WHY NOT ADMINISTRATIVE GRAND JURIES?

Ronald F. Wright*

INTRODUCTION

The people care nothing for their bureaucrats. The typical citizen of the United States, a nation founded on the notion that the people must govern themselves, knows next to nothing about the daily administration of government. Although the government affects their lives profoundly, citizens interact with government agencies without any conviction that they could influence an outcome. And as participation and familiarity with public affairs dwindle, alienation and indifference grow. This detachment from the administrative work of government appears to be part of the larger pattern of declining voter turnout and apathy. There is reason to fear that Americans are losing any sense of community.

The time has come, then, to consider what may seem an outlandish idea. I propose in this article that local, state, and federal governments use citizen panels modeled on the criminal grand jury to monitor or perform some of the administrative tasks now handled by administrative agencies. Other

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*Associate Professor of Law, Wake Forest University. B.A. College of William and Mary, 1981; J.D. Yale Law School 1984. I appreciate the generous deliberations of Kathryn Abrams, Akhil Amar, Cynthia Farina, Michael Gerhardt, David Logan, Alan Palmier, and the participants in the Faculty Workshop of the Marshall-Wythe School of Law, College of William and Mary, in connection with early drafts. Patrick Kernan, Jayson Sowers, and Judith Wroblewski provided research assistance.


2. See Walter D. Burnham, The Turnout Problem, in Elections American Style 97 (A. James Reichley ed. 1987); 1991 Information Please Almanac 41 (Otto Johnson, et al. eds., 1991) (turnout figures for 1988 elections); L. Orin Peterson, The Day of the Mugwump 12 (1961) ("Most Americans look at politics the same way the frontiersman used to regard a bath: as something to be indulged in only every year or so.").

correctives for lack of citizen involvement in government are surely possible and desirable. However, I focus on the grand jury model because it is an institution with a track record. Its history shows some promise as a device for promoting sound governance and for educating and involving citizens; its failures may reveal some institutional pitfalls to avoid.

This proposal for one of today's ills, therefore, begins with a tale from the past. Part I traces a history of the American grand jury, and fixes on the grand jury's administrative functions rather than its power to indict targets of criminal investigations. Early in our nation's history, grand juries gave citizens a forum for participating in the daily affairs of government. Their duties ranged from initiation of criminal charges, to issuance of reports criticizing public officials, to inspections of public facilities. Those considering its worth during this time were convinced that the grand jury was both a valuable check on governmental abuse and a way to improve the civic virtue of the grand jurors. For well over a century, however, grand juries have been on the decline. They have given way to a perceived need for professionalism and expertise in government. Most administrative functions that grand juries once performed have become the duties of full-time civil servants.

Part II juxtaposes this diminishing role of the grand jury with broader forces that have closed off other opportunities for "amateur" citizen participation in government. It recounts the growth of a professionalized administration in government at the turn of the century, a central element in the creation of the modern administrative state. The rise of the administrative state, for reasons easily understood but often forgotten, created an inhospitable environment for direct citizen participation in government.

Part II goes on to explore some of the shortcomings of a government that relies on professionals to the extent ours does. Excluding citizens from the administration of public affairs calls into question its legitimacy and undermines the incentives for agencies to pursue sound government. Further, it perpetuates disaffection and ignorance among citizens about their government at all levels. In an administrative state where so many encounter the government routinely, estrangement and enmity between a bureaucracy and those it serves can become an almost constant irritant.

In response to some of these difficulties, administrative law doctrines have attempted to accommodate more citizen involvement since the New Deal era. Some little-known institutions today allow for citizen participation in agency affairs. However, those citizen groups function in ways that distinguish them from the grand jury model I propose, and arguably make them less satisfying for the participants and less effective in promoting sound government.

In Part III, I draw on the grand jury's history and an assessment of the need for citizen participation, in an attempt to sketch a workable design for an administrative grand jury. There is both ample room and great need for legislative experimentation. Any institutional design, however, must be wary of grand jury passivity and must account for some differences between the
criminal and administrative contexts. Within some limits I describe, the possibilities of administrative grand juries could make them worth all the expense and uncertainty they might involve.

1. A BRIEF HISTORY OF GRAND JURIES AS ADMINISTRATIVE BODIES

The history of the grand jury has been told well and often by others.4 This article will concentrate instead on one aspect of the grand jury's past in this country: its role in administering government, rather than its power to indict. This story, though fascinating in its own right, is important today because it illuminates some of the possible uses for citizen administrative panels modeled on grand juries. An administrative body today that draws on this rich tradition of self-government may also find it somewhat easier to gain public acceptance and to get more enthusiastic participation from its members.5

This part begins with a paean to the grand jury as it was said to operate in early American legal culture, with an emphasis on the grand jury's presentment and report powers. From its earliest years in this country until at least the middle of the nineteenth century, the grand jury served a number of critical educational and participatory functions in local government. The grand jury, however, has not proven to be a hardy legal institution in the United States. As governments increased in size and complexity, the noncriminal administrative duties once performed by grand juries fell to others, typically full-time civil servants. Hence, the grand juries at work in most states today have withered nearly beyond recognition.

A. A Catalog of Grand Jury Administrative Functions in a Frontier Democracy

The grand jury can trace its heritage at least as far back as twelfth-century England.6 It began as a body of citizens charged by the courts with inves-


tigating criminal violations in the vicinity. Initially, the criminal charges that
the grand jury issued took the form of "presentments," based on the
personal knowledge of grand jury members.\textsuperscript{7} Only later did grand juries
consider the indictments placed before them by prosecutors for the Crown.\textsuperscript{8}
They were even slower to gain a reputation for protecting individuals from
prosecutorial abuse.\textsuperscript{9}

In addition to presentments and indictments, English grand juries consid-
ered matters that did not result in charges of criminal violations. They could
issue "reports," publicizing and condemning certain practices of private citi-
zens or public officials.\textsuperscript{10} Those reports, addressed to the court supervising
the grand jury and available to the public, might have concerned possible
violations of criminal law that did not warrant prosecution, or they might
have covered private or public misconduct that was blameworthy but not a
violation of any criminal law.\textsuperscript{11} All of these tasks created an occasion for poli-
tical reflection and debate. The gathering of grand jurors at a session of the
local court was "one of the few regular opportunities for the 'county,' i.e.,
its gentry and bigwigs, to come together and assess the local political
climate."\textsuperscript{12}

The grand jury, with its full range of traditional duties, thrived when first
transplanted to England's American colonies. When summoned by the local
court,\textsuperscript{13} grand jurors had the power to consider presentments and indict-
ments and to issue reports. Indeed, the grand jury exercised even more
responsibility for public administration in the colonies than in England. Within
a short time, colonial grand juries had become multipurpose administrative
bodies in a frontier culture. They were monitoring public officials, adminis-
tering public affairs themselves, and even initiating legislative policy.

\begin{thebibliography}{9}
\bibitem{7} Roger D. Groot, The Presentment Jury Before 1215, 25 Am. J. Legal Hist. 1 (1982); 4
William Blackstone, Commentaries 301. Later the grand jury developed the power to
hear evidence presented by witnesses and prosecutors regarding alleged crimes. John G.
Bellamy, Crime and Public Order in England in the Later Middle Ages 121-23
(1973).
\bibitem{8} Bellamy, \textit{supra} note 7, at 121-28.
\bibitem{9} Sara S. Beale & William C. Bryson, Grand Jury Law and Practice \textsection{} 1.02, at
7-8 (1986). This reputation arose in part because of the refusal of a London grand jury to
indict the Earl of Shaftesbury for treason. \textit{See also} John Somers, The Security of
Englishmen’s Lives (1681).
\bibitem{10} Sidney Webb & Beatrice Webb, English Local Government from the Revolu-
tion to the Municipal Corporations Act: The Parish and the County 448-56
(1906); 10 Holdsworth, \textit{supra} note 4, at 146-51 (1938).
\bibitem{11} Richard H. Kuh, The Grand Jury "Presentment": Foul Blow or Fair Play?, 55 Colum. L.
Rev. 1103, 1109-10 (1955).
\bibitem{12} John Brewer, The Wilkesites and the Law, 1763-74: A Study of Radical Notions of Gover-
nance, in An Ungovernable People: The English and Their Law in the Seventeenth
\bibitem{13} For a description of the methods of selecting grand jurors, see infra notes 48-51 and
accompanying text.
\end{thebibliography}
1. Monitoring Public Officials

The bulk of grand jury time during the colonial period was probably spent taken up with monitoring the criminal enforcement activities of the executive. Very early in the history of most colonies, grand jury indictment became a prerequisite to conviction for any major crime. While it is no doubt true that grand juries approved most of the indictments that prosecutors brought to them, there were notable exceptions.

One of the most famous instances of a grand jury refusing to indict occurred in 1743, when the colonial governor of New York sought to indict John Peter Zenger, a newspaper publisher, for criminal libel based on Zenger’s criticism of the governor. Two grand juries refused to indict Zenger. In another famous example of grand jury resistance, a Boston grand jury in 1765 refused to indict the leaders of a riot protesting the hated Stamp Act.

These and other refusals to indict have become part of the lore of the American Revolution. They demonstrate vividly the ability of the people, through the grand jury, to thwart the will of a government that had lost their support and sympathy. These grand juries did not refuse to indict because of a lack of proof that the accused had violated a criminal statute. Rather, they refused because they fundamentally disagreed with the government’s decision to enforce these laws at all. Hence, grand juries were capable of reviewing the legal interpretations of the executive, and not just the sufficiency of the evidence the executive had amassed for a prosecution.

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14. See, e.g., N.C. Const. of 1669, art. 60. This prerequisite to trial for criminal offenses was more often guaranteed by custom than by explicit constitutional or statutory provision. See Younger, supra note 4, at 20–21.


16. When the prosecutor circumvented the grand jury by filing charges in an information, the trial jury acquitted Zenger. Alexander, supra note 15, at 19.

17. Frankel & Naftalis, supra note 4, at 11. The recalcitrance of Massachusetts grand juries led to attempts by Parliament to give the power of selecting grand juries to the sheriffs, officials more sympathetic to the Crown.

18. Later systematic refusals to enforce the law reflected the inevitable difficulties with a populist institution such as a grand jury. Grand juries in southern states during Reconstruction often refused to indict for violations of laws prohibiting Klan activity. William W. Davis, The Civil War and Reconstruction in Florida 604 (1913); Stanley F. Horn, Invisible Empire: The Story of the Ku Klux Klan, 1866–1871, at 123, 136–37 (1939).


There may have been no explicit recognition of the legitimacy of the power of a grand jury to “review” the legal interpretation of the executive. See Alexander Addison, Charges to Grand Juries 39–40, 48–52, 72 (1889) (1792 and 1794 charges to Pennsylvania grand juries). However, a respectable body of law from the eighteenth and nineteenth centuries held that petit juries properly exercised the right to “review” unconstitutional laws. Ga. Const. of 1777, art. XLI (“The jury shall be judges of law, as well as of fact.”). See Akhil
Less spectacular refusals to indict very likely occurred more commonly. These refusals would have been based on the more conventional ground of insufficient evidence. It is virtually impossible to ascertain how often the grand jury rejected the enforcement efforts of the prosecutor, but there are a few clues. The grand jury at the time was not bound by any explicit legal requirement that it employ the minimal "probable cause" standard of proof to measure the prosecution's evidence. Further, judges exercised somewhat loose control over the grand jury. Hence, there was at least an opportunity for grand juries to refuse to indict more commonly at that time than they do today.

Another monitoring function of the grand jury arose where the prosecutor overreached during the investigation, as opposed to the charging, of a crime. The grand jury could refuse a prosecutor's request to issue a subpoena for documents or testimony of a witness, and the judge supervising the grand jury might on occasion quash the subpoena as drafted by the prosecutor.

Although these efforts to monitor criminal enforcement were probably core of the grand jury's work, local grand juries also monitored governmental activity other than criminal enforcement. For example, many


20. It is even difficult to get an accurate sense of the frequency of refusals to indict in this century. For one of the first attempts at such a measurement, see Wayne L. Morse, A Survey of the Grand Jury System, 10 Or. L. Rev. 101, 152-55 (1931).


22. Judicial control over grand juries at the time was less exacting than it became during the late nineteenth century, and little attention was paid to the amount of evidence sufficient to support a grand jury indictment. See Julius Goebel, Jr. & T. Raymond Naughton, Law Enforcement in Colonial New York 359, 355-56 (1944); George L. Haskins, Law and Authority in Early Massachusetts: A Study in Tradition and Design 214 (1968) (statutory provisions loosening judicial control of grand juries).


24. See Arthur P. Scott, Criminal Law in Colonial Virginia 70 (1930). Some of these noncriminal monitoring tasks are still performed by grand juries in a few states. See Bruce T. Olson, Ombudsman on the West Coast: An Analysis and Evaluation of the Watchdog Function of the California Grand Jury, Police 12-20 (Nov.-Dec. 1987). The federal grand jury, however, has always exercised less of a monitoring role outside of criminal enforcement.
grand juries early in the nation’s history issued reports criticizing the condition of local roads, public buildings, or prisons. Grand juries criticized local officials for not providing adequate accounting of public funds or for spending public funds unwisely; they upbraided officials for not attending official meetings or for failing to supervise subordinates in local government. On occasion, they even would criticize the court supervising their work for failing to carry out the court’s various administrative duties. To facilitate these monitoring functions, grand juries generally had free access to the records of local government. A grand jury could choose for itself any activity of local government to be the subject of an inquiry and report, which would be addressed to the court and the public at large.

Perhaps the most far-reaching monitoring power of the grand jury was its power, which still exists in a few states, to initiate the removal from office.

federal judiciary had a limited jurisdiction, so the federal grand jury also retained limited powers. See Judiciary Act of 1789, ch. 20, § 29, 1 Stat. 88 (1789); United States v. Stowell, 27 F. Cas. 1350 (D. Mass. 1854) (interpreting § 29 to include grand jurors along with petit jurors); 4 Stat. 188, ch. 156 (1826) (clerk not to summon grand jury unless ordered by court); Younger, supra note 4, at 46–47; Clark, supra note 4, at 27.


Grand jurors may have paid particular attention to roads because of the difficulties they encountered in traveling to a session of court for their meetings. Poor attendance at early grand jury sessions was a recurring problem. Scott, supra note 24, at 68–69; Tchau, supra note 19, at 95–96; John A. Hall, That Onerous Task: Jury Service in South Carolina During the Early 1790s, 87 S.C. Hist. Mag. 10, 12 (1986). Grand juries performed many of these particular administrative duties well into the nineteenth century. Seymour D. Thompson & Edwin G. Merriam, A Treatise on the Organization, Custody and Conduct of Juries, Including Grand Juries § 473, at 566 n.3 (1882) (citing state statutes). A few grand juries today still have power to inspect prisons and other public facilities. In re Presentment by Camden County Grand Jury, 89 A.2d 416 (N.J. 1952).

26. Griffith, supra note 25, at 391 (misappropriation of lottery funds in Annapolis, 1766); id. at 392 (poor hiring and supervision of constables in 1772 Charleston, who took bribes and extorted payments from Negroes), id. at 219 (infrequent meetings of 1766 Annapolis city council); Younger, supra note 4, at 18; see also Thompson & Merriam, supra note 25, at 556–67 (examples from nineteenth century).


28. The power was sometimes conferred by statute, and sometimes developed gradually as courts stood ready to enforce such access. Younger, supra note 4, at 13; Thompson & Merriam, supra note 25, at 567 n.1.

29. Grand jury reports were matters of public record and were often published in the newspaper at the request of the grand jurors themselves. Griffith, supra note 25, at 209, 217–18.
of elected officials. The grand jury, after an investigation of an official's misconduct, could initiate adversarial proceedings that might ultimately result in the removal of that official. Grand jury reports from time to time called for the removal of appointed officials, as well.

2. **Grand Jury Administering Public Affairs Itself**

Grand juries did not simply monitor the work of the full-time government employees. They had many responsibilities for carrying out public affairs themselves, in compliance with the basic policy choices of the legislature. First among their administrative duties was to initiate criminal enforcement.

Grand juries could issue a "presentment," charging an individual with criminal wrongdoing even though the prosecutor had not attempted to indict the individual. Some of the most troubling exercises of grand jury power have resulted in presentments where prosecutors have hesitated to act. For instance, grand jurors in some southern states during Reconstruction issued presentments, often unfounded, against federal officials and those who cooperated with them.

On the other hand, the presentment power gave the grand jury the impetus to develop its independent judgment about the proper way to enforce the criminal laws. A presentment could correct a prosecutor who had placed too low a priority on particular enforcement activities, or one who was simply too lazy or too lax by community standards. For instance, a Kentucky grand jury in 1800 presented several persons for criminal violations of the revenue laws. The prosecutor had a reputation for inefficiency, and other officials had previously hesitated to enforce the laws because of community

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33. *Younger, supra* note 4, at 128; see also United States v. Cox, 342 F.2d 167 (5th Cir. 1965). The prosecutor is not bound to prosecute cases initiated by presentment, but typically does so by converting the presentment into an indictment that is subsequently approved by the grand jury. *In re Funston,* 233 N.Y.S. 81, 83–84 (N.Y. Sup. Ct. 1929); N.C. Gen. Stat. § 15A-641(c) (1988) (obligating prosecutor to investigate and report to grand jury on all presentments).

ambivalence regarding the revenue laws. Beginning late in the eighteenth century, many of these grand jury initiatives focused on offenses, such as nonvoting or evasion of taxes, that reflected insufficient participation in community life.

Grand juries very early developed the common law power to call witnesses to testify, even if neither the prosecutor nor the court had asked the grand jury to inquire into a matter. Investigations initiated by grand juries were partly responsible for some spectacular charges against corrupt city officials in New York City and other cities in the late nineteenth century. While a grand jury might in some cases merely monitor an investigation conducted by a prosecutor under the auspices of the grand jury’s subpoena power, the power to investigate wrongdoing gave the grand jury itself the potential to initiate criminal enforcement without guidance or restraint from the executive. The extensive use of “private prosecutors” by alleged victims of crimes brought potential subjects of investigations to the attention of the grand jury.

Grand juries had a range of administrative duties outside the criminal context, as well. For instance, grand jurors in colonial Virginia were responsible for determining whether tobacco hogheads were the required size, and whether families had planted two acres of corn per person as required. Functions such as these might today be carried out by the Department of Agriculture or some similar administrative agency. In North Carolina, grand juries were apparently responsible for preventing “abuse of orphans and their estates,” perhaps a task today for a department of social services.

In some states grand juries could set the proper rate of compensation for land taken for public purposes. In jurisdictions where local courts levied taxes, the courts relied on grand juries to set the appropriate rates and to assist in tax collection.

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35. Tachau, supra note 19, at 108, 116–17; see also Griffith, supra note 25, at 217 (1759 Annapolis grand jury presentments for illegal tread on wheels of driving carts and 1765 presentments for liquor violations; both show “previous laxity of enforcement”); Roebel, supra note 23, at 186–87 (Virginia grand juries recommending stricter enforcement of sabbath and liquor laws).


37. See United States v. Thompkins, 16 F. Cas. 483 (C.C.D.C. 1812); 2 Wilson, supra note 21, at 536–37; Goebel & Naughton, supra note 22 at 349–50; 2 William Hawkins, Pleas of the Crown §§ 99, 100 (1721) (power of subpoena).


40. Younger, supra note 4, at 11.


42. John Fiske, Civil Government in the United States 77–78 (1890) (Delaware, 18th century); Younger, supra note 4, at 11. The court seems to have routinely followed the administrative suggestions of the grand jury. See N.C. Const. of 1669, art. 66, reprinted in 1 Colonial Records of North Carolina 198 (William L. Saunders ed. 1886) (grand
3. **Grand Jury Initiation of Policy**

In addition to monitoring full-time government, and implementing the policies chosen by full-time government, the grand jury itself made many recommendations regarding governmental policy. In several colonies, grand juries substituted for the representative governmental bodies before there was any legislative body. Citizens of colonial Georgia, who for a while had no representative assembly, turned to grand juries to express their complaints and suggestions to the trustees of the colony. A grand jury in New York first proposed that the colony's government create an elected assembly.43

After legislatures settled into place, some colonies left grand juries with the power to initiate statutes. They could propose new legislation to the legislature or city council through reports. Although legislatures and councils had no obligation to respond to grand jury reports, the public attention that focused on such reports often led them to follow the grand jury's lead.44 Where judges had the power to create local ordinances, as in New York, they relied on grand juries to identify problems and propose ordinances.45

Grand juries also initiated public actions other than legislation. During the Revolution, a Philadelphia grand jury helped organize a boycott of British goods.46 Furthermore, they made observations about social conditions and called for nongovernmental action to change those conditions for the better, as a Tennessee grand jury did in 1823 when it deplored the distribution of free whiskey at campaign rallies.47

The method of selecting grand jurors made them relatively attractive as a representative body, capable of speaking for the people when it came time to set policy. In Massachusetts and elsewhere, grand jurors were elected

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43. Clark, supra note 4, at 14–15, 17; see also A. Oliver P. Chitwood, Justice in Colonial Virginia 91–94 (1905) (listing administrative duties of judges in seventeenth century, including ordering new roads, appointing and supervising road surveyors, apportioning levy of the county, licensing taverns and regulating prices for drinks, issuing certificates for land grants, receiving complaints against government and forwarding to the assembly, making by-laws for counties).

44. In Re Presentment by Camden County Grand Jury, 39 A.2d 416, 429–39 (N.J. 1952); Bodenhamer, supra note 25, at 54 & n.6; Griffith, supra note 25, at 219–20, 250. In North Carolina, if a majority of county grand juries recommend legislation, the Assembly could consider the bill without approval by the Council. See N.C. Const. of 1669, art. 60; see also Younger, supra note 4, at 16, 51, 80.

45. Goebel & Naughton, supra note 22, at 362–63.


47. Younger, supra note 4, at 83; see Goebel & Naughton, supra note 22, at 361–64. Virginia grand juries presented their fellow citizens for failing to vote in national elections. Roebber, supra note 23, at 180–81.
or selected by lot from each town. In other colonies, the grand jurors were
selected by the local elected sheriff or the court, and tended to be the
"substantial men" of the area. However, given a suffrage restricted to
white male freeholders, the grand jury was in all likelihood at least as
representative as was the legislature.

B. Early Evaluations of the Grand Jury

As observers have reflected on the shape of American institutions, they
have regularly turned their attention to the grand jury. Until well into the
nineteenth century, they generally liked what they saw. The reasons observ-
ers gave for their self-conscious reaffirmations of the grand jury may be
instructive as we ask about appropriate uses of that institution today. They
described the grand jury as an institution that could improve both the oper-
ation of government and the civic virtue of the citizens participating on the
panel.

1. Participation to Improve Government

The debates surrounding the drafting and ratification of state and federal
constitutions provide a wealth of observations about the value of grand juries.
As new constitutions unfolded, most states and the federal government
endorsed the grand jury as an indispensable part of the constitutional order.

Many state constitutions drafted in the first decades after the Revolution
assumed the existence of grand juries, while a few explicitly mentioned or
protected grand juries. Five of the original states endorsed, in their early

48. Massachusetts elected its grand jurors until 1774, when Parliament provided for
appointment of grand jurors by sheriffs in an attempt to curb the Revolutionary fervor
COMPLETE ANTI-FEDERALIST 214 (Herbert J. Storing ed. 1981) (selection by lot); Charge to
Grand Jury, 30 F. Cas. 978 (S.D.N.Y. 1869) (No. 18,247) ("drawn from the mass of citizens by
lot"); Bodenhamer, supra note 25, at 54–55.

49. Clark, supra note 4, at 15–16; see N.C. Const. of 1669, art. 62; Roeber, supra note
23, at 86–89 (freeholders eligible for service in Virginia, often repeated service; largest land-
owners did not serve on juries); Waldrep, supra note 39, at 259–63 (Kentucky grand jurors
owned more land than average citizen, less than average justice of local court).

50. Chilton Williamson, American Suffrage from Property to Democracy, 1760–

51. For examples of states not requiring grand jurors to be freeholders, see Palmore v.
State, 29 Ark. 248 (1874); Nahum & Schatz, supra note 19, at 125–26; William E. Nelson,
The Eighteenth Century Background of John Marshall's Constitutional Jurisprudence, 76 MICH. L.
REV. 893, 918–19 n.140 (1978). It appears that eligible jurors with the greatest wealth were,
in some colonies, most likely to avoid jury duty and pay the requisite fine. Hall, supra note
25, at 8–11. See also Alexis de Tocqueville, Democracy in America 272 (George Law-
rence trans., J. P. Mayer ed., 1969) ("The jury may be an aristocratic or a democratic insti-
tution, according to the class from which the jurors are selected; but there is always a republican
character in it, inasmuch as it puts the real control of affairs into the hands of the ruled, or
some of them, rather than into those of the rulers.")
constitutions, the established common law usage of grand juries.\textsuperscript{52} Virtually every state admitted to the Union during its first three decades included a constitutional guarantee of grand jury indictment in serious criminal cases.\textsuperscript{53} The appeal of the grand jury was not limited to its ability to turn aside unfounded criminal indictments. The state grand jury was defended more generally as a method of furthering popular control over government.\textsuperscript{54}

When the federal Constitution was drafted and sent to the states for ratification, it contained no provision for grand juries. This omission was a recurrent complaint among the Anti-Federalists who argued against adopting the new Constitution and who insisted on adoption of a Bill of Rights. The Anti-Federalists drew on a republican tradition that valued popular and local monitoring of government.\textsuperscript{55} For instance, "Hampden," an Anti-Federalist, argued that the grand jury’s indictment power

\textit{is} the greatest security against arbitrary power; without this, every person who opposes the violation of the constitutional right of the people may be dragged to the bar, and tried upon a bare information of an Attorney-General.—The loss of this privilege carries with it the loss of every friend to the people.\textsuperscript{56}

The ratifying conventions of several states proposed amendments that

\textsuperscript{52} Del. Const. of 1792, art. 1, § 8 (guaranteeing right to indictment); N.C. Const. of 1776, Declaration of Rights, art. VIII (same); Pa. Const. of 1790, art. IX, § 10 (same); Ga. Const. of 1777, art. XLV (addressing size of grand jury); N.Y. Const. of 1777, art. XXXIV (counsel allowed in every trial on indictment for crimes). Other state constitutions contained more general guarantees of "due process of law," or adherence to the "law of the land," phrases generally considered to include the right to indictment. See 4 Alexander Hamilton, The Papers of Alexander Hamilton 34–56 (1962); Jones v. Robbins, 74 Mass. (8 Gray) 329, 342–50 (1857) (Shaw, C.J.).

\textsuperscript{53} See, e.g., Ky. Const. of 1792, art. XII, § 11; Tenn. Const. of 1796, art. XL, § 14; Ohio Const. of 1802, art. VIII, § 10; Ind. Const. of 1816, art. I, § 12; Ala. Const. of 1819, art. I, § 12. The only exception to this trend was Louisiana, which had no experience with the grand jury of the common law tradition. La. Const. of 1812, art. VI, § 18.

\textsuperscript{54} See Goebel & Naughton, supra note 22, at 339; Herbert J. Storing, What the Anti-Federalists Were For, in 1 The Complete Anti-Federalist 19 (Herbert J. Storing ed., 1981) (lack of opportunities for jury service would "fatally weaken the role of the people in the administration of government.") (paraphrasing 3 W. Blackstone, Commentaries 380).

\textsuperscript{55} See generally Cecilia M. Kenyon, The Antifederalists xxxix–liii (1985); Jackson T. Main, The Antifederalists: Critics of the Constitution, 1781–88, at 184 (1961); Amar, supra note 19, at 1137–35. It would be a mistake, however, to equate Anti-Federalist and republican thought, for Federalists were also influenced by republican ideals. Cass R. Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1535, 1559–62 (1988).

\textsuperscript{56} Hampden, in 4 The Complete Anti-Federalist 200 (Herbert J. Storing ed., 1981); see also id. at 198–99 (suggesting jury amendments will not gain necessary support in Senate, because "the indictment by grand jury, and trial of fact by jury, is not so much set by in the southern States, as in the northern—the great men there, are too rich and important to serve on the juries, and the smaller are considered as not having consequence enough to try the others; in short, there can be no trial by peers there"); The Federal Farmer, in 2 The Complete Anti-Federalist 328 (Herbert J. Storing ed. 1981) (proposing that Constitution confirms that "no person shall be tried for any offence, whereby he may incur loss of life, or an infamous punishment, until he be first indicted by a grand jury").
guaranteed a grand jury indictment in all serious criminal prosecutions,\textsuperscript{57} and Madison incorporated the suggestion in his original group of amendments.\textsuperscript{58} The Bill of Rights ultimately provided that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."\textsuperscript{59} The Fifth Amendment's grand jury clause was enacted in direct response to these republican concerns expressed during ratification.\textsuperscript{60}

Although the constitutional guarantee of grand jury indictment was an Anti-Federalist initiative, it was not controversial among the Federalists. James Wilson, among the most influential of the drafters of the federal Constitution, fully recognized the importance of the grand jury as "a great channel of communication, between those who make and administer the laws, and those for whom the laws are made and administered."\textsuperscript{61} The importance of this body came not only from its power to indict or to refuse indictment,\textsuperscript{62} but also from its powers to administer and shape public policy:

All the operations of government, and of its ministers and officers, are within the compass of their view and research. They may suggest publack improvements, and the modes of removing publack inconveniences: they may expose to publack inspection, or to publack punishment, publack bad men, and publack bad measures.\textsuperscript{63}

Judges who instructed grand juries about the significance of their duties during this time also emphasized the importance of popular participation in the administration of the laws. They stated time and again that grand juries could simultaneously make law enforcement more effective and

\textsuperscript{57} 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 110 (Jonathan Elliot ed., 1836) (statement of Abraham Holmes); id. at 132 (statement of Samuel Adams, grand jury "so evidently beneficial as to need no comment of mine"); id. at 322–23, 326, 328, 338–40 (proposed amendments providing for grand jury).


\textsuperscript{59} U.S. Const. amend. V, cl. 1. The grand jury clause goes on to allow prosecution of an infamous crime "in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger."


\textsuperscript{61} 2 Wilson, supra note 21, at 537.

\textsuperscript{62} Id. at 534 ("In the annals of the world, there cannot be found an institution so well fitted for avoiding abuses, which might otherwise arise from malice, from rigour, from negligence, or from partiality, in the prosecution of crimes.").

\textsuperscript{63} Id. at 537. See also 2 Bernard Schwartz, The Bill of Rights: A Documentary History 1173–74 (1971) (speech of Governor Hancock in presenting proposed bill of rights to Massachusetts legislature for adoption in 1790: "a share in the administration of the laws ought to be vested in, or reserved to, the people; this prevents a government from verging towards despotism, secures the freedom of debate, and supports that independence of sentiment which dignifies the citizen, and renders the government permanently respectable. The institutions of Grand and Petit Juries are admirably calculated to produce these happy effects. . . .") (emphasis added).
prevent arbitrary exercises of administrative power.\textsuperscript{64} The grand jurors generally received these instructions enthusiastically, and arranged to have the remarks published in the newspaper for distribution to the public.\textsuperscript{65}

Observations from the next few decades echo themes from the early period of constitutional drafting and ratification. Justice Joseph Story, in his influential 1833 commentary on the Constitution, had a positive assessment of the grand jury’s role in monitoring criminal law enforcement.\textsuperscript{66} Alexis de Tocqueville, writing about the American republic in 1840, declared that the jury system (which he defined broadly enough to include grand juries)\textsuperscript{67} was primarily a “political institution” that put control of public affairs in the hands of the people: “The jury system as understood in America seems to me as direct and extreme a consequence of the dogma of the sovereignty of the people as universal suffrage.”\textsuperscript{68} Moreover, he believed it important that the jury not be limited to enforcing the criminal law: “When juries are reserved to criminal cases, the people only see them in action at long intervals and in a particular context; they do not form the habit of using them in the ordinary business of life...”\textsuperscript{69}

This praise of the grand jury is based on an image of a body not dependent on a criminal prosecutor, a group with its own priorities and agenda. The self-sufficiency of the grand jury depended in part on its temporary membership. As Chief Justice Lemuel Shaw of Massachusetts put it, a body with temporary authority is “beyond the reach of fear or favor, or of being overawed by power or seduced by persuasion.”\textsuperscript{70} It is also unlikely that a

\textsuperscript{64} Judge Ashe’s Charge to the Grand Jury, reprinted in 13 The State Records of North Carolina 438 (Walter Clark ed., 1896) [hereinafter Ashe]; Addison, supra note 19, at 35–38.


\textsuperscript{66} Joseph Story, Commentaries on the Constitution of the United States § 929 (Ronald Rotunda & John E. Nowak eds., 1987) (“grand jury perform most important public functions; and are a great security to the citizens against vindictive prosecutions, either by the government, or by political partisans, or by private enemies”). This positive assessment of the grand jury in criminal matters was a concession on the part of Story, who otherwise remained suspicious of the role of the grand jury. See infra note 103.

Francis Lieber, a student of Story’s and one of the most influential nineteenth century commentators on the Constitution, also described the various benefits of reliance on juries. Francis Lieber, On Civil Liberty and Self-Government 235 (Theodore D. Woolsey ed., 1972) (jury service “gives the people opportunities to ward off the inadmissible and strained demands of the government; It is necessary for a complete accusatorial procedure; It makes the administration of justice a matter of the people, and awakens confidence”). Although Lieber was describing the virtues of trial by jury, his reasoning seems to extend to all jury service.

\textsuperscript{67} Tocqueville, supra note 51, at 272 (“By ‘jury’ I mean a certain number of citizens selected by chance and temporarily invested with the right to judge.”).

\textsuperscript{68} Id. at 273.

\textsuperscript{69} Id. at 274.

\textsuperscript{70} Lemuel Shaw, Charge to the Grand Jury, 8 Am. Jurist 216, 217 (July 1832); Addison, supra note 19, at 72 (1795 charge to Pennsylvania grand jury); see also In re Bornn Hat Co., 184 F. 506, 509 (S.D.N.Y. 1911), aff’d sub nom., Bornn Hat Co. v. United States, 223 U.S. 713 (1912). On the importance of grand juries considering government wrongdoing, see, e.g.,
grand jury could retain this posture towards government unless it held some duties other than reacting to routine indictments. The variety of the grand jury’s duties was central to its value in promoting responsible government.

2. Participation to Improve the Participants

The perceived benefits of a grand jury system ran in more than one direction. Although grand juries were believed to improve the administration of public law and policy, supporters of grand juries also suggested that the institution improved the civic virtue of the grand jurors themselves. In particular, grand jury service educated the jurors about the nature of their political institutions and fostered a sympathetic attachment between the jurors and their government.

One form of education for the grand juror came from the instructions of the judge who supervised the work of the grand jury. The supervising judge would instruct the grand jurors about their legal duties, and remind them of the importance of their tasks and the need for regular attendance. The judge would sometimes identify for the grand jury a line of inquiry to pursue, and not leave the agenda entirely in the hands of the prosecutor or the grand jurors themselves.

Judges in the eighteenth and nineteenth centuries also offered more overtly political observations in their grand jury charges, which were less directly connected to the task facing the grand jury. For instance, federal judges appointed early in the nation’s history described for grand jurors the virtues of the new federal Constitution. The judges also praised the programs of the Federalist administration. State judges of the time also addressed the new Constitution and other significant developments in the political order in their grand jury charges.

Judges gave these charges in a self-conscious effort to educate grand jurors. The content of their charges stressed the importance of jurors who

3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 394 (Henry P. Johnston ed., 1891) (“Direct your attention also to the conduct of the national officers.”) [hereinafter JAY].
71. ADDISON, supra note 19, at 35–37; GOEBEL & NAUGHTON, supra note 22, at 344–46; Ashe, supra note 64, at 438, 439.
72. TACHAU, supra note 19, at 95–96; Ashe, supra note 64, at 438, 440.
75. R. Kent Newmeyer, Justice Joseph Story on Circuit and a Neglected Phase of American Legal History, 14 AM. J. LEGAL HIST. 112, 124–25 (1970); JAY, supra note 70, at 390; Lerner, supra note 73, at 135–36.

In some cases, a judge would abuse this educational function and attempt to direct the grand jury to indict a particular person. See Judge Iredell’s Charge to the Grand Jury, reprinted
could transcend self-interest. They pointed to grand jury service as a contribution to a government that would promote liberty and thereby make it easier for others to exercise civic virtue.\textsuperscript{76} Their charges also underscored the need for grand jurors to educate their fellow citizens regarding the operation of government: "Inform and practically convince everyone within your respective spheres of action."\textsuperscript{77}

Other enthusiasts of the grand jury during this period similarly emphasized the value of grand jury service in educating citizens. Anti-Federalists such as The Federal Farmer thought jurors were just as important to the daily public life of a community as elected representatives: "Their situation, as jurors and representatives, enables them to acquire information and knowledge in the affairs and government of the society; and to come forward, in turn, as the sentinels and guardians of each other."\textsuperscript{78}

Tocqueville dwelt at some length on the value of the jury experience in preparing citizens for self-government. He suggested that jury service instills "some of the habits of the judicial mind into every citizen, and just those habits are the very best way of preparing people to be free."\textsuperscript{79} It teaches "equity in practice," encourages jurors to take responsibility for their actions, and makes the jurors feel that they "take a share" in society and its government.\textsuperscript{80}

...
respect for the law that enabled them to hold officials accountable. Francis Lieber noted the tendency of jury service to strengthen an attachment between the citizen and the commonwealth: “It binds the citizen with increased public spirit to the government of his commonwealth, and gives him a constant and renewed share in one of the highest public affairs, the application of the abstract law to the reality of life—the administration of justice.”

For those assessing the grand jury early in our history, then, grand jury service improved the citizens participating at least as much as the governmental process. This was not merely a fortuitous by-product of the institution. For the early friends of the grand jury, there could be no sound government without paying attention to the education and involvement of its citizens. The grand jury addressed this dynamic between the quality of government and the quality of the governed, and created an opportunity to improve both.

C. Diminishing the Grand Jury’s Administrative Role

The legal authority of a grand jury to administer local affairs, issue reports, and conduct investigations into topics of their own choosing appears to be significantly more limited today than it once was. Many states have over time reduced the scope of grand jury activity, while others have effectively abolished the institution. Furthermore, grand juries do not seem inclined to use what legal power they may possess to do anything except consider indictments.

This section addresses the diminishing role of the grand jury in American democracy, beginning with an account of periodic movements to abolish the grand jury. Then I describe changes of more practical import: the

81. LIEBER, supra note 66, at 236. See id. at 240 (“It is with the representative system, one of the greatest institutions which develop the love of the law, and without this love there can be no sovereignty of the law in the true sense.”).
82. See 2 WILSON, supra note 21, at 823 (charging grand jury that, “as excellent laws improve the virtue of the citizens, so the virtue of the citizens has a reciprocal and benign energy in heightening the excellence of the law.”); LIEBER, supra note 66, at 236 (“It throws a great part of the responsibility upon the people, and thus elevates the citizen while it legitimately strengthens the government.”); HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 19 (1981) (Anti-Federalists emphasized that “the character of the people is affected by government and laws, but that that relation had been dangerously ignored in the framing of the proposed Constitution”). Cf. Pitkin & Shumer, supra note 5, at 51 (all government institutions that involve citizen participation “depend ultimately on the character of the citizenry, their love of and skill in exercising freedom; and these, in turn, rest mainly on the direct experience of meaningful local self-government”).
83. See infra notes 87–92, 101–25.
84. Occasionally a local grand jury today will issue a report, but such activism is now exceptional. Grand juries play a notable role in local administration in only a few states, particularly in New York and California. George Z. Medalie, Grand Jury Investigations, 7 THE PANEL 5 (Jan.-Feb. 1929); Trooper Cleared in Death of Fan Outside Arena, N.Y. TIMES, Dec. 13, 1990, at B3 (potential grand jury report regarding death at arena); The Way in Jersey City for 70 Years, N.Y. TIMES, May 25, 1988, at B4 (grand jury report regarding political machine in Jersey City); McClatchy Newspapers v. Superior Court, 751 P.2d 1329, 1332 (Cal. 1988).
leaching away of grand jury administrative power during the last 150 years. Along the way, I will speculate about the forces responsible for these changes in the grand jury’s powers. Several factors suggest that there are connections between the steady diminution of grand jury power and the rise of a professionalized administrative government. The grand jury has suffered wherever professionalism in government has flourished.

1. Recurring Proposals to Abolish the Grand Jury

This survey of limitations on the grand jury’s power begins with the movement to abolish the grand jury entirely. In this context, the arguments used against the grand jury were most visible and choices were made most deliberately. Even though the abolition movement may ultimately have had a less significant impact than the more incremental losses of grand jury power, the arguments and outcomes in this setting are now easier to reconstruct. Many of the same arguments, in more shadowy form, were at work in the more gradual limitation of grand jury duties.

The first significant abolition proposals appeared in the middle of the nineteenth century. Inspired by the criticisms of the grand jury offered by Jeremy Bentham,66 the earliest American critics of the grand jury, such as Francis Wharton, questioned the need for the institution where the prosecutor was accountable to the people.67 Although no states decided before the Civil War to abolish grand juries altogether, a few of them gave prosecutors the power to bypass the grand jury by bringing criminal charges based on the information.68

After the Civil War, abolition of the grand jury gathered more momentum.69 State constitutions adopted in Illinois, Colorado, and a few other

85. By professionalism, I mean reliance on those with long-term experience in government and specialized training. See infra Part II.A.


89. Abolition efforts were aided in 1884 by a Supreme Court case declaring that the federal constitution’s guarantee of grand jury indictment did not apply to the states. Hurtado v. California, 110 U.S. 516 (1884); see also Rowan v. State, 30 Wis. 129 (1872). The Hurtado decision conflicted with views commonly expressed at the time regarding the meaning of the Fifth and Fourteenth Amendments. See Anson Willis, Our Rulers, and Our Rights 97 (1869) (grand jury guarantee of federal constitution applies to states); Akhil Reed Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L.J. 1193, 1254–60 (1992).
western states late in the nineteenth century allowed the legislature to abolish the requirement of grand jury indictment. While most of these states retained a functioning grand jury to conduct investigations of certain serious crimes and to indict when requested by the prosecutor, many of them allowed the prosecution to proceed by way of the information. By the first World War, the number of states willing to eliminate the grand jury indictment as a requirement for prosecution or to abolish the institution entirely seemed to have peaked.

At first, the rationale for complete abolition of the grand jury emphasized the expense of maintaining the institution and the potential unfairness of its secret proceedings. The grand jury, reformers said, may once have been worth the expense when there was no executive officer charged with investigating crimes or where the executive power was not subject to control by the people. However, in a democratic government, the grand jury was a needless duplication of effort creating expense and delay.

Towards the end of the nineteenth century, the case against the grand jury began to highlight the superior competence of a professional criminal prosecutor. Reformers believed that grand jurors, untrained in the law, would perform their functions at greater expense to the public and greater

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90. Younger, supra note 88, at 39, 43 (Illinois in 1870, Colorado in 1876, North Dakota in 1889, South Dakota in 1889, Wyoming in 1889). California’s 1879 constitution allowed prosecution without indictment where a magistrate held a preliminary hearing, but it also required annual meetings of the county grand juries. Id. at 39. In 1889, Idaho, Montana and Washington abolished grand juries entirely. Id. at 43. Utah’s 1897 constitution allowed for prosecution by information. Utah Const. of 1897, art. 1, § 15.

91. 1 Beale & Bryson, supra note 9, at § 1.07.


94. BENTHAM, supra note 86, at 312–13 ("the incumbrance keeps its place; lawyers and their dupe never speak of it but with rapture. . . . [T]he institution is useless. . . ."); INGERSOLL, supra note 87, at 47 (criticizing grand jury for secrecy and lack of responsibility to voters); Bodenhamer, supra note 25, at 60–64. Francis Wharton claimed that grand jury panels were no longer useful as barriers to "trivial and prosecutions." WHARTON, supra note 87, at 227–34.

95. The lack of expertise of grand jurors had been present as a less visible criticism of the institution from the earlier period. 2 The Works, supra note 86, at 171 (grand jury "not presided over by a professional and permanently existing official person, a judge; but a company, a miscellaneous company of men, selected on the presumption of possessing a certain degree of opulence").
bother to the courts than a professional prosecutor might.\textsuperscript{96} Eugene Stevenson, for instance, favored abolition of the grand jury because the "summoning of a new body of grand jurors at each term insures an unfailling supply of ignorance."\textsuperscript{97} The reformers also continued to elaborate on the earlier arguments that the grand jury was unnecessary and unfair.\textsuperscript{98}

In the end, these arguments did not convince legislators to extirpate the grand jury. Although about half the states eventually stopped requiring a grand jury indictment, most states retained the grand jury for purposes of investigating crimes and for hearing requests for indictments when the prosecutor chose to use that method of charging.\textsuperscript{96} But as the next section indicates, where the grand jury did survive, it focused increasingly on investigating and charging violations of the criminal law.

2. \textit{The Slower Decline}

It is more difficult to isolate a point in time when grand jury powers other than indictment first came into question. The grand jury's authority to perform its many administrative functions was initially "founded only on use and a presumed public convenience," rather than explicit statutory or judicial pronouncements.\textsuperscript{100} Some early limitations on grand jury administrative powers, therefore, are difficult to recognize because those powers often were not based on any provision of law that required explicit repeal or reversal.

Prior to the Civil War, grand juries for the most part could carry out

\textsuperscript{96} David Dudley Field, \textit{Two Reports to the American Bar Association: Second Report in 3 Speeches, Arguments and Miscellaneous Papers of David Dudley Field} 208–11 (Titus Munson Coan, M.D., ed., 1890) (grand jury makes impossible the benefits of specialization of labor); C. E. Chipman, \textit{The Abolition of the Grand Jury}, 5 THE AMER. LAWYER 487 (1897).

\textsuperscript{97} Eugene Stevenson, \textit{Our Grand Jury System}, 8 CHIM. L. MAG. & REP. 711, 719 (Dec. 1886); see also Fiske, \textit{supra} note 42, at 187 ("The difficulty of securing intelligent and unbiased jurymen has led to a good deal of dissatisfaction with the jury system, even talk of its abolition.").


\textsuperscript{99} 1 Beale & Bryson, \textit{supra} note 9, at § 1.07. The reason for retaining the grand jury's power to investigate seems clear enough, for at the time no other body had the broad range of investigative powers available to the grand jury. Dessin & Cohen, \textit{supra} note 92, at 889–91. The reason for retaining the grand jury's power to inquire, even when the prosecutor had the power to proceed by information, is more difficult to fathom. Certainly the prosecutor used the information far more frequently than the indictment. Raymond Moley, \textit{The Initiation of Criminal Prosecutions by Indictments or Information} (1929). Perhaps the grand jury was available when the prosecutor did not want to take full responsibility for initiating charges; for instance, prosecution of powerful persons might be more likely by using the grand jury. Willoughby, \textit{supra} note 98, at 132.

their broad range of administrative functions without attracting much attention or opposition.\textsuperscript{101} There were, however, some tentative efforts to limit the agenda of the grand jury to consideration of indictments. For instance, an 1821 revision of the Louisiana Code limited its grand juries to consideration of criminal charges.\textsuperscript{102} At least one federal judge questioned the propriety of allowing the grand jury to consider any matters apart from criminal violations,\textsuperscript{103} and many judges had ceased to charge the grand jury on matters other than criminal violations.\textsuperscript{104}

State courts in Tennessee and Illinois declared for the first time that a grand jury could not investigate or act in a noncriminal matter unless empowered to do so by statute.\textsuperscript{105} Requiring statutory authority was a significant limitation on grand jury powers that had previously been grounded in common law usage. Pennsylvania imposed even greater restrictions on the activities of grand juries by preventing any investigation unless it pertained to a judicial charge specifying the nature of the criminal offense to be investigated.\textsuperscript{106}

By the late nineteenth century, several of these methods of confining the

\textsuperscript{101} See Ward v. State, 2 Mo. 120 (1829); 1 Joel Prentiss Bishop, Commentaries on the Law of Criminal Procedure 511 (1866); Bodenhamer, supra note 25, at 56.

\textsuperscript{102} La. Code of Crim. Proc., art. 210; State v. Platt, 192 So. 659 (La. 1939); 1 E. Livingston, Complete Works of Edward Livingston on Criminal Jurisprudence 372 (1873); 2 id. at 249-50 (author was codifier for Louisiana code). Chancellor James Kent approved of this limitation on grand juries. 12 Am. L. Rev. 480 (1878) (reprinting 1826 letter from Kent to Livingston).

\textsuperscript{103} Timothy Walker, Charge to Grand Jury, 1 Western L.J. 337–38 (May 1844); see also Joseph Story, Jury, in 7 Encyclopedia Americana 283 (F. Lieber ed., 1831), reprinted in John C. Hogan, Justice Story on Juries, 37 Or. L. Rev. 234 (1957) (discussion of grand jury criminal indictment powers, based on Blackstone, without mention of reporting or other administrative powers).

\textsuperscript{104} See Charge to Grand Jury, 30 F. Cas. 998 (C.C.D. Md. 1836) (No. 18,257) (grand jury charge of C.J. Taney); Charge to Grand Jury, 30 F. Cas. 978 (C.C.S.D. N.Y. 1869) (No. 18,247); Charge to Grand Jury, 30 F. Cas. 980 (C.C.D. W.Va. 1868) (No. 18,248) ("only three subjects to which it is necessary to direct your particular attention"); Shaw, supra note 70, at 220 (state judge mentioning virtues of general education but remaining silent on educational value of grand jury service); Kent, supra note 102, at 485 (criticizing use of "political charges").

\textsuperscript{105} State v. Smith, 19 Tenn. 99 (1838); State v. Love, 23 Tenn. 255 (1843); Glenn v. State, 31 Tenn. 19 (1851); Harrison v. State, 44 Tenn. 195 (1867); Pankey v. People, 2 Ill. 80 (1833) (grand jury could not inquire into allegation that constable had taken illegal fees, since it was not criminal act; only statute could empower grand jury to make such inquiry).

\textsuperscript{106} In re Communication of the Grand Jury (Lloyd & Carpenter's Case), 5 Pa. L.J. 55 (Quarter Session Phila. 1845); Willis R. Bierly, Juries and Jury Trial 96–99, 109–11 (1908); see also Commonwealth ex rel. Jack v. Crans, 2 Pa. L.J. Rep. 172, 181 (1844); McCullough v. Commonwealth, 67 Pa. 30, 33 (1870); Commonwealth v. Green, 17 A. 878 (Pa. 1889); Commonwealth v. Klein, 40 Pa. Super. 352 (1909). The limits on grand juries placed in this statute were anticipated by a Pennsylvania judge as early as 1792. Addison, supra note 19, at 37–46. At the time Addison suggested limitations on the grand jury's inquisitorial powers, it was more generally believed that a grand jury could inquire into any public matters, even if they had received no charge from the court. See 2 Wilson, supra note 21, at 537. The same held true through the Civil War. See, e.g., Charge to Grand Jury, 30 F. Cas. 986 (C.C.D. Or. 1869) (No. 18,251) (duty requires grand jury "to make special inquiry for yourselves.").
grand jury more closely to criminal indictments had taken root and spread to most states. Perhaps the most important limitation of grand jury power involved its ability to create and control a support staff. When grand juries attempted late in the nineteenth century to analyze information about government operations—say, an audit of the county books—the courts routinely denied the grand juries any power to hire their own accountants or detectives.\(^{107}\) When the grand jury lost confidence in the district attorney and sought legal counsel elsewhere, the supervising courts blocked the effort.\(^{108}\) While “private prosecutors”—attorneys representing alleged victims of crime—appeared frequently before grand juries earlier in the nineteenth century,\(^{109}\) courts began to exclude private prosecutors from the grand jury proceedings.\(^{110}\) Although private prosecutors had not been “staff attorneys,” providing disinterested advice to the grand jury, they had provided a source of information and guidance to the grand jury uncontrolled by the government.

It would be easy to miss the importance of denying the grand jury access to its own support staff, since the grand jury had never before maintained an extensive staff. But grand jurors were no longer personally aware of conditions to investigate and were without the increasingly specialized auditing and management skills necessary to monitor government. Given the complexity of governance, what institution of government could survive without adequate staff? Could Congress or the President perform their duties without the benefit of their own counsel? Preventing the grand jury from appointing and controlling its own support staff made the institution more and more ineffective in administrative matters, and increasingly dependent on the full-time prosecutor.

Certain subtle limitations on the investigative functions of the grand jury also became widespread by the end of the century. First, courts seemed confident by this time that grand juries needed statutory authorization before they

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107. Stone v. Bell, 129 P. 458 (Nev. 1912); Wm. J. Burn: Int’l Detective Agency v. Holt, 164 N.W. 590 (Minn. 1917); Woody v. Pears, 170 P. 660 (Cal. Ct. App. 1917); Wm. J. Burns Int’l Detective Agency v. Doyle, 208 P. 427 (Nev. 1922); A notation, Power of Grand Jury to Contract, 26 A.L.R. 605 (1923); Watkins v. Tift, 170 S.E. 918 (Ga. 1933); Allen v. Payne, 36 P.2d 614 (Cal. 1934); State v. Platt, 192 So. 659 (La. 1933) (investigator and counsel); see also In re Gardiner, 64 N.Y.S. 760 (1900) (clergyman asked by grand jury how to proceed in investigation of police force; suggests a report; report quashed); United States v. Edgerton, 80 F. 374 (D. Mont. 1897) (no expert allowed to assist grand jury while other witnesses present).

108. United States v. Kilpatrick, 16 F. 765 (W.D.N.C. 1883) (no one other than court can give grand jury opinion on question of law); Woody v. Pears, 170 P. 660 (Cal. Ct. App. 1917); State v. Platt, 192 So. 659 (La. 1939).

109. STEINBERG, supra note 39.

110. Durt v. State, 53 Miss. 425 (1876); Hartgraves v. State, 114 P. 343 (Okl. 1911); People v. Scannell, 72 N.Y.S. 449 (Sup. Ct. 1901).
could investigate or act in a noncriminal matter.\textsuperscript{111} Several states did enact such statutes granting limited administrative powers to grand juries.\textsuperscript{112} While these statutes reaffirmed the value of a grand jury panel in some administrative settings, the range of nonindictment duties granted to grand juries by statute was significantly narrower than the range of duties they had exercised before. For instance, a statute in Pennsylvania allowed grand juries to recommend construction of bridges or tunnels, but not to comment or act more generally on the condition of public works or public affairs.\textsuperscript{113}

A few jurisdictions also considered limiting the grand jury’s criminal investigations to matters included in the judicial charge.\textsuperscript{114} Admittedly,

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\item[\textsuperscript{111}] Ex parte Gould, 132 S.W. 365 (Tex. Crim. App. 1910); Alt v. State, 205 S.W. 53 (Tex. Crim. App. 1918); State v. Davenport, 193 P. 419 (Okla. 1920); Ex parte Jennings, 240 S.W. 942 (Tex. Crim. App. 1922) (refusal to answer question regarding membership in Ku Klux Klan); Cahen v. Harrett, 42 Md. 571 (1875); Rector v. Smith, 11 Iowa 302 (1860); Bennett v. Kalamazoo Circuit Judge, 150 N.W. 141 (Mich. 1914); In re Morse, 87 N.Y. 721 (1904); State v. Wilson, 91 S.W. 195 (Tenn. 1906); but cf. Coffey v. Superior Court, 83 P. 580 (Cal. Ct. App. 1905).
\item[\textsuperscript{112}] For instance, Georgia gave grand juries statutory authority to inspect the tax collector’s books, the county treasurer’s books, the court’s docket, and public buildings. They also inspected the list of all Civil War veterans receiving pensions to assure their eligibility. Any deficiencies in these matters would be described in their “general presentment,” or report at the end of their session. George T. CANN, REQUESTS TO CHARGE IN CIVIL AND CRIMINAL CASES §§ 27–41 (1909) (describing Georgia statutes). While some administrative powers of the grand jury were present in the 1829 Code, see O.C.G.A. § 15-12-75 (historical note), other powers of the grand jury were part of the strategy of “white supremacy Democrats” to restore their control over state government. Roy L. Allen, Three Aspects of Grand Jury System Warrant Reform, ATLANTA JOURNAL/CONSTITUTION, May 26, 1991, at H2. The powers were also sometimes limited by statutory procedural requirements. Public officials being investigated for “malpractice” in office had the right to testify before the grand jury. R. Perry Sentell, Jr., Georgia Local Government Officials and the Grand Jury, 26 GA. ST. B.J. 50 (1989).
\item[\textsuperscript{113}] In re Bridge, 25 Pa. C. 176 (bridges); In re Grand Jury Report, 23 Pa. D. 411 (1913) (tunnels). Bierly, supra note 105, at 119–23 (Pennsylvania statutes). A statute in Nevada required grand juries to inquire into corrupt misconduct of public officials, but it did not grant the authority to audit the county books, even if the audit was a necessary part of an investigation into misconduct. Nev. Rev. Stat. §§ 7028, 7029 (1879); Stone v. Bell, 129 P. 458 (Nev. 1912). See also Cahen v. Jarrett, 42 Md. 571 (1875) (discussing statute giving grand jury power to recommend recipients of liquor licenses); THOMPSON & MERRIAM, supra note 25, at 566–67 (listing statutes granting specified administrative powers to grand juries). Other state statutes from the middle of the nineteenth century may have granted the grand jury powers as broad as those existing earlier, but those powers were curtailed early in the twentieth century. See Gingerich, supra note 95, at 55.
\item[\textsuperscript{114}] See Charles H. Winfield, The Grand Jury § 15 (1883) (work based on New Jersey law, approving of limits on investigation similar to those in Pennsylvania); George J. Edwards, Jr., The Grand Jury 100–110 (1906). Although the Field Commission recommended that the New York legislature adopt the restrictive Pennsylvania approach, the legislature initially ignored the recommendation. See John Van Voorhis, Note on the History in New York State of the Powers of Grand Juries, 26 ALB. L. REV. 1, 2 (1962).
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judges and legislators in many jurisdictions remained committed to grand
juries as bodies for investigating and charging criminal conduct in special
cases, and several cases from this period use expansive language to
describe the investigative powers of the grand jury. Yet all jurisdictions, even those
affirming broad investigative powers of grand juries insisted that the inves-
tigation relate to potential criminal charges; they would not allow an indefinite inquiry into potential evils or infractions, or "personal" matters.

Courts increasingly noted that grand juries had no power to summon
witnesses to ask generally about possible violations of the law or other evils,
if the panel had in mind no particular criminal violation. This restriction
created a barrier to investigations aimed at some outcome other than a
criminal indictment or presentment. Moreover, opinions frequently
described the investigative power of the grand jury as one that extends as
far as the criminal jurisdiction of the court. Once again, this description
of grand jury authority remains pointedly silent on the more amorphous
administrative tasks of the panel.

An even more significant method of containing the grand jury's admin-
istrative authority appeared in judicial efforts to confine or eliminate the
grand jury's report regarding its investigation. Turn-of-the-century courts
created a series of limitations on the power of grand juries to issue reports
without indictments. Some announced that a grand jury could never issue
a report without an indictment unless a statute expressly allowed them to

115. Blaney v. State, 21 A. 547 (Md. 1891); State v. Collins, 35 N.W. 625 (Iowa 1887);
Lewis v. Comm'nrs of Wake, 74 N.C. 194 (1876); Frisbie v. United States, 157 U.S. 160 (1894);
Hale v. Henkel, 201 U.S. 43, 64 (1905) (limited only by diligence of panel); In re Miller, 17
F. Cas. 295 (D. Ind. 1878) (No. 9,552) (grand jury may proceed with investigation even after
being informed of President's intent not to prosecute any person for alleged embezzlement);
In re Bornn Hat Co., 184 F. 506 (S.D.N.Y. 1911), aff'd sub nom. Bornn Hat Co. v. United
States, 223 U.S. 713 (1911) (inquisitorial power must be absolute or it is nothing); State v.
Johnson, 41 So. 117 (La. 1906).

116. United States v. Kilpatrick, 16 F. 765 (W.D.N.C. 1883) (dicta, state grand jury cannot
investigate general conduct and private business of private citizen); Ex parte Jennings, 240

117. See, e.g., In re Morse, 87 N.Y.S. 721 (Gen. Sess. 1904); United States v. Kilpatrick,
16 F. 765 (W.D.N.C. 1883); In re Lester, 77 Ga. 143 (1886); Hobson v. District Court, 177
N.W. 40 (Iowa 1920); State v. Wilcox, 10 S.E. 453 (N.C. 1889); State v. Lee, 9 S.W. 425
(Tenn. 1888); State v. Lewis, 9 S.W. 427 (Tenn. 1888).

118. See People v. Tatum, 112 N.Y.S. 36, 39-40 (Sup. Ct. 1908); In re Report of Grand
Jury, 137 A. 370 (Md. 1927); see also Medalie, supra note 94, at 6. For later cases, see Moore
v. Delaney, 45 N.Y.S.2d 95 (Sup. Ct. 1943); In re Grand Jury Investigation, 96 A.2d 189 (Pa.

119. People v. Green, 1 Utah 11 (1876); Territory v. Corbett, 3 Mont. 50 (1877); People
v. International Nickel Co., 155 N.Y.S. 156 (County Ct. 1914); Finnicke v. Village of Cadiz,
56 N.E. 280 (Ohio 1900) (grand jury may only inquire into state crimes, not violation of
ordinances); Ex parte Gould, 132 S.W. 965 (Tex. 1910) (grand jury can only inquire about
material evidence to establish crime).
do so. A minority of states had statutes allowing grand juries to report without indictment, and then only in connection with limited topics.

Other state courts recognized a "common law" power of grand juries to issue reports, but created limits on the possible subjects of such reports. For instance, some courts declared that a grand jury report could only criticize public officials, and not single out any private parties for rebuke. Others prevented grand jury reports from naming any individuals at all. Some courts limited the grand jury's report to matters of fact rather than opinion.

State statutes often reinforced the judicial effort to limit grand jury reports. Some statutes adopted one or more of the judicial limitations described above, limiting the grand jury to reports on corrupt conduct of


For later confirmations of this position, see In re Report of Grand Jury, 260 P.2d 521, 526-27 (Utah 1953); Ex parte Burns, 222, 73 So. 2d 912, 915 (Ala. 1954); State v. Interim Report of Grand Jury, 93 So. 2d 99, 102 (Fla. 1957).


For more recent cases, see Ryon v. Shaw, 77 So. 2d 455 (Fla. 1955); Owens v. State, 59 So. 2d 254 (Fla. 1953); see In re Report of Grand Jury, 11 So. 2d 316 (Fla. 1943); J. Hadley Edgar, Comment, The Propriety of the Grand Jury Report, 34 Tex. L. Rev. 746, 749-52 (1956).

A related group of more recent cases allow reports to issue only against those private individuals whose false charges have instigated grand jury investigations. Hayslip v. State, 249 S.W.2d 882 (Tenn.), cert. denied, 344 U.S. 879 (1952); Ex parte Cook, 137 S.W.2d 248 (Ark. 1940); In re Presentment to Superior Court, 82 A.2d 496, 498 (N.J. Super. Ct. 1951).


123. Caruth v. Richeson, 9 S.W. 633 (Mo. 1888) (no recovery for libel from grand jury report because individual officials not named); In re Gardiner, 64 N.Y.S. 760 (Gen. Sess. 1900); In re Osborne, 125 N.Y.S. 313, 319 (Sup. Ct. 1910); In re Heffernan, 125 N.Y.S. 737 (County Ct. 1909); In re Report of Grand Jury, 137 A. 370 (Md. 1927); Parson v. Age-Herald Pub. Co., 61 So. 345, 349 (Ala. 1913); In re Grand Jury Report, 235 N.W. 789 (Wis. 1931); but see In re Jones, 92 N.Y.S. 275 (Sup. Ct.), appeal dismissed, 74 N.E. 226 (1905).


124. In re Gardiner, 64 N.Y.S. 760, 762 (Gen. Sess. 1900) (grand jury should not report if there is no evidence); Charge to Grand Jury, 30 N.J.L. 306, 307 (Ct. Oyer & Ter. 1907) (grand jury should not report unless proof is "absolutely conclusive"); In re Crosby, 213 N.Y.S. 86 (Sup. Ct. 1925).
public officials (thereby excluding inquiries into influential private persons or merely inept conduct of public officials) or reports that did not name individuals.\textsuperscript{125} Most often, the statutes specified certain narrow subjects for the grand jury’s report, such as the condition of local jails, and did not allow the grand jury to inquire into administration of government generally.\textsuperscript{126}

The grand juries in some states may have stopped performing some of their traditional functions long before they were formally prohibited by judicial or legislative pronouncements. But whether the legal constraints described here changed grand jury practice or merely formalized an earlier change in practice, it seems clear that the grand jury at work early in our nation’s history became more and more specialized, beginning in the mid-nineteenth century and increasingly so by the turn of the century. Although grand juries in some states could still report on possible corruption in public office,\textsuperscript{127} administrative duties of grand juries were by that time exceptional.\textsuperscript{128}

There are precious few indications why the grand jury came to exercise a more circumscribed set of powers. The courts from this period generally explained a narrowing of traditional grand jury powers in a conclusory way, by stating that matters other than criminal charges were outside the authority of the grand jury.\textsuperscript{129} Sometimes they discussed the inability of a person

\textsuperscript{125} GA. PENAL CODE § 886; Chatham County v. Gaudry, 47 S.E. 634 (Ga. 1904); OKLA. STAT. ANN. tit. 22, § 346 (West 1969); UTAH CODE ANN. § 77-11-11 (West 1990); WASH. REV. CODE ANN. § 10.27.160 (West 1990). In 1881, the New York legislature finally adopted the 1846 Field Commission recommendation that limited the grand jury’s reporting powers to matters that could be subject to indictment. Van Voorhis, supra note 114, at 2, 7, 10; see also 1 EDWARD LIVINGSTON, CRIMINAL JURISPRUDENCE 372 (1873) (drafter of Louisiana Code criticizes grand jury report power because it fosters “party spirit”; eliminates report power).

\textsuperscript{126} GA. CODE ANN. § 15-12-71 (Michie, 1990) (limiting grand jury to reports and other actions specified in statute); Medalie, supra note 84, at 6–7. For current statutes identifying special subject matters for grand jury reports, see BEALE & ERYSON, supra note 9, at § 3.02 nn.2–7 (14 states).

\textsuperscript{127} Kuh, supra note 11, at 1111 n.31; Medalie, supra note 84, at 5–6; Bruce T. Olson, Preface to G. EDWARDS, THE GRAND JURY (2d ed. 1972); see generally BEALE & ERYSON, supra note 9, at ch. 3. In 1931, a member of the New York bar proposed the use of “auditing” grand juries, as if grand juries had never exercised such control over local governments. Lloyd N. Scott, An Auditing Grand Jury Is Suggested, 9 THE PANEL 92 (May-June 1931).

\textsuperscript{128} See Henry C. Peabody, A Charge to the Grand Jury, 11 MAINE L. REV. 136 (1918) (charge to grand jury not mentioning any duties other than criminal indictments); Depue, Charge to the Grand Jury, 5 N.J. L.J. 319 (1882) (same). The academic treatments of the grand jury from the turn of the century looked upon grand jury reports and administrative functions with disfavor. See CHARLES H. WINFIELD, THE GRAND JURY I (1883) (manual for grand jurors in New Jersey, purporting to describe common practice of grand juries in all states, observing that grand juries “have no political nor other civil powers, and must confine their deliberations to inquiries whether there have been infractions of the penal laws”); EDWARDS, supra note 127, at 157–59.

\textsuperscript{129} EDWARDS, supra note 127, at 157–59, (condemning reports without indictments because grand jury would be “acting outside of their duties”); Rector v. Smith, 11 Iowa 302 (1867); FIELD COMMISSION, supra note 100, at 115–18 (1849 Commission recommendation, enacted into law 1881).
named in a report to respond adequately, or the need to maintain secrecy of grand jury proceedings not ending in indictment, or the lack of political accountability of private prosecutors. A few courts also argued that grand jury reports regarding executive or legislative matters violated the constitutional separation of powers, and involved the grand jury in matters where it lacked either authority or ability to proceed.

There are also a few indications that concerns about the grand jury's lack of expertise (the same concern that dominated the abolition debate) led to restrictions of grand jury power. When grand juries attempted to appoint support staff to assist it in some inquiry into the affairs of government, the courts stressed the grand jury's lack of expertise by concluding that the grand jury should not perform such a function. A grand jury, they decided, must leave tasks requiring the professional skills of a manager, an accountant, or an attorney to other parts of government that already have such expertise at their disposal.

The timing of these changes in grand jury practice, which coincided with the emergence of new administrative institutions in government, points toward a hypothesis that builds on this lack of expertise on the grand jury.

131. Bennett v. Kalamazoo Circuit Judge, 150 N.W. 141, 144 (Mich. 1914); FIELD COMMISSION, supra note 100, at 115–18.
133. In re Gardiner, 64 N.Y.S. 760, 762 (Gen. Sess. 1900) ("functions are not executive but judicial"); In re Wilcox, 276 N.Y.S. 117 (1934); In re Texas Co., 27 F. Supp. 847, 849–50 (E.D. Ill. 1939); In re Schirm, 166 N.Y.S.2d 423 (Sup. Ct. 1957); In re United Elec., Radio & Machine Workers of Am., 111 F. Supp. 858 (S.D.N.Y. 1953); see also Peabody, supra note 128 (separation of powers limits grand jury power, no authorization to submit reports).
134. In re Osborne, 125 N.Y. 313, 319 (Sup. Ct. 1910) (court used language suggesting concern for lack of grand jury's qualifications to conduct investigation; grand jury had an "exaggerated idea of its own importance"); In re Jones, 92 N.Y.S. 275 (Sup. Ct. 1905) (Woodward, J., dissenting) (grand jury report should not be allowed because not based on criminal laws as described to grand jury by court; instead, based on "its own standards of public or private morals"); In re Charge to Grand Jury, 50 F. Cas. 992, 994–95 (C.C.D. Cal. 1872) (limits on grand jury investigative power needed to avoid apparent abuses caused by grand jury acting on information from private parties, rather than relying on guidance of court or professional prosecutor).

Lack of legal expertise among jurors was also the primary rationale for restriction of the trial jury's right to decide questions of law, a limitation also settling into place just prior to the time that restrictions on grand jury power were taking place. See Note, supra note 19, at 178–82.

135. Medalie, supra note 84, at 7 (comparing inquisitorial powers of grand jury to legislative and executive agencies, concluding that "skill, experience, energy, patience and the possibility of devoting unlimited time are indispensable factors. Unfortunately, grand juries are not so equipped.").

136. There may have been other unspoken reasons for curtailing grand juries. Perhaps if a grand jury is drawn from the "men of substance" in the county, the institution could be viewed as a protector of property interests against the whims of a popularly elected prosecutor. Limitations on grand jury power would become more attractive to those with property as the membership of the grand jury became more democratic. See Bentham, supra note 86, at 140 (grand jury "gives no protection to the subject many against the . . . opulent, and the
Grand juries began to wane just as administrative agencies, staffed by professional civil servants, started to rise. The volume of matters handled by the federal government increased noticeably at the end of the nineteenth century; the subjects of federal regulation expanded in the early decades of the twentieth. 137 Many state governments were increasing in size and complexity at roughly the same time. 138

There was at least some awareness at the time that grand juries were being replaced by professionalized administrative agencies. Some state statutes reassigned certain investigative tasks from grand juries to administrative agencies. 139 Those who still supported a broad range of powers for grand juries pointed to expanding governmental power as a reason to defend broad grand jury powers. They looked to that body as a means of resisting a "surrender to bureaucracy." 140

Thus, at a time when states were restricting the administrative functions of the grand jury, in part because of its lack of experience and training, both federal and state government were creating new institutions that would allow professional administrators to conduct the affairs of government. The grand jury lost many of its powers when a growing professionalism in government made the amateur administrators of the grand jury seem

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140. Charles H. Tuttle, Grand Jury Criticisms Answered!, 7 The Panel 7 (Jan.-Feb. 1929). The Panel was a periodical published by the Association of Grand Jurors of New York County beginning in 1924, devoted to the improvement and defense of the grand jury. See Our Aim, 1 The Panel 1 (June 1924). The vocabulary of some courts from this time indicates an awareness of the overlap between grand juries and administrative agencies. See Kerby v. Long, 42 S.E. 386, 387 (Ga. 1902) ("civil matters were acted upon by that body as a commission, and not as a jury").
unnecessary and inconvenient. It may be tenable, then, to think of these two trends as related.\textsuperscript{141}

In order to understand the prospects for relying today on a citizen panel to participate in administrative affairs, we must consider broader attitudes towards professionalism in government. There is every possibility that the same forces that diminished the grand jury’s traditional administrative powers could prevent it from taking on new administrative powers today.

II. CITIZEN PARTICIPATION AND THE ADMINISTRATIVE STATE

As the institutional outlines of the American administrative state began to take shape at the turn of the century,\textsuperscript{142} citizen participation in the ongoing affairs of government was never a serious possibility. In this part, I will consider the assumptions about administration and citizens that made the idea of citizen participation seem so irrelevant at that time, along with the accumulated changes in those assumptions that made different forms of citizen participation seem more attractive over time. I will then survey the various forms of citizen participation now incorporated into the federal administrative process and compare them to the historical operation of grand jury panels.

A. How Citizen Panels Became Unthinkable

It seemed apparent to many during the last quarter of the nineteenth century that the administration of government (particularly the federal government) had to change. Whatever the motives and objectives of the reformers,\textsuperscript{143} their views on proper administration and of citizen participation in government were apparent. Those views made it seem preposterous—perhaps even corrupt—to rely on citizen participation through a panel resembling a grand jury, even though the grand jury was a familiar administrative tool available to the reformers.

\textsuperscript{141} Cf. Olson, supra note 127, at v--vi, xi--xii (treating grand jury as one device for restoring role of citizen in professionalized government). I do not suggest that attitudes towards professionalism alone explain the change in the role of the grand jury. Another factor at work may have been the decreasing vitality, noted by many historians, of local community life toward the end of the nineteenth century. Skowronek, supra note 137, at 12 nn.18--19.

\textsuperscript{142} Some date the “framing” of the administrative state well back into the nineteenth century. William E. Nelson, The Roots of American Bureaucracy, 1830--1900, at 2 (1982) (Civil War as watershed date in American bureaucracy). It is more common, however, to begin the story of today’s administrative institutions in the last quarter of the nineteenth century. See Steven G. Breyer & Richard B. Stewart, Administrative Law and Regulatory Policy 26--29 (2d ed. 1985).

\textsuperscript{143} Neither the cause for this reshaping of government nor the desired effects of the reform was entirely clear. Compare Gabriel Kolko, Railroads and Regulation (1965) with James D. Morone, The Democratic Wish: Popular Participation and the Limits of American Government 97--128 (1990), Robert V. Prentus, The Organizational Society 84 (rev. ed. 1978), and James M. Landis, The Administrative Process 7--13 (1938).
The Progressive reformers hoping to reshape American government were reacting to an administrative system that we have all but forgotten today. The Progressives decried the "spoils system" of Jacksonian democracy that had been in place since the 1830s. This system granted government positions to "common men," those who had supported the political party in power and who would continue to support its programs and future electoral efforts. The pejorative title suggests that these offices were granted as illegitimate perquisites to friends of the powerful. But the rationale for the so-called spoils system was more complicated than the label used by its enemies would allow. Indeed, the rationale for this system of staffing the government has much in common with the rationale for giving power to grand juries.

Defenders of this system called it a method of assuring "rotation in office" by common citizens. Rotation in office had many purported virtues. First, it broke the claim of a privileged "aristocracy" on government office and opened up opportunities for a wider range of citizens. Second, it prevented government servants from stagnating in office. In the view of Jacksonians, public servants with long tenure in office were more susceptible to corruption or indolence than newcomers to the job. They were also more likely to lose sight of the real impact of government policy on private transactions, while officeholders recently departed from private life and soon to return there would be more mindful of government's impact.


146. 8 Cong. Deb. 1325 (1892) (statement of Senator Marcy: "To the victor belong the spoils of the enemy.").


Andrew Jackson himself gave one of the most widely quoted defenses of rotation in office, and touched upon this objective: "The proposed limitation would destroy the idea of property now so generally connected with official station, and although individual distress may be sometimes produced, it would, by promoting that rotation which constitutes a leading principle in the republican creed, give healthful action to the system." Andrew Jackson, First Annual Message, in 2 A Compilation of the Messages and Papers of the Presidents 449 (James D. Richardson ed., 1896).

149. Jackson, supra note 148, at 448–49 ("There are, perhaps, few men who can for any great length of time enjoy office and power without being more or less under the influence of feelings unfavorable to the faithful discharge of their public duties ... Corruption in some and in others a perversion of correct feelings and principles divert government from its legitimate ends and make it an engine for the support of the few at the expense of the many."). The emphasis on individual qualifications of officeholders rather than the structure of the office reflects the rudimentary nature of the Jacksonian bureaucracy. On the other hand, the first signs of a depersonalized view of official positions began to take hold during these years. Crenson, supra note 148, at 4, 161.
Proponents of the rotation system were also convinced that most government positions were not overly complicated and that many citizens were capable of doing the job without extensive experience or training.\textsuperscript{150} To the extent that government service required special skills, rotation in office provided an opportunity to educate many citizens in the affairs of government.\textsuperscript{151} The parallels here to the grand jury are striking.

Finally, rotation in office helped to reinforce the wishes of the majority of the people as expressed in elections. By giving office to those who would carry out administration policy, the people's selection of a chief executive could more readily lead to changes in the operation of government.\textsuperscript{152}

Progressive reformers\textsuperscript{153} preferred filling offices with experts who could conduct the affairs of government unwarmed by political considerations.\textsuperscript{154} They condemned several aspects of the Jacksonian system of citizen rotation in administrative offices. Progressives pointed first to the need for more complex government interaction with an ever more complex economy.\textsuperscript{155} In such an economy, the government would have to assemble and make wise use of tremendous amounts of information. In order to handle these facts, bureaucracies had to establish specialized routines and positions.\textsuperscript{156}

This view of the complexity of government activity led the reformers to question the ability of untrained citizens, rotating in and out of office, to serve competently. Those with proper education and long-standing expen-

\textsuperscript{150} Jackson, supra note 148, at 448 ("The duties of all public officers are, or at least admit of being made, so plain and simple that men of intelligence may readily qualify themselves for their performance.").

\textsuperscript{151} Fish, supra note 144, at 80–84; Robert V. Remini, The Revolutionary Age of Andrew Jackson 74 (1976); White, supra note 137, at 18.

\textsuperscript{152} Nelson, supra note 142, at 22–30; Crenson, supra note 148, at 6; Remini, supra note 150, at 71–83; Arthur M. Schlesinger, The Age of Jackson 45–47 (1945).

The Post Office, the largest and most important source of patronage positions, offers an interesting example of the use of positions to further an administrative program. In addition to the salaries of postal workers that might induce political supporters to work fervently for their party, the Post Office also served as an important method of communicating the views of the Administration to the people and hearing their reactions. Jackson, supra note 148, at 460–61.

\textsuperscript{153} A group of early Progressives were known as "Mugwumps," because of their apparent distaste for partisan politics. They were depicted sitting on a fence with their "mugs" facing in one direction and their "wumps" in another. Lorin Peterson, The Day of the Mugwump 25 (1961). The simplified account I give here of administrative reform during a 40–50 year period necessarily glosses over important distinctions within the movement.

\textsuperscript{154} Eaton, supra note 144, at 82–97 (1881); Fish, supra note 144, at 228–40.

\textsuperscript{155} Skowronek, supra note 147, at 49–50; Ernest Freund, The Law of the Administration in America, 9 Pol. Sci. Q. 403, 424 (1895); Woodrow Wilson, The Study of Administration, 2 Pol. Sci. Q. 197, 200–201, 203 (1887) ("at the same time that the functions of government are every day becoming more complex and difficult, they are also vastly multiplying in number. . . . Like a lusty child, government with us has expanded in nature and grown great in stature, but has also become awkward in movement.").

\textsuperscript{156} Max Weber, a sociologist trying to explain the rise of bureaucracies, later emphasized the bureaucracy's capacity to process information by using a rule structure. Max Weber, The Presuppositions and Causes of Bureaucracy, in Reader in Bureaucracy 60–68 (Robert K. Merton ed., 1952).
rience in a position could best serve the needs of a complicated economy. Special expertise would be necessary to gather and analyze the data that government would need.\footnote{157}{White, supra note 144, at 327–29; Nelson, supra note 142, at 89–95; Jasper Y. Brinton, Some Powers and Problems of the Federal Administrative, 61 U. Pa. L. Rev. 135, 160–61 (1913); Freund, supra note 155, at 421; Wilson, supra note 155, at 216–17 ("A technically schooled civil service will presently have become indispensable.").}

The Progressives also worried about the possible tyranny of majoritarian party politics. They feared that public officials would provide preferential treatment to those who supported the party in power and would ignore the legitimate interests of others.\footnote{158}{This criticism of the spoils system was articulated earlier by Daniel Webster. 11 Cong. Deb. 460–61 (1835); see also H.R. Rep. No. 945, 27th Cong., 2d Sess. (1842). For a description of the political obligations of administrators, see White, supra note 145, at 332–43. An administrator was more likely to respond to a request for preferential treatment from a party leader in Congress than in the executive branch. See Whit’s, supra note 137, at 15–14, 328–29.}

A related but distinct concern about rotation in office was its corrupting influence. Even if officeholders, appointed because of their political loyalty, were entirely qualified for their jobs, Progressives noted that officials viewed their jobs as payment for services rendered. This attitude, they believed, sometimes led these officials to favor a regulated party or a potential government contractor for reasons of personal gain.\footnote{159}{See Paul R. Verkuil, The Emerging Concept of Administrative Procedure, 78 Colum. L. Rev. 258, 264–74 (1978).}

Paradoxically, they believed that a permanent civil service selected on merit would serve democratic values by stopping the corrupt party control of offices.\footnote{160}{Nelson, supra note 142, at 120; White, supra note 137, at 289–90; Freund, supra note 155, at 421.}

161. Unfortunately, women were not generally considered relevant to the discussion about officeholders at the time. I adopt, for the moment, the exclusive language of the day. But see U.S. Const. amend. XIX (1920).


Second, they pressed for specialized agencies, responsible for limited subject matter. Specialized agencies would become more responsive to constituencies interested in that subject than to the President or party leaders in the Congress. Hence, their advocacy for independent regulatory commissions was in part a device to fragment power and reduce the impact of majoritarian politics. Progressives also endorsed independent commissions with narrowly defined jurisdictions, because the continual exposure to a limited area would enable the agency to develop expertise. It would make possible a separation of politics (the ends of government) from administration (the scientific means of government).

Finally, some (but not all) Progressives emphasized the importance of judicial review of agency decisions. If “politically neutral” judges were vigilant in monitoring administrators, they might reduce the influence of the political parties and better preserve the “individual rights” of all who dealt with the agency. The Progressives shared this emphasis on judicial review with others less enthusiastic about expanding administrative capabilities. Frank Goodnow, author of one of the earliest texts on administrative law in this country, placed considerable weight on review of agencies by neutral judges.

The results of the Progressives’ reform efforts were electrifying. The Civil Service, established by an 1883 statute, steadily expanded to create a largely professionalized national bureaucracy within several decades. An 1887 statute created the Interstate Commerce Commission, the first federal independent regulatory commission. The Food and Drug Administration appeared in 1906, the Federal Reserve Board in 1913, and the Federal Reserve Bank in 1914.


167. An Act to Regulate and Improve the Civil Service of the United States, 22 Stat. 403 (1883); see also Van Riper, supra note 148, at 116–24, 128–35.

Trade Commission in 1914.\textsuperscript{169} Judicial review of these agencies remained a central legal device for controlling their work.\textsuperscript{170}

At the state level, Progressives could count similar achievements. Wisconsin and several other states established a civil service early in the twentieth century.\textsuperscript{171} Massachusetts and a number of other states created their own commissions to regulate the railroad industry.\textsuperscript{172} Some states established agencies with special responsibilities for regulation of banks, or labor relations, or for conservation of natural resources.\textsuperscript{173} A number of cities followed the lead of Staunton, Virginia, in adopting a city manager form of government, replacing elected aldermen with professional managers.\textsuperscript{174}

Thus, by the turn of the century, the institutional outlines of a modern administrative government were in place. Its salient features were a permanent staff with specialized training and experience and agencies with specialized subject matter jurisdiction.\textsuperscript{175} Such enthusiasm for professionals with specialized duties in government was merely one piece of a much larger trend favoring such qualities in universities,\textsuperscript{176} in the legal and medical professions, and elsewhere.\textsuperscript{177}

\begin{itemize}
\item \textsuperscript{171} Peterson, \textit{supra} note 152, at 39 (New York and Massachusetts); Charles McCarthy, \textit{The Wisconsin Idea} (1912).
\item \textsuperscript{172} Hoogenboom & Hoogenboom, \textit{supra} note 137; George H. Miller, \textit{Railroads and the Granger Laws} (1971).
\item \textsuperscript{173} Reginald H. Smith, \textit{Administrative Justice}, 18 Ill. L. Rev. 211 (1923) (labor and worker compensation commissions). While some states had created regulatory commissions to govern banks and insurance companies by the 1850s, see Ronald E. Seavoy, \textit{The Origins of the American Business Corporation}, 1784-1855: \textit{Broadening the Concept of Public Service During Industrialization} 242-44 (1982), these commissions became more widespread late in the century.
\item \textsuperscript{175} While the Progressives put into place the institutional outlines of the modern regulatory state, it remained for supporters of the New Deal to use those institutions to question more fundamentally the reliance on economic markets. Rabin, \textit{supra} note 170, at 1218-29, 1243-53. The Progressives' enthusiasm for professionalism and expertise among the bureaucracy, specialized functions of agencies, and insulation of administration from politics passed intact to the New Dealers. James Landis, an advocate of the New Deal building on the Progressive tradition, emphasized each of these themes. Landis, \textit{supra} note 143, at 10, 23-30 (1938).
\item \textsuperscript{176} Skowronek, \textit{supra} note 137, at 42-45; Burton S. Bledstein, \textit{The Culture of Professionalism: The Middle Class and the Development of Higher Education in America} (1976).
\item \textsuperscript{177} Nelson, \textit{supra} note 142, at 82-87, 94-112; Fredrickson, \textit{supra} note 164, at 199-
Although this vision of professional administration in government and elsewhere was plainly not congenial to an amateur administrative body such as a grand jury, the Progressives never explicitly discussed such an alternative. They paid some attention to voting methods. However, they never bothered to expand their argument against the rotation of full-time administrative offices into a more general argument against other types of direct citizen involvement in administration. While there were occasional efforts to describe the contrast between grand jury investigative powers and agency investigative powers, there appears to have been virtually no discussion of the merits or demerits of part-time citizen involvement with administration. Some who saw the expansion of government’s administrative capacities as natural or desirable also, on other occasions, took positions favoring limitations on grand jury power. Yet they never drew a connection between their stances on the two questions.

This silence regarding citizen panels and the more general question of citizen participation in administration is perplexing. Given the affinities between the grand jury and the repudiated Jacksonian system of rotation in office, reformers might have taken the trouble to argue against this related alternative. Further, the absence of any debate on the topic is probably not explained by saying that the issues here overlapped completely with the


178. Progressives advocated primary elections for selecting candidates, proportional representation voting, and more frequent use of referenda. Morone, supra note 143, at 110–12; Peterson, supra note 153, at 43; see James Bryce, 2 The American Commonwealth (3d ed. 1904).

179. For instance, Woodrow Wilson thought it important to address a larger agenda than civil service reform, and believed that administrators should ultimately respond to the wishes of voters. Yet he did not consider any methods of citizen participation in administration, and even sought to constrain electoral influences on administration. Wilson, supra note 155, at 210, 214–15 (“Directly exercised, in the oversight of the daily details and in the choice of the daily means of government, public criticism is of course a clumsy nuisance, a rustic handling delicate machinery.”).


182. In addition, some of the early independent commissions relied primarily on the power to gather information and report on what they found, without taking further action. See Kentucky & I. Bridge Co. v. Louisville & N.R. Co., 37 F. 567 (C.C.D. Ky. 1889); William Letwin, Law and Economic Policy in America 240–44 (1965). This method of operation surely would have called to mind comparisons to the powers still exercised, to some degree, by the grand jury.
issues involved in a civil service based on merit. Some of the objections leveled against citizen rotation in office did apply equally to a temporary citizen panel, such as a grand jury. A grand jury, like a Jacksonian citizen official, might lack the expertise to respond intelligently to complex conditions. On the other hand, not every piece of the civil service debate fit neatly into this related context. The corrupting influence of special interests that might work on full-time public officials was a bit less likely to affect the rotating membership of grand juries. Grand juries might also be less affected by party loyalty, making them more likely to conduct their business without showing favoritism for particular political groups.

Perhaps Progressive reformers never focused on citizen panels because by that time grand juries had already lost a great deal of vitality in areas apart from criminal indictments, or because they were institutions that differed from state to state. More likely, the larger forces that made professionalization seem attractive in so many contexts made the amateur citizen panel easy to ignore. The temperament of the times made it seem credible to create institutions with little place for citizens to take part. It took several decades before the virtues of citizen participation in administration began to reassert themselves.

B. Problems with Excluding Citizen Participation

Several problems with the model of specialized administrative expertise have appeared over time and have made citizen participation seem more important and desirable than it had seemed during the Progressive era. There are several possible ways to diagnose the precise problem with excluding citizen participation, and several corresponding cures. Two of the diagnoses—the potential illegitimacy of agency action and poor incentives for the agency—point towards solutions such as electoral accountability that do not literally call for citizen participation in many governmental decisions. A third potential diagnosis of the problem—citizen disaffection—might only be addressed by involving citizens in administration themselves. I will address in turn each of these descriptions of the problem.

The problem with excluding citizen participation could be characterized first as one of legitimacy. If the people in a democracy do not participate meaningfully in the affairs of an agency, they might not consent to the agency’s actions and ultimately may withhold the respect and resources it needs. Where an unelected official is perceived to be a trained expert, making choices as dictated by professional craft, there will be no inclination

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183. See supra note 66. At least this would be true were the members of the grand jury represented an appropriately diverse segment of society.

to question his or her legitimacy. But there is now no conviction that the expertise of agency personnel, or the application of scientific or professional analysis to particular problems, will produce government policy acceptable to all interested parties. Indeed, some have dismissed agency expertise as an "illusion." At most then, the expertise necessary to collect and interpret empirical data might help focus issues.

Popular input into the administrative process seems both possible and desirable under this view. It is possible—in fact, imperative—for citizens to contribute in some meaningful way to administration. Without disputing the complexity of many governmental problems, a skeptic of agency expertise who is concerned with agency legitimacy would argue that technical expertise can only supplement and inform more basic value choices in public policy. In a self-governing society, the people must either consent to such choices or make the choices for themselves. The entire field of administrative law has been called an attempt to explain how unelected bureaucrats, making their choices without resort to a scientific method that produces a single correct answer, can claim to exercise legitimate power in a democracy.

For those concerned with legitimacy, there is a range of possible strategies for establishing a connection between the desires of citizens and the choices of unelected administrators. Some strategies stress election day. The vote becomes a popular pronouncement about the general direction of administrative policy. Elected officials carry out this popular mandate by appointing sympathetic leadership in the agencies and lobbying for particular policies. The best solutions to the problem of excluding citizens, from this perspective, create and strengthen mechanisms to enable elected

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officials to coordinate and control the work of agencies.\textsuperscript{192} Related approaches might enlist judges in the effort to hold administrators accountable to representatives elected by the people.\textsuperscript{193}

Others who characterize the problem as one of illegitimate agency action train their efforts on improving the representational quality of administrative action, without focusing on elected officials as intermediaries. These strategies try to enhance the responsiveness of administrators acting as representatives themselves. They might seek some assurance that administrators hear a proper range of arguments about public policy.\textsuperscript{194} They may try to insure that administrators themselves are drawn from a group diverse enough to be receptive to many points of view.\textsuperscript{195}

Yet another strategy aiming to safeguard the legitimacy of the administrative process would attempt to insulate administrators from popular and interest group pressure. The administrative process would be structured to encourage agency deliberation and not merely responsiveness. Only by transcending and shaping the interests of the community and regulated parties can an agency make sound choices. The administrators then stand a chance of arriving, after deliberation with one another, at some notion of the public interest acceptable to the public at large.\textsuperscript{196}

The second diagnosis of the problem would contend that excluding citizen participation is more a problem of poor incentives for the agency than one of legitimacy. This approach treats the legitimacy of agency action as an accepted feature of the current legal order, but concludes that exclusion of citizen participation from the administrative process leads to unsound outcomes. An agency cut off from the citizens’ right pursue a policy that harms many people because it has been “captured” by a regulated group.\textsuperscript{197} It might propose regulations that are overly difficult to understand or to


\textsuperscript{194} Stewart, supra note 186, at 1715 (describing interest representation model of administrative law); Paul R. Verkuil, \textit{Jawboning Administrative Agencies: Ex Parte Contacts by the White House}, 80 Colum. L. Rev. 943, 950 (1980).

\textsuperscript{195} J. Donald Kingsley, \textit{Representative Bureaucracy} (1967); Van Riper, supra note 148, at 7.


comply with, or it might regulate without receiving important information the public could provide.

One might respond to this diagnosis of the problem by improving the public's ability to scrutinize the agency, through measures such as the Freedom of Information Act. Alternatively, one could compel the agency to consult certain sectors of the public likely to give important information about the subject of regulation.

There may also be use here for the techniques already described for responding to the problem of illegitimacy; techniques such as improved coordination of agency work by elected officials can address both problems at once. However, there is an important difference in the two readings of the problem. If legitimacy is the issue, the people must perceive that the agency is responding to their wishes or is representing their interests well. They must accept agency action. If, on the other hand, poor agency incentives and information are the problem, the actual response of the people does not matter. It is only important that agency decisionmakers act as if they are being watched and informed by the public. The agency must obtain information about the ideals and preferences of the people and must understand the ability of the public to comply with regulations, but the people might never actually get involved in the process.

While each of these two diagnoses of the problem has some force, I would add to them an observation that goes a bit further than the conventional accounts of administrative law have suggested. Without denying the problems with legitimacy and incentives that can arise from excluding citizens from participating in administrative affairs, one might focus on problems it creates for the citizen rather than problems for the government. Even if the public passively accepted the legitimacy of agency action, and even if the agency acted on the proper information with appropriate incentives, administrative action that does not allow for adequate citizen involvement will not satisfy the needs of the people.

This view of the administrative process highlights the experience of community life as a deeply held human need rather than a necessary evil.

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Ongoing and active involvement in the administration of government, rising above a passive acceptance, might remedy some of the ignorance and disaffection with government that corrodes public life. Participation could educate those involved about the processes of government and about their own interests and aspirations.205 It might increase attitudes of trust towards government and other members of society206 and create a sense that an individual belongs to a community and can be effective in changing that community.207 Given the pervasiveness of contact with the government in the administrative state,208 steps that could make such contact more palatable—perhaps even fulfilling—would be a welcome change.

Active participation in administration, as opposed to acquiescence, also vindicates the moral value of an individual who must participate in social decisions that affect him or her profoundly.209 Some administrative law scholars, in attempting to explain the value of a due process hearing (to be held by an administrative agency before depriving a person of liberty or property), have focused on respect for individual dignity.210

Voting and representation are not adequate means of achieving these same results.211 Those concerned about citizen disaffection and ineffectiveness often propose solutions that attempt to supplement voting and representation with citizen participation in administrative affairs extending

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208. See Kwiet & Kwiet, supra note 1, at 63 (“What transpires in our passage from the cradle (which is constructed according to safety regulations) to the grave (whose location and standards are determined by health regulations) is increasingly regulated by universal standards that are established by large, impersonal organizations.”).


211. There is a sizeable political science literature describing the shortcomings of voting as a means of participating in public life. For instance, Benjamin Barber has argued that voting in a liberal democracy creates an insufficient sense of attachment to the society because of its episodic quality. Benjamin R. Barber, Strong Democracy: Participatory Politics for a New Age 187–88 (1984); Paul Brest, Further Beyond the Republican Revival Toward Radical Republicanism, 97 Yale L.J. 1623, 1624–25 (1988).
beyond election day. Such efforts to augment the political life of citizens draw on a republican tradition—preferring direct citizen involvement over representation—that has always played a supporting part in the American constitutional order.

Some uses of republican tradition envision a role for heightened citizen involvement only at special times, "republican moments," or for fundamental questions facing the political order. An administrative grand jury, however, would not limit its work to particularly momentous times or issues. Continuous involvement is valuable because it prepares citizens for self-government in those formative times and issues. It also recognizes that many of the most important collective choices are made at the time of administering or implementing a chosen policy initiative.

C. Current Forms of Citizen Administration

Ultimately, the administrative process changed from the progressive ideal of a specialized agency with professional staff to accommodate more citizen involvement. There are now a number of existing ways that citizens can participate in the work of administrative agencies on days other than election day. In this section, I survey some current methods of involving nonemployees in an agency's business. Each of these methods, while beneficial, contributes something significantly different from the administrative grand juries proposed in Part III. None of them duplicates the emphasis of a grand jury on making the experience of self-government available continuously to any citizen.

One of the first ways found to involve citizens generally in administrative affairs was the informal rulemaking proceedings mandated under the Administrative Procedure Act. According to section 553 of the APA, an agency formulating substantive regulations must publish notice of its proposal


215. 5 U.S.C. § 553 (1988). Administrative hearings, often required by statute and more recently under the Due Process Clause, create a forum for an individual to participate in administrative matters when the government is disadvantaging that individual in a way different from the general public. This form of participation has always been available where agencies have relied on adjudication to enforce their policy.
in the Federal Register and accept comments about the regulations from any interested party. These procedures provide an opportunity for any citizen to become personally involved in agency rulemaking, although there is no guarantee that his or her involvement will affect the agency in the least.

It is common for agencies to take other measures to keep the public informed of their activities and to solicit public views on proposed action. Often this takes the form of meetings between agency personnel and any interested members of the public. Many state and federal statutes require agencies to make some effort to consult with the public before finalizing certain policy choices. Agencies must consult with any interested members of the public during long-range planning in areas such as management of public lands and transportation. In this setting, as in rulemaking, individuals who participate do not necessarily interact with one another or influence the agency.

Some federal agencies also attempt to use panels with fixed memberships, composed of members other than agency employees. For instance, the Federal Advisory Committee Act encourages federal agencies to obtain advice or recommendations from such groups. Many agencies, including the Consumer Product Safety Commission and the Federal Trade Commission, use advisory committees to obtain information from those with special education and experience. Others utilize these committees to keep relevant segments of the public informed of agency proposals or to build consensus about a possible

216. See 40 C.F.R. § 25.10 (1991); Walter A. Rosenbaum, Public Involvement as Reform and Ritual: The Development of Federal Participation Programs in Citizen Participation in America 81, 82 (Stuart Langton ed., 1978) (listing the APA as participation vehicle).

217. Judges have made some efforts to enhance the power of those who benefit from regulation to influence an agency, with modest success. See Richard B. Stewart & Cass R. Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 193, 1271–75 (1982); Stewart, supra note 186, at 1762.

A more recent form of rulemaking enhances the influence of those who participate. Under the Negotiated Rulemaking Act of 1990, Pub. L. No. 101-618, 104 Stat. 4967 (codified at 5 U.S.C. §§ 581–590 (Supp. 1990)), certain parties with an identifiable interest in the subject of proposed rulemaking can participate in negotiations designed to fashion proposed regulations. While the proposals that result from these negotiations are not binding on the agency, the framework does give participants an unusual ability to influence the agency's decision.


Stuart Langton, Citizen Participation in America: Current Reflections on the State of the Art in Citizen Participation in America 1, 3–6 (Stuart Langton ed., 1978). Such requirements are most commonly imposed on local governments.


course of action. The Commission on Civil Rights uses nonexpert advisory committees with some noteworthy parallels to grand juries: each state has an advisory committee that (1) informs the commission of any knowledge it has of any alleged deprivation of the right to vote and (2) may undertake studies other than those chosen by the Commission. However, these committees, like the Civil Rights Commission itself, only have power to make recommendations based on their investigations.

Other federal agencies give nonemployees power to make decisions, and not just to consult about agency policy. The Food and Drug Administration, for example, appoints Public Boards of Inquiry to adjudicate certain agency disputes. The board members must have special technical qualifications. While most groups of nonagency employees with power to dispose of issues at the federal level are comprised of experts, citizen groups employed by the Department of Housing and Urban Development make some binding decisions regarding the management and planning of public housing.

It is somewhat more common for state and local administrative agencies to give decisionmaking authority to a panel composed at least in part of lay members. In Minnesota, Iowa, and elsewhere, citizen boards in environmental agencies ultimately direct agency policy. Most commonly, however, state and local bodies with power to dispose of issues make room for only a few lay members. Furthermore, the participants are usually appointed by the governor and unlike jurors are not selected randomly.

Each of these forms of public participation, while important, misses some aspect of the grand jury experience. These devices differ from the grand jury model first because the participants are not selected randomly. Membership on some panels is only open to those with special qualifications or experience. For the few citizen panels that do not require special qualifications, there is still no random selection of members from the citizenry.


224. 45 C.F.R. §§ 703.2(a), 703.3 (1991). The members of the committees are not chosen for any special expertise, but they are appointed and not selected randomly. 45 C.F.R. § 703.5 (1991).


228. MINN. STAT. ANN. § 116.01–.02 (West 1987); IOWA CODE ANN. § 455A.6 (West 1990); see also Henry & Harms, supra note 227, at 154–55.


Instead, the participants are volunteers, typically those with a special interest in the area, perhaps an economic motivation, or those with connections to the elected official making the appointments to the panel.

The opportunity to participate without prior specialized experience or interest in an area, missing from current citizen panels in government, contributes mightily to the grand jury’s monitoring and educational functions. The random selection of grand jurors makes it possible for the members to form views during their proceedings rather than bringing established views into the room. It makes possible the education of panel member jurors during the administrative process. Random selection also helps prevent manipulation by those responsible for selecting citizens for participation. Further, random selection may affect a broader sector of the public who do not serve. Participants not drawn from particular interest or professional groups are likely to return from their duties to more diverse parts of the community, and inform their friends and co-workers about their experience on a panel.

An administrative grand jury would also differ from the current forms of public participation because of the tasks assigned to the group. Most current participatory forums do not require the participants to reach any decision as a group. Each participant might express a view to the agency or receive information, but need not interact with other group members. Deliberation as a group creates more room for personal transformation. Each panelist would interact with other panelists and with parties, not just with government. Citizens who participate together as a group also tend to obtain better responses from the bureaucracy. Group deliberation is especially important for temporary participants in government, who cannot rely on time and repetition to help them anticipate and appreciate the different views of those interested in the question.

Finally, the administrative grand jury would differ from those participatory devices that only grant citizens the power to advise an agency. The power to dispose of issues prevents the agency from treating the group’s


232. Random selection would therefore be most important for those who advocate a form of government aspiring to something more than aggregating preferences. See Sunstein, supra note 195.

233. For the potential strength of randomly selected legislators (i.e., representatives chosen by lottery), see A. H. M. Jones, Athenian Democracy 100–107 (1957); Akhil R. Amar, Choosing Representatives by Lottery Voting, 93 Yale L.J. 1283 (1984).


deliberations as a meaningless ritual in the policymaking process.236 The lack of any power to bind the agency has been one of the leading causes of dissatisfaction with many current participatory devices.237

Without qualities such as random selection, group deliberation, and power to dispose of issues, the opportunities for citizens themselves to participate in administrative government have been limited and uninspiring for many. The administrative grand jury just might bring new energy to the problem of how to involve citizens with their bureaucrats.

III. STRUCTURING AN ADMINISTRATIVE GRAND JURY

The grand jury’s history by no means compels its use today as an administrative body. Yet, even if history does not clearly call for a restoration of the grand jury to some “rightful place,” it does suggest some possibilities. The grand jury has in the past involved citizens, those with no special interest or qualifications, in the monitoring and administration of government.

It was thought to contribute to the education and virtue of citizens and to increase their attachments to society. A similar panel today might help to strike the proper balance between professional and amateur government.

If a legislature were convinced of the need for some direct citizen participation in administrative affairs, through panels resembling grand juries, it would confront right away a legion of practical issues. This part tries to identify the institutional qualities of grand juries that are most worth preserving in the administrative sphere.

I do not, however, purport to describe a single definitive structure for administrative grand juries. Different agencies might use the panels differently and might structure them accordingly. Experimentation by various legislatures and agencies could certainly generate important lessons over time on how to refine such panels. What follows is a preliminary set of observations to guide the experimentation. I suggest ways to meet those obstacles likely to face the administrative grand jury in a way that best retains the traditional virtues of the people’s panel: a capacity to improve both its members and its government.

A. Potential Tasks for an Administrative Grand Jury

The working context for all administrative grand juries will not be alike. Different parts of the polymorphous administrative process might make use of the grand jury concept. The hardest task facing those who experiment with administrative grand juries will be to specify the tasks within the administrative process that grand juries might be able to accomplish. Some

236. Frug, supra note 212, at 568.
combination of the duties described below might be feasible, and there are surely possibilities not mentioned here.

1. Panel as Ombudsman

Let us begin with what I consider to be the most auspicious of the potential tasks for administrative grand juries. The institution builder might give the panel the responsibilities of an ombudsman or mediator: a body to hear complaints from regulated parties and from regulatory beneficiaries, from recipients of government benefits, and from taxpayers. A panel could inquire into complaints about the particular agency or group of agencies within its purview. Like the ombudsmen now employed by a number of federal and state agencies, the panel could develop some expertise in the affairs of an agency while bringing an outsider’s perspective to the problem. Unlike the ombudsman, the administrative complaints grand jury would not serve full-time and would remain in office for a period of months rather than years. Hence, the grand jury would require more ongoing instruction about the agency's work, but would run less risk than an individual ombudsman of being assimilated into the agency.

The ombudsmen currently at work in the administrative process typically have access to agency records and other information; a similar power would be vital to the work of a complaints grand jury. Ombudsmen also have authority to issue recommendations about particular adjudications and rules, or more generally about agency procedures and policies. This power closely tracks the broad-ranging “report” power traditionally exercised by the grand jury. Citizens’ panels should have an opportunity to report on any aspect of the administrative process that concerns to their attention. The unbridled power to comment on agency work would give this panel some control over its own agenda, one of the qualities that distinguishes a traditional grand jury from most current forms of citizen participation in the administrative process. The legislature might compel the agency to respond publicly to the criticism.

However, it takes no real commitment to a new institution to allow it to

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243. ABA MODEL STATUTE, supra note 241, at §§ 15, 16.
express a nonbinding opinion on a subject. More serious consequences will flow from the choice of issues to assign to an administrative grand jury for disposition. In order to promote a sense of meaningful work by the panel, it may be desirable to give the panel the ability to make some decisions that could bind the agency.

It could, perhaps, have the power to declare an exception to agency policy for a particular party. Many agencies currently have an exceptions process, to temper their general rules with some equitable consideration of facts specific to the situation.244 A citizens' panel might administer the exceptions process. It would be perceived as an entity independent of the agency, structured to be attentive to the equities of a given case.245 Although the panel could award exceptions on an ad hoc basis, the exceptions process could be integrated into the agency's work more effectively if panels over time develop some criteria for granting exceptions.246 If the panel granting exceptions becomes convinced that the agency's policy needs to be adjusted for all parties, it could recommend such a change to the agency in a report.247

2. Administrative Indictments

Another potential task for the administrative grand jury involves the enforcement function of agencies. Government agencies enforce existing rules against regulated parties, and there might be a role for administrative grand juries in approving enforcement actions. In other words, a legislature might require an "administrative indictment" before the agency could carry forward with an administrative or judicial enforcement proceeding against some target of regulation.

The administrative indictment, however, is in my view a less promising use for an administrative grand jury. It asks the panel to focus on the activity of private parties, rather than government. Hence, this task could promote passivity among the grand jurors, converting them all too easily into a rubber stamp—and an expensive one at that—for agency enforcement decisions. Certainly for agencies with a large enforcement caseload, there is good reason not to encumber their process with a procedural nicety

that will not often change the outcome or the participants in the process.248

To be sure, an administrative indictment would not be entirely worthless. By forcing the agency to explain its case to a group of lay persons, it may force some early screening of cases. It may also give an enforcement target the forum in which to argue that the agency is prosecuting a meritless case, perhaps to favor a group of private interests or to further the agency’s budgetary or other internal priorities. These sorts of values may be worth pursuing if the grand jury can spend a minority of its time on such matters. This may be feasible only with agencies with a relatively light caseload, such as the Consumer Product Safety Commission.

3. Policy Veto and Policy Input

Finally, a legislature might also give administrative grand juries power to veto proposed policies or priorities of the agency. This assignment would have the virtue of directing the panel’s attention to the conduct of the agency. It would give the agency an incentive to provide a fuller explanation for its choices than currently required for promulgating substantive rules under the state and federal Administrative Procedure Acts.249 Judicial review might be available to enforce the law requiring the agency to submit certain issues to a panel; judges might also review the rationality of the panel’s decision.250

The influence of a citizens’ panel on rulemaking would depend on when it became involved in the process. For informal rulemaking subject to the notice-and-comment procedures of the APA,251 the panel could review any proposed rule before it is published in the Federal Register. A panel might be especially useful in reviewing “interpretive” rules that currently may be enacted without any public input at all.252 The agency could obtain some input without resorting to the increasingly cumbersome notice-and-comment procedures.

One intriguing use of citizens’ panels for review of agency policy might involve them even earlier in the policymaking process. Federal agencies must create a “regulatory agenda” every year to plan their upcoming initiatives.253 The grand jury could review a proposed regulatory agenda and either approve it, amend it to reflect different priorities, or reject it altogether. The regulatory agenda is often framed in a way that minimizes the

248. See Cassia Spohn, The Role of Advisory Boards in the Policy Process: An Analysis of the Attitudes of HEW Board Members, 16 AM. REV. PUB. ADMN. 185, 189 (1983) (citizen panel members believe they have more impact on policy formation than on enforcement decisions).
need for technical expertise. The general terms of the agenda, framed early in the process, leave the agency adequate time and room to choose later the wisest method of implementation. The selection of agency priorities in the face of limited resources seems an ideal point for direct citizen involvement.

A voice in setting policy could most readily improve the outcomes of agency decisionmaking and the panel participants themselves where the policy has some readily observable impact on the general public. Panel members would have an unprompted interest, for example, in a decision by the Internal Revenue Service to require additional recordkeeping from taxpayers or to change its auditing strategy. Recall that local grand jurors, when making administrative decisions early in our history, dealt with community affairs that touched their lives directly. Hence, some of the best potential uses of administrative grand juries would involve state and local affairs.

Expanding federal responsibilities have made the federal government more involved than ever in matters of everyday concern to its citizens, so administrative grand juries should not be confined to the work of state and local agencies. So long as an institution builder seeks out those regulatory matters with the most visible connections to the well-being of the public at large, there should be room for citizen panels at the federal level, as well as the state and local levels. Federal agencies might use administrative grand juries to identify and develop appropriate local variations in policy. They might use the deliberations of a grand jury in one locale to inform subsequent policymaking for the rest of the nation.

The use of citizens’ panels for policy formation might give rise to objections that it places governmental power into private hands. The difficulty with such a subdelegation of power is that the private parties might too


256. Jerry Frug has suggested the possibility of using citizen panels to control administrative agencies at the local, state, and federal levels. He proposes that panels for federal issues be drawn from a location selected by lot. See Frug, supra note 212, at 573, 580.

257. See D. Lempert, The Democracy Amendments (unpublished manuscript, on file with the author). The logistics of administrative grand juries at the federal level may become exceptionally difficult to manage. All federal panels should not be drawn from the citizens of Washington, D.C., and thereabouts. Hence, panel members would either need to be drawn from one location (perhaps selected randomly), or be linked electronically for their deliberations.

easily use governmental power for personal gain. However, these constitutional concerns are, in the end, ephemeral. First, to the extent that the citizen panel makes a decision that can later be modified by the agency, governmental power remains with the bureaucracy. More fundamentally, a group of citizens selected at random for service on an administrative panel are not likely to choose policies for personal economic advantage. They are no more "private" parties than the full-time civil servants working in the agency. Their amateur perspective can enrich policymaking without placing it into the hands of those who will act for selfish interest.

B. Antidotes for Grand Jury Passivity

The legislature or agency considering an administrative grand jury must also structure the panel in a way that suits the tasks chosen for it. Yet all administrative grand juries, regardless of their specific assignments, must face certain structural problems that have plagued the criminal grand jury.

The criminal grand jury has gradually earned a nasty reputation as a "rubber stamp" for the prosecution. Many have dismissed the criminal grand jury as a protector of liberty, because a grand jury would "indict a ham sandwich" if the prosecutor so desired. Some attribute the grand jury's identification with the prosecutor to the method of selecting grand jurors. Others explain that the grand jury does not hear information from anyone except the prosecutor, and naturally agrees with the prosecutor's suggestions. Whatever the explanation, the passive grand jury of today's criminal justice system hardly seems worth exporting to other locations. If administrative grand juries are to succeed in their efforts to monitor and improve government, they must find antidotes for passivity.

One way to prevent grand jury passivity is to reelect for membership on the panel strong and knowledgeable individuals. A lawmaker trying to preclude grand jury passivity might choose a "blue ribbon" panel, whose members have prior training, experience or interest in the field where the agency operates. This prior experience would perhaps enable them to decide issues without becoming overly dependent on a government representative. Random selection of jurors, on the other hand, best furthers the

educational mission of an administrative grand jury. It provides an equal opportunity for participation and reaches those most in need of strengthening their involvement and ties in the community. Is there a way to resolve this dilemma in selecting members?

One might choose some members based on their experience and others randomly, but the inexperienced panel members would probably defer entirely to those with experience. Random selection standing alone may have somewhat more appeal. Jurors selected without any background in an area might, given the proper support, resist passivity as well as a panel of experts. A group randomly selected would surely provide a greater diversity of perspectives, and might not accept uncritically many of the agency's views that could go unchallenged by those who share the agency's professionalized perspective on these issues. A panel of randomly selected jurors need not be passive, if the institutional environment otherwise encourages independent judgment by the panel.

An administrative citizen's panel can best avoid passivity if its members must deliberate with one another and reach a group decision that has some binding effect on an agency or on regulated parties. If the members of the grand jury are only asked to listen and respond individually to a presentation of an agency's chosen policy, or to provide advice or information individually, they may be unlikely to step out alone to challenge the agency's agenda. Opportunities for deliberation together increase the odds that a panel would actually engage the agency. Resistance to a proposal might be expressed tentatively at first, and then perhaps strengthen through the affirmation and observations of others.

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265. See Checkoway, supra note 223, at 102–104. An agency might allow citizens to volunteer for service on the grand jury. This method of selection would increase the chances that those serving will work conscientiously, without necessarily limiting members to those with personal interests in the outcomes or with the connections to be appointed. See Cash Mathews, The County Grand Jury System: A Study in Reforms, 10 JUST. SYS. J. 110 (1985) (selection of county grand jurors through volunteer system leads to more diversity on panel and higher compliance with its recommendations to county departments). However, volunteer grand juries might be filled entirely by special interests unless those with personal economic interests in the subject were barred from service.

266. See YIN ET AL., supra note 235, at 65 (appointed citizen panels more passive than those with volunteer or elected members); cf. MARK TWAIN, LIFE ON THE MISSISSIPPI 71–72 (1902); MAGALI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS 40–52 (1977).

267. The optimal length of service on an administrative grand jury may be difficult to pinpoint. Newcomers to a field may be unlikely to question the judgment of an agency with a long-standing presence in the area; grand jurors with terms too short would remain newcomers for their entire tenure. Terms lasting too long would make grand jurors difficult to distinguish from full-time agency employees. Moreover, long terms would diminish the participatory and educational goals of citizen panels. Considerable trial and error may be necessary to find the proper length of service, although the typical grand jury term of twelve to eighteen months may be as good a place as any to begin. Cf. Richard L. Cole, Citizen Participation in Municipal Politics, 19 AM. J. POL. SCI. 761, 771 (1975); Paul E. Peterson, Forms of Representation: Participation of the Poor in the Community Action Program, 64 AM. POL. SCI. REV. 491 (1970) (overly extensive involvement leads to less success of citizen participation program).
The process of educating and advising an administrative grand jury will go a long way towards deciding how passively it will behave. If the panel hears only a request for action from an agency representative, it is unlikely to consider other possibilities or to disagree very often. The panel needs an advisor with an incentive to cultivate some distance between the panel and an agency with a request. Perhaps that sort of advisor could be an agency employee insulated from some forms of agency controls, much like an Administrative Law Judge. Alternatively, advisors might be drawn from an independent corps, with its own developing ideals of detachment from agency priorities and respect for the potential wisdom of citizen choices.

There is, however, a real danger that the grand jury could become overly deferential to any permanent government employee who advises them. Hence, it may be wisest to give the grand jury power to hire and supervise its own staff, possibly by giving it funds to hire lawyers or other experts drawn from a list of qualified candidates for the duration of their term in office.

Finally, if history is any guide, the agenda of the grand jury will determine to some extent the posture of the panel towards government. Grand juries have accomplished more than passive approval of criminal indictments where their agenda has at least two features. First, grand juries have best fostered a healthy distance from full-time government when they have controlled the topics of their inquiry. It may be overly disruptive to give an administrative grand jury a roving commission to make administrative decisions. However, panels should retain power to report to the public on whatever administrative matters they see fit to address. Executive and legislative controls on the agency might take account of such reports. The White House and Congress should cultivate a tradition of considering care-

268. Indeed, the criminal grand jury is often criticized because the prosecutor serves as its advisor, and the judge does not participate actively enough in advising the grand jury. Paule, supra note 261, at 316–19. Cf. Kweit & Kweit, supra note 1, at 125, 148–49 (citizen groups with staff support more effective); Checkoway, supra note 223, at 108–10.


270. See Earl Thomas, Administrative Law Judges: The Corps Issue 14–17 (1987). While trial judges might also serve as advisors to the administrative citizens' panel, their current reluctance to become involved with the work of criminal grand juries suggests that advisors for new panels should be found elsewhere.


272. Cf. Hawaii Const. art. 1, § 1 (providing for appointment of independent counsel for grand jury); Robert Appleton, Special Counsel for Grand Juries: Pros and Cons of Association's Plan, 8 The Panel 1 (Sept.–Oct. 1930) (proposing same); Olson, supra note 127, at x (same).

273. Cf. Landis, supra note 143, at 36 (importance of power to initiate policy).

274. Cf. Roberto Unger, False Necessity 453 (1936) (proposing a “destabilization branch” of government with power to make systematic interventions, and to reorganize major institutions of government).

fully any recommendations appearing in a panel report.\textsuperscript{276}

In addition, grand juries have moved beyond a rubber stamp role when they have spent a significant amount of time inquiring into the practices of government, rather than alleged violations by private persons. A grand jury considering potential misfeasance or nonfeasance in government will likely develop a nondeferential posture towards government, regardless of its ultimate conclusion. That attitude may also influence its other deliberations, when government conduct is not the explicit focus.

C. The Transition from Criminal to Administrative Context

The guidelines for experimentation discussed so far have aimed at making the grand jury more active than it currently is, without accounting for any potential differences in the sorts of tasks an administrative grand jury would face. It is now time to recognize that an administrative grand jury would be operating in contexts vastly different from the criminal justice system. This section sketches out the institutional features that might best account for some of these changes in context.

1. Collecting Information and the Need for Secrecy

One of the conspicuous functions of a criminal grand jury is to collect information from the public about potential criminal violations. The grand jury's free-ranging power to subpoena documents and witnesses has generated much criticism. The administrative grand jury, however, would likely have no need to obtain such information directly from the public. Since administrative agencies already have ample means of obtaining the information they need, an agency could provide the relevant facts to the panel at work in the area. Interested private parties might also volunteer information. While the administrative grand jury may need to decide for itself which information it can obtain from the agency, it will not need to develop a duplicative method of gathering facts from the public.

Consequently, the administrative grand jury need not operate in secrecy as its criminal counterpart must.\textsuperscript{277} Grand jury secrecy protects targets of an investigation from unfavorable publicity, prevents manipulation of the grand jury, and encourages free disclosure by witnesses.\textsuperscript{278} If an administrative grand jury relies on information already available to the agency, there will be no need to encourage disclosure by witnesses. It will, of course,

\begin{thebibliography}{9}
\item[276] See Spohn, supra note 247, at 189 (citizen panel members believe they have more influence with agency than with Congress or President); cf. Alexander Konta, Gentleman of the Grand Jury, Know Yourselves!, 7 The Panel 11, 12 (Sept.–Oct. 1929) (press invariably gives generous space and editorial attention to grand jury reports); Wright, supra note 188, at 83–84.
\item[277] Secrecy of grand jury proceedings has long been one of the chief complaints against the institution. 2 BENTHAM, supra note 86, at 314 (1827); Samuel Dash, The Indicting Grand Jury: A Critical Stage? 10 Am. Crim. L. Rev. 807, 818–24 (1972).
\item[278] United States v. Procter & Gamble Co., 345 U.S. 677, 681 n.6 (1958); WILLIS R. BIERLY, JURIES AND JURY TRIAL 87–88 (1908); Peabody, supra note 128, at 137–38.
\end{thebibliography}
be important for the panel to protect nonpublic information to the same extent the agency can. Further, if a panel is used in the enforcement process (e.g., passing on an administrative indictment), there is more of a chance that it will receive sensitive information that should not become public and there is some risk of damaging publicity about the enforcement target. But in other contexts, particularly where a panel focuses on the practices of government rather than conduct of the public, there will be only a limited need for secrecy prior to the time it begins deliberations.279

2. Degree of Reliance on an Adversarial System

One of the proposals discussed earlier for encouraging an active grand jury was to ensure that the agency asking for a panel's approval would not control all the information presented to the panel. If parties opposing the agency's proposal were allowed to make a presentation to the panel, it would effectively break the agency's control over what the panel would hear. On the other hand, administrative agencies have avoided relying on a full-blown adversarial process, such as that found in criminal trials. They have done so to save time and money and to improve the quality of the outcomes they reach.280 Hence, those experimenting with administrative grand juries will need to search out methods of airing the views of parties opposed to the agency without imposing all elements of an adversarial process on the agency.

Concerns such as these might lead a lawmaker to make rules of evidence inapplicable to the administrative grand jury, just as there are generally no rules of evidence governing criminal grand jury proceedings.281 Lawmakers also might take care to structure the role of counsel in these proceedings to be consistent with a nonadversarial administrative process. Thus, counsel should not generally be allowed to cross-examine those who make presentations to the panel. Moreover, the panel should not entrust counsel for a party with the power to control the scope of the proceedings or the issues to address.

There would be no need, however, to bar counsel for individual witnesses entirely from the proceedings, as with the traditional criminal grand jury.282 Given the participation of counsel throughout the administrative process, it would be a pointless anomaly—indeed, an injustice—to exclude counsel to this extent.283 The presentations of parties with objectives conflicting

279. Cf. Olson, supra note 127, at xi (secrecy not important for grand jury's watchdog role); Frug, supra note 212, at 582–83.
281. FED. R. EVID. 102; FED. R. EVID. 1101(d)(2); but see CAL. PENAL CODE § 939.6 (West 1970) (minority approach, requiring grand jury to base its deliberations on evidence admissible at trial).
283. Some states now allow counsel for a witness to be present in the grand jury during testimony, and to participate in certain ways in the proceedings. See Beale & Bryson, supra note 9, at § 6.18.
with the agency should help promote an independent panel.

3. Expertise Required

The administrative process and criminal justice system may differ most vividly in the level of technical expertise required by decisionmakers. There is quite a difference between deciding whether Jones fired a weapon with intent to cause serious injury\textsuperscript{284} and deciding whether Jones can discharge effluents containing a given level of toxins. Some administrative grand juries might routinely encounter such questions calling for technical training.\textsuperscript{285}

The administrative grand jury may not always require more technical skill than a criminal grand jury. Some criminal matters, including violations of the antitrust laws or environmental violations, immerse criminal grand juries in highly complex and technical issues.\textsuperscript{286} Grand jury panels have proven capable of understanding these issues and making acceptable decisions.\textsuperscript{287} Conversely, there are numerous administrative matters, such as creation of recordkeeping requirements, that panel members could readily understand without technical background.

As an initial response to the perceived problem of expertise, administrative grand juries could be limited to handling those matters not depending on scientific expertise. For instance, labor relations or civil rights matters would not often raise questions requiring technical or scientific expertise.\textsuperscript{288} The administrative grand jury should be able to address those matters calling for a level of technical facility similar to the level required for complex criminal matters.

While this may be the best place for the experiment to start, however, there is some reason to allow administrative grand juries to venture into areas with more technical aspects. It should be possible for the agency or its detractors to frame issues in a way that disentangles technical choices from the political choices inevitably hiding beneath the surface. Preparing explanations for policy that expose what is at stake in a decision in non-technical terms is a useful discipline for an agency.\textsuperscript{289}

\textsuperscript{284} See \textit{Model Penal Code} § 211.1(2)(b) (aggravated assault).

\textsuperscript{285} Cf. Sparf \& Hansen \textit{v.} United States, 156 U.S. 51, 173 (1894) (Gray, J., dissenting) (questions of criminal law less complicated than those arising in civil litigation).

\textsuperscript{286} See 2 \textit{Kathleen Brickey, Corporate Criminal Liability} chs. 7–11 (1984) (selected white collar crime statutes, including RICO, securities fraud, foreign corrupt practices, tax and banking crimes).

\textsuperscript{287} I draw this conclusion in part based on personal observations of federal grand juries at work. As a federal prosecutor, I worked with grand juries in several states to investigate complex antitrust and obstruction of justice crimes. Each of those grand juries impressed me with their willingness to apply themselves to a complex investigation. They consistently understood more than I or my colleagues believed they could.


Moreover, grand jurors could meet their bureaucrats halfway on technical matters. Their proceedings should include some instruction on technical issues to prepare them for decisions about agency action. Ideally, that instruction would derive from a source other than the agency that seeks approval from the panel for its decisions. Hence, the independent advisors discussed above must include those capable of introducing panel members to some of the technical matters bound up in the agency's decision.

The prospect of randomly selected citizens deliberating about the adequacy of agency decisions based on scientific evidence may be disquieting. But is it any less disquieting than citizens of a democracy who care very little and know even less about those agency decisions? If participation in administrative decisions is to improve the strength of communal bonds and an awareness of social issues, it must extend to some of the great number of issues with technical components. The ultimate aim would not be to displace entirely the agency professionals in favor of the citizen panel, but to create a viable collaboration between professionals and amateurs, even on technical matters. The success of the collaboration will turn on the precise tasks assigned to each.

CONCLUSION

I have attempted in this article to make creative use of history. That history began with a flourishing colonial administrative body composed of amateurs. The grand jury early in our nation's history carried out a surprising variety of duties apart from indictment of criminals. It was prized for its ability to prevent arbitrary exercises of governmental power and for its capacity to involve citizens directly in public affairs. The story took a fascinating turn as those nonindictment functions slowly fell into disuse, about the same time that both state and federal governments were turning to professionalized civil administration as the solution to some very real governmental abuses.

The present day relevance of this history begins with an assessment of the need for amateurs in government. In a time when citizens are convinced that they cannot influence the administration of government, that need hardly seems worth exploring at length. A panel of citizens—chosen randomly, serving temporarily, and deliberating together before disposing of administrative affairs—offers a way to increase the legitimacy of admin-

290. Cf. The American Farmer, in 5 THE COMPLETE ANTI-FEDERALIST 39 (Herbert Storing ed., 1981) ("I know it has and will be said—they have—that [jurors] are too ignorant. . . . There is some truth in these allegations—but whence comes it—The Commons are much degraded in the powers of the mind:—They were deprived of the use of understanding, when they were robbed of the power of employing it. . . . Give them power and they will find understanding to use it—But taking juries with all their real and attributed defects, is it not better to submit a cause to an impartial tribunal, who would at least, as soon do you right as wrong—than for every man to become subservient to government and those in power?") (emphasis in original).

291. Pitkin & Shumer, supra note 204, at 52.
istrative bodies that do not answer directly to the voters. It could be part of a larger strategy to prevent agency capture and promote sound agency deliberation and outcomes. Perhaps most important, an administrative panel of amateurs could help to educate its members and foster civic virtue among citizens.

This vision of a republican citizens’ body could not emulate too closely the current criminal grand jury, a body that has become overly passive. Hence, the administrative panel would need to concentrate on potential government misconduct rather than private wrongdoing and would need to control its own agenda to some degree. It would need adequate education to react intelligently to the inevitably technical issues it would face, and it should receive information from private parties as well as the government.

Granted, an administrative grand jury would be expensive and inconvenient. It would create the potential for delay and add to governmental expenses in an age of shrinking budgets.292 There is also some real question whether the concept would stand a chance in the legislature. The reluctance of the Congress to establish ombudsmen might also apply to an administrative grand jury that would compete with legislative committees in overseeing the agency’s work.

Any one of these objections might in the end be adequate reason to reject the administrative grand jury as a workable institution. Nevertheless, I have attempted here to introduce this idea as a legislative proposal with serious historical and theoretical family ties. A debate about a proposal such as this could become an inquiry into our current political self-image. The appeal of the administrative grand jury may show the extent to which daily self-government is thinkable in a complicated administrative state. Perhaps soon the idea will not seem so outlandish, after all.
