Prosecutorial Investigations Using Grand Jury Reports: Due Process and Political Accountability Concerns

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"It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[1]

The Fifth Amendment guarantees all federal criminal defendants indictment by grand jury, which is generally thought of as an institution designed to protect individuals from unwarranted prosecution. In many states, however, grand juries have the power to conduct investigations and release public reports accusing individuals of misconduct or criminal activity even if they are not indicted. Because of its historical role as an institution composed of laymen designed to screen criminal charges, the Supreme Court has exempted the grand jury from most of the procedural protections that are afforded to defendants in criminal trials. This Note examines the history of grand jury reports and their modern use and argues that the historical justification for the lowered procedural protection afforded to subjects of grand jury investigations does not apply when the grand jury issues a public report. It concludes by identifying the procedural protections that should be extended to subjects of grand jury reports.

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1. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

I. INTRODUCTION

In at least half of the states, grand juries are empowered to issue written reports in cases in which no criminal activity is charged.[2] While the grand jury historically issued indictments after a prosecutor presented sufficient evidence to establish probable cause that criminal activity had occurred, its reporting authority is vastly different. An indictment serves as a formal charging document that initiates judicial adjudication of criminal accusations.[3] In contrast, a grand jury report does not formally accuse anyone of a crime and is instead a written document most commonly addressed to the court that has empanelled the grand jury.[4] These reports have historically focused on a wide array of public concerns ranging from accusations of political corruption or misconduct to the care of local roads and bridges.[5] Most states that permit grand juries to issue reports provide for limited judicial review of the reports to ensure that the grand jury has not exceeded its legal authority.[6] If the judge determines that the written report is appropriate, it will be filed as a public record.[7]

The reporting authority of grand juries dates back to the colonial era,[8] but grand jury reports have become more controversial in modern times.[9] Through the grand jury, prosecutors gain broad investigative powers that otherwise would not be available, such as the right to compel witnesses to testify without an attor-

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2. SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 2:1 (2d ed. 2010).

3. *Id.* § 1:7.

4. *Id.* § 2:1.

5. *See* Richard H. Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?*, 55 COLUM. L. REV. 1103, 1110 (1955). A related but procedurally distinct function of the grand jury's reporting authority is the ability of the grand jury to initiate removal proceedings against a public official. *See* BEALE ET AL., *supra* note 2, § 2:1. When the grand jury's accusation of misconduct automatically leads to the initiation of removal proceedings against that official, the grand jury's function is analogous to issuing an indictment in that a formal administrative or judicial proceeding will follow. *Id.* Where, however, the grand jury is empowered to issue a public report that criticizes public agencies or officials but does not initiate adversarial proceedings, the power is analogous to traditional grand jury reports. *Id.* The thirteen states that currently allow grand juries to initiate removal proceedings are Alabama, California, Idaho, Indiana, Maine, Massachusetts, Michigan, Nevada, New Mexico, New York, North Dakota, Oklahoma, and Utah. *See id.*

6. *Id*.

7. *Id.*

8. Kuh, *supra* note 5, at 1110.

9. BEALE ET AL., *supra* note 2, § 2:1.

ney.[10] Subjects of investigation are denied some due process rights of trial, such as the right to confront accusers, the right to testify, the right of an open and public adjudication, and the right to examine the fairness and the accuracy of the report's findings by examining the grand jury's minutes.[11] The subject of an investigation has no constitutional right to receive exculpatory evidence from prosecutors and present it to the grand jury.[12] Despite limited safeguards for individual rights, grand juries are often empowered to issue public written reports that are critical of specific individuals.[13] Thus, the existence of grand jury reports presents the potential for violation of an individual's rights and damage to her reputation, often with little power for the courts to prevent such harm from occurring.

Part II of this Note traces the history of grand jury reports, and Part III analyzes the arguments that have been advanced in favor and against their use. Part IV analyzes the reforms that several states have enacted and discusses concerns regarding fairness and political accountability that still remain. Part V concludes that grand jury reports that criticize specific individuals or accuse them of a crime without an indictment cannot be justified absent procedural protections and suggests which protections are essential to ensure fairness.

II. THE LEGAL STATUS OF THE GRAND JURY

A. THE DEVELOPMENT OF THE GRAND JURY REPORT

The Supreme Court has repeatedly made clear that "[t]here is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor" and has often looked to the common law when confronting questions

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10. *See, e.g.*, *id.* § 4:5.

11. *See* United States v. Williams, 504 U.S. 36, 48–50 (1992) (noting that these rights are traditionally protected by the Sixth Amendment but holding that a grand jury proceeding is not a "criminal prosecution" within the meaning of the Sixth Amendment).

12. *See generally id.*

13. While the subject of a criminal investigation can invoke her Fifth Amendment right against self-incrimination and refuse to testify, if a prosecutor grants the subject immunity from prosecution for this testimony she will be required to testify and can be prosecuted for perjury if his answers are untruthful. *See* United States v. Apfelbaum, 445 U.S. 115 (1980).

regarding the power of the grand jury.[14] In order to understand the modern power of the grand jury, it is therefore vital to understand its historical function and powers. Although the focus of this Note is on the reporting function of the grand jury, there is no formal institutional distinction between a grand jury that issues indictments and a grand jury that issues reports.[15] The dividing line between the two functions of the grand jury can often be fluid, as a prosecutor may empanel a grand jury with the intent of seeking an indictment but is free to change course and instead request that the grand jury issue a report.[16] Consequently, it is important to understand the history of the institution as a whole.

Although often considered an individual's shield against oppressive or unwarranted prosecutions,[17] the grand jury in fact originated as a sword to initiate prosecutions. The precursor to the grand jury originated in 1166, when King Henry II created the Assize of Clarendon as his regime's investigative arm.[18] It

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14. Costello v. United States, 350 U.S. 359, 362 (1956); *see* United States v. Navarro-Vargas, 408 F.3d 1184, 1199 n.21 (9th Cir. 2005) (engaging in extensive review of the grand jury throughout early English and American history "to understand [its] core functions and their origins" and to determine whether or not model grand jury instructions at issue were constitutional).

15. *See generally* BEALE ET AL., *supra* note 2, § 1:7.

16. *See* Barry Jeffrey Stern, *Revealing Misconduct by Public Officials Through Grand Jury Reports*, 136 U. PA. L. REV. 73, 130–31 (1987). *See also infra* Part IV.C (discussing an Alaska Special Counsel's decision to issue a grand jury report in lieu of indictment, despite concluding that the state's governor had engaged in criminal conduct).

17. *See, e.g.*, United States v. Mandujano, 425 U.S. 564, 571 (1976) (plurality opinion) ("The grand jury is an integral part of our constitutional heritage which was brought to this country with the common law. The Framers, most of them trained in the English law and traditions, accepted the grand jury as a basic guarantee of individual liberty; notwithstanding periodic criticism, much of which is superficial, overlooking relevant history, the grand jury continues to function as a barrier to reckless or unfounded charges. . . . Its historic office has been to provide a shield against arbitrary or oppressive action, by insuring that serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens acting under oath and under judicial instruction and guidance.").

18. MARVIN E. FRANKEL & GARY P. NAFTALIS, THE GRAND JURY: AN INSTITUTION ON TRIAL 7 (1977). The term "assize" originally meant the sitting of the court or assembly but later came to refer to the actions taken by the court or assembly. Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 281 n.101 (1995). Prior to the Assize, the most common method of criminal accusation was by presentation "before the country": the defendant was required to prove his innocence upon the charges of the injured party and to convince eleven oath takers to support him. Helene E. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701, 707 (1972). If he failed to do so, he faced trial by ordeal or battle. *Id.* The Assize merely replaced the method of presentment: instead of accusation by the injured party,

was believed to be the first time that England used citizens as an accusatorial body.[19] King Henry II's intent was not to protect individuals from unfounded accusations but rather to raise additional money for the Crown[20] and consolidate administration of the criminal justice system at the expense of the Church and feudal barons.[21] Because indictment by a grand jury was followed by a trial by ordeal with little chance of acquittal, the grand jury's decision whether or not to indict was critical. Although today an indictment may still bring negative publicity, an indicted individual has the ability to contest the charges against her in an adversarial proceeding and possibly prevail, instead of having to face near-certain death.[22]

Thus originally, the grand jury was "oppressive and much feared by the common people"[23] instead of being a protector of individual rights. The grand jury did not exercise independence from the crown, and grand jurors were subject to heavy fines if they failed to indict someone accused of a crime.[24] Given that one of the primary purposes of the grand jury was to raise money for the Crown, grand jurors were subject to additional fines if they did not indict a sufficient number of criminals.[25] The notion that the grand jury could act as a protector of individual rights did not emerge until over 500 years after the Assize of Clarendon, when a grand jury in England, for the first time, refused to indict a political enemy of the king.[26]

The institution of the grand jury traveled from England to America in similar form, but in practice, it has exercised much

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"juries" of twelve men heard the case; otherwise the ordeal remained the same. *Id.* at 708. Because the person presented was presumed guilty, the lesser forms of ordeal were eliminated, and the accused was forced to take ordeal by water, which generally resulted in death. *Id.*

19. *See* Leipold, *supra* note 18, at 280.

20. *See* Schwartz, *supra* note 18, at 703–04. The fines leveled by the criminal justice system were an important source of revenue for the crown. *Id.* Some historians maintain that Henry was alarmed by and reacted to the fact that the money the Church's courts collected annually in fines surpassed all of the crown's revenues. *Id.*

21. *See* FRANKEL & NAFTALIS, *supra* note 18, at 7.

22. *Id.* Trial by ordeal included sticking the defendant's hands into boiling water and requiring him to survive without injury or throwing him into a lake and requiring him to survive without swimming. *See* Leipold, *supra* note 18, at 281 n.105.

23. *See* Schwartz, *supra* note 18, at 709.

24. *Id.*

25. *Id.*

26. FRANKEL & NAFTALIS, *supra* note 18, at 9.

greater independence in America.[27] This independence likely resulted from the fact that the grand jury filled a void in relatively weak colonial governments, which rarely had professional police forces.[28] As a result, the grand jury served as a "quasi-legislative and executive" body.[29] Colonial grand jurors took on diverse functions: from auditing the use of public funds and the performance of public officials, to inspecting and reporting on the condition of public roads.[30] In fact, the grand jury has been described as an "instrument for popular participation" in the affairs of colonial government.[31] Through the grand jury, colonists demanded that roads be repaired, protested against corruption and abuses by legislatures, and voiced the general wishes of citizens.[32] It is doubtful, however, that grand juries acted as a significant shield against unwarranted criminal accusations.[33] The absence of a professional police force in most colonies meant that the grand jury itself was initiating criminal charges, not screening charges brought by others.[34]

As the role of grand juries expanded into administrative and regulatory matters such as monitoring road conditions and public corruption, the use of reports expanded as well.[35] By the eighteenth century, English grand juries issued reports in cases where conduct was considered blameworthy but did not rise to the level of criminal liability.[36] British emigrants brought this tradition with them to America, where the grand jury flourished as an institution that both screened criminal charges and moni-

27. Leipold, *supra* note 18, at 283.

28. *Id.*

29. *Id.*

30. FRANKEL & NAFTALIS, *supra* note 18, at 10.

31. RICHARD D. YOUNGER, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634–1941, at 17 (1963).

32. *Id.* at 17, 26.

33. *See* Leipold, *supra* note 18, at 283.

34. *Id.*

35. Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL'Y & L. 67, 70 (1995).

36. *Id.* at 69. The fact that a report is not intended to serve as the basis for criminal prosecution is what separates it from an indictment. *See* Wood v. Hughes, 173 N.E.2d 21, 22 n.1 (N.Y. 1961), *superseded by statute*, N.Y. CRIM. PROC. LAW § 190.85 (McKinney 1971) (current version at N.Y. CRIM. PROC. LAW § 190.85 (McKinney 2010)). A presentment, which is rarely used, differs from an indictment only in that the former is issued independently by the grand jury while the latter is issued by the grand jury upon request of the prosecutor. *Id.*

tored and reported on matters of public importance.[37] Despite the increased importance of colonial American grand juries in new areas, their routine work consisted of screening criminal charges.[38]

In the years leading up to the Revolutionary War, the grand jury became an important tool of colonial resistance to British rule. By refusing to indict political protestors, grand juries prevented enforcement of British criminal statutes, such as those regulating trade.[39] Grand juries also used their investigative authority to harass British officials and protest against their rule.[40] For example, a Boston grand jury indicted British soldiers quartered in a town for trespassing, harassing citizens, and injuring a justice of the peace during a riot.[41] In another case, a Philadelphia grand jury denounced British tea taxes and declared its support for a boycott of British goods and for unified colonial resistance against the colonizer.[42] Throughout the Revolutionary War, grand juries indicted for treason those who joined or gave information to the British army.[43]

The grand jury system survived the Revolutionary War with enhanced popularity due to its effectiveness in resisting British rule,[44] and its screening function was guaranteed in the Fifth Amendment.[45] However, some view the popularity of the grand jury system in post-Revolutionary America as resulting not from its potential to protect individual rights but instead from its usefulness as a political weapon to harass unpopular British soldiers and politicians while protecting the resisting colonists from pros-

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37. Brenner, *supra* note 35, at 70.

38. BEALE ET AL., *supra* note 2, § 1:3.

39. YOUNGER, *supra* note 31, at 27. Colonial grand juries were considered prejudiced in favor of smugglers and patriotic mob leaders. *Id.*

40. *Id.*

41. *Id*. at 30. The royal prosecutors refused to prosecute the indictments against British soldiers. *Id.*

42. *Id.* at 30–31. Although the indictments issued against British officials were high profile, grand juries more commonly acted as "propaganda agencies" during the Revolution, denouncing the enemy and rallying support for the war. *Id.* at 39–40.

43. *Id.* at 38.

44. *See* Leipold, *supra* note 18, at 285.

45. *See* 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 . . . .").

ecution by failing to issue indictments.[46] Such popularity was perhaps shortsighted, though, given that the grand jury could easily be abused in the future to stifle unpopular views.[47]

Grand juries remained largely unchanged into the late nineteenth century, at which point voters and legislators in a number of states began to criticize the grand jury as an outmoded relic and moved to abolish or restrict its role in issuing indictments and conducting investigations.[48] Currently, the grand jury retains reporting authority in approximately half of the states and plays a particularly active role in Alaska, California, Florida, New Jersey, and New York.[49] However, in several states that authorize reports, the subject matter of the reports is limited to specific matters of public administration.[50] Only about a quarter of the states retain a broad grand jury reporting authority that allows reports critical of individuals, and some of these statutes allow criticism of only public officials.[51] Other critics of the grand jury became alarmed by the increased aggressiveness of grand juries.[52] Due to the emergence of professional prosecutors and more established government, many believed that the grand jury was no longer necessary to fill the void that existed in colonial times when government was relatively weak.[53] Consequently, there has been a general trend toward abolishing or limiting the power of the grand jury to issue written reports.[54]

In most states, the very structure of the grand jury undermines the goal of having it operate independently from prosecutors. Typically, prosecutors are charged with serving as both "advocates" — zealously presenting evidence and pursuing investigations in front of the grand jury — and as "neutral" legal advi-

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46. *See, e.g.*, Leipold, *supra* note 18, at 285.

47. *Id.*

48. *See* BEALE ET AL., *supra* note 2, § 1:1; Brenner, *supra* note 35, at 71–72. The Fifth Amendment, unlike virtually all other guarantees in the Bill of Rights, is binding only on the federal government and not the states. Brenner, *supra* note 35, at 71.

49. BEALE ET AL., *supra* note 2, § 2:1 .

50. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 8.3(h) (3d ed. 2010), *available at* Westlaw CRIMPROC § 8.3(h). These states include Colorado, Illinois, Louisiana, Mississippi, Ohio, and Oregon. *Id.* nn.49–50.

51. *Id.* This group includes Florida, Nevada, and Oklahoma. *Id.* n.51.

52. *See* Brenner, *supra* note 35, at 71–72.

53. *Id.* at 72.

54. *See* BEALE ET AL., *supra* note 2, § 2:1.

sors for the grand jury.[55] This conflict between the two roles has led to doubt about the institution's ability to be impartial.[56]

While states may continue to allow for grand jury reports, the advent of the Federal Rules of Criminal Procedure ("the Rules") in 1946 laid the foundation for what would essentially become the end of federal grand jury reports.[57] Although the stated purpose of the Federal Rules was to codify common-law grand jury practices, the Rules significantly diminished the grand jury's historic reporting authority. Perhaps most importantly, Federal Rule of Criminal Procedure 6 ("Rule 6") prohibits a grand jury from making any disclosure, including that which would be required to publicize a report, without first receiving the court's permission.[58] This requirement was not present at common law.[59] The Rules make no provision for grand jury reports or presentments, and the advisory committee notes refer to presentments as "obsolete, at least as concerns the Federal courts."[60] Despite Rule 6's protection of grand jury privacy and its potential to limit the reporting authority, courts were initially slow to apply it in this fashion due to congressional praise of the grand jury's ability to investigate organized crime.[61]

As the federal grand jury reporting authority became abused as a political weapon during the McCarthyism era, federal courts responded by using their new authority under Rule 6 to restrict

55. *See* Brenner, *supra* note 35, at 92.

56. *See, e.g.*, *In re* Grand Jury Subpoena of Stewart, 545 N.Y.S.2d 974, 977 n.1 (Sup. Ct. 1989) (noting wide-spread skepticism among lawyers and judges regarding the power and independence of the grand jury and citing N.Y. Chief Judge Sol Wachtler's famous quip that a grand jury would indict a "ham sandwich" if asked to do so by a prosecutor).

57. *See* Renee B. Lettow, Note, *Reviving Federal Grand Jury Presentments*, 103 YALE L.J. 1333, 1343 (1994).

58. FED. R. CRIM. P. 6(e)(3). Even the exception to grand jury secrecy does not explicitly provide for reports but merely authorizes the court to make disclosure "at a time, in a manner, and subject to any other conditions that it directs." FED. R. CRIM. P. 6(e)(3)(E); *see also In re* Grand Jury Proceedings (*Rocky Flats Grand Jury*), 813 F. Supp. 1451, 1466 n.11 (D. Colo. 1992) ("Even here, there is no indication that Rule 6(e) contemplates disclosure to the public. While Rule 6 allows disclosure by the Court or by U.S. Attorneys to an attorney for the government (6(e)(3)(A)(i)), to the personnel who assist them (6(e)(3)(A)(ii)), to another grand jury (6(e)(3)(C)(iii)), and to appropriate officials of a state or political subdivision (6(e)(3)(C)(iv)), nowhere does it provide for disclosure to the *public*.").

59. Lettow, *supra* note 57, at 1344.

60. FED. R. CRIM. P. 7 advisory committee's notes.

61. Lettow, *supra* note 57, at 1344.

the reporting power.[62] For example, in 1953 a federal judge in Manhattan blocked a grand jury from issuing a public report accusing a labor union of communist infiltration.[63] As the Rules no longer provided for grand jury reports, the grand jury referred to its report as a "presentment."[64] The judge held that the grand jury was "without power publicly to censure those who had been under investigation but whose acts did not warrant" indictment; therefore, the issuance of a public report violated grand jury secrecy laws.[65] Limiting the power of the grand jury to publicly criticize those who it chose not to indict constituted a significant limitation on the grand jury's reporting power.

In modern times, the absence of any mention of grand jury "reports" in the Rules has caused confusion.[66] In one notable case, a federal special grand jury empanelled in 1989 to investigate alleged environmental crimes at a Rockwell International plant in Colorado rebelled against a prosecutor's decision to indict only a corporation and not any of the individuals responsible.[67] Although the prosecutor considered the grand jury's work done, the grand jurors decided to use the prosecutor's manual to draft "indictments" against individuals, "presentments," and a report criticizing the prosecutor's handling of the case.[68] The presiding judge sealed all these documents, and after the jurors responded by leaking them to the media, he asked the Justice Department to investigate them for violating the grand jury secrecy laws.[69]

62. *Id.* at 1345. The author notes that "[d]uring the civil rights movement in the 1960's, courts grew increasingly wary of amateur citizen bodies not under the direct control of the central government." *Id.* at 1345–46.

63. *In re* United Elec., Radio & Mach. Workers, 111 F. Supp. 858, 860 (S.D.N.Y. 1953).

64. *Id.* at 859. The report was not properly characterized as a "presentment," because it was not intended to initiate criminal charges. *See* Brenner, *supra* note 35, at 69; *see also United Elec*., 111 F. Supp at 863 ("It should be noted that the document which the October 1952 Grand Jury handed up is not, strictly speaking, a 'presentment,' since it does not accuse with the intent that anyone should be put to trial.").

65. *United Elec.*, 111 F. Supp. at 866.

66. *See, e.g.*, Lettow, *supra* note 57, at 1334 ("While a presentment is capable of serving as a formal charging document, its main function is to publicize.").

67. *Id.* at 1349.

68. *Id.* at 1349–50.

69. *Id.* at 1350. Although there is no mention of grand jury reports in the Federal Rules, 18 U.S.C. § 3333 authorizes special grand juries to release public reports regarding misconduct "concerning noncriminal misconduct, malfeasance, or misfeasance in office involving organized criminal activity by an appointed public officer or employee as the basis for a recommendation of removal or disciplinary action [or] regarding organized

As the Rockwell incident demonstrates, the power and prominence of the grand jury report has waned significantly from its pre-Revolution peak. Nevertheless, the reports continue to be authorized in a number of states and give the grand jury significant power. As the following section demonstrates, this power is enhanced by modest constitutional limitations on the grand jury's investigative authority.

B. DUE PROCESS RIGHTS IN THE GRAND JURY ROOM AND JUDICIAL SUPERVISION

Recognizing the grand jury's historical role as an institution separate from the courts, the Supreme Court has refused to subject the grand jury to the "supervisory powers" that courts exercise over judicial proceedings.[70] These powers allow federal courts, "within limits, [to] formulate procedural rules not specifically required by the Constitution or the Congress" in order to remedy violations of existing rights and deter illegal conduct in court.[71] Therefore, many of the protections afforded to defendants in trials do not extend to defendants appearing before a grand jury — or at least any protections provided will not be enforced by federal courts, rendering them largely symbolic.

Grand juries may issue indictments based solely on presumably inadmissible hearsay evidence[72] or evidence obtained in violation of the Fourth[73] or Fifth[74] Amendments. Prosecutors are not

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crime in the district." 18 U.S.C. § 3333(a)(1)–(2) (2006); *see also In re* Grand Jury Proceedings (*Rocky Flats Grand Jury*), 813 F. Supp. 1451, 1459–60 (D. Colo. 1992). The judge found that the report did not meet these statutory requirements, but a redacted version of the report could be released pursuant to the exceptions to the grand jury secrecy in Rule 6(e), which allows public disclosure with the court's leave. *Id.* at 1465–70. In deciding what portions to release, the judge referred to the common-law powers of grand juries to issue reports. *Id.* at 1466. The court noted:

> It is also conceivable that no meaningful document will survive the extensive excision necessary to cure the flaws of the Report. Indeed, once the Report is shorn of its objectionable aspects, it may provide some of the same information as that which is already available in the public record, but has largely been ignored.

Id. at 1468.

70. *See* United States v. Williams, 504 U.S. 36, 46–47 (1992).

71. *See* United States v. Hasting, 461 U.S. 499, 505 (1983).

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

73. *See* United States v. Calandra, 414 U.S. 338 (1974).

74. *Id.* at 346. The grand jury's power to compel testimony does not override a witness's Fifth Amendment guarantee against self-incrimination, but if a grand jury violates

required to present the grand jury with exculpatory evidence.[75] Furthermore, the Fifth Amendment's prohibition on double jeopardy does not preclude a grand jury from returning an indictment when an earlier panel has refused to do so.[76] The Court has suggested but never explicitly held that the Sixth Amendment right to counsel does not apply to an individual summoned before the grand jury, even if she is the subject of the investigation.[77] The Court allows such practices under the rationale that the grand jury serves merely to screen criminal charges and does not make a final determination of guilt.[78] Given the limited role of a traditional grand jury, the Court has approved of lesser protections for the accused in order to preserve the historical role of the grand jury as a body "in which laymen conduct their inquiries unfettered by technical rules."[79]

Despite its independence from the courts, the grand jury must still rely on the courts to compel the appearance of witnesses and the production of evidence, and the courts will refuse to assist when such compulsion would override constitutional rights.[80]

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this privilege and its actions aren't challenged in court so that the grand jury issues an indictment based on such illegally obtained evidence, the Court has suggested the indictment "is nevertheless valid." *See Williams*, 504 U.S. at 49 (quoting *Calandra*, 414 U.S. at 346).

75. *See Williams*, 504 U.S. at 52–53.

76. *See Ex parte* United States, 287 U.S. 241, 250–51 (1932); United States v. Thompson, 251 U.S. 407, 413–15 (1920).

77. *See Williams*, 504 U.S. at 49; *see also* FED. R. CRIM. P. 6(d) (omitting attorney for the witness from the list of people who may be lawfully present while the grand jury is in session).

78. *See, e.g.*, *Williams*, 504 U.S. at 1744 ("It is axiomatic that the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge. That has always been so; and to make the assessment it has always been thought sufficient to hear only the prosecutor's side." (internal citation omitted)); *but see* Leipold, *supra* note 18, at 268 ("Despite the informality of the proceedings, the stakes for the defendant are high. Once the jurors return an indictment, the charges are made public and the formal accusation has the weight of the grand jury behind it. In the public's mind an indictment often carries a presumption of guilt; it can cause economic harm and damage to reputation even if the defendant is later acquitted at trial.").

79. Costello v. United States, 350 U.S. 359, 364 (1956).

80. *Williams*, at 48 (citing Gravel v. United States, 408 U.S. 606 (1972)). In *Gravel v. United States*, the Court upheld a protective order issued by the district court that barred a grand jury from compelling testimony that would violate a senator's Speech or Debate Clause immunity under Article 1, Section 6, Clause 1 of the Constitution. *See* 408 U.S. 606, 629 (1972). The Court never explicitly addressed the district court's authority to prescribe the grand jury's subpoena power in this way and "assumed authority to enter a protective order." *See In re* Grand Jury Investigation of Hugle, 754 F.2d 863, 865 (9th Cir. 1985) (Kennedy, J.); *see also id.* at 864 (holding that the district court had the authority to

Thus, while a grand jury may consider evidence illegally obtained by others and presented to it, the grand jury cannot itself compel evidence that would "violate a valid privilege, whether established by the Constitution, statutes, or the common law."[81] Consequently, the Court has recognized procedural limits on the grand jury's authority to compel testimony where the process of producing the evidence would violate a specific privilege.[82] At the same time, though, it has refused to apply exclusionary rules that limit what evidence the grand jury may consider once some other actor has already caused constitutional harm in obtaining it.[83] The Court, therefore, has been willing to exercise judicial supervision to prevent the grand jury from independently causing a constitutional harm, while also recognizing that the grand jury's screening function does not require the accused to receive complete constitutional protections.

III. ARGUMENTS FOR AND AGAINST REPORTING POWER

This Part lays out the arguments in favor of and against grand jury reporting authority. Critics of the reports argue that they allow the grand jury to publicly tarnish an individual's reputation with few limits on its broad powers to investigate, compel evidence, and publicize the results in a form that the public is likely to perceive as authoritative.[84] Supporters of the reports emphasize their historical importance and effectiveness in exposing public corruption, incompetence, and malfeasance that may not rise

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issue a protective order barring grand jury testimony that would violate the marital privilege and noting that "[c]ourts may also exercise supervisory power over the grand jury where there is a clear potential for a violation of the rights either of a witness or of a nonwitness, if the violation cannot be corrected at a later stage").

81. United States v. Calandra, 414 U.S. 338, 346 (1974).

82. *See, e.g.*, *id.* ("Judicial supervision is properly exercised [when a grand jury subpoena violates the Fourth Amendment] to prevent the wrong before it occurs.").

83. *See id.* at 354 ("The wrong condemned is the unjustified governmental invasion of these areas of an individual's life. That wrong, committed in this case, is fully accomplished by the original search without probable cause. Grand jury questions based on evidence obtained thereby involve no independent governmental invasion of one's person, house, papers, or effects, but rather the usual abridgment of personal privacy common to all grand jury questioning. Questions based on illegally obtained evidence are only a derivative use of the product of a past unlawful search and seizure. They work no new Fourth Amendment wrong.").

84. *See, e.g.*, *infra* note 88 and accompanying text.

to the level of an indictable offense.[85] Without grand jury reports, the supporters maintain, some misconduct would simply not come to light and the public would be worse off for it.[86]

In *Wood v. Hughes*,[87] the New York Court of Appeals struck down the ability of New York grand juries to issue reports criticizing public officials based on a lack of explicit statutory authorization. Judge Stanley Fuld's opinion expressed the classic arguments against grand jury reports:

> In the public mind, accusation by report is indistinguishable from accusation by indictment and subjects those against whom it is directed to the same public condemnation and opprobrium as if they had been indicted. An indictment charges a violation of a known and certain public law and is but the first step in a long process in which the accused may seek vindication through exercise of the right to a public trial, to a jury, to counsel, to confrontation of witnesses against him and, if convicted, to an appeal. A report, on the contrary, based as it is upon the grand jury's own criteria of public or private morals, charges the violation of subjective and unexpressed standards of morality and is the first and last step of the judicial process. It is at once an accusation and a final condemnation, and, emanating from a judicial body occupying a position of respect and importance in the community, its potential for harm is incalculable. A grand jury report — which as a judicial document obviously differs radically from newspaper charges of misconduct — carries the same sense of authoritative condemnation as an indictment does, without, however, according the accused the benefit of the protections accorded to one who is indicted.[88]

Thus, the *Wood* court found that grand jury reports lacked due process rights and protections and objective standards upon which to base their criticism. If prosecutors and their staff gain

85. *See, e.g.*, *infra* note 93 and accompanying text.

86. *See, e.g.*, *infra* notes 95–99 and accompanying text.

87. 173 N.E.2d 21, 26 (N.Y. 1961), *superseded by statute*, N.Y. CRIM. PROC. LAW § 190.85 (McKinney 1971) (current version at N.Y. CRIM. PROC. LAW § 190.85 (McKinney 2010)).

88. *Id.* at 26.

complete control over a grand jury investigation and the ensuing report, these concerns are amplified because the prosecutor has gained powers through the grand jury that she would not otherwise have.[89] Although abuses are rare, there are few legal checks to prevent them from occurring. While historically the broad power of the grand jury could be justified by the absence of professional police forces and prosecutors, this justification does not apply if the grand jury is merely a front for the professional prosecutor.[90]

Supporters of grand jury reports emphasize the institutional independence of the grand jury from the prosecutor, even if grand juries are largely dependent on prosecutors for leading investigations.[91] They argue that the grand jury's ability to issue reports encompassing misconduct not rising to the level of an indictable offense is justified by the public interest.[92] As The New Jersey Supreme Court explained in *In re Presentment by Camden County Grand Jury*, one of the classic cases cited in support of grand jury reports:

> There are many official acts and omissions that fall short of criminal misconduct and yet are not in the public interest. It is very much to the public advantage that such conduct be revealed in an effective, official way. No community desires to live a hairbreadth above the criminal level, which might

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89. The Supreme Court has long treated the grand jury as a unique entity due to its constitutional significance and extensive pre-Constitutional history. *See* BEALE ET AL., *supra* note 2, § 2:4. Therefore, procedural rights such as the right of appraisal, confrontation, and cross-examination have not been extended to defendants in grand jury proceedings.

90. *See, e.g.*, Stern, *supra* note 16, at 93 ("[P]ublic interest in learning of official misconduct may not outweigh the interest of the official in protecting her reputation from possibility unfounded allegations if the accuser is publicly perceived as government . . . .").

91. *See, e.g.*, *In re* Presentment by Camden Cnty. Grand Jury, 89 A.2d 416, 423 (N.J. 1952) ("The grand jury within its sphere is an independent body and it reports to no one. Its function for centuries, at common law and here, has been to indict or to present and its work is limited to indictments and presentments."), *rev'd on other grounds*, 169 A.2d 465, 475 (1961); *but see* Hawkins v. Superior Court of S.F., 586 P.2d 916, 919 (Cal. 1978) ("The grand jury is independent only in the sense that it is not formally attached to the prosecutor's office; though legally free to vote as they please, grand jurors virtually always assent to the recommendations of the prosecuting attorney, a fact borne out by available statistical and survey data."), *superseded by constitutional amendment*, CAL. CONST. art. I, § 14.1, *as recognized in* Bowens v. Superior Court of Alameda Cnty., 820 P.2d 600 (Cal. 1991).

92. *See In re Presentment by Camden Cnty. Grand Jury*, 89 A.2d at 423.

> well be the case if there were no official organ of public protest.[93]

Thus, while grand juries in colonial America initially filled a void created by the absence of an effective government, their continued existence became justified by the necessity of imposing a check on the complex modern state that later emerged.[94] Proponents of grand jury reports point out the difficulties of keeping the average citizen informed about government agencies and elected officials, the role of grand juries in monitoring them, and the lack of possible alternatives.[95] If the people are to remain confident in a democratic form of government, these proponents say, there needs to be an effective mechanism of oversight.[96] Especially in the case of elected officials, there are few other viable options aside from the grand jury.[97] While there are executive and judicial agencies capable of conducting investigations, these mechanisms may be overly susceptible to political meddling.[98] Non-government entities, such as the news media, may have sufficient interest to investigate public misconduct, but they too are not without political motivations and will lack the ability of the grand jury to compel evidence.[99]

Critics of the grand jury report counter that the use of grand jury reports as a mechanism for investigating and exposing information allows prosecutors to decide to avoid prosecution when it is politically advantageous to do so; after deciding to do nothing, the prosecutor may place blame on the grand jury for the failure to act.[100] Conversely, an aggressive prosecutor could use a grand jury report to damage the reputation or career of a political rival currently holding office, even in cases where there is insuffi-

93. *Id.* at 444.

94. *See* Frank W. Cureton, Note, *The Reportorial Power of the Alaska Grand Jury*, 3 ALASKA L. REV. 295, 305 (1986).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 306.

100. Some commentators also point out that grand jury reports serve the less nefarious purpose of enabling the prosecutor to respond to criticism when she believes that charging the subject of a grand jury investigation is inappropriate and thus does not do so. The prosecutor may use the report to explain why criminal charges were not warranted, instead of using the grand jury as a scapegoat. *See* LAFAVE ET AL., *supra* note 50, § 8.3(h).

cient evidence to warrant an indictment.[101] Although perhaps rare, the potential for prosecutorial abuse is omnipresent.

IV. REFORMING THE GRAND JURY REPORT

A. RATIONALE FOR REFORM

Once the distinction is made between an individual's right *to* grand jury screening and her protections *from* grand jury actions,[102] it is apparent that the rationale for the limited due process rights afforded in grand jury screening is inapposite to grand jury reports. The limited protections afforded in screening cases can be tolerated because a trial will follow an indictment that offers the defendant an opportunity to vindicate her rights.[103] This rationale does not apply when grand jury reports make final factual determinations. In spite of this difference, there is no formal institutional distinction between the grand jury when used for these two different purposes — a grand jury that initially intends to issue an indictment can instead change course and issue a written report.[104] Despite the grand jury's institutional independence from the judicial and executive branches, the Supreme Court has recognized that the judiciary does have a role in supervising grand juries where their actions will violate rights that cannot be remedied at an ensuing trial.[105] Consequently, the due process framework that the Supreme Court has prescribed for screening grand juries may be inadequate to protect the interests of the subjects of a grand jury report.[106]

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101. *See, e.g.*, Simpson v. Langston, 664 S.W.2d 872, 874 (Ark. 1984) (refusing to permit certain material in a grand jury report concerning public officials when unaccompanied by an indictment, as there is "grave danger that grand jury reports, which are state judicial publications, may readily be used as instruments of unfair partisan politics").

102. *See supra* Section II.B.

103. *See* Peter J. Henning, *Prosecutorial Misconduct in Grand Jury Investigations*, 51 S.C. L. REV. 1, 8 (1999) ("The Court relies on the criminal trial to vindicate a defendant's rights; thus a decision on the core issue of the defendant's guilt or innocence should be the focus of the criminal process, not the prosecutor's conduct.").

104. *See* Stern, *supra* note 16, at 131.

105. *See* United States v. Calandra, 414 U.S. 338, 346 (1974) ("Judicial supervision is properly exercised in such cases to prevent the wrong before it occurs.").

106. *See* United States v. Briggs, 514 F.2d 794, 804 (5th Cir. 1975) ("The absence with respect to the grand jury of procedural safeguards required in other contexts is but an application of the usual rule that due process requirements vary according to particular circumstances.").

B. NEW YORK GRAND JURY REPORTS AND TAWANA BRAWLEY

After the New York Court of Appeals in *Wood* struck down the ability of grand juries to issue reports criticizing public officials based on a lack of explicit statutory authorization, New York Governor Nelson Rockefeller urged the legislature to respond with legislation authorizing grand juries "to make public reports calling attention to unsavory conditions and recommending reforms" while also including "appropriate safeguards against abuse."[107] The legislature responded by passing the modern New York grand jury reporting statute. The New York statute contains the most detailed and protective provisions in the country to ensure that reports do not trample upon individual rights.[108]

The law limits the subject matter of reports, which initiate removal, reprobation, or recommendations for legislative, executive, or administrative action, to "misconduct, non-feasance or neglect in public office by a public servant."[109] Additionally, reports can be issued to exonerate the subject of an investigation at that person's request.[110] Limiting critical reports to public officials reflects a consensus that reports regarding private conduct are not justified in light of due process concerns and would serve little benefit.[111]

The New York statute provides for pre-publication judicial review,[112] which is key to addressing the concerns of publishing reports that criticize individuals. One of Judge Fuld's major criticisms of grand jury reports in *Wood* was that the reports represented the "first and last step of the judicial process," unlike an indictment that could be refuted at trial.[113] The New York statute ensures that there is at least some judicial review of reports before release to ensure that the reports are supported by valid evidence. The grand jury report only becomes public after a court

107. *In re* Report of Aug.–Sept. 1983 Grand Jury III, 479 N.Y.S.2d 226, 229 (App. Div. 1984) (internal quotation marks omitted).

108. *See* BEALE ET AL., *supra* note 2, § 2:3.

109. N.Y. CRIM. PROC. LAW § 190.85(1)(a)–(c) (McKinney 2010).

110. § 190.85(1)(b).

111. *See* BEALE ET AL., *supra* note 2, § 2:3. The Supreme Court recognized a due process interest in one's reputation in *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), but narrowed its holding in *Paul v. Davis*, 424 U.S. 693 (1976).

112. N.Y. CRIM. PROC. LAW § 190.85(2) (McKinney 2010).

113. *See supra* note 88 and accompanying text.

reviews the report and the grand jury minutes to ensure that the subject of the report is proper and all allegations are supported by the "preponderance of the credible and legally admissible evidence."[114] Every person named in the report must be given an opportunity to testify before the grand jury, and the report cannot criticize an identifiable private citizen.[115] If the court releases the report over the subject's objection, the subject of the report can submit a response that becomes an appendix to the public record of the report itself.[116]

Allowing a subject to publish a response partially ameliorates the concern that reports, unlike indictments, do not allow a subject the opportunity to publicly vindicate himself. The appended response, however, would likely not carry the same weight in the public's mind as a dismissed indictment or acquittal after trial.[117] Nevertheless, the result of the New York statute is that those named in grand jury reports are ensured that a libelous grand jury report will not become public, which amounts to a greater judicial check on the grand jury that issues a report instead of an indictment.[118]

Perhaps the most famous use of a grand jury report in New York's recent history arose from the Tawana Brawley episode. Brawley, an African-American teenager, alleged that she had been abducted and sexually assaulted over a period of four days in 1988 by a gang of racist white men, including police officers and an assistant district attorney, in Wappingers Fall, New York.[119] She was found smeared with feces and had racial epithets inscribed on her body.[120] The episode quickly became racially polarizing and gained national attention, as the Reverend Al Sharpton and civil rights lawyers Alton H. Maddox Jr. and C.

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114. § 190.85(2)(a).

115. § 190.85(2)(b).

116. § 190.85(3).

117. *See* Simington v. Shimp, 398 N.E.2d 812, 816 (Ohio Ct. App. 1978) ("[I]njury to an individual named in a report can arise not only from the grand jury proceeding, but also from the public's belief that the grand jury speaks with judicial authority. Further, any attempt by a named individual to rebut the contents of the report would not have, in the public's mind, the same 'official weight' as the report's original accusation." (footnotes omitted)).

118. Stern, *supra* note 16, at 101.

119. Robert D. McFadden, *Brawley Made Up Story of Assault, Grand Jury Finds*, N.Y. TIMES, Oct. 7, 1988, at A1.

120. *Id.*

Vernon Mason rallied to Brawley's defense.[121] New York Attorney General Robert Abrams convened a grand jury to investigate the allegations.[122] After a seven-month investigation, Abrams and the grand jury released a 170-page report[123] that ultimately determined that Brawley fabricated the allegations to avoid punishment from her parents for staying out late and skipping school.[124] As the New York grand jury reporting statute does not allow reports to criticize identifiable private individuals, the subjects of the report were ostensibly allegedly involved assistant district attorney, Steven A. Pagones, and a police officer who committed suicide shortly after the accusations were made public.[125] The report cited extensive evidence of how Brawley concocted the entire episode, fabricated evidence, and lied to the authorities.[126] Nevertheless, a judge determined that the report did not "criticize" Brawley.[127]

Abrams was said to have used the grand jury not merely to issue a public report but also as an investigative tool to gather evidence and compel recalcitrant witnesses in a case with many unanswered questions.[128] Abrams's use of the grand jury was widely viewed with suspicion by Brawley's supporters, who argued that the institution was completely controlled by the prosecutor and would be used to whitewash the allegations.[129] Supporters cited former New York Chief Judge Sol Wachtler's famous quip that a grand jury would indict a "ham sandwich" if a prosecutor so requested, and argued that the corollary was also true: a grand jury

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121. *Id.*

122. E.R. Shipp, *The Case Without Brawley: A Grand Jury's Rare Role*, N.Y. TIMES, Mar. 16, 1988, at B1. Governor Mario Cuomo appointed Abrams as a special prosecutor. *Id.*

123. GRAND JURY OF THE SUPREME COURT, REPORT OF THE GRAND JURY OF THE SUPREME COURT ISSUED PURSUANT TO CRIMINAL PROCEDURE LAW SECTION 190.85 SUBDIVISION (1)(b) (1988), *available at* http://www.nicolederise.com/tawanabrawleyarchive/items/show/12.

124. *See* McFadden, *supra* note 119.

125. GRAND JURY OF THE SUPREME COURT, *supra* note 123, at 1; *see also* N.Y. CRIM. PROC. LAW § 190.85(1)(b) (McKinney 2010) (permitting an exculpatory report to be released if, after an investigation, the grand jury finds no misconduct by a public servant).

126. *See* McFadden, *supra* note 119.

127. *Id.*

128. *See* Shipp, *supra* note 122. Brawley's mother refused to testify and was held in contempt of court and jailed for 30 days; Brawley also refused to cooperate. McFadden, *supra* note 119.

129. Shipp, *supra* note 122.

would decline to indict if a prosecutor so signaled, thereby absolving the prosecutor from making a difficult political decision and leaving responsibility with the grand jury.[130]

While there seems to be scant lingering doubt that the Brawley allegations were in fact a hoax and that the conclusions of the Abrams report were correct,[131] it is unclear if the grand jury exercised judgment independent of Abrams.[132] Despite the outsized influence of prosecutors over the grand jury, the *Brawley* experience demonstrates that grand jury reports can serve the public in a unique fashion. The *Brawley* result was widely considered to be correct and exposed the truth in a case of great local and national importance. While Abrams could have conducted an investigation and released a written summary without the aid of the grand jury, the grand jury was necessary to compel crucial witnesses and evidence.[133]

C. CAUTIONARY TALES OF GRAND JURY ABUSES

This section will examine cases in which grand jury reports have been abused or used in questionable circumstances. While Abrams's grand jury report served the public interest by bringing to light Brawley's false allegations and served justice by publicly exonerating Pagones, the use of grand jury reports to accuse someone of a crime without indictment is more controversial.[134]

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130. *Id.*

131. *See* Ralph Blumenthal, *At Its Final Session, Brawley Grand Jury Is Praised for Effort*, N.Y. TIMES, Oct. 8, 1988, § 1, at 31. Al Sharpton continues to stand behind Brawley's story, even though, in 1998, Pagones won a defamation suit against him and Brawley's lawyers. *See* William Saletan et al., *The Worst of Al Sharpton: A Troubling Tale from His Past. Is It True?*, SLATE (Sept. 8, 2003), http://www.slate.com/id/2087557. Brawley, who later moved to a farm in Virginia and converted to Islam, maintains, as do her parents, that her allegations were true and that the grand jury report was a cover-up. *See* Dorian Block, *Secret Life of Tawana Brawley*, N.Y. DAILY NEWS, Nov. 18, 2007, at 11.

132. It appears that most of the Brawley grand jurors maintained their secrecy. *See* Martha A. Miles & Richard L. Madden, *After the Grand Jury; What Happened to Tawana Brawley's Case — And to Attitudes About Race and Justice*, N.Y. TIMES, Oct. 9, 1988, § 4, at 8.. One grand juror spoke out after the report was released, saying that there was insufficient evidence to support it. *Jurors Disbelieved Brawley*, EUGENE REGISTER GUARD, Oct. 8, 1988, at 4. The twenty-two other grand jurors concurred with the report's findings. *Id.* Publication of a report only requires that twelve grand jurors concur in its result. *See* N.Y. CRIM. PROC. LAW § 190.25(1) (McKinney 2010).

133. *See supra* text accompanying 128.

134. The use of grand jury reports to accuse an official of criminal misconduct without indicting him or her may present additional constitutional issues. *See* United States v.

This latter use highlights Judge Fuld's concern that reports could be abused by subjecting targets to "the same public condemnation and opprobrium as if they had been indicted" without the opportunity for vindication at trial.[135] The New York grand jury reporting statute has no prohibition on such reports,[136] but other jurisdictions require that reports be limited to non-criminal conduct unless accompanied by an indictment.[137] The justification for this limitation is that reports accusing someone of criminal conduct subject that person to a "quasi-official accusation of misconduct which he cannot answer in an authoritative forum" and "impose the punishment of reprimand based upon secret ex parte proceedings in which the person punished has not been afforded the opportunity of formal open defense."[138] Where reports are issued in instances in which the prosecutor has insufficient evidence to seek an indictment yet uses a report to severely damage an official's reputation, the result may be perceived as especially unfair.

Although limiting grand jury reports to non-criminal accusations offers some protection for the rights of the accused, the restrictions will sometimes present definitional difficulties. For example, a report criticizing a public official for misconduct may inevitably mention some conduct that could be covered by broad

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Briggs, 514 F.2d 794, 801–02 (5th Cir. 1975) (holding that a grand jury violated petitioner's Due Process rights by naming him as an unindicted coconspirator, comparing the issue to grand jury reports, and finding "no substantial authority permitting a federal grand jury to issue a report accusing named private persons of criminal conduct," *id.* at 802).

135. *See* Wood v. Hughes, 173 N.E.2d 21, 26 (N.Y. 1961), *superseded by statute*, N.Y. CRIM. PROC. LAW § 190.85 (McKinney 1971) (current version at N.Y. CRIM. PROC. LAW § 190.85 (McKinney 2010)).

136. *See* N.Y. CRIM. PROC. LAW § 190.85 (McKinney 2010).

137. *See, e.g.*, 18 U.S.C. § 3333(a) (2006) (authorizing special grand jury reports concerning noncriminal misconduct by public officials connected to organized crime or reports regarding organized crime in general that do not name specific individuals); NEV. REV. STAT. § 172.267(2)(c) (2010) (providing that a report may not "[a]ccuse a named or unnamed person directly or by innuendo, imputation or otherwise of an act that, if true, constitutes an indictable offense unless the report is accompanied by a presentment or an indictment of the person for the offense mentioned in the report"); N.J. CT. R. 3:6-9(c) ("If a public official is censured the proof must be conclusive that the existence of the condemned matter is inextricably related to non-criminal failure to discharge that public official's public duty."). *But see, e.g.*, ALASKA R. CRIM. P. 6.1(a)(2) ("A grand jury report may include allegations of criminal conduct.").

138. Barngrover v. 4th Judicial Dist. Court, 979 P.2d 216, 220 (Nev. 1999) (per curiam) (quoting *In re* Report of Ormsby Cnty. Grand Jury, 322 P.2d 1099, 1100 (Nev. 1958)).

ethics, official misconduct, or perjury statutes.[139] Another concern is that forcing a judge to scrutinize grand jury reports and excise any accusations of criminal conduct could render "the grand jury impotent in its reporting function."[140] Similarly, such restrictions may not serve the public good in instances in which a criminal trial resulting from an indictment would focus on whether the public official's conduct met the elements of criminal liability and not whether the official disregarded the public interest with his actions.[141]

A 1985 grand jury report initiating impeachment proceedings against the then-governor of Alaska exemplifies some of the concerns with reports issued in lieu of indictments for criminal conduct. That particular investigation stemmed from allegations that Governor William Sheffield manipulated the state's competitive bidding process to steer $10 million in state contracts to political supporters.[142] A prosecutor in the Attorney General's office and a Special Counsel who was appointed for the case conducted the investigation jointly.[143]

The prosecutors reportedly concluded that the Governor's conduct was indictable but recommended that the grand jury instead issue a critical report because a conviction was not assured, and the grand jury report could more quickly release the facts to the public.[144] The Special Counsel claimed that he hoped to avoid

139. *Compare* Biglieri v. Washoe Cnty. Grand Jury Report, 601 P.2d 703, 705 (Nev. 1979) ("The dividing line between proper public criticism and unlawful accusations of possible criminal conduct is often difficult to discern, but it is one which must be drawn."), *with id.* at 706 (Batjer, J., concurring) (arguing that the criminal accusations suggested in the report could not support an indictment for lack of probable cause but agreeing that the report might contain an "innuendo or imputation" of a violation and therefore should be sealed).

140. *Biglieri*, 601 P.2d at 706 (Batjer, J., concurring).

141. *See* Stern, *supra* note 16, at 106.

142. *See id*. at 79 n.16; *see also Chief Prosecutor Ousted in Alaska*, N.Y. Times, Aug. 22, 1985, at A14.

143. Stern, *supra* note 16, at 117. Alaska's Attorney General is appointed by the Governor and serves at his pleasure. *Id.* at 117 n.177. The Attorney General in turn appointed the state's chief prosecutor. *Id.* The chief prosecutor appointed a Special Counsel to counter concerns that the prosecutor's office would not be able to investigate impartially because the chief prosecutor could be fired by the Attorney General, who was himself politically connected to the Governor. *See id.* This concern may have been warranted, as the chief prosecutor who appointed the Special Counsel (apparently without the Attorney General's consent) was later fired by the Attorney General for his role in the investigation. *See Chief Prosecutor Ousted in Alaska*, *supra* note 142.

144. Stern, *supra* note 16, at 119.

bringing the state to a standstill with a lengthy criminal adjudication and that instead the legislature would act to impeach the Governor rapidly.[145] Perhaps more significantly, however, the prosecutors were also concerned that certain key evidence might not be admissible in a trial and that an acquittal after trial would be "disastrous" and imply that the Governor "was vindicated and it was prosecutorial over-reaching to charge him."[146] The grand jury followed the prosecutors' recommendation and issued a strongly critical report suggesting that the Governor perjured himself before the grand jury and ought to be impeached.[147] The Alaska State Senate held impeachment proceedings but ultimately decided not to impeach the Governor.[148]

Several Alaskan legislators criticized the prosecutors in the case and challenged the legality of accusing the Governor of criminal conduct in a report without indicting him.[149] One of the asserted injustices was that prosecutors were able to use the report to levy quasi-official criminal charges against the Governor while avoiding any form of substantial judicial review.[150] The Governor was only vindicated because the State Senate decided to initiate further proceedings and exonerate him, although it was not legally required to do so.[151] Several other states have statutes whereby a removal proceeding is automatically launched at the suggestion of the grand jury.[152] While this provides an opportunity for vindication, it may come after the damage to the official's reputation has already been done.[153] Overall, the Alaska experience demon-

145. *Id.*

146. *Id.* (internal quotation marks omitted) (quoting transcript of grand jury proceedings, see *id*. at 177 n.177).

147. *Id.*

148. *Id.* at 79 n.16. The Senate concluded that there was "substantial" but not the requisite "clear and convincing evidence" that the Governor had committed an impeachable offense. *Id.*

149. *See id.* at 79–81 nn.16 & 19; *see also* Cureton, *supra* note 94, at 323 (noting criticism of the prosecutors' influence over the grand jury proceedings).

150. The report was released publicly only one day after its completion; judicial review was "virtually nonexistent." *See* Stern, *supra* note 16, at 132 n.244. The Governor had no opportunity to review the report or object to it prior before its release. *Id.*

151. *See* Cureton, *supra* note 94, at 314.

152. *See* Stern, *supra* note 16, at 136 nn.261–69. Among the states in this category are New Mexico, North Dakota, Oklahoma, and Utah. *Id.*

153. *See In re* Report of Grand Jury of Carroll Cnty., 386 A.2d 1246, 1249 (Md. Ct. Spec. App. 1978) (noting that expunging an improper grand jury report was a "hollow victory" when it had already been publicized and the subject had lost his job as a result); *see also* Republic Props. Corp. v. Grand Jury Presentment, 971 So. 2d 289, 292–93 (Fla.

strates the dangers of allowing grand jury reports to obscure prosecutorial accountability. Knowing that their evidence against the Governor was weak and that a criminal prosecution might result in an acquittal, the prosecutors instead turned to the grand jury report. The report allowed the prosecutors to level questionable charges at the Governor while being able to avoid the political accountability for the weakness of their allegations that would have resulted if the Governor had been acquitted after a criminal trial.[154]

In order to ensure that grand jury reports protect the due process rights of the accused, this Note recommends that state legislatures ensure that statutes authorizing grand jury reports prohibit a grand jury from being able to accuse an individual of a crime in a report unless it returns an indictment.[155] Allowing such reports exemplifies the concern that the reports are unfair because they act as an official sanction without providing any opportunity for the accused to contest the validity of the accusation.[156] If an individual is truly guilty of a crime, then she should face those charges in court with the assurance that there is sufficient evidence to prove a charge. Grand jury reports should be reserved for those cases when the public interest demands that non-indictable misconduct charges be made public.[157]

Dist. Ct. App. 2008) (holding that grand jury report referenced corporation by name in violation of Florida law and ordering expungement of its name from the report that had already been released publicly); *but see* Kuh, *supra* note 5, at 1133–34 (noting that although striking a report cannot fully assuage the harm done, it will "remove any appearance of official sanction from the charges and render them as impotent or potent as any other non-official charges of wrongdoing").

154. *See supra* notes 130 and 146 and accompanying text.

155. *See, e.g.*, NEV. REV. STAT. § 172.267(2)(c) (2010) (providing that a report may not "[a]ccuse a named or unnamed person directly or by innuendo, imputation or otherwise of an act that, if true, constitutes an indictable offense unless the report is accompanied by a presentment or an indictment of the person for the offense mentioned in the report"); N.J. CT. R. 3:6-9(c) ("If a public official is censured the proof must be conclusive that the existence of the condemned matter is inextricably related to non-criminal failure to discharge that public official's public duty."); *see also* note 138 and accompanying text. *Contra* ALASKA R. CRIM. P. 6.1(a)(2) ("A grand jury report may include allegations of criminal conduct.").

156. *See supra* note 88 and accompanying text.

157. *See supra* note 141 and accompanying text.

D. THE NEED FOR PRE-PUBLICATION REVIEW

California provides perhaps the fewest safeguards against the grand jury's reporting powers; the results have often been quite damaging. In 1879, California eliminated the state constitutional requirement that criminal charges be initiated by a grand jury. The state constitution, however, requires that at least one grand jury "shall be drawn and summoned in each county" every year.[158] As a result, California grand juries spend most of their time exercising statutorily assigned civil oversight functions, such as investigating "the condition and management" of public prisons, auditing public financial records, and investigating local governments.[159] Despite the broad power of the California grand jury to investigate and issue reports, there is little judicial authority to restrain it. A court cannot suppress any report — even one that it considers "ill-advised, insufficiently documented, or even libelous."[160] The only recourse for the wrongly maligned is to file a defamation suit against individual grand jurors.[161] However, even this remedy will likely have little deterrent effect on grand jury misconduct, because the California Attorney General has concluded that grand jurors who face such suits must be defended and indemnified by the State.[162]

The case of San Diego Mayor Susan Golding provides an illustration of the California system. A civil grand jury in San Diego County issued a report accusing her of non-criminal "willful misconduct" in connection with the construction of a downtown baseball stadium for the San Diego Padres and sought her dismissal from office.[163] According to the grand jury report, the Mayor

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158. CAL. CONST. art. 1, § 23.

159. *See* Michael Vitiello & J. Clark Kelso, *Reform of California's Grand Jury System*, 35 LOY. L.A. L. REV. 513, 519–20 (2002) (internal quotation marks omitted).

160. McClatchy Newspaper v. Superior Court, 751 P.2d 1329, 1333 (Cal. 1988) (internal quotation marks omitted) (quoting People v. Superior Court (*1973 Grand Jury*), 531 P.2d 761, 766 (Cal. 1975)).

161. *See* CAL. PENAL CODE § 930 (West 2010); Gillett-Harris-Duranceau & Assocs. v. Kemple, 147 Cal. Rptr. 616 (Ct. App. 1978).

162. *See* Op. No. 97-1219 from the Office of the Att'y Gen. of Cal. to the Hon. Bernie Richter (June 2, 1998), 81 Ops. Cal. Att'y. Gen. 199 (concluding that grand jurors are effectively employees of county in which they report and are therefore entitled to defense and indemnification under the California Tort Claims Act).

163. *See* Michael Vitiello & J. Clark Kelso, *Reform of California's Grand Jury System*, 35 LOY. L.A. L. REV. 513, 532 n.134 (2002).

promised to increase funding for the San Diego Hotel-Motel Association in exchange for its support of a ballot measure that would dedicate public funds to help finance the new stadium.[164] In fact, the report was factually incorrect in a critical respect: this money was not allocated to the Hotel-Motel Association but rather to the city's visitors and convention bureau.[165] The conclusion that the mayor's actions constituted misconduct was widely criticized by politicians across the ideological spectrum, newspaper editorial boards, and academics.[166] The city council member who was an outspoken critic of the stadium project and referred the case to the grand jury called the panel's conclusions "ludicrous."[167]

Many commentators claimed that the Mayor had engaged in nothing more than simple political horse-trading without seeking to personally enrich anyone.[168] The panel's charge of "willful misconduct" had no legal definition, so the grand jury's seemingly legal conclusion was in fact quite subjective.[169] The grand jury foreman, a 70-year-old retired military intelligence officer, defended the panel's conclusion while conceding that perhaps this was nothing more than an example of everyday politicking, but he added, "Do you think it should be? Politicians think it's fine to trade votes for votes and so forth and so on. . . . But when you're trading taxpayers' dollars for votes, that's considered misconduct in office."[170]

Apparently, the grand jury operated with substantial independence from the local prosecutor, who rejected the grand jury's findings, blasted the panel for refusing to seek his legal advice or the Mayor's testimony, and declared that the Mayor was "factually innocent."[171] A judge agreed with the prosecutor and dismissed the charges, declaring, "The grand jury ignored the Constitution,

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164. *See* Karen Brandon, *It's Politics, but No Strange Bedfellows Allowed; San Diego Judge Mulls Mayor's Fate*, CHI. TRIB., July 8, 1999, at N4.

165. *Id*.

166. *Id*.

167. *Id*.

168. *See, e.g., id*. (quoting Steve Erie, a University of California-San Diego political science professor and self-described critic of the Mayor, who described the grand jury charges as "looney tunes": "'Under this definition, every big-city mayor would be facing an accusation right now,' he said. What Golding is accused of 'is the very essence of big-city coalition building. This is the essence of politics.'").

169. *Id*.

170. *Id*.

171. *Id.* (internal quotation marks omitted).

ignored the facts and ignored common sense."[172] The dismissal of the charges came too late for the Mayor, as the report had already been made public and "destroyed" her political career.[173] The Mayor Golding incident demonstrates that grand jury reports should be subjected to pre-publication judicial review before they are publicly released to ensure that they comply with the law and that allegations are supported by credible evidence.[174] Allowing for review only after a report is released may provide little relief to the named subject, as the damage will have already been inflicted by the release of the report.[175]

Such problems are not unique to the California system. Critics point out that even when prosecutors use grand jury reports responsibly, the reports can still obscure political accountability and result in the suppression of public information.[176] The institutional structure of the grand jury makes such a result possible. For example, a prosecutor can conduct a grand jury investigation and maintain secrecy while strictly controlling what information is released to the public. Pennsylvania Attorney General Tom Corbett issued a grand jury report to publicize the findings of his investigation of the 2005 accidental, station house shooting death of Easton Police Officer Jesse Sollman by one of his colleagues, Officer Matthew Renninger.[177] Although the report concluded that Renninger acted negligently and should be fired from the police force for the accidental shooting,[178] Corbett declined to seek criminal charges against him. Some criticized the report for leaving many questions unanswered and failing to justify why Renninger should be fired but not held criminally liable.[179] As Pennsylvania does not require a grand jury indictment to bring criminal charges, Corbett likely used the grand jury for its investiga-

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172. Tony Perry, *Golding Case Dismissed*, L.A. TIMES, July 23, 1999, at 3 (internal quotation marks omitted).

173. *See* Vitiello & Kelso, *supra* note 159, at 514.

174. *See, e.g., supra* note 114.

175. *See supra* note 153.

176. *See supra* note 100 and accompanying text.

177. *See* 22D STATEWIDE INVESTIGATING GRAND JURY, GRAND JURY REPORT NO. 1 (2006), *available at* http://www.attorneygeneral.gov/uploadedFiles/Press/Sollman%20Grand%20Jury%20Report%201.pdf.

178. *Id.* at 24.

179. *See, e.g.*, Editorial, *Grand Jury Report, Easton Response Are a Miscarriage of Police Shooting Probe*, MORNING CALL (Allentown, Pa.), Mar. 26, 2006, at A16 (calling the report's findings "baffling"), *available at* 2006 WLNR 5021000.

tive advantages, such as the ability to compel testimony, and to insulate himself from the final decision, which would likely be unpopular no matter what conclusions were reached.[180]

Despite the success of the grand jury report in adjudicating important and high-profile cases for Abrams and Corbett, these same results could have been achieved if the investigative authority were given directly to the prosecutors. It seems unlikely that the grand jurors themselves contribute anything to most investigations, and their presence may just obscure the true source of the investigation's findings by having them listed as the official authors of the report.[181] If anything, in these cases the use of the grand jury seems to undermine the findings of investigations that would otherwise be perceived as legitimate.

V. CONCLUSION

Grand jury reports that principally represent the work and conclusions of a prosecutor are far removed from such reports' original historical justification, which was to fill a void caused by a lack of professional prosecutors.[182] Nevertheless, in modern times, professional prosecutors have transformed grand jury reports into instruments for conducting public investigations of important matters. In doing so, prosecutors gain vast power to compel evidence in furtherance of their investigations and can obscure their own role in conducting the investigation. The results have thus far been mixed: at times important information has been exposed to the public, but there have also been some cases of abuse.

In cases where the conclusions of the grand jury report are more disputed and primarily driven by the supervising prosecutor, this lack of accountability is even more problematic as the prosecutor may be absolved of responsibility for reaching such questionable conclusions. The public would be better served if it were clear whether the prosecutor or the grand jury had made the decision not to bring criminal charges in a given case. In-

180. *See* Elliot Grossman, *Easton Inquiry Altered by Grand Jury; Panel's Use Indicates Difficulty of Probe into Police Officer's Death*, MORNING CALL (Allentown, Pa.), June 24, 2005, at B1, *available at* 2005 WLNR 10013462.

181. *See supra* note 90.

182. *See supra* note 28 and accompanying text.

creasing the visibility of decision making would allow the public to hold accountable an elected attorney general or district attorney in the next election. Subjects of grand jury investigations would certainly be better off with a system where accusations require support by credible and legitimate evidence and the accused are given an opportunity to defend themselves. However, due to their historical vitality and the lack of an impetus for change, grand jury reports are not disappearing, or at least not quickly. If we continue using grand jury reports, it is important that procedural protections are built into authorizing statutes to ensure that due process concerns are satisfied.

While grand jury reports have a long history as a means of popular participation in government, the use of such reports to publicly criticize or accuse someone of criminal activity without sufficient safeguards can no longer be justified solely by historical tradition. Prepublication judicial review of grand jury reports is critical to ensure that procedural protections have been followed before a report with the potential to cause irreversible damage is released. As long as these procedural protections are followed, grand jury reports can continue to be used responsibly by prosecutors to resolve high-profile controversies and combat public corruption.