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The Jurisdictional Heritage of the Grand Jury Clause

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Article

The Jurisdictional Heritage of the Grand Jury Clause

Roger A. Fairfax, Jr.[†]

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*"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury"*¹

INTRODUCTION

Every day, defendants in federal courts waive grand jury indictment, usually in the process of pleading guilty. Waiver of indictment, permitted by Rule 7 of the Federal Rules of Criminal Procedure (FRCP) since 1946, enhances the efficiency of the federal criminal process by facilitating and expediting guilty pleas and the commencement of sentences, by preserving court and prosecutorial resources, and by permitting defendants to use their willingness to forgo grand jury indictment as leverage when plea bargaining. Waiver of adjudicatory criminal procedural rights typically promotes the efficient adjudication of guilt and produces practical benefits for the court system, the government, and, in some cases, the individual defendant. Furthermore, because such rights usually are understood to be in the manner of a personal privilege of the defendant rather than a prerequisite to the jurisdiction of the court, waiver generally is deemed proper from a constitutional standpoint.

However, the dominant view in the nineteenth and early twentieth centuries acknowledged a nexus between the Fifth Amendment right to grand jury indictment and a federal court's exercise of jurisdiction over a criminal matter. In fact, a valid grand jury indictment was thought to be a prerequisite to

1. U.S. CONST. amend. V.

the exercise of federal criminal jurisdiction. Therefore, a federal defendant could not waive or forfeit the right to grand jury indictment for an infamous crime, because without an indictment a federal court had no jurisdiction over a criminal case.

Although federal courts for the first 150 years of U.S. constitutional history viewed the right to grand jury indictment as having jurisdictional significance, the promulgation of the controversial provision for waiver of grand jury indictment in Rule 7 of the 1946 FRCP reflected the view that the right to grand jury indictment is just another waivable criminal procedural right, unrelated to a court's power to hear a case. This modern view was recently affirmed by the Supreme Court.²

The shift in judicial understanding about the relationship of grand jury indictment and jurisdiction came about not as the result of a constitutional amendment or a novel interpretation by the Supreme Court of the Grand Jury Clause; the rejection of the jurisdictional significance of the grand jury is, at bottom, the direct result of the rejection of formalist and mechanical approaches to criminal procedure during a larger project of criminal law reform in the late nineteenth and early twentieth centuries. The reformers saw the grand jury as an ineffective protector of individual liberty and, more importantly, as an unnecessary obstacle to the procedural efficiency to which they aspired.

Placing practical concerns at the forefront, these reformers were able to obscure the "jurisdictional heritage" of the grand jury and push through—over serious constitutional objections—a provision for waiver of grand jury indictment as part of the promulgation of the FRCP. Rule 7's waiver provision seemingly achieved the goal of efficiency, but it did so without full consideration of the role the Grand Jury Clause might play in the constitutional framework governing criminal cases. However, a half century later, *Apprendi v. New Jersey*³ and its progeny prompted a more granular analysis of the function of grand jury indictment in the framework of criminal procedural rights. In the process, the serious flaws of the modern understanding of the grand jury were laid bare.

This Article recovers the jurisdictional heritage of the grand jury and argues that the modern understanding is contradicted by the weight of the compelling and, thus far, largely

2. See *United States v. Cotton*, 535 U.S. 625, 631 (2002).

3. 530 U.S. 466 (2000).

ignored historical evidence of the grand jury's jurisdictional significance. The modern view undervalues the rich history of the nexus between grand jury indictment and subject matter jurisdiction in federal criminal cases as a result of the legal realist procedural reform project of the early twentieth century and its failure to reconcile its pragmatic view of the grand jury requirement with the jurisdictional heritage of the Grand Jury Clause. To this day, there has been no considered judgment regarding what the jurisdictional significance of the grand jury might mean for the protection of individual liberty. In short, the reformers made short shrift of the jurisdictional heritage of the grand jury and the Supreme Court, relying on flawed legal and historical analysis, has failed to correct the course. As a result, we remain frustrated in our understanding of the proper role of the grand jury in the constitutional design.

Part I of the Article previews the central arguments militating against the jurisdictional import of the grand jury, some of which were recently endorsed by the Supreme Court. Part II argues that the federal grand jury indeed boasts a "jurisdictional heritage" worthy of acknowledgement as we consider the contours of the continuing role of the grand jury in the structure of the U.S. Constitution. After a brief treatment of the origins, history, and development of the grand jury in the United States, Part II examines case law and contemporary commentary demonstrating that a grand jury indictment was, for the first 150 years of our constitutional history, a mandatory prerequisite to a federal trial court's exercise of jurisdiction over a criminal case. Part II also defends this jurisdictional heritage against the modern pragmatic critique that dismisses the jurisdictional significance of the grand jury.

Part III examines the criminal procedural reform project of the late nineteenth and early twentieth centuries, which showed little respect for the jurisdictional heritage of the grand jury. These reformers, who shared significant philosophical common ground with the legal realists, sought to discard the formalism of the English and nineteenth century American approaches to the initiation and adjudication of criminal cases, and targeted the institution of the grand jury for reform and even abolition. This campaign for functionalism over formalism in criminal procedure planted the seeds for the drafting and adoption—despite serious constitutional concerns—of the 1946 FRCP's provision for waiver of indictment in federal criminal cases. Part III concludes that the legal realist criminal proce-

dural reform project of the early twentieth century, with its attack on the inefficiency and formalism, may have subverted the mandate of the Grand Jury Clause.

These successful efforts to promulgate a waiver provision, as Part IV explains, may have been undertaken for wholly legitimate and desirable policy purposes, but they failed to satisfactorily address serious doubts raised regarding the constitutionality of the indictment waiver. As a result, the questions of jurisdictional significance of the grand jury remained and continued to confound courts into the twenty-first century. The result is the weakly supported consensus at which we have arrived today—one that is flawed, uninformed by the historical evidence, and vulnerable to future constitutional challenges with respect to important procedural efficiency tools such as pre-indictment plea bargaining. After highlighting the implications of this uncertainty and contextualizing them within the broader discussion of the role of pragmatism and originalism in criminal procedure jurisprudence, Part IV discusses the ways in which an earnest assessment of the grand jury's jurisdictional heritage may help us to transform the modern grand jury into a more efficacious protection of liberty.

The Article concludes with a call for work on a new theory of the relationship between the right to grand jury indictment and the exercise of federal criminal jurisdiction—one that balances important constitutional and practical considerations by both acknowledging the “jurisdictional heritage” of grand jury indictment and allowing for efficiency-promoting tools such as waiver of indictment.

I. THE MODERN REJECTION OF THE GRAND JURY'S JURISDICTIONAL SIGNIFICANCE

If the existence of a valid grand jury indictment were a mandatory, non-waivable prerequisite to a federal district court's exercise of jurisdiction over a (felony) criminal case, then the absence of a valid grand jury indictment would deprive a district court of jurisdiction over the case. This result would follow regardless of whether the defendant waives the right to indictment, an indictment is never found by a grand jury, or the indictment is fatally defective in some way.⁴ The

4. Indictment defects can take a number of forms, ranging from failure to provide notice of charges as required by the Sixth Amendment to the failure of the indictment to reflect the Fifth Amendment due process “screening” func-

Supreme Court, in *United States v. Cotton*, recently rejected the aforementioned premise that there is a relationship between grand jury indictment and federal criminal jurisdiction.⁵ In so doing, the Court revealed some of the central misunderstandings at the core of the question of whether the federal grand jury boasts a jurisdictional heritage.

Just prior to *Cotton*, the watershed case of *Appendi v. New Jersey*⁶ helped to expose a fault line in our understanding of the relationship of grand jury indictment and jurisdiction. In *Appendi*, the Supreme Court held that any fact that increases the punishment for a crime in a way that exceeds the statutory maximum for that crime must be charged in the indictment and determined by the fact-finder beyond a reasonable doubt.⁷ This monumental ruling led to challenges by defendants convicted of federal crimes for which they received an enhanced sentence based on a sentencing judge's determination, by a preponderance of the evidence, that the defendant's conduct qualified in some way for an enhancement under the United States Sentencing Guidelines or a statutory provision.⁸

tion that the grand jury alone is meant to perform (e.g., where a court alters an indictment at trial in some material way). Benjamin E. Rosenberg, *The Analysis of Defective Indictments After United States v. Cotton*, 41 CRIM. L. BULL. 463, 463, 465–66 (2005). For purposes of this Article, regardless of the type of defect, when courts treat the flaw as rendering the purported indictment a nullity, the defect is fatal. Cf. Peter G. Ballou, "Jurisdictional" Indictments, Informations and Complaints: An Unnecessary Doctrine, 29 ME. L. REV. 1, 21 (1977) (reflecting the assumption that "failure of an indictment to charge an offense is the equivalent of no indictment at all").

5. 535 U.S. at 631.

6. 530 U.S. 466.

7. *Id.* at 490.

8. See, e.g., *United States v. Booker*, 125 S. Ct. 738, 746 (2005); *Blakely v. Washington*, 124 S. Ct. 2531, 2535 (2004). *Blakely* extended the *Appendi* rule to the statutory guidelines context, holding that the Sixth Amendment requires that juries—not judges—must find facts necessary to impose an enhanced sentence, even if the sentence remains within the statutory maximum. See *id.* at 2537–38. Shortly thereafter, the Supreme Court extended the *Blakely* reasoning to the Federal Sentencing Guidelines, see *Booker*, 125 S. Ct. at 751, but saved the Guidelines by severing the provisions that had made them mandatory and by setting forth standards of review on appeal. See *id.* at 755–56, 764; see also Craig Green, *Booker and Fanfan: The Untimely Death (and Rebirth?) of the Federal Sentencing Guidelines*, 93 GEO. L.J. 395, 395 (2005) (describing the Court's rejection of mandatory use of the Federal Sentencing Guidelines); David Yellen, *Saving Federal Sentencing After Appendi, Blakely, and Booker*, 50 VILL. L. REV. 163, 163–64 (2005) (detailing the *Appendi* line of cases). As a result, the Federal Sentencing Guidelines remain, but are advisory. *Booker*, 125 S. Ct. at 756–67.

One such challenge came in *Cotton*. Cotton, along with seven others, was indicted for and convicted of a single count of conspiracy to distribute and possession with intent to distribute cocaine hydrochloride and cocaine base.⁹ Neither the indictment nor the verdict form specified a particular quantity of narcotics to be attributed to the conspiracy or the various co-conspirators.¹⁰ However, based on its finding, by a preponderance of the evidence, regarding various quantities of cocaine base attributed to each co-conspirator, the district court sentenced Cotton and six of his seven co-conspirators to a term of imprisonment greater than the twenty year maximum penalty provided for when there exists "an unspecified quantity" of cocaine base.¹¹ Cotton and the others appealed on a number of grounds, including the argument that because a specific threshold drug quantity was neither alleged in the indictment nor found by the jury beyond a reasonable doubt, the enhanced sentence punished them for a crime with which they were neither charged nor convicted, in violation of *Apprendi*.¹²

The Fourth Circuit agreed, holding that "the district court exceeded its jurisdiction in sentencing the appellants for a crime with which they were never charged, thus depriving them of the constitutional right to 'answer' only for those crimes presented to the grand jury."¹³ The court explained that "because an indictment setting forth all the essential elements of an offense is both mandatory and jurisdictional, and a 'defendant cannot be "held to answer" for any offense not charged in an indictment returned by a grand jury,' a court is without

9. *Cotton*, 535 U.S. at 627–28.

10. *Id.* at 628.

11. See 21 U.S.C. § 841(b)(1)(C) (2000). Cotton and four of his co-conspirators had over 1.5 kilograms of cocaine base attributed to them and, thus, were sentenced to life imprisonment. *Cotton*, 535 U.S. at 628. Two other co-conspirators received sentences of thirty years imprisonment. *Id.* In imposing these sentences, the district court relied on 21 U.S.C. § 841(b)(1)(A)(iii), which allows for a maximum sentence of life in prison for offenses involving fifty grams or more of cocaine base. *Id.* However, for offenses involving unspecified quantities of cocaine base, the maximum penalty is twenty years. 21 U.S.C. § 841(b)(1)(C); *Cotton*, 535 U.S. at 628.

12. *Cotton*, 535 U.S. at 624–25.

13. *United States v. Cotton*, 261 F.3d 397, 405 (4th Cir. 2001); see also *id.* at 404 ("[W]hen an indictment fails to set forth an 'essential element of a crime,' '[t]he court . . . ha[s] no jurisdiction to try [a defendant] under that count of the indictment.'" (alteration in original) (quoting *United States v. Hooker*, 841 F.2d 1225, 1232–33 (4th Cir. 1988))).

'jurisdiction to . . . impose a sentence for an offense not charged in the indictment.'"¹⁴

The Supreme Court reversed.¹⁵ Rejecting the Fourth Circuit's view, the Court held that a defective indictment does not deprive a court of jurisdiction.¹⁶ The Court explained that the Fourth Circuit view had originated in the nineteenth century case of *Ex parte Bain*,¹⁷ in which the Court granted a petitioner's writ of habeas corpus on the ground that an allegation had been stricken from the indictment, thus depriving the court of jurisdiction over the matter.¹⁸ Although the grand jury had returned an indictment against the defendant, the alteration of that charging document by the trial court rendered that indictment a nullity—as if it had never existed—and, therefore, the *Bain* Court reasoned, the trial court no longer had jurisdiction over the matter.¹⁹

The *Cotton* Court explained that the *Bain* decision arose in an era in which the Supreme Court had relatively little authority to review criminal convictions.²⁰ In 1887, the Court could only review a criminal conviction pursuant to a writ of habeas corpus and, then, only when the court of conviction had no jurisdiction over the matter.²¹ This narrow ability to review criminal convictions only on habeas review and only for jurisdictional defects led the *Bain* Court to adopt, what *Cotton* described as, "a 'somewhat expansive notion of jurisdiction,'"²² which "was 'more a fiction than anything else.'"²³ According to the *Cotton* Court, "*Bain's* elastic concept of jurisdiction is not what the term 'jurisdiction' means today, i.e., 'the court's statutory or constitutional power to adjudicate the case.'"²⁴

14. *Id.* at 404–05 (alteration in original) (quoting *United States v. Tran*, 234 F.3d 798, 808 (2d Cir. 2000)). The court also found that the failure to charge the drug quantity in the indictment satisfied the plain error standard. *See id.* at 406–07.

15. *Cotton*, 535 U.S. at 634.

16. *See id.* at 631.

17. 121 U.S. 1 (1887), overruled by *Cotton*, 535 U.S. 625.

18. *Cotton*, 535 U.S. at 631.

19. *See Ex parte Bain*, 121 U.S. at 13 ("[T]he jurisdiction of the offence [was] gone, and the court [had] no right to proceed any further in the progress of the case for want of an indictment.").

20. *Cotton*, 535 U.S. at 629.

21. *Id.* at 629–30.

22. *Id.* at 630 (quoting *Custis v. United States*, 511 U.S. 485, 494 (1994)).

23. *Id.* (quoting *Wainwright v. Sykes*, 433 U.S. 72, 79 (1977)).

24. *Id.* (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998)). The Court pointed out that subject-matter jurisdiction "can never be

Analyzing selected post-*Bain* twentieth century cases, the Court concluded that "defects in an indictment do not deprive a court of its power to adjudicate a case,"²⁵ and, "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction, *Bain* is overruled."²⁶ The *Cotton* Court also contrasted "subject-matter jurisdiction," which "involves a court's power to hear a case" and "can never be forfeited or waived," with the "grand jury right," which "can be waived."²⁷ Notably, the Court did not advance a rationale for the constitutionality of waiver of grand jury indictment.²⁸

forfeited or waived" and, therefore, "defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court." *Id.* (citing *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908)). The Court contrasted subject-matter jurisdiction, which cannot be waived, with the grand jury right, which can be waived. *Id.* (citing *FED. R. CRIM. P. 7(b)*; *Smith v. United States*, 360 U.S. 1, 6 (1959)).

25. *Cotton*, 535 U.S. at 631. The cases the courts cited for this proposition, *United States v. Williams*, 341 U.S. 58 (1951), and *Lamar v. United States*, 240 U.S. 60 (1916), do not ultimately support this position. In *Williams*, the question was whether a defendant could be convicted of perjury when the alleged false statement took place before a court entertaining a faulty indictment. 341 U.S. at 61. There, the Court's discussion was highly contextual and chiefly concerned with whether a perjury defendant would be able to escape criminal liability by collaterally challenging the jurisdiction of the court before which he or she lied. *Id.* at 65. Aside from the fact that the Court was dealing with murky and context-specific questions, the analysis in no way touched upon the impact on a court's jurisdiction where there is no indictment at all. *See id.* at 65-69. Likewise, in *Lamar*, the Court's analysis focused on the distinct question of whether an objection to an indictment on the grounds that it does not charge a crime is an issue of merits or jurisdiction. 240 U.S. at 64. These cases do not counter the principle set forth in *Ex parte Bain* that a grand jury indictment is a mandatory prerequisite to a federal court's exercise of jurisdiction in a criminal case. *See Ex parte Bain*, 121 U.S. 1, 13 (1887), *overruled by* *United States v. Cotton*, 535 U.S. 625 (2002).

26. *Cotton*, 535 U.S. at 631. The Court went on to hold that the failure of the indictment to allege a specific drug quantity did not meet the plain error test. *Id.* at 633-34.

27. *Id.* at 630 (citing *FED. R. CRIM. P. 7(b)*; *Smith v. United States*, 360 U.S. 1, 6 (1959)).

28. The Court cited only *FED. R. CRIM. P. 7(b)*, the rule allowing for waiver of indictment, and *Smith*, 360 U.S. 1, for the proposition that the right to grand jury indictment may be waived. Rule 7(b) was promulgated over serious constitutional objections that the rulemakers failed to answer. *See infra* Part III. The *Smith* Court advanced no constitutional rationale for waiver of indictment in the face of the jurisdictional mandate of the Grand Jury Clause, but rather relied on district court and circuit court opinions construing Rule 7(a) to allow for waiver in non-capital cases. 360 U.S. at 6-9. Missing from this waiver analysis is any rebuttal of the nineteenth century view that grand jury indictment is a mandatory prerequisite to the exercise of jurisdiction—a con-

Whether due to misconstruction or legerdemain, the Supreme Court in *Cotton* squandered an opportunity to clarify the relationship between grand jury indictment and jurisdiction. To be sure, the *Cotton* decision was chiefly focused on the question of whether an *Apprendi* error in an indictment gave rise to a jurisdictional defect sufficient to satisfy plain error review.²⁹ However, the Court, of necessity, also made certain observations about the relationship of grand jury indictment and jurisdiction beyond that narrow question.³⁰ Two distinct statements germane to the question of whether there is a relationship between grand jury indictment and jurisdiction can be gleaned from the Supreme Court's decision in *Cotton*. First, the notion that grand jury indictment and jurisdiction are linked is a nineteenth century fiction.³¹ Second, FRCP 7's provision for waiver of indictment means that there can be no relationship between indictment and jurisdiction, as jurisdiction can never be waived.³²

Cotton is evidence that the reform movement of the late nineteenth and early twentieth centuries succeeded in challenging the continued usefulness of the institution of the grand jury and promoting, without serious constitutional scrutiny, what the reformers saw as practical improvements in the administration of criminal justice in the federal courts.³³ The reformers' success was realized despite the fact that their efforts surrounding the waiver provision labored against the weight of the historical evidence which established the jurisdictional significance of the right to grand jury indictment.³⁴ The failure of the Supreme Court to analyze fairly the "jurisdictional heritage" of the grand jury works a disservice to an accurate assessment of the proper place of the grand jury in our constitutional structure, and to long overdue efforts to fashion much-needed improvements to the federal grand jury.

straint on the court's jurisdiction that could not be defeated by consent of the defendant. *See id.* at 6–10.

29. *See, e.g.,* Joshua A.T. Fairfield, *To Err Is Human: The Judicial Conundrum of Curing Apprendi Error*, 55 BAYLOR L. REV. 889, 921–26 (2003).

30. *See Cotton*, 535 U.S. at 629–31.

31. *See id.*

32. *See id.* at 630.

33. For a description of the reform movement, *see infra* Part III.

34. *See infra* Part II.B–C.

II. RECOVERING THE JURISDICTIONAL HERITAGE OF THE GRAND JURY

An examination of the early understanding of the grand jury's role in our constitutional system yields a much different picture than that painted by the Court in *Cotton*. There can be no denying that the grand jury is an institution rich in jurisdictional significance. Indeed, grand jury indictment, for the first century and a half of U.S. constitutional history, was a mandatory prerequisite to a federal trial court's exercise of jurisdiction in a criminal case; without a valid grand jury indictment, there was no felony criminal case for a federal court to entertain.

A. LESSONS FROM ENGLAND AND THE FOUNDING

The right to grand jury indictment in federal felony criminal prosecutions flows from the Grand Jury Clause of the Fifth Amendment to the Constitution.³⁵ However, the grand jury itself, "rooted in long centuries of Anglo-American history,"³⁶ is "an ancient institution of the common law,"³⁷ the heritage of which may go back as far as Athens,³⁸ but safely can be traced back to the fourteenth century reign of Edward III, when "the modern practice of returning a panel of twenty-four men to inquire for the county was established and the body then received the name 'le graunde inquest.'"³⁹ During the first three centu-

35. U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ."). For a broad introduction to the history, role, and function of the grand jury, see SARA SUN BEALE ET AL., *GRAND JURY LAW AND PRACTICE* (2d ed. 1997 & Supp. 2005).

36. *United States v. Williams*, 504 U.S. 36, 47 (1992) (quoting *Hannah v. Larche*, 363 U.S. 420, 490 (1960) (Frankfurter, J., concurring in result)).

37. *United States v. Gill*, 55 F.2d 399, 400 (D.N.M. 1931) (citing 4 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA (Rothman Reprints 1969) (1803); Charge to Grand Jury, 2 Sawy. 667 (1872), reprinted in 30 Fed. Cas. 992 (1897)).

38. GEORGE J. EDWARDS, *THE GRAND JURY: AN ESSAY* 1 (1906).

39. *Id.* at 2. Two centuries prior, Henry II's reign was responsible for the Constitutions of Clarendon and the Assize of Clarendon. M.M. KNAPPEN, *CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND* 185-86 (1942); Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 4-5 (2002). These documents laid the groundwork for what would become the grand jury. See *id.* at 5. The Constitutions of Clarendon (1164) offered to a layperson who was being charged in an ecclesiastical court the protection of a state-governed "accusing jury" when no public accuser had made charges against him or her. *Id.* at 4. This provision

ries of the grand jury's use in England, it served largely the interests of the monarchy,⁴⁰ although by the seventeenth century English grand juries had begun to stand between the Crown and accused subjects as a protection against unwarranted accusation.⁴¹ Eventually, the law required a valid indictment by a grand jury before a court could try a defendant for certain classes of crime.⁴² English history demonstrates that the grand jury was transformed from merely an arm of the Crown into a protector of individual liberty. Absent a grand jury indictment, English courts were powerless to try a defendant for certain serious crimes, irrespective of the wishes of the Crown.⁴³

The grand jury institution followed the English common law to the American colonies and quickly established itself as a

was designed to stem the common practice of bringing a layperson before an ecclesiastical court based solely on a secret, private accusation. *Id.* at 4 n.9. Here, the layperson was afforded in certain situations "twelve lawful men of the neighborhood or the town to swear in the presence of the bishop, that they will make manifest the truth in the matter, according to their conscience." Constitutions of Clarendon, ch. 6, reprinted in SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY 11, 12 (George B. Adams & H. Morse Stephens eds., 1920). The Assize of Clarendon (1166) established a purely accusatory body comprised of twelve men out of every one-hundred in a particular town, who were selected to reveal, under oath, whether any local residents had committed a crime. EDWARDS, *supra* note 38, at 7. The accused individuals were said to be "presented" by the accusatory jury for trial on the accusations. See *id.*; JUDICIAL TRIBUNALS IN ENGLAND AND EUROPE, 1200-1700, at 9 (Maureen Mulholland & Brian Pullan eds., 2003).

40. See Simmons, *supra* note 39, at 6.

41. A commonly cited example of this phenomenon can be found in certain grand juries' refusal to indict in cases brought against Stephen Colledge and Anthony Ashley Cooper, the Earl of Shaftesbury. See EDWARDS, *supra* note 38, at 28-30; Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1, 9 (1996); Simmons, *supra* note 39, at 8.

42. See JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 90-92 (2003); BARBARA J. SHAPIRO, BEYOND REASONABLE DOUBT AND PROBABLE CAUSE: HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE 91 (1991); see also *Hurtado v. California*, 110 U.S. 516, 556 (1884) (Harlan, J., dissenting) (observing that by the time the American colonies were established, there existed "an informing and accusing tribunal [. . .], without whose previous action no person charged with a felony could, except in certain special cases, be put upon his trial" (quoting Charge to Grand Jury, 30 F. Cas. 992, 993 (C.C.D. Cal. 1872)) (alteration in original)).

43. See *Hurtado*, 110 U.S. at 543 (Harlan, J., dissenting) ("If a man were to commit a capital offense in the face of all the judges of England, their united authority could not put him upon his trial . . .") (citation omitted); see also *Ex parte Wilson*, 114 U.S. 417, 423 (1885) ("By the law of England, informations by the Attorney General without the intervention of a grand jury were not allowed . . .").

buffer between the colonists and the King.⁴⁴ The grand jury indictment was not only a prerequisite to serious criminal charges in many colonies, but the grand jury was woven into the fabric of everyday colonial life.⁴⁵ Colonial grand juries also played a part in expressing colonists' dissatisfaction with the exercise of monarchical power by nullifying attempted prosecutions of critics of the Crown and aggressively issuing "angry and well-publicized presentments and indictments"⁴⁶ against representatives of the Crown.⁴⁷

The role of the grand jury in the colonies gave it "enhanced prestige"⁴⁸ and special respect among American colonists during the pre-Revolution period. After the Revolution, the colonists remained aware of the power and potential threat posed by any central governing authority.⁴⁹ As a result, the right to indictment by grand jury was a topic of discussion among

44. See BERNARD SCHWARTZ, *THE GREAT RIGHT OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS* 24 (1992) [hereinafter SCHWARTZ, *THE GREAT RIGHT*]; Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL'Y & L. 67, 70 (1995). Although the earliest colonial grand jury was established in 1635, Kadish, *supra* note 41, at 9, probably the first mention of the grand jury right in the American colonial experience can be found in the 1683 *New York Charter of Libertyes and Priviledges*. See 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 163 (1971). The Charter, which was passed by the first elected assembly of the colony of New York, provided that "[i]n all Cases Capitall or Criminall there shall be a grand Inquest who shall first present the offence." *Id.* at 166.

45. In addition to performing the traditional accusatory function, colonial grand juries often addressed matters of local concern including overseeing community infrastructure and public works projects, taxing and spending, and the appointment of individuals to local office. See LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 221-23 (1999); Kadish, *supra* note 41, at 10-11; Simmons, *supra* note 39, at 10-11.

46. Renée B. Lettow, Note, *Reviving Federal Grand Jury Presentments*, 103 YALE L.J. 1333, 1337 (1994).

47. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 84-86 (1998) [hereinafter AMAR, *BILL OF RIGHTS*]; Kadish, *supra* note 41, at 11.

48. Lettow, *supra* note 46, at 1337; see also SCHWARTZ, *THE GREAT RIGHT*, *supra* note 44, at 76-77 (noting that North Carolina Declaration of Rights, adopted in 1776, contained a guarantee of right to indictment and, thus, was the "direct precursor" to the Fifth Amendment's Grand Jury Clause); H.L. McClintock, *Indictment by a Grand Jury*, 26 MINN. L. REV. 153, 156 (1942).

49. See SUSAN W. BRENNER & GREGORY G. LOCKHART, *FEDERAL GRAND JURY PRACTICE* § 2.1, at 4-6 (1996); LEROY D. CLARK, *THE GRAND JURY: THE USE AND ABUSE OF POLITICAL POWER* 19-20 (1975); Simmons, *supra* note 39, at 12-13.

states deliberating the ratification of the Constitution.⁵⁰ Ratifying conventions from such influential states as Massachusetts, New York, and New Hampshire considered amendments to the newly drafted Constitution that would have established the right to grand jury indictment.⁵¹

The Constitution as originally ratified, however, made no mention of grand juries.⁵² Not until the ratification of the Fifth Amendment in 1791 as part of the Bill of Rights was the grand jury enshrined in the Constitution:⁵³ "No person shall be held

50. See ALFREDO GARCIA, *THE FIFTH AMENDMENT: A COMPREHENSIVE APPROACH* 23 (2002); RICHARD D. YOUNGER, *THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941*, at 45-46 (1963) [hereinafter YOUNGER, *THE PEOPLE'S PANEL*].

51. See *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS* 278 (Neil H. Cogan ed., Oxford Univ. Press 1997) (1788) [hereinafter *THE COMPLETE BILL OF RIGHTS*]; SCHWARTZ, *THE GREAT RIGHT*, *supra* note 44, at 128-29, 147-48, 157-58; YOUNGER, *THE PEOPLE'S PANEL*, *supra* note 50 at 45-46. One of the amendments proposed by the Massachusetts ratifying convention provided "[t]hat no person shall be tried for any Crime by which he may incur an infamous punishment or loss of life until he be first indicted by a Grand Jury, except in such cases as may arise in the Government and regulation of the Land and Naval forces." *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES* 218 (Ralph Ketcham ed., Penguin Books 1986) (1788). New Hampshire's provision was virtually identical. See *THE COMPLETE BILL OF RIGHTS*, *supra*, at 278. New York proposed that "a Presentment or Indictment by a Grand Jury ought to be observed as a necessary preliminary to the trial of all Crimes cognizable by the Judiciary of the United States . . ." *Id.*

52. See EDWARDS, *supra* note 38, at 32. There was a mention of indictment in Article I, which explained that individuals whose conduct would subject them to impeachment might also otherwise be subject to criminal prosecution, which, it was contemplated, would be initiated by grand jury indictment. See U.S. CONST. art. I, § 3, cl. 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."); Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 50 (1996) ("[T]he constitutional reference to 'indictment' seemed to refer to a uniform federal criminal practice and thus necessarily would presuppose the requirement of indictment by grand jury as part of the federal criminal process.").

53. Even prior to the ratification of the Fifth Amendment, however, "federal grand juries returned criminal indictments as a matter of course," Kurland, *supra* note 52, at 51 n.179, as evidenced by records of grand jury charges given by Supreme Court Justices. See *id.* (citing as one example David J. Katz, Note, *Grand Jury Charges Delivered by Supreme Court Justices Riding Circuit During the 1790s*, 14 CARDOZO L. REV. 1045, 1085-86 (1993)).

to answer for a capital, or otherwise infamous⁵⁴ crime, unless on a presentment⁵⁵ or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia,⁵⁶ when in actual service in time of [W]ar or public danger . . . ”⁵⁷

There is little discussion in the ratification debates regarding the grand jury generally and virtually no discussion of the relationship of grand jury indictment to jurisdiction.⁵⁸ The debates surrounding the Grand Jury Clause appear to have been confined largely to language and style.⁵⁹

54. An “infamous” crime, for purposes of the Fifth Amendment, includes a felony (defined under former 18 U.S.C. § 1 (repealed 1984) as any offense punishable by death or a term of imprisonment exceeding one year), a crime punishable by imprisonment in a penitentiary with or without hard labor (with certain exceptions), and a misdemeanor the punishment for which has the character of that of the aforementioned. *See, e.g., Ex parte Wilson*, 114 U.S. 417, 429 (1885); 1 CHARLES A. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF CRIMINAL PROCEDURE* § 121, at 518–20 (3d. ed. 1999). For the sake of simplicity, this Article will refer to infamous crimes for purposes of the Fifth Amendment’s Grand Jury Clause as felonies.

55. As early as World War II, presentments were no longer used in federal criminal practice. Upon the 1944 adoption of the Federal Rules of Criminal Procedure, the Advisory Committee explained that it had not included a procedural provision for presentments because “presentment has fallen into disuse in the federal courts . . . ” ADVISORY COMM. ON THE RULES OF CRIMINAL PROCEDURE, *FEDERAL RULES OF CRIMINAL PROCEDURE: SECOND PRELIMINARY DRAFT* 26 (1944); *see also* AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 178 (1997); Lettow, *supra* note 46.

56. Armed services personnel are not subject to grand jury indictment and trial by jury for criminal conduct but rather are subject to court martial. *See Lee v. Madgian*, 358 U.S. 228, 232–35, 241 (1959); *Johnson v. Sayre*, 158 U.S. 109, 114 (1895); 2 BEALE, *supra* note 35, § 8:1.

57. U.S. CONST. amend. V.

58. *See* THE COMPLETE BILL OF RIGHTS, *supra* note 51, at 265–78; SCHWARTZ, *THE GREAT RIGHT*, *supra* note 44, at 167, 183–84; SHAPIRO, *supra* note 42, at 91. Interestingly, James Madison proposed that Article III, Section Two, which defined the limits of federal court jurisdiction, contain the provision that “presentment or indictment by a grand jury shall be an essential preliminary” to a criminal case. *See* THE COMPLETE BILL OF RIGHTS, *supra* note 51, at 265; James Madison’s Proposals in the House of Representatives (June 8, 1789), in GEORGE ANASTAPLO, *THE AMENDMENTS TO THE CONSTITUTION: A COMMENTARY* app. J-1. at 318 (1995) (including selected sections of James Madison’s proposals to the House of Representatives on June 8, 1789). Delegate Aedanus Burke of South Carolina was particularly adamant that the Constitution prohibit prosecutions from being initiated by information. *See* THE COMPLETE BILL OF RIGHTS, *supra* note 51, at 268, 283.

59. *See* THE COMPLETE BILL OF RIGHTS, *supra* note 51, at 268, 283 (providing examples of debates over the use of terms such as “district” and “public danger”).

B. EMERGENCE OF THE JURISDICTIONAL NEXUS IN THE FEDERAL COURTS

It did not take long after the ratification of the Fifth Amendment for courts to begin recognizing a nexus between the right to grand jury indictment enumerated in the Grand Jury Clause and the power of a court to entertain a criminal case. In the 1808 case of *United States v. Hill*, Chief Justice John Marshall, sitting as Circuit Justice, explained:

[N]o act of [C]ongress directs grand juries, or defines their powers. By what authority, then, are they summoned, and whence do they derive their powers? The answer is, that the laws of the United States have erected courts which are vested with criminal jurisdiction. This jurisdiction they are bound to exercise, *and it can only be exercised through the instrumentality of grand juries*. They are, therefore, given by a necessary and indispensable implication. But, how far is this implication necessary and indispensable? The answer is obvious. Its necessity is co-extensive with *that jurisdiction to which it is essential*.⁶⁰

Chief Justice Marshall's opinion, though chiefly focused on the nature and powers of the grand jury itself, provides an early example of the jurisdictional significance that courts attributed to the grand jury. The grand jury's return of an indictment was a prerequisite to the exercise of criminal jurisdiction vested in federal courts by Congress pursuant to Article III.⁶¹ Thus, very early on, there was the recognition of a relationship between the grand jury indictment guarantee and the jurisdiction of federal courts in criminal cases.

C. THE POST-BELLUM ERA—*EX PARTE BAIN* AND ITS PROGENY

Federal criminal prosecutions were relatively rare in the early days of the Republic.⁶² Moreover, the jurisdiction of the Supreme Court to review federal criminal cases was very limited.⁶³ It is unsurprising, therefore, that the Supreme Court had little to say about the constitutional role of the grand jury until the post-bellum era,⁶⁴ by which time federal courts had

60. 26 F. Cas. 315, 317 (Marshall, Circuit Judge, C.C.D. Va. 1809) (emphasis added).

61. *See id.*

62. *See* ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS 281 (2002); Kurland, *supra* note 52, at 57.

63. *See infra* Part II.E.

64. In addition to the expansion of substantive federal criminal law by the latter half of the nineteenth century, prior to 1870, informations were rarely used to prosecute even minor, "non-infamous" offenses in federal courts. Because indictments were used universally, there was not much opportunity for

begun to clearly indicate their agreement with the view Chief Justice Marshall had taken of grand jury indictment as a mandatory prerequisite to the exercise of criminal jurisdiction. In *Ex parte Wilson*, the Supreme Court considered whether a certain punishment was "infamous" within the meaning of the Fifth Amendment.⁶⁵ In doing so, the Court acknowledged that a conclusion in the affirmative meant that "no court of the United States had jurisdiction to try or punish him, except upon presentment or indictment by a grand jury."⁶⁶ Indeed, the Court in *Wilson* held that the punishment under consideration was infamous and, therefore, "the District Court, in holding the petitioner to answer for such a crime, and sentencing him to such imprisonment, without indictment or presentment by a grand jury, exceeded its jurisdiction . . ."⁶⁷

Two years later, in *Ex parte Bain*, the Court entertained a petition for writ of habeas corpus brought by a defendant who had been convicted of a federal false statement offense.⁶⁸ The indictment charging the offense had been amended by the trial court striking certain "surplusage" more than a year after the indictment had been returned by the grand jury.⁶⁹ The Court, after reviewing the common law heritage of the grand jury and crediting the fundamental individual rights protected by the institution,⁷⁰ concluded that an indictment could not be amended by a court after it had been passed upon by the grand jury.⁷¹ Therefore, the Court reasoned, an indictment rendered defective or void as a result of a trial court's amendment deprived that court of jurisdiction.⁷²

courts to address the issue of federal court jurisdiction in the absence of an indictment. See *Albrecht v. United States*, 273 U.S. 1, 7 n.3 (1927) (outlining the history of the use of informations during the first eighty years of the nation).

65. 114 U.S. 417, 429 (1885).

66. *Id.* at 422.

67. *Id.* at 429.

68. 121 U.S. 1 (1887), *overruled by* *United States v. Cotton*, 535 U.S. 625 (2002).

69. The indictment had alleged that Bain, a bank teller, in filing a false report, had acted with intent to deceive "*the Comptroller of the Currency and the agent appointed to examine the affairs*" of the bank. *Id.* at 4. The trial judge, viewing the language "*the comptroller of the currency and*" as surplusage, struck it from the indictment prior to trial. *Id.* at 5.

70. *Id.* at 12-13.

71. *Id.* at 13-14.

72. See *id.* at 12-13 ("We are of the opinion that an indictment found by a grand jury was indispensable to the power of the court to try the petitioner for the crime with which he was charged.").

It is of no avail . . . to say that the court still has jurisdiction of the person and of the crime; for, though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, the jurisdiction of the offense is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. If there is nothing before the court which the prisoner, in the language of the constitution, can be 'held to answer,' he is then entitled to be discharged so far as the offense originally presented to the court by the indictment is concerned. The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a *nolle prosequi* had been entered. There was nothing before the court on which it could hear evidence or pronounce sentence.⁷³

Following the logic of *Ex parte Bain*, later Supreme Court and lower court rulings reasoned that because an ineffective indictment deprived a court of jurisdiction over a criminal matter, it is a proper indictment that conveys to a federal court jurisdiction over a criminal matter.⁷⁴

Although the inquiry addressed in these cases most often centered on whether fatally defective indictments deprived a court of jurisdiction, in *Ex parte McClusky*, a United States Circuit Judge considered squarely the question whether a defendant in a federal court may waive indictment and be prosecuted for an infamous crime by information.⁷⁵ Citing *Bain*, the court held as follows:

A party cannot waive a constitutional right when its effect is to give a court jurisdiction. The fifth amendment to the constitution, 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, provides for a requisite to jurisdiction. If the crime is of such a nature that an indictment to warrant a prosecution of the crime is required by the law, the court has no jurisdiction to try without such indictment.⁷⁶

Again, grand jury indictment was seen as a mandatory prerequisite to a court's exercise of jurisdiction.

73. *Id.* at 13-14.

74. *See, e.g., In re Sawyer*, 124 U.S. 200, 221 (1888); *Parkinson v. United States*, 121 U.S. 281, 281-82 (1887); *Mackin v. United States*, 117 U.S. 348, 354 (1886); *Ex parte Wilson*, 114 U.S. 417, 429 (1885); *Ex parte McClusky*, 40 F. 71 (C.C.D. Ark. 1889); *cf. United States v. McKee*, 26 F. Cas. 1112, 1114 (C.C.E.D. Mo. 1876) (explaining that presentment of an indictment before the court is the "best evidence of its existence and contents").

75. 40 F. at 74.

76. *Id.* (citing *Ex parte Bain*, 121 U.S. 1; *Parkinson*, 121 U.S. 281).

D. THE EARLY TWENTIETH CENTURY

The well-established rule that a valid grand jury indictment was a mandatory prerequisite to the exercise of jurisdiction in a federal criminal case went unchallenged as the nineteenth century gave way to the twentieth.⁷⁷ In the 1909 case of *Renigar v. United States*, the Fourth Circuit was faced with a criminal case that had proceeded on an improperly filed indictment.⁷⁸ In explaining that the filing error meant that "no indictment was found or presented by a grand jury, *which is a jurisdictional prerequisite*,"⁷⁹ the court cited with approval the following passage from a leading treatise on the indictment:

[It] was manifestly designed and intended for the security of personal rights. It is an essential to the jurisdiction of the court[,] and[,] being a constitutional right of a party, cannot be waived by him so as to preclude him from subsequently setting up want of jurisdiction in the court to try him. *A party cannot waive a constitutional right when its effect is to give the court jurisdiction.*⁸⁰

Relying on *Bain's* pronouncement that "an indictment found by a grand jury was indispensable to the power of the court to try the petitioner for the crime with which he was charged,"⁸¹ the court in *Renigar* concluded that even the arguably ministerial indictment filing error in that case deprived the court of jurisdiction:

This is not a question of irregularity, but of substantive law, based upon the direct terms of the constitutional guaranty that no man shall be 'held to answer' for an infamous offense except on an indict-

77. See, e.g., *Rider v. United States*, 149 F. 164, 170 (8th Cir. 1906); *Peterson v. Keiffer*, 50 F.2d 459, 460 (D.N.J. 1931); *United States v. Tyler*, 15 F.2d 207, 207 (D. Del. 1926); *Ex parte Rumsey*, 291 F. 671, 672 (D. Kan. 1923); cf. *Moreland v. United States*, 276 F. 640, 640 (D.C. Cir. 1921) (reversing a conviction in the juvenile court where the sentence was over six months and the grand jury had not indicted the defendant).

78. 172 F. 646, 647-48 (4th Cir. 1909).

79. *Id.* at 655 (emphasis added). Interestingly, the next sentence of this passage from the decision was: "If a valid indictment can be dispensed with, so may that providing for a trial by a petit jury . . ." *Id.*

80. *Id.* at 656 (alteration in original) (emphasis added) (quoting HOWARD C. JOYCE, *TREATISE ON THE LAW GOVERNING INDICTMENTS WITH FORMS* § 31 (1908) (citation omitted)). The passage continues:

'So[,] where there has been no presentment of [the] grand jury[,] or bill of indictment, the fact that a person confesse[d] in court to being guilty of a crime[,] which requires an indictment or presentment, confers no power upon the court to sentence him to imprisonment, and he can only be lawfully sentenced after he has been proceeded against in the manner provided in the Constitution.'

Id. (alterations in original) (quoting JOYCE, *supra*, § 32).

81. *Renigar*, 172 F. at 657 (citing *Ex parte Bain*, 121 U.S. at 12-13).

ment of a grand jury. The indictment—and that means of course a valid indictment found and presented according to the settled usage and established mode of procedure—is a *prerequisite to the jurisdiction of the court to try the person accused, an indispensable condition and requirement*, the absence of which renders the proceedings not simply voidable, but absolutely void.⁸²

Further evidence of the relationship between grand jury indictment and jurisdiction can be found in a notable state case, *People ex rel. Battista v. Christian*, in which the New York Court of Appeals took up the question of whether an indictment can be waived by a defendant without divesting the court of jurisdiction.⁸³ Although the United States Supreme Court had made clear in 1884 that the Grand Jury Clause is not incorporated through the Fourteenth Amendment to apply to the States,⁸⁴ the New York State Constitution in the 1920s had a grand jury provision virtually identical to that of the Fifth Amendment.⁸⁵ Despite this constitutional provision, the New York State Legislature passed a statute providing for waiver of grand jury indictment.⁸⁶ The law was soon challenged.⁸⁷ The opinion of the New York court, which was joined by Chief Judge Benjamin N. Cardozo, was explicit in its consideration of the grand jury right as the root of jurisdiction in capital or felony cases.⁸⁸ Declaring that “[c]onsent cannot give a court jurisdiction,” the New York court followed the reasoning of *Bain* and *McClusky* in striking down the waiver provision as unconstitutional.⁸⁹

82. *Id.* (emphasis added).

83. 249 N.Y. 314 (1928).

84. *See Hurtado v. California*, 110 U.S. 516, 538 (1883).

85. Article I, Section 6 of the Constitution of the State of New York provided that “[n]o person shall be held to answer for a capital or otherwise infamous crime . . . unless on presentment or indictment of a grand jury. . . .” CAHILL’S CONSOLIDATED LAWS OF NEW YORK 7 (James C. Cahill ed., 1923).

86. *See* N.Y. CODE CRIM PROC. § 222 (Bender 1928).

87. *See Battista*, 249 N.Y. at 317.

88. *See id.* at 319 (“Until the grand jury shall act, no court can acquire jurisdiction to try. In the most solemn and absolute language the Constitution dictates the only method by which one can be held to answer for murder, burglary, arson or any other infamous crime. Without the prescribed action by a grand jury, all our other tribunals are powerless to proceed. Such action is the foundation of jurisdiction.”).

89. *Id.* at 320. As the *Battista* court explained, “waiver is not permitted where a question of jurisdiction or fundamental rights is involved and public injury would result.” *Id.* The court distinguished a “privilege, merely personal, [which] may be waived” from a “public fundamental right, the exercise of which is requisite to jurisdiction to try, condemn and punish, [which] is binding upon the individual and cannot be disregarded by him.” *Id.*

Given the similarity of the Federal Constitution's Grand Jury Clause and the New York state constitutional provision guaranteeing grand jury indictment, as well as the high regard in which the New York Court of Appeals was held, the *Battista* decision would join *Bain*, *McClusky*, and *Renigar* as the core support for the proposition that a valid indictment of a grand jury was a prerequisite to a court's exercise of jurisdiction over a criminal matter.⁹⁰ Treatises of the era accepted this proposition as an accurate statement of constitutional principle.⁹¹ Indeed, the view that a valid grand jury indictment was a prerequisite to the federal court's exercise of jurisdiction over a criminal matter held sway up through World War II.⁹² Thus from the beginning of the nineteenth century through the first half of the twentieth century, the established and accepted view of the Grand Jury Clause was that federal criminal jurisdiction depended on the return of a valid grand jury indictment.

90. Waiver of indictment is now permitted in New York. The New York Constitution was amended in 1973 to permit waiver of indictment in non-capital cases with the consent of the district attorney. See N.Y. CONST. art. I, § 6 (McKinney 1974). It should be noted that New York's *Battista* case, because it addressed a statutory provision for waiver of indictment rather than a fatally defective indictment, would serve as a harbinger for how the question would be presented in the federal system in the 1940s as a result of the rule providing for waiver of indictment.

91. See, e.g., WILLIAM L. CLARK, JR., HANDBOOK OF CRIMINAL PROCEDURE 7 (1918) ("If the court has no jurisdiction by law to take cognizance of an offense, jurisdiction cannot be conferred upon it by the defendant's consent. Consent of the parties cannot supply want of jurisdiction."); ARMISTEAD M. DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE 65 (1928) ("[The Fifth Amendment] makes a presentment or an indictment by a grand jury an essential prerequisite in capital or infamous crimes. And so important is this right deemed that the accused cannot, even by express consent, waive the presentment or indictment." (citing *Ex parte McClusky*, 40 F. 71, 74 (C.C.D. Ark. 1889); *Ex parte Bain* 121 U.S. 1, 12-13 (1887), overruled by *United States v. Cotton*, 535 U.S. 625 (2002))).

92. See, e.g., *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26-27 (1943) (noting that the lack of a grand jury indictment affected the jurisdiction of the court); *United States v. Norris*, 281 U.S. 619, 622-23 (1930) (observing that an amendment to grand jury indictment "would oust jurisdiction of the court"); *Albrecht v. United States*, 273 U.S. 1, 8 (1927) ("A person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court." (citing *Ex parte Bain*, 121 U.S. 1)); see also S. REP. NO. 72-201, at 2 (1932) ("For many years it was generally held that an indictment by a grand jury was jurisdictional; that it was indispensable to the power of a court to try a person accused of a felony, and, accordingly could not be waived.").

There is clear evidence, therefore, that well into the twentieth century, a federal district court did not have the power to proceed in a criminal matter unless and until a valid grand jury indictment was returned against a defendant. Neither forfeiture nor voluntary waiver of the grand jury right was sufficient to supply a court with jurisdiction to try or sentence a defendant.

E. WHY JURISDICTION MEANT JURISDICTION

Despite this historical evidence, the modern understanding, as expressed by the *Cotton* Court, is that in the unbroken line of authority discussed above, the Supreme Court and other federal and state courts neither understood nor meant what they wrote about the concept of jurisdiction. The reformers argued, and the Supreme Court ultimately agreed in *Cotton*, that those courts which wrote clearly and powerfully that federal criminal jurisdiction depended on the existence of a valid grand jury indictment really did not mean to say that a court had no power to consider a federal criminal case simply because there was no indictment conferring jurisdiction. This view posits that the nineteenth century courts were simply terming as “jurisdictional” certain constitutional errors because the Supreme Court lacked authority to reverse a federal criminal conviction for non-jurisdictional errors. This reinterpretation is remarkable in light of the plain language of the earlier decisions and the unmistakable connection courts repeatedly found between a valid indictment and jurisdiction.

In *Cotton*, the Court asserted that “*Bain*’s elastic concept of jurisdiction is not what the term ‘jurisdiction’ means today, *i.e.*, ‘the courts’ statutory or constitutional *power* to adjudicate the case.”⁹³ This assertion flies in the face of the clear language used in *Bain* and other cases. There is, in fact, no evidence that *Bain* and other decisions treating grand jury indictment as a prerequisite to “jurisdiction” were referring to anything but the “power” to adjudicate the case.⁹⁴

93. *Cotton*, 535 U.S. at 630 (quoting *Steel Co. v. Citizens for Better Env’t*, 523 U.S. 83, 89 (1998)).

94. See, e.g., *Ex parte Bain*, 121 U.S. at 12–13; *Renigar v. United States*, 172 F. 646, 656 (4th Cir. 1909) (“So[,] where there has been no presentment of [the] grand jury[,] or bill of indictment, the fact that a person confesse[d] in court to being guilty of a crime[,] which requires an indictment or presentment, confers no power upon the court to sentence him to imprisonment” (quoting *JOYCE supra* note 80, § 32)); *People ex rel. Battista v. Christian*, 249

A fair review of the case law from the nineteenth and early twentieth centuries makes clear that the courts which recognized that a grand jury indictment was a prerequisite to the exercise of jurisdiction did indeed refer to judicial power.⁹⁵ In fact, *Bain* itself instructed that "an indictment found by a grand jury was indispensable to the power of the court to try the petitioner for the crime with which he was charged."⁹⁶

Furthermore, trial and appellate courts in the second half of the twentieth century and even in the months prior to *Cotton* still spoke of a relationship between grand jury indictment and jurisdiction. Surely these contemporary courts understand "what the term 'jurisdiction' means today."⁹⁷ Yet these courts, which presumably comprehend the modern concept of jurisdiction, relied heavily upon *Bain* and its progeny in concluding that the absence of an indictment impairs a court's jurisdiction. Contrary to the view expressed by the *Cotton* Court and by other skeptics, the nineteenth century courts did, indeed, intend that the absence of a grand jury indictment deprive a court of the power and the authority to entertain a criminal matter.

Also suspect is the *Cotton* Court's reasoning that *Bain* was the product of an era when, because there was no right to direct appeal of criminal convictions to the Supreme Court,⁹⁸ the Court would shoehorn obvious constitutional violations into "jurisdictional defects"—the only type of error cognizable on habeas review.⁹⁹ The Court's description of *Bain* as a desire for just outcomes which produced a "somewhat expansive notion of

N.Y. 314, 319 (1928) ("Without the prescribed action by a grand jury, all our other tribunals are powerless to proceed. Such action is the foundation of jurisdiction.").

95. See *supra* Part II.A–D and cases cited therein.

96. *Ex parte Bain*, 121 U.S. at 12–13 (emphasis added).

97. *Cotton*, 535 U.S. at 630.

98. See AMAR, BILL OF RIGHTS, *supra* note 47, at 84–101; WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 229 (1980). Congress extended direct review in the Supreme Court to capital cases in 1889 and to all cases involving infamous crimes in 1891. See Act of Mar. 3, 1891, ch. 517, 26 Stat. 827; *Cotton*, 535 U.S. at 629–30, 630 n.1; *In re Claasen*, 140 U.S. 200, 200 (1891). Lower court appellate supervision in criminal cases was established in 1879. See SURRENCY, *supra* note 62, at 271 (citing Act of Mar. 3, 1879, ch. 176, 20 Stat. 354).

99. See *Cotton*, 535 U.S. at 629–30; *Ex parte Watkins*, 28 U.S. 193, 201–03 (1830).

“jurisdiction,””¹⁰⁰ that was “more a fiction than anything else”¹⁰¹ is as strong a charge of judicial “activism” and expansion of judicial power as is made by the Court’s most vocal critics.

The dismissal of the grand jury’s jurisdictional heritage described above labors not only against history, but against logic. If the *Bain* Court or any other court had deemed the right to grand jury not so fundamental to render denial of that right a jurisdictional defect, it would have been easy to say as much. Assuming that, as a general matter, the lack of availability of federal habeas review in the earlier era contributed to a broader understanding of “jurisdiction” for the purposes of avoiding unjust results,¹⁰²—i.e., unremedied constitutional errors in federal criminal cases—there is no reason to believe that the courts of the era felt that *every* constitutional error had to be remedied. If grand jury indictment were a mere technicality, courts could have just said so and focused on other more fundamental defects in criminal proceedings.

Indeed, the Court did treat some grand jury-related errors as mere technicalities. Rather than promiscuously providing relief to habeas petitioners presenting grand jury-related errors, courts were not reluctant to deny a remedy to petitioners who presented errors that did not go to the real or constructive absence of a grand jury indictment.¹⁰³ The Court regularly denied relief to petitioners who had been convicted on technically defective indictments,¹⁰⁴ but found jurisdictional error only where there was no indictment at all, or where there was, in effect, no

100. *Cotton*, 535 U.S. at 630 (quoting *Custis v. United States*, 511 U.S. 485, 494 (1994)).

101. *Id.* (quoting *Wainwright v. Sykes*, 433 U.S. 72, 79 (1977) (citations omitted)).

102. See *Custis*, 511 U.S. at 494; *Wainwright*, 433 U.S. at 79; DUKER, *supra* note 98, at 229–30; Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 470 (1963); see also Nancy J. King, *Priceless Process: Non-Negotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 143–44 (1999). But see James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas/Direct Review Parity*, 92 COLUM. L. REV. 1997 (1992) (describing the history of habeas corpus review and scholarly opinions on the topic).

103. See, e.g., *Breese v. United States*, 226 U.S. 1, 2 (1912) (denying relief where an indictment was not presented by the grand jury as a body); *Kaizo v. Henry*, 211 U.S. 146, 149 (1908) (holding that an improperly constituted grand jury did not destroy jurisdiction); cf. *Ex parte Ward*, 173 U.S. 452, 456 (1899) (denying relief on habeas review when an unconfirmed judge presided over the trial).

104. DUKER, *supra* note 98, at 237–38.

indictment because it had been voided due to tampering or flawed grand jury review.¹⁰⁵ Additionally, during the era when writs of error were not cognizable in the Supreme Court, the Court displayed recognition of that limitation on its appellate jurisdiction in the context of non-jurisdictional grand jury-related errors—errors not severe enough to render an indictment null.¹⁰⁶

Another factor supports the view that, no matter what inferences one is tempted to draw from the Court's limited ability to correct non-jurisdictional errors in criminal cases,¹⁰⁷ nineteenth century courts were not stretching the notion of jurisdiction in the context of grand jury indictment. The "jurisdictional" characterization often was employed outside of the habeas context. Under the *Cotton* Court's rationale, there would have been no further reason to classify an indictment error as jurisdictional for purposes of avoiding injustice after the advent of federal habeas relief for non-jurisdictional errors.¹⁰⁸ However, well after the beginning of the twentieth century, when habeas review began to expand to non-jurisdictional errors, courts continued to characterize certain deprivations of the grand jury right as affecting the jurisdiction of the court.¹⁰⁹

105. See, e.g., *Ex parte Bain*, 121 U.S. 1, 13 (1887), *overruled by Cotton*, 535 U.S. 625; *Renigar v. United States*, 172 F. 646, 655 (4th Cir. 1909); *Ex parte McClusky*, 40 F. 71, 76 (C.C.D. Ark. 1889).

106. See, e.g., *In re Wilson*, 140 U.S. 575, 584 (1891).

107. See generally Stephen A. Saltzburg, *Habeas Corpus: The Supreme Court and the Congress*, 44 OHIO ST. L.J. 367 (1983) (arguing that the Court has interpreted its habeas jurisdiction without sufficient deference to Congress); Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575 (1993) (critiquing "institutional competence" and "full review" models of nineteenth century habeas review and advancing the view that habeas jurisprudence, properly understood, has not been static).

108. Federal habeas review began to expand beyond jurisdictional errors as early as the late nineteenth century. E.g. *Custis v. United States*, 511 U.S. 485, 494 (1994). By the early 1940s, the Supreme Court had "openly discarded" the notion that jurisdiction was the only basis for federal habeas review, which the Court recognized could be applied to lower courts' "disregard of the constitutional rights of the accused." *Wainwright v. Sykes*, 433 U.S. 72, 79 (1977) (quoting *Waley v. Johnson*, 316 U.S. 101, 104-05 (1942) (*per curiam*)). In addition, as discussed above, direct review in the Supreme Court of cases involving capital and infamous crimes was established in the late nineteenth century. See Act of Mar. 3, 1879, ch. 176, 20 Stat. 354. Notably, even after direct review of criminal cases was authorized, appellate courts continued to term certain grand jury-related errors as "jurisdictional." See, e.g., *Renigar*, 172 F. at 655.

109. See, e.g., *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26-27 (1943); *United States v. Norris*, 281 U.S. 619, 622-23 (1930); *United States v. Mack-*

Thus, even expanded habeas review did not alter the established notion that a valid grand jury indictment was a prerequisite to federal criminal jurisdiction in felony cases.

There is, in short, no reason to believe that the Court said other than what it believed about the relationship of grand jury indictment and the court's power to hear a case. An examination of the historical evidence demonstrates that attempts to minimize the jurisdictional heritage of the grand jury are flawed. The nineteenth and early twentieth century courts treated grand jury indictment as a mandatory jurisdictional prerequisite, and clearly saw it as a limit on the courts' power to entertain a criminal matter. Furthermore, motive does not explain why the courts of that era found jurisdictional error outside of the habeas context, and sometimes declined to find jurisdictional error within it. The grand jury, indeed, boasts a rich jurisdictional heritage established in the nineteenth and early twentieth centuries.

III. REALISM, REFORM, AND RULEMAKING: OBSCURING THE JURISDICTIONAL HERITAGE OF THE GRAND JURY FOR PRACTICAL PURPOSES

Despite the rich jurisdictional heritage of the Grand Jury Clause, the view subsequently emerged that the right to grand jury indictment is just another criminal procedural right—unrelated to a court's power to hear a case—a right which, in contrast to subject matter jurisdiction, can be waived or forfeited. Given the historical evidence, how did we get to this point? The shift in thinking about the relationship between grand jury indictment and jurisdiction derives not from a constitutional amendment or a novel interpretation by the Supreme Court of the text of the Grand Jury Clause, but from the legal realist criminal law reform project's rejection of formalist and mechanical approaches to criminal procedure in the late nineteenth and early twentieth centuries. The reformers' efforts with respect to the grand jury culminated in the waiver of indictment provision of Rule 7. Rule 7 provides for waiver of grand jury indictment in non-capital cases.¹¹⁰ Courts seeking to

lin, 523 F.2d 193, 196 (2d Cir. 1975).

110. FED. R. CRIM. P. 7(b). The Rule provides, in relevant part: "(b) Waiving Indictment. An offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant—in open court and after being advised of the nature of the charge and of the defendant's rights—waives prosecution by indictment." *Id.*

decouple the right to grand jury indictment from the establishment of a district court's jurisdiction over a criminal case have relied upon the fact that Rule 7 permits waiver. As the syllogism goes, subject matter jurisdiction never can be waived; Rule 7 permits waiver of grand jury indictment; therefore, grand jury indictment cannot be a prerequisite to a court's jurisdiction. The reasoning is perfect provided that each step in the analysis is constitutionally sound. However, if Rule 7 is not constitutional, then waiver is not permissible, and the syllogism fails.

Rule 7's constitutional foundations are questionable at best. The historical record shows that after many failed legislative attempts, the rulemaking process of the early 1940s created a prime opportunity to address practical considerations raised by reformers bent upon enhancing the efficiency of disposition of criminal cases in federal courts. The symbiotic ascension of the FRCP and the momentum of the legal realist criminal reform project ensured an approach more concerned with the law in action than the law in books.¹¹¹ The fresh view led to the gradual discarding of technical, mechanical, and categorical approaches to the law. Perhaps the promulgation of

111. See EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* 93 (1973) ("[T]he realists were driven by the twin motives of intellectual discovery and social improvement. They hoped to understand the legal process in a new and more useful manner, and they hoped to see both political and legal reform flow from their discoveries."). Although the nuances shaping the contours of the philosophy of legal realism are beyond the scope of this Article, it is sufficient for the limited purposes here to point out that: (1) some of those at the vanguard of criminal law reform in the early twentieth century are also included on the lists of legal thinkers who defined or influenced American Legal Realism; and (2) not only were the aims of the broad criminal law reform project compatible with those of American Legal Realism, they advanced them. Thus, for example, Roscoe Pound is more accurately described as having belonged to the American sociological jurisprudence school. See G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999, 1004 (1972). However, in the criminal law reform context, American Legal Realism shares enough of the characteristics of, and is sufficiently derived from, Pound's philosophy that this Article, for sake of simplicity, refers to Pound and the core group of like-minded, progressive criminal law reformers in the early twentieth century as "legal realists." See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 169-170 (1992); WILFRID E. RUMBLE, JR., *AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS* 13 (1968); Roger A. Fairfax, Jr., *Wielding the Double-Edged Sword: Charles Hamilton Houston and Judicial Activism in the Age of Legal Realism*, 14 HARV. BLACKLETTER L.J. 17, 31 (1998).

no single provision of the FRCP was impacted more by this reform philosophy than that allowing waiver of indictment in non-capital felony cases. However, the realists, through the rulemaking process, disregarded the established understanding of the jurisdictional heritage of the grand jury and adopted a pragmatic approach to waiver of indictment that eliminated grand jury indictment as a jurisdictional prerequisite—all without having to amend the Constitution.

A. ENVIRONMENT OF REFORM

1. American Legal Realism and Criminal Procedure Reform

Early in the twentieth century, American Legal Realism shook the consciousness of U.S. legal culture with its call for rejection of nineteenth century formalism and its recognition of the importance of social realities in the law's interpretation and administration. A prominent manifestation of this new approach to the law was found in the philosophy undergirding reform efforts in criminal law. This result is not surprising, given that a number of prominent legal realists were engaged in the criminal law reform movement of the early twentieth century.

Roscoe Pound, then-dean of Harvard Law School, directed a well-received survey of the administration of criminal justice in Cleveland, Ohio, published in 1922.¹¹² The survey, as co-director Felix Frankfurter wrote in the preface, was conducted by "men whose professional interest is the scientific administration of justice adapted to modern industrial conditions"¹¹³ and had the dual goals of "render[ing] an accounting of the functioning of this system"¹¹⁴ and "trac[ing] to their controlling sources whatever defects in the system the inquiry disclosed."¹¹⁵ The study was hailed in the *Harvard Law Review* as having "demonstrated how it is sought to avoid the mechanical operation of legal rules in our administration of criminal justice."¹¹⁶

112. See THE CLEVELAND FOUND., CRIMINAL JUSTICE IN CLEVELAND (Roscoe Pound & Felix Frankfurter eds., 1922); JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 82 (1995) (describing the Cleveland study as, "the best of many such surveys").

113. THE CLEVELAND FOUND., *supra* note 112, at vii.

114. *Id.* at v.

115. *Id.*

116. Note, *Judicial Discretion in the Filing of Informations*, 36 HARV. L. REV. 204, 204 (1922).

In the Cleveland study, Pound advocated reforms that had broader applicability to other jurisdictions,¹¹⁷ and he elsewhere was a vocal supporter of criminal law reform that rejected "an analytical scheme or rigid system worked out logically in libraries on the sole basis of books and law reports."¹¹⁸ Pound also subsequently served on President Hoover's Wickersham Commission, which studied a series of topics related to the administration of criminal justice in the United States. Pound's major contribution to the commission's work—a report on the prosecution function—recommended a number of bold reforms to the way criminal cases were adjudicated in the nation's courts.¹¹⁹

Another legal realist, Charles E. Clark, professor and dean of Yale Law School in the 1920s and 1930s and a strong proponent of the use of empirical social science in law,¹²⁰ engaged in a study of court administration in Connecticut, modeled after the Cleveland study.¹²¹ Clark, who had long been a student of reform of criminal and civil procedure and evidence,¹²² also subsequently served as a consultant to the Wickersham Commission, studying federal district courts,¹²³ and later served as reporter for the promulgation of the Federal Rules of Civil Procedure.¹²⁴

One of the central tenets of the early twentieth century criminal reform movement was that adjudicatory criminal procedure was in need of overhaul.¹²⁵ These reformers, a broad and

117. THE CLEVELAND FOUND., *supra* note 112, at 649–52.

118. Roscoe Pound, *The Future of the Criminal Law*, 21 COLUM. L. REV. 1, 16 (1921) [hereinafter Pound, *The Future*].

119. NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 37–38 (1931).

120. See HORWITZ, *supra* note 111, at 312 n.85.

121. See CHARLES E. CLARK & HARRY SHULMAN, A STUDY OF LAW ADMINISTRATION IN CONNECTICUT (1937).

122. See SCHLEGEL, *supra* note 112, at 83.

123. See 1 AM. LAW INST., A STUDY OF THE BUSINESS OF THE FEDERAL COURTS (1934).

124. Interestingly, Clark's work in Connecticut and on the federal courts with the Wickersham Commission was not as well-received as the Pound study. See, e.g., HORWITZ, *supra* note 111, at 312 n.85; SCHLEGEL, *supra* note 112, at 85–98.

125. See, e.g., SCHLEGEL, *supra* note 112, at 83 (discussing the view that "procedure was too technical and complicated and, as a result, allowed lawyers imbued with 'the sporting theory of justice' to avoid decisions on the merits of claims by playing procedural games"); Rollin M. Perkins, *Absurdities in Criminal Procedure*, 11 IOWA L. REV. 297, 318–19 (1926) (discussing reform efforts of the early twentieth century).

diverse collection of academic and legal reform groups,¹²⁶ thought that procedural rules laden with the rigidity and formalism of the previous two centuries were doing a disservice to the administration of criminal justice in the United States.¹²⁷ In 1906, Pound addressed the American Bar Association, critiquing the role of procedure in perverting adjudication into something more akin to a contest.¹²⁸

As Pound later wrote in 1921:

The legal science of to-day, with its functional attitude, its study of law in action as well as law in books, its insistence upon justice through rules in contrast to abstractly just rules, and its insistence upon the limitations on effective legal action and the importance of discovering means of making legal rules achieve their purpose, could be made to do great things in the domain of criminal law.¹²⁹

Others would answer Pound's call for a new approach to adjudicatory criminal procedure less concerned with the mechanical approaches of the nineteenth century and more adaptive to social conditions as they existed in the early twentieth century.¹³⁰

126. See, e.g., SCHLEGEL, *supra* note 112, at 83–84 (noting antecedents of the movement for procedural reform in the 1920s and 1930s).

127. For instance, one commentator in 1911 lamented the “evils” criminal procedure visits upon the criminal justice system, and called for “sorely” needed reform. John Davison Lawson, *Technicalities in Procedure, Civil and Criminal*, 1 J. AM. INST. CRIM. L. & CRIMINOLOGY 63, 75, 85 (1911). An observer in 1925 argued that judges in criminal cases were “applying antiquated rules of procedure, which have no life or vitality to cope with present social requirements.” Lenn J. Oare, *Our Antiquated Criminal Procedure*, 1 NOTRE DAME LAW. 35, 35 (1925).

128. See Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 AM. L. REV. 729, 731 (1906) (“The most important and most constant cause of dissatisfaction with all law at all times is to be found in the necessarily mechanical operation of legal rules.”).

129. Pound, *The Future*, *supra* note 118, at 15.

130. See, e.g., Herbert S. Hadley, *Present Conditions Historically Considered*, 11 A.B.A. J. 674, 679 (1925) (calling for “changes in our system of procedure as will tend to make our administration of justice prompt, efficient and final, and free it from its present burden of technicality and formalism that a dead past has imposed upon it”); Perkins, *supra* note 125, at 334 (“[N]ow it is high time the old cumbersome out-of-date methods of administering criminal justice were giving way to new, more in keeping with the needs of the twentieth century.”). See generally Wayne L. Morse, *A Survey of the Grand Jury System*, 10 OR. L. REV. 101 (1931) (discussing the results of a social science study of the American grand jury system).

2. Grand Jury Reform and Abolition

At the same time as the early twentieth century rise to prominence of the legal realist approaches to reform of adjudicatory criminal procedure, the grand jury was coming under increasing attack in the United States. The reformers in the United States, however, were not original in their attacks on the grand jury; they were merely following the lead of the English.¹³¹ From Jeremy Bentham's early nineteenth century critiques of the grand jury,¹³² respect for the grand jury in England continued to diminish throughout the nineteenth century and into the twentieth century,¹³³ as detractors cited the perceived corruption, inefficiency, and expense of the grand jury system. During World War I, the use of grand juries in England was suspended.¹³⁴ Although English grand juries were reinstated in 1921, a groundswell of support for their permanent abolition had formed in the war years, and, during the 1920s, the anti-grand jury movement in England gained significant momentum. Ultimately, in the wake of criticism of the grand jury levied by prominent jurists and the perceived financial drain of the grand jury in Depression-era England, the House of Commons formed a commission to study the proposed abandonment of the grand jury system.¹³⁵ The commission recommended elimination of the grand jury, and, in September of 1933, Parliament abolished the grand jury.¹³⁶

Anti-grand jury advocates in the United States certainly had been taking note. Although almost all of the original states provided for grand jury indictment in their constitutions, a

131. See generally Edson R. Sunderland, *The English Struggle for Procedural Reform*, 39 HARV. L. REV. 725 (1926) (reviewing the history of English procedural reform).

132. See JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* (1827); see also SHAPIRO, *supra* note 42, at 98–101; Richard D. Younger, *The Grand Jury Under Attack*, 46 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 26, 28 (1955) [hereinafter Younger, *The Grand Jury*] (citing 2 THE WORKS OF JEREMY BENTHAM 139–40, 171 (John Bowring ed., 1843); JEREMY BENTHAM, *THE ELEMENTS OF THE ART OF PACKING, AS APPLIED TO SPECIAL JURIES* 14–28 (1821)).

133. See Younger, *The Grand Jury*, *supra* note 132, at 28–29, 32–35; Royal Commission on Delay in the King's Bench Division, *Second and Final Report of the Commissioners*, Nov. 28, 1913 (recommending the abolition of the grand jury in England).

134. See Younger, *The Grand Jury*, *supra* note 132, at 217.

135. See *id.*

136. See Albert Lieck, *Abolition of the Grand Jury in England*, 25 J. AM. INST. CRIM. L. & CRIMINOLOGY 623, 623 (1934); Younger, *The Grand Jury*, *supra* note 132, at 217.

movement away from indictment as a means of instituting state felony prosecutions continued throughout the nineteenth century.¹³⁷ In 1884, the Supreme Court, in *Hurtado*, affirmed California's use of the preliminary examination in lieu of grand jury indictment,¹³⁸ a decision which led to further anti-grand jury sentiment at the state level in the late nineteenth century.¹³⁹ The sharp criticism of the grand jury continued into the twentieth century, and just as England was disposing of the ancient institution during the interwar period, the movement to abolish the grand jury gained traction in the United States.¹⁴⁰

This anti-grand jury sentiment was prevalent among those engaged in broader criminal law reform as part of the legal realist project. The law reviews and bar journals of the 1920s and 1930s are replete with calls for the reform or abolition of the grand jury.¹⁴¹ The Cleveland study deemed the grand jury redundant in a system that also had provision for preliminary examination, and claimed that "[i]t is no longer needed as a bulwark of our liberties"¹⁴² and "does little more than rubber-stamp the opinion of the prosecutor."¹⁴³

137. See, e.g., Younger, *The Grand Jury*, *supra* note 132, at 29–49.

138. *Hurtado v. California*, 110 U.S. 516, 538 (1884).

139. See, e.g., Eugene Stevenson, *Our Grand Jury System*, 8 CRIM. L. MAG. & REP. 711, 715, 717 (1886) (calling for an anti-grand jury constitutional amendment in New Jersey and arguing that "the grand jury system would never be seriously suggested in our day if it did not already exist . . ."); Younger, *The Grand Jury*, *supra* note 132, at 42–45.

140. See, e.g., EDWARDS, *supra* note 38, at 35–44 (acknowledging contemporary criticism of grand juries); R. Justin Miller, *Informations or Indictment in Felony Cases*, 8 MINN. L. REV. 379, 407–08 (1923) (supporting Minnesota's proposed move to information as a method of instituting all prosecutions). See generally George H. Dession & Isadore H. Cohen, *The Inquisitorial Functions of Grand Juries*, 41 YALE L.J. 687 (1931) (offering criticisms of grand juries and reviewing the claims of critics).

141. See, e.g., Charles Kellogg Burdick, *Possibility of Improvement by Statutory Changes and Constitutional Amendments Affecting Procedure*, 11 A.B.A. J. 510, 511–15 (1925) (questioning the utility of grand juries); Raymond Moley, *The Initiation of Criminal Prosecutions by Indictment or Information*, 29 MICH. L. REV. 403, 425, 430–31 (1931) (presenting the results of a study comparing the two methods of initiating prosecutions). But see Jerome Hall, *Analysis of Criticism of the Grand Jury*, 22 AM. INST. CRIM. L. & CRIMINOLOGY 692 (1931) (calling attention to possible problems with the critiques of grand juries).

142. THE CLEVELAND FOUND., *supra* note 112, at 211.

143. *Id.* at 212. Pound specifically called for the abolition of the grand jury in Cleveland. *Id.* at 650.

These designs for reforming or abolishing the grand jury were not limited to state grand juries.¹⁴⁴ Although Pound's arguments were largely centered on the Cleveland grand jury, the Cleveland study bemoaned the "accumulation of detail and drain upon facilities, human and otherwise" effected by having both a grand jury and a preliminary examination at the federal level.¹⁴⁵ Furthermore, the study echoed arguments made by Pound and others elsewhere regarding the grand jury institution in general, including federal grand juries.¹⁴⁶

The *Hurtado* opinion had freed states to abolish the grand jury, but whatever the reformers' thoughts about the usefulness of the grand jury on the federal level, the Grand Jury Clause stood as an absolute bar to the abolition of the federal grand jury. Despite this constitutional obstacle to complete abolition of the grand jury, however, a provision allowing felony defendants to waive the right to grand jury indictment, was, many reformers thought, an achievable goal.

B. CAMPAIGN FOR WAIVABILITY OF FEDERAL GRAND JURY INDICTMENT

As part of the larger movement to reform judicial procedure in the criminal area, bar and law reform associations, judges, legal scholars, and politicians—including members of Congress and the Hoover and Roosevelt administrations—engaged in a campaign to establish the availability of waiver in the grand jury context. Although discussion of indictment

144. There had long been grumblings about the efficacy and usefulness of the federal grand jury. Congress, in 1846, placed the summoning of federal grand juries within the discretion of the presiding judge. See Younger, *The Grand Jury*, *supra* note 132, at 31. In 1892, a Justice of the U.S. Supreme Court proposed the elimination of the grand jury to simplify criminal procedure. See *id.* at 44, 47 (citing Justice (Henry B.) Brown, Assoc. Justice Supreme Court of the U.S., Address at Ohio Bar Association Annual Session (July 14, 1892), in 13 OHIO STATE BAR ASSOCIATION REPORTS 35, 42-43 (1892)).

145. THE CLEVELAND FOUND., *supra* note 112, at 190.

146. See RAYMOND MOLEY, POLITICS AND CRIMINAL PROSECUTION 127-28 (1929). The 1931 Wickersham Commission report concluded that "under modern conditions the grand jury is seldom better than a rubber stamp of the prosecuting attorney and has ceased to perform or be needed for the function for which it was established and for which it was retained throughout the centuries." NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, *supra* note 119, at 124-25. One federal appellate court in 1928 lamented that the grand jury had atrophied beyond recognition. *Falter v. United States*, 23 F.2d 420, 425 (2d Cir. 1928) (noting the "degradation of that ancient institution").

waiver can be found in the context of state constitutional law early in the twentieth century,¹⁴⁷ the debate with regard to waiver of federal grand jury indictment began in earnest in the early 1930s. The American Law Institute, in its 1930 Draft Code of Criminal Procedure, included a provision allowing prosecution for felony offenses without indictment.¹⁴⁸

The advocacy surrounding criminal procedure and grand jury reform would begin to migrate from the law reform and legal academia circles and enter the political sphere in the early 1930s.

1. *United States v. Gill*

Efforts to provide for waiver of indictment in federal criminal cases were aided immensely by a 1931 federal district court opinion, *United States v. Gill*.¹⁴⁹ In *Gill*, the court was presented squarely with the question whether a defendant may waive indictment and "consent to be charged by information for an offense above the grade of misdemeanor."¹⁵⁰ The court in *Gill* reviewed the grand jury indictment's historical position in the context of the common law and catalogued other waivable criminal procedural rights, including those related to self-incrimination, speedy trial, confrontation of witnesses, double jeopardy, unreasonable searches and seizures, and assistance of counsel.¹⁵¹

While acknowledging *Ex parte Bain*'s teaching that an indictment is a prerequisite to a federal court's jurisdiction over a criminal matter, the court pointed out that the right to trial by jury, which—up until the Supreme Court's *Patton v. United*

147. See Note, *The Constitutionality of a Statute Dispensing with Indictment on Plea of Guilty*, 29 HARV. L. REV. 326 (1916).

148. See AM. LAW INST., CODE OF CRIMINAL PROCEDURE §§ 113, 115 (1930) (permitting the government to choose to initiate prosecution by either information or indictment; requiring indictment only in felony or capital cases where the defendant neither had nor waived preliminary examination).

149. *United States v. Gill*, 55 F.2d 399 (D.N.M. 1931). Judge Orie Phillips was elevated to the Tenth Circuit by President Hoover in 1929. Phillips, who later was considered for an appointment to the Supreme Court, was involved in the deliberations over the adoption of the waiver provision in the Federal Rules of Criminal Procedure. In 1950, he was awarded the prestigious American Bar Association Medal for his work in legal reform. See 75 REP. AM. BAR ASS'N 151, 152 (1950) (accepting award as recognition of "the work of judges and lawyers unselfishly striving together to make the law so living and dynamic as to meet the needs of a modern and complex society").

150. *Gill*, 55 F.2d at 399.

151. *Id.* at 400.

*States*¹⁵² decision one year prior—also had been considered jurisdictional and non-waivable. However, as the court in *Gill* pointed out, the *Patton* Court explained that the common law's aversion to waiver of the right to jury trial and other criminal procedural protections "was unquestionably founded upon the anxiety of the courts to see that no innocent man should be convicted" in an age when penalties were disproportionately severe, counsel was not afforded to defendants, and waiver principles were applied harshly and without regard to the sophistication of unrepresented defendants.¹⁵³

Adopting the reasoning of *Patton*, which held that the right to trial by jury is waivable,¹⁵⁴ the court in *Gill* declared that "the provision of the Fifth Amendment requiring an indictment in capital or other infamous cases creates a personal privilege which the defendant may waive."¹⁵⁵

Thus, the *Gill* decision analogized the right to grand jury indictment to the right to jury trial, which had been declared by the court in 1930 to be waivable. This analogy, however, is flawed. Whether a defendant might forgo a jury trial and agree to a bench trial or even forgo trial altogether and plead guilty has no bearing on whether jurisdiction had been established over the criminal case in the first instance. If compliance with the Grand Jury Clause is a jurisdictional prerequisite, it is essential no matter how the defendant is permitted to proceed to guilt adjudication under the Article III and Sixth Amendment clauses of the Constitution relating to the petit jury. This juris-

152. 281 U.S. 276 (1930), *abrogated by* *Williams v. Florida*, 399 U.S. 78 (1970); see also Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 69–70 (2003) (noting the changes brought about by the *Patton* decision).

153. *Gill*, 55 F.2d at 402 (quoting *Patton*, 281 U.S. at 307 (citations omitted)).

154. *Id.* at 403 (concluding that "the reasoning of the court in the *Patton* Case should apply with equal force" to the question of waivability of grand jury indictment).

155. *Id.* But see *Ex parte McClusky*, 40 F. 71, 74 (C.C.D. Ark. 1889) ("A party cannot waive a constitutional right when its effect is to give a court jurisdiction." (citation omitted)); *id.* ("The fifth amendment to the constitution, 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, provides for a requisite to jurisdiction." (citing *Ex parte Bain*, 121 U.S. 1 (1887), *overruled by* *United States v. Cotton*, 535 U.S. 625 (2002); *Parkinson v. United States*, 121 U.S. 281 (1887))).

dictional requirement is precisely how the federal courts viewed grand jury indictment for nearly a century and a half.¹⁵⁶

Even though the *Gill* court was willing to break with precedent and analogize the indictment provision to the jury trial right, the court concluded that, without congressional action, an indictment was still a necessary prerequisite to invoking federal criminal jurisdiction.¹⁵⁷ Congress had not provided for any other method of initiating a felony prosecution. The fundamental holding of the *Gill* decision was that a grand jury indictment was a jurisdictional prerequisite in a felony case because Congress had not yet passed a law to the contrary, not because the Grand Jury Clause made it so.

Despite *Gill*'s shortcomings, the case would spur on the reform project's push for waiver of grand jury indictment. Using the *Gill* decision's reasoning as a springboard, both bench and bar advanced the position that waiver of indictment should be permitted in federal criminal cases out of the expressed concern for detained defendants—particularly those held in districts

156. Furthermore, as Professor Akhil Amar has argued, the reasoning of the *Patton* Court is suspect in light of, for example, the plain language of those clauses. See AMAR, *BILL OF RIGHTS*, *supra* note 47, at 104–08. Also, aside from any quarrels one might have with the propriety of the analogy to the waivability of the right to jury trial, at least the Supreme Court explicitly rejected the prior approach of treating jury trial as necessary to a court's jurisdiction. At the time of *Gill*, the Supreme Court had not—and, indeed, still has not—advanced any rationale for straying from the 150 years of treating the right to grand jury indictment as a mandatory, non-waivable jurisdictional prerequisite.

157. *Gill*, 55 F.2d at 404 (“[W]hile the provision of the Fifth Amendment requiring an indictment where the offense is capital or otherwise infamous creates a personal privilege which may be waived, it will take enabling legislation by Congress to authorize an accusation to be made in such a case by information filed by the United States Attorney.”). The court reasoned that because at common law only misdemeanors could be prosecuted by information, federal prosecutors could not proceed by information in felony cases, even if a defendant has waived indictment, in the absence of statutory abrogation of the common law rule. *See id.* (“It follows that no lawful accusation has been filed against the defendant; that the jurisdiction of the court was not properly invoked, and that the sentence was void.”). The court pointed out that although the language of the amendment did nothing to alter common law understandings, it did “fix[] the matter, beyond the power of congress or the courts to alter the course proceeding in bringing forward a charge of crime, in the class of cases embraced by the provision.” *Id.* (citation omitted); *see also* *Albrecht v. United States*, 273 U.S. 1, 5–6 & n.1 (1927); JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION* § 1780 (1833) (“[The] process [of charging by information] is rarely recurred to in America; and it has never yet been formally put into operation by any positive authority of congress, under the national government, in mere cases of misdemeanor . . .”).

where grand juries met infrequently—who may wish to plead guilty in an attempt to expedite the commencement (and completion) of an expected term of imprisonment.¹⁵⁸ Regardless of whether the expressions of concern for the welfare of criminal defendants were genuine,¹⁵⁹ this “real world” view of how the rules of criminal procedure should serve the ends of efficiency and justice would be woven throughout the calls for provision of waiver.

2. The Hoover Administration and Congress

In 1932, Professor John B. Waite predicted that the Supreme Court would uphold as constitutional a provision for waiver of indictment should Congress pass such a statute.¹⁶⁰ Professor Waite’s prediction, which rested primarily upon comparison of the right to grand jury indictment with the jury trial right which had recently been held by the Supreme Court to be waivable,¹⁶¹ was prompted by a recommendation made to Congress by President Herbert Hoover earlier that year.

158. See, e.g., FED. R. CRIM. P. 7; 6 FEDERAL RULES OF CRIMINAL PROCEDURE: WITH NOTES AND INSTITUTE PROCEEDINGS 156–57 (Alexander Holtzoff ed., 1946); Homer Cummings, *The Third Great Adventure*, 3 F.R.D. 283, 285 (1944) (“A highly desirable provision of the Rules permits a defendant, except in a capital case, to waive indictment and to consent to prosecution by information.”); Alexander Holtzoff, *Reform of Federal Criminal Procedure*, 3 F.R.D. 445, 449–50 (1944) [hereinafter Holtzoff, *Reform*] (discussing how the provision aids indigent defendants unable to make bail); Alexander Holtzoff, *Some Problems of Federal Criminal Procedure*, 2 F.R.D. 431, 436 (1943) [hereinafter Holtzoff, *Some Problems*] (describing how defendants in rural and outlying districts “may languish in jail for a number of months before he can be indicted”).

159. There is a degree of irony in the call for the diminution of the grand jury to protect criminal defendants. As this Part shows, much of the political support for the waiver provision derived from a desire to reduce the costs of administering the criminal justice system, a goal against which the Bill of Rights might sometimes be found in opposition. Of course, there were ways other than allowing waiver of grand jury indictment to protect the reformers’ hypothetical defendant from languishing in confinement awaiting the empanelling of a grand jury. For example, pre-trial release could be expanded, additional grand juries could be empanelled, defendants could consent to be transferred to other districts or divisions where grand juries may be sitting, or grand juries simply could sit more frequently in all districts. Indeed, many such accommodations are necessitated by the statutory framework developed pursuant to the Speedy Trial Clause. See, e.g., 18 U.S.C. §§ 3161–74 (2000).

160. See John B. Waite, *President Hoover’s Recommendations—Waiver of Right to Accusation by Grand Jury Indictment*, 30 MICH. L. REV. 922, 928 (1932) (quoting *President Asks for Reforms in Judicial System*, U.S. DAILY (Wash., D.C.), Mar. 1, 1932, at 1).

161. See *Patton v. United States*, 281 U.S. 276, 312 (1930), *abrogated by*

President Hoover urged Congress to legislate a provision for waiver of indictment for purposes that would be cited by proponents of waiver throughout their campaign:

Legislation should be enacted to permit an accused person to waive the requirement of indictment by grand jury. Where the accused admits his guilt, preliminary hearings and grand-jury proceedings are not necessary for his protection, they cause unnecessary expense and delay. In such cases the law should permit immediate plea and sentence upon the filing of an information. That would allow the accused to begin immediate service of his sentence without languishing in jail to await action of a grand jury, and would reduce the expense of maintenance of prisoners, lessen the work of prosecutors, and tend to speed up disposition of criminal cases.¹⁶²

At the time of President Hoover's remarks, the Seventy-Second Congress already was acting upon legislation providing for waiver of indictment in federal criminal cases.¹⁶³ Senate Bill 2655, an Act "providing for waiver of prosecution by indictment in certain criminal proceedings," allowed for waiver of indictment, in open court and in writing, unless a preliminary examination had previously resulted in the discharge of the defendant.¹⁶⁴

Although the bill was easily passed in the Senate, it was the subject of controversy in the House,¹⁶⁵ where the Judiciary Committee produced a minority report signed by eleven members.¹⁶⁶ In contrast to the views of the Senate Judiciary Committee and the House Judiciary Committee majority that the

Williams v. Florida, 399 U.S. 78 (1970).

162. See HERBERT HOOVER, SPECIAL MESSAGE TO THE CONGRESS ON REFORM OF JUDICIAL PROCEDURE, (1932), reprinted in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HERBERT HOOVER 83, 86 (1977); Waite, *supra* note 160, at 928 (quoting *President Asks for Reforms in Judicial System*, *supra* note 160).

163. See 72 CONG. REC. 75, 5092 (1932).

164. See *id.*

165. During debate, Representative Thomas D. McKeown, Democrat of Oklahoma, stressed that the waiver provision did not deprive a defendant of the right to grand jury involuntarily, but it made guilty pleas more efficient and would save the treasury between \$250,000 to \$300,000 per annum. 72 CONG. REC. 76, 698-99 (1932). Representative Burnett M. Chipfield, Republican of Illinois, expressed a concern with coercion of vulnerable defendants and argued that the provision "is an iniquitous measure and it should not be passed in this way." *Id.* Representative Fiorello H. La Guardia, Republican of New York, lauded the grand jury as "one of the outstanding protections to individuals of our whole Anglo-Saxon jurisprudence, and it should not be brushed aside on a plea of saving \$250,000, to be spread over a whole nation." *Id.* at 698-99.

166. See H.R. REP. NO. 72-1300, at 8 (1932).

right to indictment "is personal and may be waived,"¹⁶⁷ the minority report of the House Judiciary Committee asserted the view that grand jury indictment is a mandatory prerequisite to a district court's jurisdiction.¹⁶⁸ Dismissing the analogy to the *Patton* Court's approval of waiver of the right jury trial, the minority report argued that the grand jury right "is not merely a right of the defendant, personal to him, which may be waived," but is "a restriction upon the right and *jurisdiction of the court*, and it is beyond the power of any defendant to confer jurisdiction where none would otherwise exist."¹⁶⁹

Notably, the minority report saw in the waiver provision an attempt by the criminal law reformers to achieve their ultimate goal of abolition of the grand jury:

That this bill is an attempt to weaken the protection accorded the citizen by the grand jury system can not be denied; and if we begin to countenance attacks upon that system, it may not be long until other legislators, sitting in our places, will begin to listen to the arguments of other legal writers who have been for years insisting that the grand jury has outgrown its usefulness, and should be abolished in its entirety.¹⁷⁰

Although the Senate Committee that had reported favorably on Senate Bill 2655 also acknowledged the historical relationship between grand jury indictment and jurisdiction,¹⁷¹ the House minority report demonstrated that, even into the 1930s, there was still a recognition of the jurisdictional heritage of the grand jury.¹⁷²

Despite the failure of legislative attempts to provide for waiver of indictment,¹⁷³ a steady drumbeat of pro-waiver advocacy emanated from the Department of Justice during the

167. S. REP. NO. 72-201, at 2-3 (1932); *see also* H.R. REP. NO. 72-1300, at 2-3.

168. H.R. REP. NO. 72-1300, at 5-8.

169. *Id.* at 6 (emphasis added).

170. *Id.* at 7.

171. S. REP. NO. 72-201, at 2 ("For many years it was generally held that an indictment by a grand jury was jurisdictional; that it was indispensable to the power of a court to try a person accused of a felony, and, accordingly could not be waived.")

172. H.R. REP. NO. 72-1300, at 5-8. The minority report also asserted that the waiver of indictment would expose less sophisticated defendants to undue pressure from the government, and made a textual argument that the language of the Grand Jury Clause is of a mandatory nature. *See id.* at 6-8.

173. Both S. 2655, 72nd Cong. (1932), and S. 1518, 73rd Cong. (1933), identical bills introduced during the first session of the seventy-second and seventy-third Congresses respectively, failed to become law. Similar legislation introduced during the Roosevelt administrations also met a similar fate.

1930s. A review of the annual reports of attorneys general in that decade evidences repeated calls for legislative action on the issue of waivability.¹⁷⁴ By the late 1930s, Roosevelt Attorney General Homer Cummings, who had earlier highlighted the issue of "waiver of indictment by grand jury in certain criminal cases,"¹⁷⁵ spurred the Justice Department to draft and propose legislation on waivability by the Justice Department:

At my request a number of bills drafted in the Department of Justice were introduced and are now pending before the Congress. Their purpose is to eliminate archaic technicalities and to make possible greater expedition in the disposition of criminal cases without depriving defendants of any substantial rights to which they should be entitled. Among such measures are the following: To permit the defendant to waive indictment by grand jury and to consent to prosecution by information.¹⁷⁶

The criminal law reformers' 1930s campaign for waivability waged in the law reviews, law reform and bar groups, lower courts, the Congress, and the executive branch, though unsuccessful, had gained enough momentum to capitalize on the golden opportunity presented by the federal criminal procedural judicial rulemaking of the 1940s.

C. THE RULEMAKING PROCESS

Despite the more general procedural reform efforts of the early twentieth century, by the end of the 1930s federal crimi-

174. For example, in his 1931 annual report, Herbert Hoover's Attorney General William D. Mitchell wrote:

Legislation should be enacted permitting an accused to waive the requirement of an indictment by a grand jury. Where the accused intends to plead guilty, preliminary hearings and grand jury proceedings are needless for his protection and cause unnecessary expense and delay. In such cases the law should permit the filing of an information and immediate plea and sentence. Such a system will tend to speed up the disposition of criminal cases. The recent decision of the Supreme Court of the United States respecting waiver by the accused of the right to trial by petit jury, and the recent recommendation by the judicial conference respecting this matter, give ground to believe that there is no valid constitutional objection to this proposal.

1931 ATT'Y GEN. ANN. REP. 2-3; see also 1932 ATT'Y GEN. ANN. REP. 6 ("I call special attention to the pending bill to allow waiver of indictments by the accused . . .").

175. 1933 ATT'Y GEN. ANN. REP. 1.

176. 1937 ATT'Y GEN. ANN. REP. 11. Likewise, Cummings' successor, Frank Murphy, used his 1940 annual report "to call attention also to the following pending legislation drafted in this Department: A bill to permit a defendant in a criminal case to waive indictment by grand jury (H.R. 1994)." 1939 ATT'Y GEN. ANN. REP. 7.

nal procedure was still "in a somewhat amorphous and disorganized state."¹⁷⁷ Prior to the promulgation of the Federal Rules of Criminal Procedure, the procedure guiding criminal matters in federal courts was a hodge-podge gleaned from the common law, federal statutes "sporadically enacted at different times in regard to isolated points,"¹⁷⁸ and the law of the forum state "to which the Federal courts conform in respect to many matters which are not governed by Federal statutes."¹⁷⁹ Rules governing federal civil procedure had been promulgated during the 1930s with great success.¹⁸⁰ Against this backdrop, the frequent advocacy regarding the proposed grand jury waiver provision, and the need for other criminal procedure rules more generally, prompted Congress to act.¹⁸¹

On June 29, 1940, Congress authorized the Supreme Court to promulgate rules governing federal criminal procedure, just as it had in previous years for civil procedure and for appellate procedure in criminal cases.¹⁸² The Court appointed an Advi-

177. Alexander Holtzoff, *Proposed Rules of Criminal Procedure*, 3 F.R.D. 420, 420 (1944) [hereinafter Holtzoff, *Proposed Rules*]; see also Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 749-50 (2001) (noting that, with few exceptions, federal courts applied state procedural law into the twentieth century).

178. Holtzoff, *Proposed Rules*, *supra* note 177, at 420; see also *United States v. Debrow*, 346 U.S. 374, 376 (1953) (arguing that the Federal Rules of Criminal Procedure were meant to promote simplicity in procedure).

179. Holtzoff, *Proposed Rules*, *supra* note 177, at 420; see also Holtzoff, *Reform*, *supra* note 158, at 447.

180. See Homer Cummings, *The New Federal Rules of Criminal Procedure*, 5 F.R.D. 20, 22 (1946).

181. See *Proceedings of the Institute on Federal Rules of Criminal Procedure*, 5 F.R.D. 88, 91 (1946). The adoption of the Federal Rules of Criminal Procedure had been urged by, among others, then-Attorney General Robert Jackson. In his *Annual Report of the Attorney General* for the fiscal year ended 1940, Jackson noted that the Supreme Court's promulgation of the Federal Rules of Civil Procedure, made possible by the congressional enabling act of June 19, 1934, made the new civil rules "probably the simplest form of civil procedure yet devised in any jurisdiction in which Anglo-Saxon jurisprudence prevails." 1940 ATTY GEN. ANN. REP. 5. Jackson went on to note, however, that criminal procedure remained "largely in a chaotic and archaic state" with "[m]any technicalities dating back a century or two. . . ." *Id.* Praising the recent passage of an enabling act empowering the Supreme Court to promulgate rules of criminal procedure, Jackson was optimistic that the act would "undoubtedly lead to a reform in criminal procedure that will be as vital as the recent changes in civil procedure." *Id.*

182. See Act of June 29, 1940, ch. 445, 54 Stat. 688; Arthur T. Vanderbilt, *New Rules of Federal Criminal Procedure*, 29 A.B.A. J. 376, 376 (1943). For a discussion of the development and restoration of judicial rulemaking authority in the 1930s and 1940s, see Alexander Holtzoff, *Participation of the Bar in Ju-*

sory Committee to draft the new rules.¹⁸³ The seventeen member Committee, chaired by Arthur T. Vanderbilt, a former president of the American Bar Association, was comprised of prominent practitioners and academics, learned in the criminal law and drawn from across the United States.¹⁸⁴ Some of the nation's foremost advocates of criminal law reform served on the Committee, including George H. Dession of Yale Law School and Sheldon Glueck of Harvard Law School, both advocates of integrating social considerations into criminal processes.¹⁸⁵

At the same time the Court and Advisory Committee were undertaking to develop the new criminal rules, the advocacy for waivability continued. In the early 1940s, the Judicial Conference of Senior Circuit Judges recommended that "existing law or established procedure be so changed that a defendant may waive indictment and plead guilty to an information filed by a United States attorney in all cases except capital felonies."¹⁸⁶ The judges stated that the rationale for provision for waiver of indictment was so that "a defendant, who desires to plead guilty, [can] avoid the delays which sometimes occur when the impaneling of a grand jury to find an indictment is required."¹⁸⁷ As many reformers had been arguing, waiver of indictment was necessary to facilitate pre-indictment guilty pleas.

These pro-waiver sentiments manifested in the preliminary draft of the proposed rules, transmitted to Chief Justice Harlan F. Stone from the Committee in May of 1942.¹⁸⁸ Rule

dicial Rule-Making, 3 F.R.D. 165 (1944) [hereinafter Holtzoff, *Participation*]; Holtzoff, *Reform*, *supra* note 158, at 431.

183. See Appointment of Advisory Committee on Rules in Criminal Cases, 312 U.S. 717 (1941); Holtzoff, *Some Problems*, *supra* note 158.

184. Holtzoff, *Participation*, *supra* note 182, at 166; Holtzoff, *Reform*, *supra* note 158, at 447 (listing members and affiliations).

185. See ADVISORY COMM. ON THE RULES OF CRIMINAL PROCEDURE, FEDERAL RULES OF CRIMINAL PROCEDURE: SECOND PRELIMINARY DRAFT, at iii-iv (1944). In addition to the Advisory Committee itself, there were judicially-appointed bar committees organized in each federal judicial district in the United States that would critique each draft of the rules along with national, state, county, and city bar associations and members of the federal bench. See Holtzoff, *Participation*, *supra* note 182, at 167.

186. JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES, REPORT OF THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES: ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 9 (1941).

187. *Id.*

188. Letter from the Advisory Comm. on Fed. Rules of Criminal Procedure to the Honorable Harlan F. Stone, Chief Justice of the U.S. (May 23, 1942) [hereinafter May 23 Letter to Chief Justice Stone], *reprinted in* 1 DRAFTING

8(b) provided as follows: "In a case not punishable by death a defendant represented by counsel may consent that the proceeding be by information instead of by indictment and in that event the United States attorney may file an information or proceed by indictment."¹⁸⁹

But despite the provision for waiver of indictment in the preliminary draft of the rules, questions remained regarding the constitutionality of the rule. In 1941, William W. Barron of the Justice Department, which favored the provision for waiver, described the dissent as such: "Some very conscientious and literal-minded lawyers see an insurmountable objection to the proposal. They view the constitutional right to be proceeded against by indictment as a jurisdictional requirement which cannot be waived."¹⁹⁰

Questions regarding the constitutionality of the waiver provision came even from the Supreme Court. Chief Justice Stone, in offering feedback to the Advisory Committee on the preliminary draft on behalf of the Court, commented specifically on Rule 8(b): "This rule, authorizing waiver of indictment, raises questions of policy and *possibly constitutionality*, which should be the subject of annotation."¹⁹¹

HISTORY OF THE FEDERAL RULES OF CRIMINAL PROCEDURE 3, 3-5 (Madeleine J. Wilken & Nicholas Triffin eds., 1991) [hereinafter DRAFTING HISTORY]; May 1942 Preliminary Draft of Advisory Committee, *reprinted in* 1 DRAFTING HISTORY, *supra*, at 52, 52-53 [hereinafter May 1942 Preliminary Draft].

189. May 1942 Preliminary Draft, *supra* note 188, at 52. Rule 8(a) reflected the waivability set out in Rule 8(b); ("Accusation of an offense which may be punished by death shall be by indictment. Accusation of an offense which may be punished by imprisonment for a term exceeding one year or by hard labor shall be by indictment or, if indictment is waived, by information. Accusation of any other offense may be by indictment or by information.").

190. William W. Barron, *Proposed Rules of Procedure in Criminal Cases. A Prosecutor's Viewpoint*, 2 F.R.D. 211, 214-15 (1943) (citing *United States v. Gill*, 55 F.2d 399 (D.N.M. 1931); *Ex parte McClusky*, 40 F. 71 (C.C.D. Ark. 1889); *Edwards v. State*, 45 N.J.L. 419 (N.J. 1883); *People ex rel. Battista v. Christian*, 249 N.Y. 314 (1928)). Barron went on to counter that "[w]e think the Patton case and the reasoning employed in reaching that decision disposes of the constitutional objection for the federal courts as it has been disposed of by some of the state courts." *Id.* at 215 (citing *Patton v. United States*, 281 U.S. 276 (1930), *abrogated by Williams v. Florida*, 399 U.S. 78 (1970)). Barron also recounted and dismissed concern that a waiver provision would allow influential defendants to persuade prosecutors to proceed by information rather than indictment. *See id.*

191. Memorandum from Harlan F. Stone, Chief Justice to Arthur T. Vanderbilt, Chairman Advisory Comm. on Fed. Rules of Criminal Procedure (June 16, 1942), *reprinted in* 1 DRAFTING HISTORY, *supra* note 188, at 11, 15 (emphasis added). The comment went on:

The Advisory Committee took this and other comments on the rules and, the following year, produced a new preliminary draft, accompanied by annotations. In this draft, transmitted from the committee to Chief Justice Stone on May 3, 1943,¹⁹² the language of the Rule read as follows: "An offense not punishable by death may be prosecuted by information if the defendant, being represented by counsel, waives indictment in writing."¹⁹³

Although the changes to the previous draft were, for the most part, stylistic,¹⁹⁴ the annotations shed a good deal of light on the thinking of the committee. The Note to Rule 8 acknowl-

One purpose of the rule, we understand, is to enable a defendant to go to trial promptly in a division of a district where grand juries sit infrequently. Would that not be possible under [proposed] Rule 22 [providing for the transfer of proceedings, with consent of the defendant, from one court to another within a judicial district] and, if so, are there other reasons for the proposal of Rule 8?

Id. at 16; *see also* ADVISORY COMM. ON FED. RULES OF CRIMINAL PROCEDURE, PRELIMINARY DRAFT OF ADVISORY COMMITTEE (1942), *reprinted in* 1 DRAFTING HISTORY, *supra* note 188, at 70, 70.

192. Letter from Arthur T. Vanderbilt, Chairman Advisory Comm. on Fed. Rules of Criminal Procedure, to Harlan F. Stone, Chief Justice (May 3, 1943), *reprinted in* 1 DRAFTING HISTORY, *supra* note 188, at XIII, XIII-XVI. The Secretary of the Committee, Alexander Holtzoff, had, in September of 1942, prepared a memorandum regarding the desirability of waiver if indictment. *See* Memorandum of Alexander Holtzoff on Waiver of Indictment (Sept. 1, 1942), *reprinted in* 2 FILES OF ADVISORY COMMITTEE ON RULES OF CRIMINAL PRACTICE, LIBRARY OF CONGRESS, CM-1057 (1942). The memorandum emphasized only practical considerations and did not attempt to address the constitutional issues posed by the proposed provision for waiver. *See id.*

193. FEDERAL RULES OF CRIMINAL PROCEDURE PRELIMINARY DRAFT [hereinafter PRELIMINARY DRAFT], *reprinted in* 1 DRAFTING HISTORY, *supra* note 188, at 27, 28. As with the May 1942 preliminary draft, Rule 8(a) of this draft reflected the waivability set out in Rule 8(b):

Offenses shall be prosecuted in the district court by indictment or by information as provided by these rules. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, by information. Any other offense may be prosecuted by indictment or by information.

Id. at 27. Another interesting feature of Rule 8 in this draft can be found in Rule 8(c), which provided that "[t]he information shall be signed by the attorney for the government and may be filed only by leave of court." *Id.* at 28.

194. One major change was the deletion of the language "and in that event the United States attorney may file an information or proceed by indictment." May 1942 Preliminary Draft, *supra* note 188, at 53 (emphasis added). This language appears to allow the government to proceed by indictment (and, presumably, avail itself of the compulsory process of the grand jury) even over the effective waiver of grand jury indictment by a defendant.

edged that "[t]he present law is not changed by the subdivision except in the provision . . . for prosecution of an infamous crime by information if indictment is waived."¹⁹⁵ In response to the Supreme Court's concerns about the constitutionality of the waiver provision, the committee cited *United States v. Gill*,¹⁹⁶ and argued that the rule, once passed, "would supply the legislative authority considered to be necessary for proceeding by information in non-capital cases."¹⁹⁷ Thus, the Advisory Committee assumed that a lone 1930s district court opinion more accurately interpreted the Grand Jury Clause than the consistent approach taken by the Supreme Court and other federal courts over the prior century and a half.

In May of 1943, the Chief Justice, without critical comment, authorized the Advisory Committee to circulate the preliminary draft of the proposed Federal Rules of Criminal Procedure, along with annotations, to both bench and bar.¹⁹⁸ The Rules were discussed at circuit judicial conferences, and comments were received from federal judges, various bar committees (including the American Bar Association) as well as from government and private attorneys.¹⁹⁹ In soliciting such commentary and discussion on the preliminary draft through an article in the *American Bar Association Journal* in July of 1943, Arthur Vanderbilt, the Chairman of the Advisory Committee on Federal Rules of Criminal Procedure, commented specifically on the waiver provision of proposed Rule 8(b), noting that

[e]xpress provision is made to permit the defendant to waive indictment and to consent to prosecution by information. (Rule 8-B.) This

195. PRELIMINARY DRAFT, *supra* note 193, at 30.

196. 55 F.2d 399 (D.N.M. 1931).

197. PRELIMINARY DRAFT, *supra* note 193, at 30-31. The note also argues the necessity of a provision for waiver of indictment, for purposes of expediency and to serve the interests of criminal defendants who would rather commence proceedings than wait for an available grand jury. *Id.* at 31. Another interesting note to Rule 8 deals with the rationale for excluding the presentment as a third form of formal accusation. *See id.* at 32. *See generally* Renee Lettow, Note, *Reviving Federal Grand Jury Presentments*, 103 YALE L.J. 1333, 1337 (1994) (exploring the relationship of presentment and the grand jury in the early republic).

198. Letter from Harlan F. Stone, Chief Justice, to Arthur T. Vanderbilt, Chairman, Advisory Comm. on Fed. Rules of Criminal Procedure (May 22, 1943), *reprinted in* 1 DRAFTING HISTORY, *supra* note 188, at XVII, XVII-XVIII.

199. Letter from Alexander Holtzoff, Sec'y of the Advisory Comm. on Fed. Rules of Criminal Procedure, to the Advisory Committee on Federal Rules of Criminal Procedure (Sept. 25, 1943), *reprinted in* 2-3 DRAFTING HISTORY, *supra* note 188, at 362.

provision is of particular importance in those districts, constituting a majority, where the grand jury convenes two or four times a year. In such jurisdictions a defendant who is unable to give bail may be confined in jail for several months awaiting a grand jury to convene although he expects to plead guilty and is anxious for an expeditious disposition of the case.²⁰⁰

By September 1943, the first round of commentary was circulated to the Committee. The comments, sent primarily from sitting federal judges and United States Attorneys, overwhelmingly favored the adoption of the provision for waiver of indictment, most for the same reasons put forward by the committee in the annotations to the proposed rule.²⁰¹ The second installment of commentary, received by the committee in October of 1943, continued much of the same.²⁰²

200. Vanderbilt, *supra* note 182, at 377; see also James J. Robinson, *The Proposed Federal Rules of Criminal Procedure*, 27 J. AM. JUDICATURE SOC'Y 38, 45 (1943). That same summer, former Attorney General Homer Cummings spoke in support of the proposed rules, describing proposed Rule 8(b) as a "highly desirable provision" that would help indigent defendants to reduce time spent in pre-trial detention awaiting indictment, particularly in districts where grand juries met infrequently. Homer Cummings, *The Third Great Adventure*, 29 A.B.A. J. 654, 655 (1943) (reprinting the address delivered before the annual meeting of the Institute on Federal Rules of Criminal Procedure on August 24, 1943). The talk was thus titled because Cummings considered the promulgation of the criminal rules the third and final step—following the earlier promulgation of the Federal Rules of Civil Procedure and the establishment of the Administrative Office of the United States Courts—toward "a rounded system of judicial rule-making." *Id.* at 654.

201. See COMMENTS TO PRELIMINARY DRAFT OF RULES OF CRIMINAL PROCEDURE, RULE 8(b) [hereinafter FIRST ROUND COMMENTS TO RULE 8(b)], reprinted in 2-3 DRAFTING HISTORY, *supra* note 188, at 65, 65-68. Indeed, many commentators suggested that even unrepresented defendants should be permitted to waive indictment. See *id.*

202. See COMMENTS TO PRELIMINARY DRAFT OF RULES OF CRIMINAL PROCEDURE, RULE 8(b) [hereinafter SECOND ROUND COMMENTS TO RULE 8(b)], reprinted in 2-3 DRAFTING HISTORY, *supra* note 188, at 363, 363-66a; Letter from Alexander Holtzoff, Secretary of the Advisory Comm. on Fed. Rules of Criminal Procedure, to the Advisory Committee on Federal Rules of Criminal Procedure (Oct. 4, 1943), reprinted in 2-3 DRAFTING HISTORY, *supra* note 188, at 362. There were a few dissenting voices, however, including those who thought compliance with the procedural requirements of the waiver rule was too cumbersome, as well as those who maintained that the rule contravened the Grand Jury Clause. Nevertheless, the overwhelming tenor of the comments was positive. Interestingly, one of the commentators was Judge Orie L. Phillips of the U.S. Court of Appeals for the Tenth Circuit, who had authored the opinion in *Gill* when he had been a district court judge in the District of New Mexico. Phillips was as willing to take the credit as he was deserving of it:

This waiver of indictment is my baby. I started that back in 1923 and I undertook to start it by first writing a decision in habeas corpus proceedings which was that the defendants could constitutionally waive

In November of 1943, the Committee transmitted the second preliminary draft of the proposed Rules of Criminal Procedure to the Supreme Court.²⁰³ In this draft, the provision for waiver of indictment was re-titled Rule 7(b) and read as follows: "An offense not punishable by death may be prosecuted by information if the defendant, after he has been advised of the nature of the charge and of his rights, waives in open court prosecution by indictment."²⁰⁴

Again, the Note to the waiver rule relied solely on the *Gill* decision for its constitutionality and stressed the efficiency benefits of pre-indictment guilty pleas.²⁰⁵ The Note cited Pound's Cleveland survey and other surveys, the Wickersham Commission reports, and the American Law Institute Code for the proposition that the waiver provision was a much-needed reform.²⁰⁶

In May and June of 1944, the Committee received installments of comments on the second preliminary draft of the proposed Rules of Criminal Procedure.²⁰⁷ Although many of the

indictment, and that is found in the annotations, here, the case reported in New Mexico.

SECOND ROUND COMMENTS TO RULE 8(b), *supra*, at 363. Phillips, who made his comments at an August 24, 1943 American Bar Association meeting on the proposed rules, reiterated his rationale for the constitutionality of the provision for waiver of indictment:

I don't think there is any doubt about the constitutionality upon the basis of the holdings of the courts that the other provisions for the protection of the defendants, such as the right of trial by common law jury, right to be confronted with your witnesses and so forth, may be waived.

Id.

203. See Letter from Advisory Comm. on Fed. Rules of Criminal Procedure to the Chief Justice and Assoc. Justices of the Supreme Court of the United States (Nov. 19, 1943), *reprinted in* 4 DRAFTING HISTORY, *supra* note 188, at XIII-XIV.

204. ADVISORY COMM. ON THE RULES OF CRIMINAL PROCEDURE, FEDERAL RULES OF CRIMINAL PROCEDURE: SECOND PRELIMINARY DRAFT 22 (1944). As with previous versions of the rule, this proposed Rule 7 required indictment in capital cases, required indictment in non-capital felony cases in which there was no waiver, and allowed prosecution by either indictment or information for all other offenses. Also, the annotations remained substantially the same as in the first preliminary draft. See *id.*

205. See *id.* at 24-25.

206. See *id.* at 25.

207. See ADVISORY COMM. ON FED. RULES OF CRIMINAL PROCEDURE, FEDERAL RULES OF CRIMINAL PROCEDURE, SECOND PRELIMINARY DRAFT (1944), *reprinted in* 4 DRAFTING HISTORY, *supra* note 188, at III, III-IV; Letter from Alexander Holtzoff, Sec'y of the Advisory Comm. on Fed. Rules of Criminal Procedure, to the Advisory Comm. on Fed. Rules of Criminal Procedure (May

comments echoed earlier ones applauding the provision of waiver for purposes of expediting the criminal process for defendants detained pre-trial in rural areas,²⁰⁸ there were comments again questioning the advisability of the provision. Such comments ran the spectrum from calling for waiver only when in written form, to opposing waivability by unrepresented defendants, to doubting the constitutionality of the provision.²⁰⁹ One comment, a "[s]ummary of views of Tennessee Federal Judges," set out the views of Judge John D. Martin of the Sixth Circuit and Judge Elmer Davis Davies of the Middle District of Tennessee that "it is unwise to disturb a long established workable practice by a new procedure of doubtful constitutionality."²¹⁰

29, 1944), *reprinted in* 5 DRAFTING HISTORY, *supra* note 188; Letter from Alexander Holtzoff, Sec'y of the Advisory Comm. on Fed. Rules of Criminal Procedure, to the Advisory Comm. on Fed. Rules of Criminal Procedure (June 6, 1944), *reprinted in* 5-6 DRAFTING HISTORY, *supra* note 188.

208. *See* COMMENTS TO THE SECOND PRELIMINARY DRAFT OF RULES OF CRIMINAL PROCEDURE, RULE 8(B) (Sept. 14, 1943), [hereinafter COMMENTS TO THE SECOND PRELIMINARY DRAFT], *reprinted in* 5-6 DRAFTING HISTORY, *supra* note 188, at 27, 27-28a.

209. *See id.* One comment served to undermine the central rationale for the provision of waiver—expediting the criminal process for defendants who desire to plead guilty but are detained in districts with infrequent grand jury sittings. Harry C. Blanton, United States Attorney for the Eastern District of Missouri, who supported the provision of waiver, observed that often in such outlying districts, judges sit as infrequently as grand juries and, therefore, defendants—who had to waive indictment and plead guilty in open court—"will have to wait as long as [they] would for a Grand Jury." *See id.* at 17. Another comment, from the Federal Grand Jury Association for the Southern District of New York, advocated removing the ability of prosecutors to choose whether a matter can be prosecuted by indictment or information. *See id.* at 16. Under the proposed Rule 7(a), non-capital felony cases could be prosecuted by information if the defendant waived indictment and misdemeanor cases could be prosecuted by either information or indictment. The Association was,

opposed to giving prosecutors, some of whom like to be untrammelled and are irked by having to defer to a Grand Jury, freedom to do 'trading' with accused persons to persuade them that a trial prosecuted by information would be more to their advantage than a trial prosecuted by indictment.

Id.

210. COMMENTS TO THE SECOND PRELIMINARY DRAFT, *supra* note 208, at 27. Perhaps part of the challenge for opponents of the waiver rule was that they seemed unable to articulate a strong rebuttal to the practical arguments being advanced by the pro-waiver reformers. Instead of merely resting upon the jurisdictional heritage of the grand jury, a better strategy might have been to argue that, even in a modern criminal justice system, protection for individual defendants might better be served by enhancing the role of grand jury rather than diminishing it.

In June of 1944, the final report of the Advisory Committee on the Rules of Criminal Procedure was issued with the final draft of the rules, with the language for provision of waiver of indictment remaining unchanged from the previous draft.²¹¹ The Rules were transmitted to Attorney General Francis Biddle by Chief Justice Harlan F. Stone in December of 1944²¹² and Biddle submitted them to Congress in January of 1945.²¹³

Ultimately, the advocacy on the part of the judges and the bar bore fruit. With the adoption in 1946²¹⁴ of the Federal Rules of Criminal Procedure came a provision for waiver of indictment in non-capital felony cases:

Rule 7. The Indictment and the Information.

(a) USE OF INDICTMENT OR INFORMATION. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment, or if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

(b) WAIVER OF INDICTMENT. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after he has been advised of the nature of the charge and of his rights, waives in open

In addition to speaking of the ways short of waiver in which, as noted above, the grand jury process might be altered to avoid lengthy pre-indictment detention of defendants, waiver opponents might have pointed out the pressures that could be brought to bear upon an unsophisticated defendant to have him or her waive indictment and plead guilty to a charge of the prosecutor's choosing rather than have the grand jury pass upon the merits of any such charge. Such coercion would not be possible where the grand jury indictment is treated as a jurisdictional prerequisite. Furthermore, those opposed to the waiver rule might have tried to counter the broader philosophical argument being made by the reformers—that the grand jury was no longer a useful tool for protecting individual liberty. In response to this anti-grand jury argument, defenders of the grand jury might have gone on the offensive, arguing that not only should we decline to diminish the grand jury's role in criminal procedure, but we should make it more robust.

211. See Letter from Advisory Comm. on Fed. Rules of Criminal Procedure to the Chief Justice and Assoc. Justices of the Supreme Court of the U.S. (July 1944), *reprinted in* 7 DRAFTING HISTORY, *supra* note 188, at 13, 13.

212. See Letter from Harlan F. Stone, Chief Justice, to Francis Biddle, Attorney General (Dec. 26, 1944), *reprinted in* 7 DRAFTING HISTORY, *supra* note 188, at 125, 125.

213. See Letter from Francis Biddle to the Senate and House of Representatives of the United States of America (Jan. 3, 1945), *reprinted in* 7 DRAFTING HISTORY, *supra* note 188, at 123, 123.

214. The Rules went into effect on March 21, 1946.

court prosecution by indictment.²¹⁵

With regard to the issue of constitutionality, the Note to Rule 7(b) cited *United States v. Gill* for the proposition that the "constitutional guaranty of indictment by grand jury may be waived by [the] defendant,"²¹⁶ and pointed to "other constitutional guaranties [that] may be waived by the defendant,"²¹⁷ including trial by jury, right to counsel, protection against double jeopardy, privilege against self-incrimination, and confrontation of witnesses.²¹⁸

With its formal authorization to the government to proceed by information in the face of an effective waiver of indictment by a defendant in a felony case, Rule 7(b) of the new Federal Rules removed the final impediment to the waiver of grand jury indictment. After the rules went into effect in March of 1946, initial reports were that the waiver provision performed its intended function, improving efficiency of the federal criminal process and allowing certain defendants to avoid pre-indictment incarceration.²¹⁹

215. FED. R. CRIM. P. 7 (1946). The Advisory Committee Notes accompanying Rule 7(b) explained that:

Opportunity to waive indictment and to consent to prosecution by information will be a substantial aid to defendants, especially those who, because of inability to give bail, are incarcerated pending action of the grand jury, but desire to plead guilty. This rule is particularly important in those districts in which considerable intervals occur between sessions of the grand jury. In many districts where the grand jury meets infrequently a defendant unable to give bail and desiring to plead guilty is compelled to spend many days, and sometimes many weeks, and even months, in jail before he can begin the service of his sentence, whatever it may be, awaiting the action of a grand jury.

ADVISORY COMM. ON RULES OF CRIMINAL PROCEDURE, NOTES TO THE RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, reprinted in 7 DRAFTING HISTORY, *supra* note 188, at 244, 244.

216. ADVISORY COMM. ON RULES OF CRIMINAL PROCEDURE, NOTES TO THE RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, reprinted in 7 DRAFTING HISTORY, *supra* note 188, at 245.

217. *Id.*

218. *Id.* The Note to Rule 7(b) also pointed out that "[t]he Federal Juvenile Delinquency Act now permits a juvenile charged with an offense not punishable by death or life imprisonment to consent to prosecution by information on a charge of juvenile delinquency." *Id.* at 244. See generally *Recent Statutes*, 38 COLUM. L. REV. 1318 (1938) (discussing the constitutionality of the Federal Juvenile Delinquency Act).

219. See SURRENCY, *supra* note 62, at 283; Tom C. Clark, *An Indorsement of Federal Rules of Criminal Procedure*, 5 F.R.D. 305, 306 (1946) (describing a case in which a federal defendant in New Mexico—where the grand jury sits only twice a year—was arrested just following a grand jury session and saved himself six months in jail by waiving indictment under the new Rule 7(b) and

Rule 7(b) represented a triumph of the anti-grand jury, criminal law reform, and, ultimately, the legal realist efforts of the early twentieth century to adapt criminal procedure to the realities of the time. Despite the well-established "jurisdictional heritage" of the federal grand jury, these reformers were able—without having to amend the Constitution—to remove a key obstacle to the more efficient disposition of criminal cases. In doing so, the reformers were able to further their efforts to eradicate the tendency of adjudicatory criminal procedure "to worship form at the expense of justice."²²⁰ However, in the case of the relationship between grand jury indictment and jurisdiction, the formalism of the nineteenth century discarded by these pro-waiver efforts concerned not mere antiquated judge-made procedure, but the perceived mandate of the Fifth Amendment's Grand Jury Clause.

IV. TOWARD RECONCILIATION OF THE JURISDICTIONAL HERITAGE OF THE GRAND JURY AND ITS MODERN ROLE

This Article has sought to critique the modern understanding of the right to grand jury indictment for its unjustified dismissal of the grand jury's jurisdictional heritage, which was obscured—but not countered—by the criminal procedural reform movement of the early twentieth century. Although the issue of constitutionality and jurisdiction was glossed over in the rule-making process of the 1940s, the waiver provision was widely perceived both as efficient and as protecting defendants against periods of uncharged detention,²²¹ and the constitutional objections raised during the rulemaking process eventually melted away.²²²

The question remains: why is this important? What does it matter that nineteenth century courts saw grand jury indictment as a jurisdictional prerequisite? Perhaps we have received

describing a case in Massachusetts that was completed in 4.5 hours); Alexander Holtzoff, *Changes in Federal Criminal Procedure*, 6 F.R.D. 277, 279 (1947) (describing effective use of the rule by defendants in Wyoming, New Mexico, and the District of Columbia); see also Lester B. Orfield, *Two Years of the Federal Rules of Criminal Procedure*, 21 TEMP. L.Q. 299, 310 (1948) ("The provision for waiver has reduced the number of grand juries called in 1947, the number of days of service of the grand juries, and the cost to the government of bringing witnesses before the grand jury.").

220. Perkins, *supra* note 125, at 300.

221. See *supra* Part III.B.

222. See SURRENCY, *supra* note 62, at 203.

all we can expect from the Court on this question. Presumably, the Supreme Court could have chosen not to acquiesce in the promulgation of Rule 7 in 1946, or it could have chosen to use one of the many federal criminal cases it has heard in the past sixty years to strike down Rule 7 as violative of the Grand Jury Clause. And, indeed, a reasonable reading of *Cotton* and even other cases where the rule was cited in passing could be seen as an implicit endorsement of the notion that grand jury indictment is not a jurisdictional prerequisite.

So why is further consideration of these questions important? An easy answer is that the current understanding of the relationship between grand jury indictment and jurisdiction is based on flawed history and analysis, which must be corrected. In addition, there is reason for concern that the criminal procedure reformers were able to use the rulemaking process to sidestep a clear constitutional mandate in the name of efficiency. Historical accuracy and constitutional fidelity are important values. By themselves, they warrant an examination of how we arrived where we are today. But, there are additional reasons to explore this issue.

First, the failure to reconcile the modern approach with the jurisdictional heritage of the grand jury has spawned confusion. Even though federal courts since the promulgation of the FRCP have been uniform in their uncritical acceptance of the constitutionality of indictment waiver, courts have struggled with how to deal with defective indictments in light of the grand jury's jurisdictional heritage. Second, there is some movement on the part of the Supreme Court to return to fundamental constitutional principles and to adopt a more formalist or originalist approach to certain criminal procedural rights. Questions arise regarding whether the Court will look again to the jurisdictional heritage of the Grand Jury Clause, and what that examination could mean for procedural efficiency tools like preindictment plea bargaining. Finally, the process of examining and accounting for the jurisdictional heritage of the grand jury can provide valuable insights into the role the grand jury is meant to play in our constitutional structure.

A. LINGERING CONFUSION OVER THE RELATIONSHIP BETWEEN GRAND JURY INDICTMENT AND JURISDICTION, AND THE CONTINUED VITALITY OF *BAIN*

Although the Rule 7 waiver debate had been all but conceded by the second half of the twentieth century, the continu-

ing vitality of *Bain* and its progeny has been apparent in modern judicial decisions. Perhaps due to the specious nature of the constitutional rationale for the waiver provision, the grand jury's jurisdictional heritage continues to live on as both the Supreme Court and lower courts continue to recognize—through their treatment of forfeited claims related to fatally flawed indictments—that there remains some nexus between grand jury indictment and a court's exercise of jurisdiction over a criminal matter. The Court, in *Cotton*, vastly overstated the case when it said that *Bain* had been disproved by later cases in the twentieth century. Indeed, aside from the reform-driven promulgation of Rule 7 and a decision that narrowed *Bain* in the context of proof and pleading questions,²²³ *Bain* and the jurisdictional heritage it represented were alive and well at the time *Cotton* was decided.²²⁴

In 1960, the Supreme Court, in *Stirone v. United States*, was presented with the question of whether a defendant can be convicted on allegations that, though closely related to those in the indictment, were not themselves charged.²²⁵ The Court said of *Bain*: “The *Bain* case, which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him.”²²⁶ Two years later, in *Russell v. United States*, the Court again seemed to confirm the vitality of *Bain* as a general matter, describing the case as the “settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form.”²²⁷ Although the Court again had no occasion in *Russell* to address the issue of the constitutionality of waiver, it quoted with approval *Bain*'s description of the Grand Jury Clause's

223. The 1985 case of *United States v. Miller*, 471 U.S. 130 (1985), partly overruled *Ex parte Bain*: “To the extent *Bain* stands for the proposition that it constitutes an unconstitutional amendment to drop from an indictment those allegations that are unnecessary to an offense that is clearly contained with it, that case has simply not survived. To avoid further confusion, we now explicitly reject that proposition.” *Id.* at 144.

224. Indeed, during oral argument in the *Cotton* case, Justice Ginsburg acknowledged that “it isn't [clear] in our cases so far, that the kind of error, whatever it is, doesn't qualify as, quote, jurisdictional.” Transcript of Oral Argument at 8, *United States v. Cotton*, 535 U.S. 625 (2002) (No. 01-687), available at http://www.supremecourtus.gov/oral-arguments/argument_transcripts/01-687.pdf.

225. 361 U.S. 212, 218 (1960).

226. *Id.* at 217.

227. 369 U.S. 749, 770 (1962).

“prerequisite of an indictment” as “the restriction which the Constitution places upon the power of the court.”²²⁸

Aside from never being fully overturned by the Supreme Court prior to *Cotton*, *Bain* and the jurisdictional heritage it represents were regularly relied upon by lower federal courts exploring the impact of indictment defects upon their jurisdiction in criminal cases. A review of the cases leading up to the *Cotton* decision provides compelling evidence that the jurisdictional heritage of the grand jury was being recognized even at the turn of the twenty-first century. The federal reporters are replete with cases throughout the latter half of the twentieth century, relying upon *Bain* and reaffirming its central premise that a valid grand jury indictment is a mandatory prerequisite to a court's exercise of subject matter jurisdiction over a criminal case.²²⁹ Even while acknowledging the waivability of the right to grand jury indictment under Rule 7, courts subscribed to the view that “the lack of an indictment in a (federal) felony case is a defect going to the jurisdiction of the court.”²³⁰

Following the 1999 *Apprendi* decision, appellate courts were flummoxed by the question of whether an *Apprendi* error in a federal indictment affected a court's jurisdiction. Some courts, such as the Tenth Circuit, rejected the notion that an indictment failing to include all the elements of an offense was jurisdictional in nature.²³¹ Other courts, including the Fourth

228. *Id.* (quoting *Ex parte Bain*, 121 U.S. 1, 13 (1887), *overruled by* United States v. *Cotton*, 535 U.S. 625 (2002)).

229. *See, e.g.*, *Crosby v. United States*, 339 F.2d 743, 744 (D.C. Cir. 1964) (“The scope of the indictment goes to the existence of the trial court's subject-matter jurisdiction.” (citing *Ex parte Bain*, 121 U.S. at 12–13; *Stirone*, 361 U.S. at 213.)); *see also* *United States v. Montgomery*, 628 F.2d 414, 416 (5th Cir. 1980) (“Unless there is a valid waiver, the lack of an indictment in a (federal) felony case is a defect going to the jurisdiction of the court.” (quoting *WRIGHT*, *supra* note 54, § 121, at 522)); *United States v. Macklin*, 523 F.2d 193, 196 (2d Cir. 1975) (“The absence of an indictment is a jurisdictional defect which deprives the court of its power to act.” (citing *Ex parte Wilson*, 114 U.S. 417 (1885); *Ex parte Bain*, 121 U.S. 1)); *United States v. Choate*, 276 F.2d 724, 728 (5th Cir. 1960) (“[L]ack of indictment goes to the court's jurisdiction.”); *Colson v. Smith*, 315 F. Supp. 179, 182 (N.D. Ga. 1970) (noting that lack of indictment deprives the court of jurisdiction while uncritically acknowledging the validity of indictment waiver); *United States v. Anzelmo*, 319 F. Supp. 1106, 1125 (E.D. La. 1970) (referring to jurisdiction).

230. *Montgomery*, 628 F.2d at 416 (quoting *WRIGHT*, *supra* note 54, § 121, at 213).

231. *See* *United States v. Prentiss*, 256 F.3d 971, 981 (10th Cir. 2001). *But see* *United States v. Tran*, 234 F.3d 798, 808–09 (2d Cir. 2000) (limiting the scope of the court's subject matter jurisdiction to an offense charged in the in-

Circuit, held squarely that a valid grand jury indictment was a mandatory prerequisite to subject matter jurisdiction under *Bain* and its progeny.²³² Still other courts were divided on the question; the Eleventh Circuit had a split panel with two judges holding that “the constitutional right to be charged by grand jury indictment simply does not fit the mold of a jurisdictional defect, because it is a right that plainly may be waived” under Rule 7,²³³ while a third judge on the same panel asserted that “an indictment found by a grand jury [i]s indispensable to the power of the court to try [the defendant] for the crime with which he was charged.”²³⁴

Lest anyone take false comfort from the *Cotton* Court’s flawed historical analysis, the fact remains that *Bain* has retained its vitality. The Court never definitively resolved the constitutionality of waiver of indictment. The reformers were able to establish waivability of indictment through the rule-making process and by making arguments about efficiency, but the core view that there is a relationship between grand jury indictment and jurisdiction lived on in other contexts right up until the Supreme Court decided *Cotton*. Due to the uncertain foundation of the waiver rule and the failure of the Court to address directly the jurisdictional heritage of the grand jury, confusion lingers—confusion that obscures our understanding of the role of the grand jury.

B. REALISM AND FORMALISM, PRAGMATISM AND ORIGINALISM

It is necessary, therefore, to reconcile, in a principled and reasoned way, the jurisdictional heritage of the grand jury with our desire for efficiency in the criminal process. By sweeping this jurisdictional heritage under the rug, the reformers and the Supreme Court have failed to take into account the intended role of grand jury indictment in our system. A more comprehensive understanding might lead to consideration of

dictment), *overruled by* United States v. Thomas, 274 F.3d 655 (2nd Cir. 2001).

232. See United States v. Cotton, 261 F.3d 397, 404 (4th Cir. 2001), *rev’d*, 535 U.S. 625 (2002); see also United States v. Longoria, 259 F.3d 363, 365 (5th Cir. 2001) (“The grand jury’s issuance of an indictment is what gives federal courts jurisdiction to hear a case and impose a sentence.”), *rev’d en banc*, 298 F.3d 367 (5th Cir. 2002) (reversing course after the decision in *Cotton*).

233. See McCoy v. United States, 266 F.3d 1245, 1249 (11th Cir. 2001).

234. See *id.* at 1263 (Barkett, J., concurring in result only) (“[A]n indictment found by a grand jury [i]s indispensable to the power of the court to try [the defendant] for the crime with which he was charged.” (quoting *Ex parte Bain*, 121 U.S. at 12–13) (second and third alterations in original)).

how to make the grand jury a more robust protection of individual liberty as well as an effective tool for the investigation of criminal activity. By avoiding the question of how to reconcile the jurisdictional heritage of the grand jury with the modern quest for criminal procedural efficiency, the rulemakers and the Supreme Court have left the grand jury requirement in legal limbo. If it is not a jurisdictional requirement, what is it? If it is a jurisdictional requirement, how is waiver constitutional?

It might seem that the promulgation of Rule 7 represented the triumph of realism over formalism, and that the realist criminal procedural reform project succeeded in sidestepping the constitutional issue, thereby demeaning the grand jury and rejecting it as a fundamental protector of liberty. Recent cases have demonstrated, however, that the Supreme Court sometimes returns to the origins of constitutional provisions and to fundamental principles.²³⁵ A future Supreme Court might be persuaded to return to formalism or originalism in determining whether the right to grand jury indictment is of jurisdictional import.

Cotton, to be sure, was a pragmatic decision—both in the way it echoed the legal realist view of the grand jury right and because of its conscious avoidance of the havoc that a contrary decision would have wreaked in the short term, given the uncertainty surrounding the implications of the *Apprendi* decision.²³⁶ The Court undoubtedly was concerned about the impact that the contrary conclusion—that grand jury indictment was, indeed, a mandatory prerequisite to a court's exercise of jurisdiction over a criminal case—would have had on the administration of criminal justice in the federal courts. Fearing an avalanche of similar challenges to sentences under indictments that did not charge the crime for which the defendant was sen-

235. See, e.g., *United States v. Booker*, 125 S. Ct. 738 (2005); *Blakeley v. Washington*, 124 S. Ct. 2531 (2004); *Crawford v. Washington*, 541 U.S. 36 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

236. See, e.g., Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 948–50 (2006). For a definition of legal pragmatism (and a comment on some difficulties in defining it), see RICHARD POSNER, *OVERCOMING LAW* 11–15 (1995). See generally STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005); RICHARD POSNER, *LAW, PRAGMATISM AND DEMOCRACY* (2003); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988); Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1 (1996).

tenced, the Court may have felt compelled to preserve appellate courts' ability to apply plain error or harmless error review.²³⁷

However, a truly profound—if unintended—consequence would have been the concomitant weakening of the foundation of pre-indictment plea bargaining. To re-open the question of whether grand jury indictment can be waived without divesting a court of jurisdiction might have meant the beginning of the end of federal pre-indictment guilty pleas. Over ninety percent of convictions in adjudicated criminal cases in federal district courts come by way of guilty plea.²³⁸ Elimination of the availability of pre-indictment pleas, although only a subset of that number, would negatively impact the ability of the federal district courts to process the more than sixty-seven thousand criminal case filings each year.²³⁹

In this way, *Cotton* can be read as the pragmatic recognition of the same concerns that animated the realist project's attack on the grand jury. The view that the right to grand jury indictment is nothing more than a personal privilege of the criminal defendant, unrelated to structural considerations, is certainly a common thread. Practical concerns of efficiency undergird the modern understanding just as they did the realist reform project. Driven by pragmatic concerns about *Apprendi* challenges to indictments like the one the Court faced in that case, and, perhaps, the broader and more calamitous problem of potential challenges to pre-indictment guilty pleas, the *Cotton* Court made a weak argument against the jurisdictional heritage of the grand jury, based upon revisionist historical evidence and flawed reasoning.

237. A fair argument can be made that the pro-jurisdictional heritage decision may have had minimal impact for purposes of *Apprendi*-type indictment errors. First, federal prosecutors responded immediately to *Apprendi* by including sentencing enhancement facts in grand jury indictments, thus making the indictments immune to the type of challenge pressed in the *Cotton* case. Second, at least in its early refinements, *Booker*, the case which ultimately applied *Apprendi*'s core teaching in the federal context, does not require grand jury indictments to include sentencing factors, although a careful prosecutor might include them anyway. See *Booker*, 125 S. Ct. at 761–62; *id.* at 780 n.10 (Stevens, J., dissenting); 2 BEALE, *supra* note 35, § 8.1 (noting that recent precedent may require prosecutors to include aggravating factors in their indictments).

238. See Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 96 (2005); Federal Justice Statistics, Summary Findings, <http://www.ojp.usdoj.gov/bjs/fed.htm#Adjudication>.

239. See, e.g., Judicial Business of the United States Courts (2002), <http://www.uscourts.gov/judbus2002/appendices/d00sep02.pdf>.

The danger in the Court's pragmatic approach displayed in *Cotton* is that it may have begun to give way to an originalist approach in a closely-related area of criminal procedure.²⁴⁰ Recent scholarship has highlighted the ways in which a majority of the Court has been persuaded to apply an originalist and formalist approach in the area of criminal procedural rights.²⁴¹ Whether a trend is afoot is debatable.²⁴² In any event, the willingness of a majority of the Rehnquist (now Roberts) Court to apply originalist approaches to constitutional criminal procedural protections is certainly worth recognition. Should the originalist approach extend to the grand jury context, a future court may be inclined to re-examine the question of whether the grand jury right is a jurisdictional prerequisite such that waiver of indictment or allowing fatal defects to the indictment would unconstitutionally violate the Grand Jury Clause.²⁴³

240. For some attempts to define the contours of originalism, see ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 133–267 (1990); ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 37–47 (1997); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20–35 (1971); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 851–65 (1989). See also 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); AMAR, *BILL OF RIGHTS*, *supra* note 47; Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365 (1997); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

241. See Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 184 (2005); Rachel E. Barkow, *Originalists, Politics, and Criminal Law on the Rehnquist Court*, 74 GEO. WASH. L. REV. 1043 (forthcoming 2006), available at <http://ssrn.com/abstract=910563>.

242. Professor Bibas points out that the use of originalism in one of the two cases he examines, *Blakely v. Washington*, 124 S. Ct. 2531 (2004), in applying the *Apprendi* logic to state sentencing guidelines, was not as straightforward as might appear on the surface. Bibas observes that, in *Blakely*, the record was anything but definitive with regard to the history of the Article III and Sixth Amendment Jury Clauses. See Bibas, *supra* note 241, at 195–96. Also, Bibas notes that a true fidelity to originalism in *Blakely* settled for “half an originalist loaf” by leaving intact waiver of jury trial which, although essential to modern day plea bargaining, fairly clearly contravenes the mandate of the Jury Clause of Article III. See *id.* at 197.

243. An originalist resort to text and history may very well lead to the conclusion that the fulfillment of the right to grand jury indictment is a mandatory jurisdictional prerequisite that would make, for example, pre-indictment plea bargaining unconstitutional much like a true originalist approach to the right to jury trial would render all plea bargaining unconstitutional. *Bain*, the decision standing for the proposition that the Grand Jury Clause is a jurisdictional mandate, has been described as a quintessential originalist decision:

It is never to be forgotten that, in the construction of the language of the Constitution here relied on, as, indeed in all other instances where construction becomes necessary, we are to place ourselves as

Given the clear and undeniable evidence of the jurisdictional heritage of the grand jury and the questionable constitutional rationale for the indictment waiver provision, the modern understanding is inadequate and must be revisited. Precisely because plea-bargaining is a necessity in our federal criminal justice system, for example, it is imperative that it rest upon a firmer constitutional foundation than that which the Court has supplied. In addition, although *Booker* on its face does not compel federal prosecutors to include enhancement factors in indictments,²⁴⁴ this view could change, and the Court and lower courts reviewing indictment challenges on that basis would be forced again to come to grips with *Cotton*'s weak rationale. Furthermore, unanticipated developments in the recognition of criminal procedural rights could expose the soft underbelly of the Court's approach.²⁴⁵

nearly as possible in the condition of men who framed that instrument. Undoubtedly the framers of this article had for a long time been absorbed in considering the arbitrary encroachments of the crown on the liberty of the subject, and were imbued with the common-law estimate of the value of the grand jury as part of its system of criminal jurisprudence. They, therefore, must be understood to have used the language which they did in declaring that no person should be called to answer for any capital or otherwise infamous crime, except upon an indictment or presentment of a grand jury, in the full sense of its necessity and of its value.

Ex parte Bain, 121 U.S. 1, 12 (1887), *overruled by* *United States v. Cotton*, 535 U.S. 625 (2002); see also Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 30–31 (1994); Kevin C. Newsom, *Setting Incorporation Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643, 696 (2000). An interesting query is why the *Cotton* decision earned the vote of Justice Scalia. Possible explanations are that Scalia was of the mind that a contrary result was not required by an originalist approach—the text and history of the Grand Jury Clause do not provide sufficient certainty to warrant the conclusion that grand jury indictment is a jurisdictional prerequisite. Another possibility is that, in the words of Professor Bibas, there was no “half an originalist loaf” to take from *Cotton*, and the full loaf—which arguably would entail abolishment of all waiver of grand jury indictment, including pre-indictment plea bargaining—was far too expensive. Bibas, *supra* note 241, at 197.

244. See *supra* Part I.

245. This Article is not a general call for an originalist approach to interpreting criminal procedural protections in the Constitution. However, we must ensure that our historical understanding of these protections is sound as we interpret and apply them to our modern situation. See, e.g., Thomas Y. Davies, *What Did the Framers Know and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 107 (2005) (disputing the Court's characterization of the “original meaning of the Confrontation Clause”). Also, it is, to say the least, a good idea to get questions of jurisdiction correct. Because limits on a court's power to entertain a case serve a number of important functions in our constitutional democracy—such as separation of

Therefore, it makes sense to determine whether a more dynamic interpretation of the Grand Jury Clause's mandate might yield the same result as the pragmatic approach, but, at the same time, respect the jurisdictional heritage of the grand jury and the implications that history has for the way we can improve it today.

C. LESSONS LOST, LESSONS TO BE LEARNED

Aside from the lingering confusion and the vulnerability of the modern understanding is the fact that the grand jury as an institution could benefit from a thorough consideration of its intended role in the constitutional system. To discard the jurisdictional heritage as mere historical novelty in order to reap practical benefits would be to ignore over a century of jurisprudence rich with guidance for re-examining what the modern grand jury could and should be and how it could and should best serve our democracy.

If the grand jury protection was important enough to be enforced through a restriction on the judicial power, what does that tell us about the effectiveness of the grand jury today? Have we allowed the grand jury to stray so far from its supposed function that the Grand Jury Clause demands a correction of course? Perhaps the jurisdictional treatment of the right to grand jury indictment was as much about restraining prosecutorial power as it was about restraining judicial power. If this is the case, then waiver and forfeiture rules promoting efficiency might be less obviously "good" than we have assumed. The Supreme Court adopted the pragmatic view without critical examination of the jurisdictional heritage of the grand jury and has failed to confront the reason why the Fifth Amendment was written to contain a Grand Jury Clause. As a result, our understanding of the grand jury has suffered.

By the end of the twentieth century, many in the American legal community—judges, attorneys, and scholars alike—were content with the illogical position that grand jury indictment is a mandatory prerequisite to a court's jurisdiction, but that a defendant could waive the right to grand jury indictment. Although the availability of waiver of grand jury indictment may be desirable from an efficiency standpoint, it is of paramount

powers, federalism, and individual liberty—we should be ever-vigilant to ensure continued fidelity to constitutional strictures. *See, e.g.*, Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 649–50, 650 n.30 (2005).

importance that we obtain a firm grasp on the principles that define the role of both the grand jury as well as the indictment in the pantheon of criminal procedural rights, particularly at a time when the closely-related right to a jury trial is enjoying a new vitality. The Court's uncritical acceptance of the pragmatic approach has squandered the opportunity to critically examine and to clarify the relationship between the grand jury and jurisdiction. Much work remains to be done. The acknowledgment of the grand jury's "jurisdictional heritage" is an important first step in the long-overdue project of taking inventory of the grand jury and its place in the constitutional framework of our criminal justice system.

CONCLUSION

The modern rejection of the grand jury's jurisdictional heritage is largely without basis. Once we move beyond the fiction that the grand jury has no jurisdictional significance, a number of interesting questions emerge. How do we square that robust view of grand jury indictment with the non-incorporation of the grand jury right to the states, and should that question be revisited? Does the jurisdictional heritage of the grand jury place any restrictions on the extent to which we can implement much-needed reforms to the grand jury? Does it mandate that we implement reforms that make the grand jury a more effective protection of individual rights?

In this age when the institution of the grand jury has lost the respect of much of the legal profession and, perhaps, the citizenry, it may be difficult to imagine the grand jury as a robust jurisdictional prerequisite to the exercise of federal criminal jurisdiction. To be sure, the jurisdictional heritage of the grand jury has been obscured by twentieth century pragmatic efforts at criminal procedural reform; however, it has never been sufficiently disproved.

A far superior approach would acknowledge the jurisdictional significance of the grand jury and balance it against practical considerations in a way that enhances both efficiency and liberty. Rather than sweeping under the rug for practical purposes the relationship between the grand jury and jurisdiction, we need to reclaim that heritage and determine how it might help us decipher the role the grand jury is *supposed* to play in our constitutional system and what might be done, in compliance with the Constitution, to enhance the quality of criminal justice in the United States.