge William C. Coleman, were not of particular importance in the case but nonetheless carried verbatim, from case to case, “like a fruitcake that is passed from family to family but never cut into.”<sup>146</sup>

Over the next thirty years, these five reasons were gradually embedded into grand jury jurisprudence. The United States Supreme Court first mentioned them in a footnote in 1958.<sup>147</sup> The following decades saw the Supreme Court repeat these five reasons in a half-dozen decisions.<sup>148</sup> By the 1980s this recitation had become so ritualized as to become virtually constitutionalized by the courts.<sup>149</sup>

In 1967, Richard Calkins published an article that attempted to bring this transformation of the basis for grand jury secrecy to the attention of the legal community.<sup>150</sup> “The present day reasons for grand jury secrecy,” Calkins wrote, “bear little similarity to the underlying factors which first motivated grand juries to proceed in secret.”<sup>151</sup> Calkins suggested that **the** five reasons were not only unworthy of their exalted status in federal jurisprudence, but that they represented an outright falsification of history.<sup>152</sup> Calkins pointed out that where a defendant has already been arrested, an indictment issued, and the grand jury dismissed, three of the five stated reasons “can have no application.”<sup>153</sup> Thus, there would seem to be little reason for allowing federal prosecutors to keep the transcripts in secret. Prosecutors or grand jurors, using the grand jury transcripts, can easily ferret out witness tampering or perjury and punish it, doing away

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146. Bernstein, *supra* note 10, at 596-97.

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

148. The five reasons first appeared in a Supreme Court opinion in a footnote by the majority in *United States v. Procter & Gamble Co.*, 356 U.S. at 681 n.6; *see also* *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 405 (Brennan, J., dissenting) (condensing the five reasons into four reasons and citing *Rose* and *Amazon Industrial*); *Houchins v. KQED, Inc.*, 438 U.S. 1, 35 n. 26 (1978) (Stevens, J., dissenting); *Douglas Oil Co. of California*, 441 U.S. at 218-19; *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 424 (1983); *Illinois v. Abbott & Associates, Inc.*, 460 U.S. 557, 566 n.11(1983); *Press-Enterprise Co. v. Superior Court of Cal.*, 478 U.S. 1, 27 (1987)(Stevens, J., dissenting); *United States v. John Doe, Inc.*, 481 U.S. 102, 109 n.5 (1987); *Butterworth v. Smith*, 494 U.S. 624, 630 (1990). The number of federal district and circuit court opinions that have repeated the five reasons of *Amazon Industrial* is too high to justify listing them here. *See Rose*, 215 F.2d at 628.

149. *See generally* Calkins, *supra* note 102.

150. *Id.*

151. *Id.* at 19-20.

152. *See generally id.*

153. *Id.* at 20.

with a fourth reason.<sup>154</sup>

This leaves the preservation of an unindicted suspect's reputation as the only reason worthy of confining the grand jury in a shroud of secrecy in most cases. While this concern over a suspect's reputation does have some importance, it seems somewhat overvalued in light of the fact that unconvicted trial defendants often suffer similar disrepute with no remedy.<sup>155</sup>

Significantly, the original reason for grand jury secrecy—the principle of the *Shaftesbury* and *Colledge* cases—has been long forgotten in contemporary grand jury jurisprudence. Modern federal courts have created a false history, with a false line of precedents regarding the purposes of grand jury secrecy. Modern courts apply rules of secrecy so strict that secrecy per se is deemed more important than grand jury findings.<sup>156</sup> State and federal courts have refused to allow grand jury transcripts to become public thirty years after trial,<sup>157</sup> cited people who leak grand jury information for contempt and theft of government property,<sup>158</sup> and even punished a reporter for airing the names of witnesses who testified three decades earlier in Jim Garrison's grand jury investigation of President Kennedy's assassination.<sup>159</sup>

#### CONCLUSION

In recent years, originalist methods of constitutional interpretation have

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154. Bernstein, *supra* note 10, at 577 (Today, “[the] prosecutor generally calls one witness, a federal agent whose only role is to summarize his investigation and tell the grand jury what other witnesses if any told her.”).

155. See Calkins, *supra* note 102, at 22; see also Bernstein, *supra* note 10, at 620. “Commentators have long wondered why grand jury witnesses need more protection than trial witnesses.” *Id.* Protections from perjury and witness tampering are already present in the law, remediable by mechanisms other than by grand jury secrecy, and “[m]ost grand jury witnesses are government agents who do not need encouragement to testify against grand jury targets.” *Id.* at 621.

156. This irrational twist of purpose of grand jury secrecy has not escaped the notice (and criticism) of jurists. See *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 403 (1959) (Brennan, J., dissenting) (“Grand jury secrecy is, of course, not an end in itself. Grand jury secrecy is maintained to serve particular ends”).

157. See *Hiss v. Department of Justice*, 441 F. Supp. 69, 71 (S.D.N.Y. 1977) (involving the famed case of Alger Hiss).

158. See, e.g., *Barry v. United States*, 865 F.2d 1317, 1324 n.6 (D.C. Cir. 1989); *United States v. Jeter*, 775 F.2d 670, 672 (6th Cir. 1985).

159. See *Reporter Fined for Airing Names in 1960s Probe*, ROCKY MOUNTAIN NEWS, Feb. 23, 1996, at 37A. The court's ruling was reversed by a Louisiana state appeals court on grounds that the secrecy laws do not pertain to news reporters who receive grand jury materials from others who themselves violate their oaths of secrecy. *Judge Dismisses Contempt Finding in JFK Case*, PHOENIX GAZETTE, Sept. 26, 1996.

achieved great judicial and scholarly popularity. The Supreme Court has looked to Founding-era common law on hundreds of occasions, relying on such sources as Madison's notes of the 1787 Constitutional Convention, Blackstone's *Commentaries*, and eighteenth-century English and American cases for insights on the intended meanings of the Sixth and Seventh Amendment petit jury clauses.<sup>160</sup> But the Fifth Amendment grand jury clause has not been subjected to this same interpretation.<sup>161</sup> Instead, federal courts have granted the prosecution bar ever-increasing power and control over grand juries.<sup>162</sup>

What is needed is a bold reformation of grand jury practice that reestablishes grand juries as powerful checks on the power and ambition of the government. Government attorneys must be barred from appearing before grand jury investigations except where grand jurors vote to consult with them. Above all, grand juries must regain their constitutional power to investigate the state independently, to retain grand jury records independently from government attorneys, and to release presentments and statements regarding their investigations to the public without the permission of courts or prosecutors.

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160. See *Blair v. United States*, 250 U.S. 273, 282 (1919) ("The Fifth Amendment and the statutes relative to the organization of the grand juries recognize such a jury as being possessed of the same powers that pertained to its British prototype.").

161. Note that even when recent Supreme Court justices have addressed grand jury practice from a purportedly originalist perspective, their reasoning has been discernibly inaccurate. See, e.g., *United States v. Williams*, 504 U.S. 36, 51–55 (1992). The Rehnquist Court announced that prosecutors have no constitutional duty to provide exculpatory evidence to grand juries because grand juries have no constitutional obligation to consider such evidence. *Id.*

162. See, e.g., *Blair*, 250 U.S. 273; LYSANDER SPOONER, AN ESSAY ON TRIAL BY JURY 5 (1852) (asserting that since 1215, juries have had a "primary and paramount duty, to judge of the justice of the law, and to hold all laws invalid that are, in their opinion, unjust or oppressive, and all persons guiltless in violating, or resisting the execution of, such laws."); STORY, *supra* note 93, at 608 ("Here, then [in Article III], at least, the constitution of the United States appeals to, and adopts, the common law to the extent of making it a rule in the pursuit of remedial justice in the courts of the Union."); J. A. C. GRANT, OUR COMMON LAW CONSTITUTION 2 (1960).