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Anne Feder Lee
University of Cincinnati

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Cover Page Footnote

This paper is based upon research carried out for a doctoral dissertation. The author would like to thank Alan Engel, Miami University, for kind encouragement and helpful comments.

THE GRAND JURY IN OHIO: AN EMPIRICAL STUDY*

*Anne Feder Lee***

I. INTRODUCTION

The institution of the grand jury is, for the most part, shrouded in mystery. Although the grand jury indictment is provided for in the Constitution to protect those who come in conflict with the law, very few citizens know much about its history, purposes, or practices. Much of this "mysteriousness" is due to the very nature of the institution — a group of citizens formed as an arm of the court, holding secret hearings where the accused does not automatically have the right to be present. Its major function is to accuse individuals of a crime where there is probable cause and, by refusing to indict, to protect against false accusation. Seldom is there a glimpse into its activities since members are sworn to secrecy and, under most circumstances, the finished product of their labor, the indictment or refusal to indict, gets little public exposure.

The fifth amendment of the United States Constitution states 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, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . ."[1] In 1884, in the case of *Hurtado v. California,*[2] the Supreme Court held that this constitutional provision applied only to the federal government. States were thus free to use or not to use the grand jury indictment process in charging crimes. Today, however, most states east of the Mississippi have provisions in their state constitutions or statutes which require a grand jury indictment for felony cases whereas in almost all states west of the Mississippi, the prosecutor may select either an information or a grand jury indictment for felony cases. Both the indictment and the information are written accusations which are filed with the appropriate court. In "grand jury states" the indictment is usually prepared by the prosecutor, presented to the grand jury, and the panel

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**B.A. University of California, Berkeley, 1966; M.A. University of Essex, England, 1970; Ph.D. Miami University, Ohio, 1977. Currently visiting Assistant Professor, Political Science, University of Cincinnati.

1. U.S. CONST. amend. V.
2. 110 U.S. 516 (1884).

returns a true bill or a no true bill. Informations, on the other hand, are prepared by the prosecutor and filed with the court without the intervention of a grand jury.[3]

Since the late 1960's the grand jury system has become the target of much criticism. The period of the late 1960's and early 1970's has been characterized by critics as one in which the grand jury, contrary to its proper role, was being used as a "political" tool to silence opposition to governmental policies. Arguments used by critics of the institution, (arguments which incidentally are not new ones), include: that the grand jury process is too slow and costs too much in comparison with the information process; that prosecutors actually prefer the information system; that grand jurors themselves are not made aware of their duties and powers; that since prosecutors dominate the grand jury proceedings, the result is rubber stamp panels; that the rights of the accused, the potential defendant (or target witness) and witnesses are not protected under current grand jury procedures; that witnesses ought to be allowed the presence of counsel during appearances before grand juries; that the practice of secrecy works against the accused; that since the grand jury hears only the prosecutor's side of the case, it is extremely partial; and that evidence can be used during grand jury hearings which would be inadmissible at a trial.[4]

A most interesting development in the history of the grand jury in the United States has taken place quite recently. For the first time, congressional hearings have been held on the federal grand jury system

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3. Only thirteen states require that a preliminary hearing precede a prosecution based upon an information. See Steele, *Right to Counsel at the Grand Jury Stage of Criminal Proceedings,* 36 MO. L. REV. 193 (1971), and *Federal Grand Jury: Hearings before the Subcomm. on Immigration, Citizenship, and International Law of the Comm. on the Judiciary on H.J. Res. 46, H.R. 1277 and Related Bills,* 94th Cong., 2d Sess. 716-17 (1976), for classifications of "grand jury" and "information" states. See also the very interesting article, Thompson, *The Fourth Amendment Function of the Grand Jury,* 37 OHIO ST. L.J. 727 (1976), for a novel discussion of the relationship of the indictment and information to the fourth amendment provision that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . . ."

4. For elaboration of the criticisms against the grand jury system *see, e.g.,* Calkins, *Grand Jury Secrecy,* 63 MICH. L. REV. 455 (1965); Campbell, *Eliminate the Grand Jury,* 64 J. CRIM. L. & CRIM. 174 (1973); Coates, *The Grand Jury, The Prosecutor's Puppet-Wasteful Nonsense of Criminal Jurisprudence,* 33 PA. B.A.Q. 311 (1962); Dash, *The Indicting Grand Jury: A Critical Stage?,* 10 AM. CRIM. L. REV. 807 (1972); *Grand Jury Proceedings: The Prosecutor, The Trial Judge, and Undue Influence,* 39 U. CHI. L. REV. 761 (1972); Johnston, *The Grand Jury—Prosecutorial Abuse of the Indictment Process,* 65 J. CRIM. L. & CRIM. 157 (1974); Moley, *The Initiation of Criminal Prosecutions by Indictments or Informations,* 29 MICH. L. REV. 403 (1931); Morse, *A Survey of the Grand Jury System,* 10 ORE. L. REV. 101 (1931); Schwartz, *Demythologizing the Historic Myth of the Grand Jury,* 10 AM. CRIM. L. REV. 701 (1972).

and reform legislation has been considered.[5] The criticisms put forth during these hearings have echoed, for the most part, criticisms of the process which have been made in the United States for many years. In the past, the controversy was often seen in terms of either abolishing or maintaining the grand jury system. But a major emphasis of the current thrust is the need for reforms if the grand jury is to continue to play its role as an impartial, independent accusatory body. In particular the prosecutor and his relationship with the grand jury has come under renewed attack. While the characterization of grand juries as mere rubber stamps or "prosecutorial puppets" is not new, it has taken a fresh meaning because of extensively documented cases of prosecutorial abuse of the system, particularly on the federal level, during the late 1960's and early 1970's.[6]

The criticism of prosecutorial control is an extremely serious one for if grand juries are simply puppets, then the institution has lost its vitality as an impartial and independent body.[7] The apparent assumption made by critics is that if the grand jury is subject to prosecutorial control, its independence and impartiality are necessarily lost. Thus, critics argue that the ability (or inability) of the panel to perform in-

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5. *See, Federal Grand Jury, supra* note 3, and *Reform of the Grand Jury System: Hearing before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary on S. 3274, H.R. 1277, H.R. 6006, H.R. 6207, H.R. 10947, H.R. 11660, H.R. 11870, H.R. 14146, and H.J. Res. 46,* 94th Cong., 2d Sess. (1976). There were ten bills introduced into the 94th Congress—one which would abolish the grand jury requirement on the federal level and the others including a variety of reforms. Various organizations have publicly supported reforming the grand jury system including the American Bar Association, the National Legal Aid and Defender Association, the Ad Hoc Committee on Grand Juries of the Advisory Committee on Criminal Rules of the United States Judicial Conference, and the Coalition to End Grand Jury Abuse (a coalition of more than twenty organizations). In the 95th Congress, two bills regarding federal grand jury procedures were introduced into the Senate, S. 3405 and S. 1449, and hearings were held by the Committee on the Judiciary in 1978. A number of bills regarding grand juries were also introduced into the House of Representatives during the 95th Congress and hearings were held. *See Grand Jury Reform, Hearings before the Subcomm. on Immigration, Citizenship, and International Law of the Comm. on the Judiciary on H.R. 94,* 95th Cong., 1st Sess. (1977).

6. There have been quite a number of articles written which attempt to demonstrate how grand juries were abused by prosecutors in the late 1960's and early 1970's. *See, e.g.,* Donner & Cerruti, *The Grand Jury Network,* THE NATION, Jan. 3, 1972, at 5; *Federal Grand Jury Investigation of Political Dissidents,* 7 HARV. C.R.-C.L. L. REV. 432 (1972); Tigar & Levy, *Grand Jury as the New Inquisition,* 50 MICH. ST. B.J. 693 (1971). *See also* L. CLARK, THE GRAND JURY, THE USE AND ABUSE OF POLITICAL POWER (1975), M. FRANKEL & G. NAFTALIS, THE GRAND JURY, AN INSTITUTION ON TRIAL (1977).

7. Some critics argue that historically the grand jury was not always an independent or impartial institution. But the popular view is that it has been and still is. See Schwartz, *supra* note 4, for a very interesting analysis of the historical foundations of the grand jury.

dependently and impartially is directly related to the degree of control exerted by the prosecutor. If prosecutors do in fact dictate the outcome of grand jury proceedings, then indeed it would seem fair to claim that the institution has lost much of its protective function. Since prosecutorial control is one of the dominant themes in the literature critical of the institution, it is clear that this is an area that requires close scrutiny.

While the literature on grand juries appearing in law journals and the public press has been voluminous, there have been few books devoted solely to this subject matter.[8] For the most part this literature is made up of general discussion — listing the arguments, pro and con, and the rather casual conclusions of the author approving or disapproving of the system. Typically, the authors of such papers have been present or former prosecutors, judges, or lawyers who have had dealings with grand juries. Few social scientists have subjected the grand jury system to rigorous analysis and few researchers have carried out surveys aimed at gaining a greater understanding of how the grand jury process actually works.[9] This is unfortunate because such surveys could provide an overall picture of the system instead of a limited and perhaps biased sample of personal opinions and could begin to lay the basis upon which a more rigorous analysis of the system might be made.

In 1973, this author carried out a survey of Ohio judges and prosecutors. As seen above, criticisms aimed at the grand jury process cover a wide spectrum. The survey and this article, however, focus only upon several of those criticisms. The purpose of the survey was to gather a wide variety of information about grand juries in the state. Of particular interest was an examination of prosecutorial behavior in relation to grand juries and the indictment process, as well as the at-

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8. There are really only four noteworthy books devoted to the topic of grand juries: L. CLARK, *supra* note 6; G. EDWARDS, THE GRAND JURY (1906); M. FRANKEL & G. NAFTALIS, *supra* note 6; and R. YOUNGER, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941 (1963).

9. The first surveys carried out were those of Raymond Moley and Wayne Morse. See Moley, *supra* note 4, and Morse, *supra* note 4. Other, more recent, surveys of judges and prosecutors have been carried out in California, Iowa, and Virginia: *Evaluating the Grand Jury's Role in a Dual System of Prosecution: An Iowa Case Study,* 57 IOWA L. REV. 1354 (1972); *Some Aspects of the California Grand Jury System,* 8 STAN. L. REV. 631 (1956); and Whyte, *Is the Grand Jury Necessary?,* 45 VA. L. REV. 461 (1959). Gelber, *The Grand Jury Looks at Itself,* 45 FLA. B.J. 576 (1971), describes a survey of former grand jurors. It is only fair to add that there have been numerous notes and comments in law reviews subjecting court decisions relating to grand jury practices to critical analysis.

titude which prosecutors and judges in the state have toward the grand jury system.[10]

Several questions were included to ascertain whether or not prosecutors exert substantial control over the indictment process. Other questions were designed to reveal just how the respondents viewed the system. Also included were questions asking for background information such as the tenure of the respondent and the amount of time spent on various functions connected with the grand jury process. As will be seen in the concluding section, while some of the findings seem to confirm the critics' arguments, other findings raise some questions as to the validity of certain other criticisms. Before turning to the results of the survey, it is important, however, to describe the legal basis for grand jury operations in the state of Ohio.

II. THE OHIO GRAND JURY: SOURCE OF POWER AND NATURE OF THE INSTITUTION

Article I, section 10 of the Ohio state constitution states that:

> Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law.[11]

An important qualification to this requirement of a grand jury indictment in felony cases was created in 1959 when the Ohio General Assembly enacted section 2941.021 of the Ohio Revised Code which allowed a waiver of grand jury indictment under certain circumstances:

> Any criminal offense which is not punishable by death or life imprisonment *may* be prosecuted by *information* filed in the common pleas court by the prosecuting attorney *if* the defendant, after he has been advised by

10. It is possible that a survey of opinions held by other actors in the process, such as defense lawyers and grand jurors, may give a different picture of the workings of grand juries. The benefits of such a study cannot be denied and this interesting aspect of the issues surrounding grand juries is still open to study. However, the primary aim of this paper is to evaluate the frequent criticisms of the role of prosecutors vis-a-vis grand juries which have appeared in the literature on this subject. Since the responses by the prosecutors themselves might be deceptive or self-serving, an attempt was made to frame some of the questions in an indirect manner and also to use the responses given by the common pleas judges as an external check. For studies done in a similar way, see references listed in footnotes 3 and 8, *supra*.

11. OHIO CONST. art. I, § 10.

> the court of the nature of the charge against him and of his rights under the constitution, is represented by counsel or has affirmatively waived counsel by waiver in writing and in open court, *waives in writing and in open court prosecution by indictment.*[12]

This statute was held to be constitutional by the Ohio Supreme Court in the case of *Ex Parte Stephens* in 1960.[13]

Rule 7 of the Ohio Rules of Criminal Procedure (New Rules), "The Indictment and the Information," includes the right of waiver. The Rule provides that a felony which may be punished by death or life imprisonment shall be prosecuted by indictment whereas all other felonies shall be prosecuted by indictment unless a defendant, who has been advised by the court of the nature of the charge against him and of his right to indictment, waives that right in writing and in open court.[14]

Ohio Revised Code Chapter 2939 deals with the grand jury in detail and Rule 6 of the New Rules covers many of the same provisions, omits some, and includes some changes from the provisions of the Revised Code.[15] In the paragraphs below some of the major aspects of grand juries in Ohio are summarized.

The judge of the court of common pleas for each county, or the administrative judge of the general division in a multi-judge court of common pleas or a judge designated by him shall order one or more grand juries to be summoned at such times as the public interest requires.[16] There are to be nine members, including the foreman, and

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12. OHIO REV. CODE ANN. § 2941.021 (Page 1975) (emphasis added).

13. 171 Ohio St. 323, 170 N.E.2d 735 (1960). See Johnson & Ammer, *Waiver of Indictment by Grand Jury,* 35 OHIO B. 1 (1962), for a discussion of this case. There are seventeen states, including Ohio, which allow, by statute, a waiver of grand jury indictment. In most of these states, like Ohio, the right to waiver applies only to non-capital cases and some statutes require the presence of counsel, consent of the prosecutor, or a written waiver if the waiver is to be legitimate.

14. OHIO R. CRIM. P. 7(A). Rule 7(A) also stipulates that if there is a waiver, the offense may be prosecuted by information only if an indictment is not filed within fourteen days after the date of waiver. If neither an information nor an indictment is filed within fourteen days, the defendant is to be discharged and the complaint dismissed. Misdemeanors may be prosecuted by either an indictment or an information. *Id.*

15. The new Ohio Rules of Criminal Procedure [hereinafter referred to as the New Rules] became effective in July of 1973. For more detail on the changes, omissions, and possible inconsistencies between the Ohio Revised Code and the New Rules see K. APLIN, D. DOWD, B. GILDAY & B. METZ, 1 ANDERSON'S OHIO CRIM. PRAC. & PROC. (1979); and O. SCHROEDER AND L. KATZ, 2 OHIO CRIMINAL LAW AND PRACTICE (1974 & 1978 Cum.). The survey described here was carried out just before the time the New Rules became effective. However, the changes made by the New Rules are not seen as altering the significance of the questions or the results.

16. OHIO R. CRIM. P. 6(A). For a description of the manner for selecting both

not more than five additional atlernates.[17] The designation of nine jurors (and five alternates) is one of the major changes made by Rule 6 regarding the nature of the grand jury. Under the Revised Code there were fifteen jurors with only one possible alternate.[18]

The duty of the grand jury is specified in the Revised Code but not in Rule 6. Presumably section 2939.08 still is in effect: "After the charge of the court of common pleas, the grand jury shall retire with the officer appointed to attend it, and proceed to inquire of and present all offenses committed within the county."[19] Rule 6 does not include any provision regarding the qualifications or selection of grand jurors. Section 2939.02 provides that persons serving on grand juries are to be resident electors of the county and that they shall be selected from the persons whose names are contained in the annual jury list and from the ballots deposited in the jury wheel (or from names contained in an automated processing information storage device).[20]

The court may appoint any qualified elector or one of the jurors to be the foreman and one of the jurors to be deputy foreman.[21] The foreman has the power to administer oaths and affirmations and shall sign all indictments.[22] He or another juror designated by him will keep a record of the number of jurors concurring in the finding of every indictment and will, upon the return of an indictment, file the record with the clerk of courts.[23] This record is not to be made public unless so ordered by the court.[24] When the foreman is absent or disqualified, the deputy foreman will act as foreman.[25] Having a deputy foreman is a new element in Ohio grand jury procedures as is keeping a record of the number of concurring votes. The prosecutor, the witnesses under examination, interpreters when needed, and, for the purposes of taking evidence, a stenographer or operator of a recording device, may be present while the grand jury is in session.[26] Before Rule 6 became effective, there was no provision for a stenographer or operator of a recording device for Ohio grand juries. No person other than the jurors may be present while the panel is deliberating or voting nor may

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petit and grand jurors, see OHIO REV. CODE ANN. §§ 2313.03, .07, .08, .34 (Page 1954 & Supp. 1978).

17. OHIO R. CRIM. P. 6(A), (H).
18. OHIO REV. CODE ANN. §§ 2939.02, .031 (Page 1975).
19. *Id.* § 2939.08.
20. *Id.* § 2939.02.
21. OHIO R. CRIM. P. 6(C).
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. OHIO R. CRIM. P. 6(D).

their deliberations or individual votes be disclosed.[27] Other matters occurring before the grand jury may be disclosed to the prosecutor for use in the performance of his duties.[28] An indictment may be returned only upon the concurrence of seven or more jurors.[29] The indictment, which must be signed by the foreman or deputy foreman, is to be turned over to the judge of the court of common pleas and filed with the clerk of court.[30]

According to section 2939.21, grand juries in Ohio have one additional function. They have the duty to visit and report on the county jail three times during each term of court.[31]

Under the New Rules a preliminary hearing must occur, if at all, before a grand jury considers a case since once an indictment has been handed down there is to be no preliminary hearing.[32] Rule 5 states that at the preliminary hearing the prosecutor may, but is not required to, state orally the case for the State before he examines witnesses and introduces exhibits for the state.[33] Since the prosecutor does not have to disclose all or part of his case, he has great discretionary power to withhold certain aspects of the case from the accused.[34] The prosecutor, according to section 2939.12, may request subpoenas and thus has the power to determine on his own whom he wants subpoenaed

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27. *Id.* 6(D), (E).

28. *Id.* 6(E). Rule 6(E) also provides that:

> A grand juror, prosecuting attorney, interpreter, stenographer, operator of a recording device, or typist who transcribes recorded testimony, may disclose matters occurring before the grand jury, other than the deliberations of a grand jury or the vote of a grand juror, but may disclose such matters only when so directed by the court preliminary to or in connection with a judicial proceeding, or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

29. *Id.* 6(F).

30. *Id.* Rule 6(F) of the New Rules also stipulates that if a defendant is already in custody or has been released on bail and the grand jury does not return an indictment, the foreman must report this decision forthwith to the court.

31. OHIO REV. CODE ANN. § 2939.21 (Page Supp. 1978). Some states require much more of their grand juries: for example, inspection of county buildings, papers, and records; inspection of the offices, papers, books, accounts, and records of the clerk of courts; investigation of fraud or irregularities in the conduct of primary elections; appointment of the county board of education. *See* L. GROUT, HANDBOOK FOR GRAND JURORS OF GEORGIA (1970); S. MACCORKEL, THE TEXAS GRAND JURY (1966); Watts, *Grand Jury: Sleeping Watchdog or Expensive Antique?,* 37 N.C. L. REV. 290 (1959).

32. OHIO R. CRIM. P. 5(B) (1).

33. *Id.* The Rule does, however, require that the prosecutor must produce some evidence sufficient to support the charge.

34. *Id.* 5(B) (2).

before the grand jury.[35] There is no precise statutory language in Ohio which states that the prosecutor must prepare and present all cases bound over from a preliminary hearing to the grand jury, but this is apparently the practice. In addition, the prosecutor has vast discretionary powers in determining what other cases he will present to the grand jury. As one commentator has written about prosecutors in Ohio: "[I]n recognition of the fact that an action pending in a lower court for a preliminary hearing does not prevent the grand jury from taking action by way of indictment, the prosecuting attorney has great power with regard to management of felony prosecutions in the State of Ohio . . . ."[36] Since no preliminary hearing is to be held after indictment, a prosecutor could prevent preliminary hearings by encouraging grand juries to hand down indictments before the time limit for a preliminary hearing has expired.[37]

The prosecutor may also use the grand jury as an investigative body without leave of court.[38] He may use the grand jury to investigate criminal conduct in an effort to discover the extent of criminal activity in any area.[39] The jury may also be used to force reluctant witnesses to testify.[40] In addition, the jury may be used by the prosecutor as a tool for eliminating cases "to the extent that the grand jury will follow his recommendations, where he concludes that the evidence presented is insufficient to establish probable cause for indictment."[41]

III. THE SURVEY

In June of 1973 questionnaires were sent to all of the 88 county prosecutors and to all of the 182 judges of the common pleas courts. The wording and the number of questions differed slightly on the two sets of questionnaires but the subject matter was the same. Of the 88 county prosecutors receiving the "Prosecutor's" questionnaire, 59 (or 67%) returned completed questionnaires. Thus about two-thirds of the counties are represented. Of the 182 judges receiving the "Judge's" questionnaire, 105 (or 58%) returned completed forms. Since the counties of Ohio have different numbers of common pleas judges and

35. OHIO REV. CODE ANN. § 2939.12 (Page 1975). The grand jury or the judge may also request subpoenas. But neither the grand jury, prosecutor, nor judge needs to consult with the others about the need for specific subpoenas. *Id.*

36. K. APLIN, D. DOWD, B. GILDAY & B. METZ, 1 ANDERSON'S OHIO CRIM. PRAC. & PROC. § 14.3(b) (1979).

37. *Id.* (15 days after arrest or 5 days if the person is held in jail in lieu of bail).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

since several judges from identical counties replied, 63 counties are represented by the returned "Judge's" questionnaires. There were fourteen counties from which neither a judge nor a prosecutor responded.

Both questionnaires were four pages long. The prosecutor's questionnaire consisted of thirty questions while the judge's had twenty-six. For most of the questions, answers were limited to several listed choices, but some of the questions were open-ended so that respondents could answer in their own words. The questions can be divided into several categories: 1) background information about the respondents, how long they had held their positions[42] and, for the prosecutors, whether they had worked in the prosecutor's office prior to becoming the prosecutor[43]; 2) the nature of the contact the respondent had had with grand juries; 3) the amount of time taken for the performance of certain functions such as preparing and presenting charges to the panel, preparing and presenting cases, and the time taken by the grand jury to deliberate a case; 4) inquiries about how and how much information was given to jurors regarding their powers and duties, 5) questions asked of both prosecutors and judges which would give insight into the amount of control which prosecutors exert over grand juries and the indictment process; and 6) questions to assess the attitude which the respondents had toward the grand jury system in general.

A. The Judges

When a grand jury has been sworn in, the judge "charges" them as to their duties, responsibilites, and powers. Judges were asked how often, during the previous five years, they had delivered a charge to a grand jury. Out of 98 responses, the average number given was 8.55 (or 9) with a range of 0 to 30. The average time estimate for preparing the charge was 48 minutes. For presenting their charges, the average time estimate was about 33 minutes with a range of 0 to 2 hours.

Judges were also asked whether they ever gave copies of their charges to the grand jurors.[44] Table 1 below summarizes their responses:

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42. The average tenure of the prosecutors responding was 4.69 years (with a range of ½ to 18 years), and the average tenure of the judges responding was 8.65 years (with a range of 1 to 34 years).

43. Out of 59 responses by prosecutors, 30 (50.8%) said that prior to their present position they had been employed in the county prosecutor's office while 29 (49.2%) had not been.

44. It is interesting to note that in a California survey the results showed that in most counties the judges did give copies of their charges to the grand jurors. *See Some Aspects of the California Grand Jury System, supra* note 9, at 639.

Table 1: Giving copies of charge to jurors—judges

Response	Number	Percentage
Yes, always	6	6.1%
Very often	1	1.0%
Sometimes	2	2.0%
No, never	90	90.9%
Total	99	

Judges were also asked to list a number of points about the workings of the grand jury which they considered so crucial that they would include them in their charge. The three points listed most often (not in order of preference) were: secrecy, fairness and impartiality, and the nature of probable cause. Some of other points listed were; diligence, duty to protect the innocent, the investigative power, that the grand jury has accusatory powers only, and the standards of evidence. Table 2 summarizes the responses to a question asking whether the judges gave a copy of the Ohio Grand Jury Handbook to the jurors.[45]

Table 2: Giving handbook to jurors—judges

Response	Number	Percentage
Yes, always	36	37.1%
Very often	2	2.1%
Sometimes	8	8.2%
No, never	51	52.6%
Total	97	

Grand jurors may go to the judge for further information and clarification about their duties.[46] In response to a question on this subject, only 3% of the 98 judges who responded said that the jurors came *very often.* Answers of *sometimes* and *never* were given by 52% and 45% of the judges respectively.

45. The Ohio Grand Jury Handbook, published by the Ohio Judicial Conference, outlines some historical background of the institution, its nature, organization, oath of officers, procedures, secrecy and protection of grand jurors. The role of the prosecutor is also discussed.

46. In a survey carried out in Iowa it was found that jurors "infrequently" or "very infrequently" asked the court for advice. *See Evaluating the Grand Jury's Role in a Dual System of Prosecution: An Iowa Case Study, supra* note 9, at 1369.

The questions discussed above get to the heart of the judge's contact with grand juries. The relationship is not a very intimate one; it is limited to giving a charge and occasionally giving further information to the jurors upon request. Considering that several grand juries met each year, the average number of charges given by the judges over the previous five years (9) along with the average time of one-half hour to present the charge, indicated that most judges did not have a great deal of contact with grand juries.

Another area in which judges might be able to inject some personal control and interest into the proceedings is that of selecting the foreman of the panel. Since judges have this power, two questions were asked regarding their selection process. One question asked them to list two or three qualities which they thought to be most important when selecting a foreman.The responses given most often (not in order of preference) were: leadership, common sense, and intelligence. Some of the other qualities listed were: conscientious, public spirited, backbone, business sense, good citizen, ability to follow instructions, no expertise in the law, articulate, integrity, community representative, and honesty. Table 3 summarizes the responses to the second question about how the judges actually selected the foreman.

Table 3: Selecting the Foreman—judges

Response	Number	Percentage
Selected a qualified elector whose name is not included in the annual jury list	39	39.4%
Select a qualified elector whose name is deposited in the jury wheel	6	6.1%
Select from those already selected to sit on the grand jury for the term	50	50.5%
Grand jury selects own	1	1.0%
Both 1 and 3 above used	3	3.0%
Total	99	

What is interesting to note in table 3 is that half the judges indicated that they did pick foremen from those already seated as grand jurors. This is obviously the most efficient method of selecting a foreman, for to do otherwise means independent research on the part

of the judge or his staff in order to find an available person. Still, a considerable percentage, 45.5% (if the responses to the first two categories are combined) were willing to make the effort to find a qualified foreman outside the actual jury members, and of those, the vast majority said they picked someone who was not even included in the jury list. Whether such judges saw this method of selection as maintaining a certain amount of control over the grand jury process is a question which was not pursued. But quite clearly a large number (39.4%) felt it was worth the extra effort to name an individual who was not even on the jury list. It is possible these judges felt that, by appointing a person who was more highly qualified than the average, randomly-selected, juror they were helping the proceedings achieve a high standard.

B. The Prosecutors

In contrast to the judges the prosecutors have a very intimate relationship with the grand jury. It is probably fair to say that for almost all of the time that the grand jury is meeting, the prosecutor (or his assistant) is there or nearby.[47] As with the judges, prosecutors were asked in what ways they prepared the jurors for their duties and powers. Two (3.4% out of 59) said that they relied only upon the Handbook; 48 (81.4%) said they relied on verbal instructions given by themselves and the judge; and 9 (15.3%) said they used both verbal instructions and the Handbook. If these responses are combined with those of the judges concerning the practice of providing jurors with the Handbook and copies of the charges, it may be concluded that little reliance was placed upon the written word in explaining to the jurors their duties and powers. The responses of both judges and prosecutors suggested that either the initial instructions by the judge in the charge and by the prosecutor were considered sufficient in outlining the duties, powers, and procedures, or, that once the grand jury was functioning, the jurors tended to rely a great deal upon the prosecutor for legal instructions. As seen, jurors did not return to the judge frequently.

The most important function which the prosecutor has in his relationship with the grand jury is that of presenting cases for their consideration. Several questions were asked of the prosecutors about the performance of this function. A first question asked was whether the prosecutor or an assistant usually presented cases. Out of 59 responses

47. For an illuminating discussion of the relationship between the prosecutor and the grand jury see: *Grand Jury Proceedings: The Prosecutor, the Trial Judge and Undue Influence, supra* note 4; Johnston, *supra* note 4; and Thompson, *supra* note 3.

44 (74.6%) said that the prosecutor usually presented cases, 5 (8.5%) said that an assisant usually did it, while 10 (16.9%) indicated that both prosecutor and assistant usually presented cases. A second question asked of the prosecutors involved a time estimate for preparing cases before presenting them to the grand jury. The average time estimate was 165.86 minutes or about 2 ¾ hours. So that a comparison might be made with the time taken to process cases by information, prosecutors were also asked how long they took to prepare and file an information in felony cases. The average time estimate given in response to this question was 98.1 minutes or 1 hour and 38 minutes, that is, a little bit more than half the time taken to prepare a case for presentation to a grand jury.

When asked how long they took in actually presenting a case to the jury, the average estimate was 60.89 minutes or 1 hour. Prosecutors were also asked to estimate the time spent by the juries themselves in deliberating each case. The average estimate was 23.03 minutes with a range of 3 minutes to 1 hour and 32 minutes. By combining the times given for preparation, presentation of cases, and grand jury deliberation time, the average time taken per case was about four hours and eight minutes. This, then, was the average time taken to indict or not to indict. The time required for an indictment is clearly greater than the time necessary for an information thus substantiating the critics' argument that the grand jury system is slower and more expensive than the information process.

Information was requested of prosecutors regarding the calling of witnesses and the length of time the juries were in session. All 59 prosecutors said that they did call witnesses when presenting a case to the grand jury. The average number of witnesses called was 4.9 (or 5) with a range of 1 to 30. Grand juries in the state met, on the average, 4.91 (or 5) days per term (or 16 days per year).

C. Control Exerted over Grand Juries and the Indictment Process

One group of questions asked of the prosecutors was designed to gain insight into their behavior in relation to grand juries and the indictment process. The purpose was to determine the degree of control which the prosecutor exerted in this area. If criticisms of prosecutorial behavior are valid, then it would be expected that prosecutors would exercise a high degree of control over grand juries. Judges were asked some questions, similar to those asked of the prosecutors, to determine their estimate of the level of prosecutoral control.

Prosecutors were first asked how they would handle a case which they felt should be no-billed. They were asked to imagine that the evidence was not sufficient to warrant an indictment even though the

case was before the grand jury. The question was asked in this manner, rather than asking what they would do if they favored a true-bill, because it was assumed that the prosecutor would find it easier to express his desire for a true-bill than for a no-bill. The prosecutor might hesitate to influence the grand jury directly by saying that they should not indict or he might try to act the same as he did in cases where he favored the opposite result. But since he is the one who must argue the state's case before the court if the case goes to trial, he might have good reason to stop weak cases from ever getting past the grand jury. A successful prosecutor's reputation is built, to a large extent, on the number of cases he wins at trial. Therefore, the way a prosecutor responded to this question would give an indication of the amount of control which he attempted to exert over the grand jury. It was further assumed that a prosecutor who attempted to exert control would be more likely to strongly advise the grand jury that there should be a no-bill while the prosecutor who did not attempt to exert control would tend to keep his opinion to himself. Table 4 shows how the prosecutors responded to the question: "Suppose you must present a case to the grand jury which you think should be 'no-billed.' Which of the following would you be most likely to do?"

Table 4: Responses to question about no-bill—Prosecutors

Response	Number	Percentage
Strongly advise a "no-bill" to the grand jurors	10	16.9%
Indicate your opinion as indirectly as possible	27	45.8%
Keep your opinion to yourself	10	16.9%
Other	12	20.3%
Total	59	

As can be seen, only 16.9% of the prosecutors selected the category which would indicate the strongest control exerted over the grand jury. However, only 16.9% selected the category which would indicate an unwillingness to exert any control. Most of the respondents fell into the middle range category which seems to suggest that there was at least a minimal effort on the part of the prosecutors to appear as impartial as possible.[48]

48. In response to this queston twelve prosecutors selected the "other" response. Of these twelve, eleven gave reasons why they did so. The reasons they gave make it

Judges were asked to evaluate prosecutorial behavior with a similar question. Their responses about how they thought prosecutors would behave if favoring a no-bill are given in table 5.

Table 5: Responses to question about no-bill—Judges

Response	Number	Percentage
Strongly advise a no-bill to the grand jurors	27	30.7%
Indicate his opinion as indirectly as possible	38	43.2%
Keep his opinion to himself	13	14.8%
Other	10	11.4%
Total	88	

As can be seen by a comparison of the prosecutors' and judges' responses, the proportion of judges selecting the "strongly" category was almost twice that of the prosecutors: 30.7% of the former and 16.9% of the latter. The proportion of judges who selected the "indirect" category was smaller than the proportion of prosecutors selecting that response by about 2%, and the difference was again about 2% less for the judges selecting the "keep to himself" answer. While the most significant difference between the two groups was quite clearly in the judges' perception that prosecutors would strongly advise a no-bill, its seems that on the whole, the judges and prosecutors had similar perceptions about the way in which the prosecutors behaved. The majority of both groups felt that the prosecutor would be indirect

possible to reassign them to one of the other choices given for that question. The result is that an additional 2 fall under the "indirectly" category, an additional 4 fall under the "keep to self" category, and an additional 5 fall under the "strongly advise" category. The new totals are, then, 15 selecting the "strongly advise" answer, 29 selecting the "indirectly" response, and 14 falling under the "keep to self" answer. Since one prosecutor did not give a reason the total number of prosecutors is 58. This reassignment does not, however, change the proportion of prosecutors selecting the various responses significantly. In table 4 the largest percentage of prosecutors selected the "indirectly" category and the percentage selecting "strongly advise" or "keep to self" was identical. There is a very similar division when considering the percentages derived from the reassigned responses:

Response	Number	Percentage
Strongly advise a "no-bill" . . .	15	25.9%
Indicate indirectly . . .	29	50.0%
Keep to self . . .	14	24.1%

or keep his opinion to himself. A total of 62.7% of the prosecutors and a total of 58% of the judges selected these two answers.

A second question involving the relationship between the prosecutor and the grand jury concerned the rate of disagreement between them. Respondents were given six ranges of possible disagreement and asked to select the one which represented the rate of disagreement they had experienced. This question was included because the disagreement rate which a prosecutor had with the grand jury decision to indict or not to indict would indicate whether he was exerting effective control. The assumption underlying the question was that the more disagreement a prosecutor had, the less control he would be exerting; whereas a prosecutor with a lower disagreement rate would be exerting more control. This is a point which is raised by critics of the grand jury system who argue that the reason that prosecutors and grand juries always agree on whether an indictment should issue, is because the prosecutor is controlling the grand jury.[49] Judges were also asked to estimate the disagreement rate between prosecutors and grand juries. Table 6 shows the possible ranges of disagreement rates and the number and percentages of prosecutors and judges who selected them.

Table 6: Disagreement rates—Prosecutors and Judges

	PROSECUTORS		JUDGES	
Response	Number	Percentage	Number	Percentage
Less than 5% of the time	44	74.6%	62	70.5%
5-10% of the time	8	13.5%	15	17.0%
10-15%	5	8.5%	5	5.7%
15-20%	1	1.7%	3	3.4%
20-25%	1	1.7%	3	3.4%
25-30%	0	0	0	0
Other	0	0	0	0
Total	59		88	

What is clear from the above table is that the proportion of judges estimating a disagreement rate of less than 5% was only slightly lower than the proportion of prosecutors selecting the same response. If the

49. The basis for the argument that high agreement rates indicate control by the prosecutor is found in the Moley and Morse studies, *supra* note 4. The fact that out of 6,453 cases (those where the prosecutor indicated an opinion on the case) the prosecutors disagreed with the final outcome in only 348, or 5.39% of the cases, indicated to the authors that the juries were dominated by the prosecutors.

assumption about the relationship between control exerted and rate of disagreement has merit, a large number of prosecutors indicated a high degree of control since almost 75% selected the lowest disagreement rate group. However, it should be pointed out that reliance on disagreement rates alone as a sign of control would be misleading. High agreement might simply mean that police, prosecutors, and judges have weeded out the weak cases before the grand jury stage.[50] This does not mean that disagreement rates ought to be disregarded. While it is unlikely that agreement on case outcomes results solely from the prosecutor's control, it is likely that his effort at persuasion is not a negligible factor. Low disagreement rates demonstrate, at the very least, that prosecutors and jurors tend to come to the same conclusions about the existence of probable cause. The results shown in table 6 do confirm those critics who claim that there is low disagreement between prosecutors and grand juries, at least in the state of Ohio. It is interesting to note how similar the percentages of judges and prosecutors selecting the various disagreement rates were.

A third question relating to the control issue asked for the frequency with which a prosecutor resubmitted cases, which had already been no-billed, to the same or a subsequent grand jury.[51] Some cases are undoubtedly resubmitted because new evidence comes to light. However, the assumption underlying this question was that there were times when a prosecutor, who felt strongly about a case, might try to get an indictment by bringing the case up again. It was assumed, therefore, that the more often the prosecutor resubmitted cases, the more control he was attempting to exert. This assumption appears to conform with assumptions made by some critics that since the prosecutor could, and did, resubmit cases he had great discretion and control over the process.[52]

As seen in table 7, none of the prosecutors selected the "frequently" category. Interestingly enough, none of the judges who estimated resubmission by prosecutors thought it was done frequently. Table 7

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50. *See, e.g.,* Johnston, *supra* note 4.

51. In the Iowa study, it was found that most prosecutors agreed with decisions by the grand juries to no-bill and thus rarely resubmitted such cases. *Evaluating the Grand Jury's Role in a Dual System of Prosecution: An Iowa Case Study, supra* note 9, at 1369.

52. See, for example, Coats, *supra* note 4, in which the author argues that since the prosecutor has control over a case even after the grand jury has acted, the grand jury is in reality of little use. The prosecutor can not only resubmit a case but can also ask for a *nolle prosequi.* Thus the conclusion can be reached that the prosecutor has control over the entire indictment process. However, it could be argued that the very fact that resubmission was necessary demonstrates that the prosecutor was unable to exert effective control during his earlier attempt to get an indictment by the grand jury.

also shows, however, a large discrepancy between the prosecutors' selection of the two other categories and the judges' selection. If the assumption about the relationship between control and the resubmission of cases has any validity, then it is clear that the judges perceived prosecutors as attempting more control than did the prosecutors themselves.

Table 7: Resubmission of cases to grand jury after a previous no-bill—Prosecutors and Judges

	PROSECUTORS		JUDGES	
Response	Number	Percentage	Number	Percentage
Frequently	0	0	0	0
Sometimes	16	27.6%	56	57.7%
Never	42	72.4%	41	42.3%
Total	58		97	

A final question asked of both prosecutors and judges regarding the "controlling" behavior of prosecutors concerned the submission to a grand jury of cases which had already been dismissed by a magistrate at a preliminary hearing. It was assumed that the more often such cases were submitted to grand juries, the more control the prosecutor was attempting to exert over the indictment process. Table 8 compares the answers of both sets of respondents.

Table 8: Submission of cases to grand jury which have been dismissed at a preliminary hearing—Prosecutors and Judges

	PROSECUTORS		JUDGES	
Response	Number	Percentage	Number	Percentage
Frequently	0	0	10	10.1%
Sometimes	36	62.0%	61	61.6%
Never	22	37.9%	28	28.3%
Total	58		99	

While none of the prosecutors selected the "frequently" category, 10.1% of the judges did so. This would indicate that at least a small proportion of the judges saw prosecutors as exerting control over the indictment process in this respect. It is interesting to note that the proportion of judges and prosecutors selecting the "sometimes" category was almost identical. Quite clearly a majority of judges and prosecutors agreed that the submission of these cases occurred only sometimes.

On the whole, the responses to these questions dealing with the issue of control suggest two conclusions. First, the prosecutors do not indicate that they attempt to exert great control over the indictment process or the grand juries themselves. Secondly, while the judges tend to view the prosecutors as attempting more control than the prosecutors admit to, the judges' responses are not so very different from those of the prosecutors. This suggests that both prosecutors and judges in Ohio view the relationship between the prosecutor and the grand jury and indictment process in very similar terms. Thus, it would appear that prosecutors in Ohio do not demonstrate the high levels of control which critics of the grand jury system see as a major characteristic of the relationship between prosecutors and grand juries in general. The only question (and the responses to it) which might indicate high levels of control is the one about disagreement rates.

D. The Frequency of Presentments

One of the criticisms against grand juries is that, as a consequence of prosecutorial domination, grand juries seldom, if ever, perform the independent function of initiating accusations on their own. It is interesting to note that in Ohio both the judges and prosecutors agreed that grand juries do not frequently initiate presentments.[53] Only one prosecutor and one judge said that they did so frequently. Of the prosecutors, 22% said that this occurred "sometimes" while 45.1% of the judges selected the "sometimes" category. 76.3% of the prosecutors and 53.9% of the judges said that it "never" occurs. This discrepancy between the responses of the judges and prosecutors to the "sometimes" and "never" categories may be due to the fact that the judges had had a longer tenure and had at some time in their careers known of presentments.[54] In any event, the criticism that grand juries fail to initiate presentments seems justified, at least in Ohio, although the questionnaire did not attempt to elicit information as to the cause of this failure.

E. Visiting and Reporting on the County Jail

According to Ohio law (Revised Code 2939.21), grand juries in each county have the duty to visit and report on the conditions of the

53. The Iowa survey indicated that "few Iowa grand juries independently perform the special investigative duties assigned to them by statute." *Evaluating the Grand Jury's Role in a Dual System of Prosecution: An Iowa Case Study, supra* note 9, at 1364. In two-thirds of the counties surveyed, the grand juries had not initiated such an inquiry within the previous five years. In California, only fifteen instances of independent investigations had occurred in 1955. *Some Aspects of the California Grand Jury System, supra* note 9, at 643.

54. See note 42 *supra* for the tenure of the respondents.

county jail. The report is to be made in writing and turned over to the court of common pleas. Both prosecutors and judges were asked about the grand juries' performance of this duty. As seen in table 9, only one prosecutor selected the "usually" category, while four judges selected that response in answer to a question as to whether the juries did, in fact, visit jails. It should be added that this one prosecutor came from the same county as one of those judges and that the judge was the only judge serving the common pleas court in that county. Thus it would seem that in one county there was agreement between prosecutor and judge that the grand jury did not always fulfill its legal obligation. In addition, two of the other judges selecting the "usually" category came from the same county although the other judges from that county who responded to the question selected the "always" response.

Table 9: Visiting and reporting on the county jail—Prosecutors and Judges

	PROSECUTORS		JUDGES	
Response	Number	Percentage	Number	Percentage
Always	58	98.3%	99	96.1%
Usually	1	1.7%	4	3.9%
Total	59		103	

Both prosecutors and judges were asked to estimate the time taken by the grand jury to visit and write up the report. The average estimate by the prosecutors was that the visit took one hour and 17 minutes, while the average estimate of the judges was slightly longer: one hour and 39 minutes. The time taken to write the report was estimated by the prosecutors to be, on the average, 35 minutes, while the judges felt it took, on the average, about twice as long (1 hour).

Since the written report on the county jail is to be turned over to the common pleas court, judges were asked to characterize and describe the reports they had seen. This was an open-ended question which allowed the judges to answer in their own words. Out of 98 judges responding to this question, 51 (or 52%) said that the reports were good, 19 (19.4%) said they were fair, and 9 (or 9.2%) claimed they were poor. However, 19 judges (19.4%) gave a different type of response. These respondents apparently interpreted the question as asking what conditions were found in the county jail and they made such comments as "always recommends new jail — this recommendation has been made every term for 50 years." From the responses to questions regarding the duty of grand juries to visit and report on county jails, it seems fair to conclude that in Ohio the panels did perform their duty and, on the whole, submitted competent reports.

F. *Attitudes of Judges and Prosecutors Toward the Grand Jury Process*

A final set of questions included on both sets of questionnaires centered around the attitude which the respondents had toward the grand jury system in general. The three "attitude" questions were identical for both judges and prosecutors. The first question asked the respondents to imagine that they were defense attorneys giving advice to arrested persons and to indicate how often they would advise a waiver of a grand jury indictment in favor of an information. An open-ended follow-up question was provided so that they could explain their answers. The second question asked respondents to indicate whether they felt grand juries tended to over-indict, under-indict, or neither or these. The final question was an open-ended evaluation of the grand jury process.

It was assumed that the more often the respondent advised a waiver, the more likely it was that he had some reservations about the grand jury process. Similarly, if the respondent selected the "over-indict" or the "under-indict" category, it would indicate that he saw something amiss in the process. Over-indicting would indicate that grand juries are not being selective in weeding out those cases where there is not probable cause, while under-indicting would suggest that the panels too easily dismiss cases which ought to be brought to trial. Table 10 compares the answers of prosecutors and judges on the

Table 10: Advising a waiver of indictment—Prosecutors and Judges

	PROSECUTORS		JUDGES	
Response	Number	Percentage	Number	Percentage
Very Often	11	20.2%	13	14.3%
Often	18	32.7%	24	26.4%
Not very often	23	41.8%	44	48.4%
Never	3	5.5%	10	11.0%
Total	55		91	

Table 11: Grand Juries tend to—Prosecutors and Judges

	PROSECUTORS		JUDGES	
Response	Number	Percentage	Number	Percentage
Over-indict	9	15.5%	38	38.8%
Under-indict	2	3.4%	1	1.0%
Neither	47	81.0%	59	60.2%
Total	58		98	

waiver question. Table 11 compares answers on over-indicting or under-indicting.

In answering the question about advising a waiver, considerably fewer judges selected the "very often" and "often" categories (a combined percentage of 40.7%) than did prosecutors (a combined percentage of 52.9%). The prosecutors were fairly evenly divided between the first two categories and the last two categories: a total of 52.9% in the former and 47.3% in the latter. However, the difference in the judges' responses was considerable, with 40.7% picking the first two responses and the much larger (59.4%) proportion falling in the last two categories. This clearly indicated some difference in the perceptions of the prosecutors and the judges regarding the benefits of waiver and their attitudes toward the grand jury system. Prosecutors, as compared with judges, favored advising a client to waive the grand jury indictment. Only 5.5% of the prosecutors, as compared with 11% of the judges, said they would never advise a waiver. This would seem to indicate that the prosecutors saw benefits from bypassing the grand jury. Interestingly enough, however, the responses to the open-ended question asking respondents to explain their answers were similar for both sets of respondents. The most frequent response given by respondents who selected the "very often" or "often" categories was that waiver saved time. Those who answered that they would seldom, if ever, recommend waiver most often gave as their reasons the possibility of a no-bill or the usefulness of the time delay. This latter response is a very interesting one because it demonstrates that while some saw the time delay as a serious fault of the grand jury process, others viewed it as a possible benefit to defendants.

It is noteworthy that a considerably larger proportion of judges thought grand juries tended to over-indict: 38% of the judges selected this category as compared with only 15.5% of the prosecutors. Of the judges, only 1% selected the under-indict answer while a slightly higher proportion (3.4%) of the prosecutors did so. This suggests that judges, who see the outcome of cases coming to trial, apparently felt that grand juries tended to indict without probable cause — which resulted in not guilty verdicts. Also, the larger percentage of prosecutors who selected the under-indict category indicated that they felt that more cases ought to have resulted in indictments. However, in both groups the overwhelming majority selected the "neither" response. Thus, the majority saw the grand jury as properly indicting where there was probable cause and refusing to indict where there was not. The difference between the two groups is significant, however: 81% of the prosecutors and 60% of the judges selected "neither." Fewer judges were willing to see the grand jury as successfully "weeding out" cases which

did not warrant an indictment. In this respect, the judges demonstrated greater dissatisfaction with grand juries than did the prosecutors.

The final question asked of both prosecutors and judges dealt with their evaluation of the grand jury system. Although some declined to respond to this open-ended question, answers received ranged from a few words to several typewritten paragraphs. The responses were coded into three categories: a negative attitude, a positive attitude, and a positive attitude but with some qualifications. The results are tabulated in table 12.

Table 12: Evaluation of the Grand Jury system—Prosecutors and Judges

	PROSECUTORS		JUDGES	
Response	Number	Percentage	Number	Percentage
Negative	8	14.3%	17	20.0%
Positive	38	67.9%	45	52.9%
Positive, but with qualification	10	17.9%	23	27.1%
Total	56		85	

The judges as a whole were more negative about the grand jury system than were the prosecutors. First, 20% of the judges who responded gave negative answers to the evaluation question, as compared with 14.3% of the prosecutors. Second, a higher proportion of judges than prosecutors gave a "positive, but with qualifications" response (27.1% of the judges as compared with 17.9% of the prosecutors). Those who fell into the positive, but with qualifications category were characterized by an approval of the system combined with an awareness of some problems.[55] The majority of prosecutors

55. Some examples of the positive, but with qualification responses are: Judge: "The system is right but much improvement is needed."

Judge:

The Grand Jury System is useful in eliminating a number of cases which would be unwise to pursue for a variety of reasons. In my opinion, however, the same function could be performed either at the lower Court level where presently most magistrates bind cases over without much real attempt to judicious selection or by the prosecuting attorney.

Prosecutor:

In certain types of cases the grand jury is almost essential. . . . In other types of cases which are routine and the evidence is certain, the grand jury system merely delays the expedient disposition of the case. Often, defense counsel are aware of this fact and waive presentment of the matter to the grand jury and take the matter directly into the common pleas court. I think that in these matter the unnecessary delays would be a miscarriage of justice if they were required to go through grand jury.

and judges in Ohio, however, had favorable attitudes toward the grand jury system. For many prosecutors, the grand jury was seen positively because they viewed it as a tool for the testing of their cases and for gathering evidence.[56]

III. CONCLUSION

The results of the survey do confirm several criticisms which have been made of the grand jury system. First of all, in Ohio, the time taken for an indictment is clearly longer than the time taken for an accusation by information. The time the prosecutor takes to prepare his case for an information was a little more than half the time taken to prepare a case for the grand jury. When the prosecutor's presentation time and the deliberation time of the panel are taken into account, the difference is even greater. It should be recalled, however, that a frequent reason given by prosecutors and judges in explaining why they would not advise a client to waive a grand jury indictment was the usefulness of a time delay. This suggests that perhaps time delays may be of more benefit to defendants than has been commonly thought.

A second criticism which seems to be confirmed is that grand juries do not initiate independent action leading to presentments. However, since a fairly large proportion of judges (45.1%) indicated that this does occur "sometimes," it may be that presentments have occurred more often in Ohio than in those states (or federal jurisdictions) observed by critics.

Some data also supports the idea that there is a high level of agreement between prosecutors and grand juries. As seen, the overwhelming majority of judges and prosecutors estimated that the disagreement rate was less than 5%. This figure is quite similar to that found by Wayne L. Morse in his classic study of 1931, *A Survey of the Grand Jury System*, and his disagreement rate of 5.39%[57] is often cited by critics.

There are, however, several findings which may be viewed as rebutting some of the criticisms. As already mentioned, there are critics who

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56. A number of prosecutors clearly saw the grand jury as a tool for them. Some examples of such responses are: *Prosecutor:*

> [I]t provides a sounding board for us. We can tell from the presentation of our case whether or not a jury would be receptive to our arguments. Receiving a negative reaction from the Grand Jurors may indicate to us that we need to beef up our case or to accept a plea to a lesser charge, even if they return a true bill. Second, it forces us to prepare the case well in advance of trial.

Prosecutor: "I use them as a sounding board. I present my evidence in the same manner as if it were a trial. I know their reactions will be similar to a petit jury. They often ask questions I never think of." *Prosecutor:* "I would say that the Grand Jury is very useful in testing the local reaction to certain crimes . . . ."

57. Morse, *supra* note 4, at 153.

argue that prosecutors prefer the information system over the grand jury indictment process, but this is not borne out by the results of the Ohio survey. In response to the evaluation question, a large majority of the prosecutors (67.9%) clearly reacted to the grand jury in a positive manner. Even among the judges, a majority favored the system (52.9%). If the other two attitude questions are also taken into account, it is even clearer that the prosecutors of Ohio favor the grand jury system. Most of them said that, when imagining themselves as defense counsel, they would advise a waiver "not very often" and the vast majority of them said that the grand jury neither over-indicts nor under-indicts.

What may be most controversial, in terms of the on-going debate about grand juries, is the conclusion reported earlier that prosecutors in Ohio do not demonstrate high levels of control. This is a conclusion which seems to contradict many critics' view that great control is exerted. There are several comments which may be offered with respect to this apparent contradiction. First, there might be a real difference between the behavior of prosecutors on the federal level and those on the state-county level. Federal prosecutors may have to deal more often with cases having political overtones and such cases are the type where "control" seems most onerous. Historically, grand juries have developed a reputation as bodies whose function is to protect individuals against charges which are purely political in nature. The cases of abuse of the grand jury system in the late 1960's and early 1970's illustrate how federal prosecutors can be used by other governmental officials to prosecute (or at least harass) their political opponents. It has been upon these federal prosecutors that critics have focused their attention.

In the Ohio survey reported here, the estimate of the level of prosecutorial control was made by asking questions of the prosecutors themselves and there might be some question about the reliability of the answers. However, the judges did not give completely different responses. Had all the judges indicated that they felt that there were high levels of control, in comparison to a low number of prosecutors, there might be cause to question the trustworthiness of the prosecutors' answers. As it was, however, there was some spread among the prosecutors' responses. There was also diversity in the answers given by the judges — and the overall results of both groups were essentially similar on the "control" questions.

Much of the criticism of prosecutorial control of grand juries has been made by former or present prosecutors who "admit" to the control they exerted. This sample may, however, be somewhat biased.

There are undoubtedly many prosecutors who could honestly say that they do not exert a high level of control.

It should also be noted that critics of the grand jury system have not really come to grips with the concept of control. The prosecutor's reputation and job depend, to a large extent, upon his ability to win cases on the state's behalf. Therefore he has every reason to want indictments only where there definitely is probable cause in order to avoid having to prosecute cases which he thinks are weak. Critics appear to feel that such interests ought not to enter into the picture and that, if they do, the prosecutor is, necessarily, trying to control the panel. But perhaps it is reasonable to see the prosecutor's role as one of persuading the grand jury of the strength or weakness of cases. Of course, persuasion may be seen as control, but normally it is not. Control implies an element of coercion. Critics argue that the grand jury proceeding is not an adversary one; that material should be presented impartially to the panel; and that persuasion is improper in the grand jury room. To deny, however, that the prosecutor has a legitimate interest in the outcome is to overlook an important dimension in the entire process. To hope for a completely impartial prosecutor is perhaps unrealistic. And, the fact that the prosecutor may attempt to persuade the grand jury does not necessarily mean that he "controls" them. There is obviously a fine line to be drawn in determining the point at which persuasion becomes undesirable control.

For persuasion to have meaning one usually assumes two fairly equal parties: that is, equal in significance, training, or interest. Persuasion ends and control sets in when the two parties are unequal. The relationship between the prosecutor and the grand jury is, perhaps, an odd mixture of the equal and unequal. By tradition, the grand jury is as important as the prosecutor (perhaps more so) in the indictment process. On the other hand, there is no question that the jurors do not have the training or, probably, the interest that the prosecutor has. These factors indicate that it is no simple matter to determine whether prosecutors are normally persuading (*i.e.*, inducing the jurors to take a particular course of action) or controlling (*i.e.*, dictating the action).

As already noted, there have been Congressional hearings on the question of grand jury reform and several bills have been introduced in Congress which include a wide variety of proposals. One provision of several bills deals with the manner in which federal grand juries are to be informed of their duties and powers.[58] The assumption underlying

58. In H.R. 1277 it is stipulated that the court must inform the grand jury of its power to inquire into federal offenses committed, to conduct independent inquiries, to subpoena witnesses, documents, etc. H.R. 11660 has the same provision as H.R. 1277

these provisions is that grand juries are not properly informed of their duties and powers and that, if they were, they would be better able to function as independent bodies. It is interesting that responses to several questions included in the Ohio survey indicated that little reliance was placed upon the written word to explain to Ohio grand juries their duties and powers. Few judges ever gave copies of their charges to the jurors and the majority of judges said that they did not give the jurors the Grand Juror's Handbook. Whether Ohio grand juries are adequately prepared for their job is a question which cannot be answered at this time, but it may be suggested here that clear instructions as to how the jurors are to be informed of their duties and powers are needed so that there is some uniformity across the state. Clearly informing the jurors of their powers and duties would tend to reduce those "unequal" aspects of the relationship between prosecutor and panel which were alluded to above. If it is assumed, as many critics appear to assume, that the ability of grand juries to perform independently is directly related to the amount of control which prosecutors exert, the indications are that, in Ohio, grand juries cannot simply be characterized as rubber stamps. It would seem from the results of the survey that prosecutors in Ohio do not exert so much control that the independent nature of the panels is destroyed. Whether the members of Ohio grand juries show great spirit and independence during their service is another question, of course. Do they, on the whole take part in the proceedings in an intelligent manner? Do they really try to consider the evidence presented by the prosecutor in an independent way? These are questions which cannot be answered at this time. However, given the concurrence of the prosecutors' and judges' views that prosecutors are not exercising great control over grand juries, the jurors in Ohio have at least not been deprived by prosecutors of the opportunity to behave intelligently and independently and to carry on their tradition as "people's panels."

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but stipulates that a written notice is required and that failure to notify may be the basis for the quashing of an indictment. H.R. 6006 includes the same provision as H.R. 11660 but does not require the notice to be in writing. H.R. 6207 states that the government must notify the grand jury of its intent to indict an individual and of the panel's right to subpoena that individual. *See Federal Grand Jury, supra* note 3, at 306, 532-87.