# The Federal Grand Jury is the 4th Branch of Government

by Leo C. Donofrio, J.D. January 22, 2009

About the Author - Mr. Leo Donofrio is a semi-retired New Jersey attorney who brought a case in 2008 against the New Jersey secretary of state for allowing three legally unqualified presidential candidates to be placed on the general election ballot in that state. This case was reviewed and dismissed by the Supreme Court of New Jersey, and then was reviewed by all nine justices of the U.S. Supreme Court in aprivate closed-door session. At least five of the nine U.S. Supreme Court justices felt that this case should not be heard in a public session of the Court. In addition to being a prominent legal scholar and essayist, Mr. Donofrio is also a nationally known chess champion, poker champion and musician.

All of us may one day serve as grand jurors in federal court, and I hope this article will educate the reader to his/her true power as granted by the Constitution. For that power, despite having been hidden for many years behind the veil of a legislative fraud, still exists in all of its glory in the 5th Amendment to the Constitution. The US Supreme Court has confirmed and reinforced that power. So please, copy this report and paste it far and wide. It is not spin. It is not false. It is not for sale, it is not copyrighted by me, so paste and quote it freely. This report is the truth and we need truth, now, morethan ever.

The Constitutional power of "we the people" sitting as grand jurors has been subverted by adeceptive play on words since 1946 when the Federal Rules of Criminal Procedure (FRCP)were enacted. Regardless, the power I am going to explain to you still exists in the Constitution, and has been upheld by the United States Supreme Court despite the intention of the legislature and other legal scholars to make our power disappear with a cheap magic trick. Repeat a lie with force and repetition and the lie becomes known as truth.

In the case of the 5th Amendment to the Constitution, the power of the grand jury, to return "presentments" on its own proactive initiation, without reliance upon a US Attorney to concur in such criminal charges, has been usurped by an insidious play on words. Most of this article is going to quote other scholars, judges and legislators as I piece together a brief but thorough history of the federal grand jury for your review. But the punch line is my personal contribution to the cause:

**UNITED STATES CITIZENS SITTING AS FEDERAL GRAND JURORS ARE THE FOURTH BRANCH OF THE UNITED STATES GOVERNMENT.**

My input into this vital fight is no more than the analysis of a few carefully used words. It only took a small sleight of pen back in 1946 to hide our power, and it won't take more than a few words to take that power back. But a proper overview is necessary for most of you who are unfamiliar with the issue at hand. So let me provide you with some history and then we'll see what went wrong and how to correct it.

**HISTORY OF FEDERAL GRAND JURY POWER**

I want to draw your attention to a law review article, CREIGHTON LAW REVIEW, Vol. 33, No. 4 1999-2000, 821, IF IT'S NOT A RUNAWAY, IT'S NOT A REAL GRAND JURY by Roger Roots, J.D. "In addition to its traditional role of screening criminal cases for prosecution, common law grand juries had the power to exclude prosecutors from their presence at any time and to investigate public officials without governmental influence. These fundamental powers allowed grand juries to serve a vital function of oversight upon the government. The function of a grand jury to ferret out government corruption was the primary purpose of the grand jury system in ages past."

The 5th Amendment: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." An article appearing in American Juror, the newsletter of the American Jury Institute and the Fully Informed Jury Association, citing the famed American jurist, Josep Story,

explained: "An indictment is a written accusation of an offence preferred to, and presented, upon oath, as true, by a grand jury, at the suit of the government. An indictment is framed by the officers of the government, and laid before the grand jury. Presentments, on the other hand, are the result of a jury's independent action:

A presentment, properly speaking, is an accusation, made by a grand jury of its own mere motion, of an offence upon its own observation and knowledge, or upon evidence before it, and without any bill of indictment laid before it at the suit of the government. Upon a presentment, the proper officer of the court must frame an indictment, before the party accused can be put to answer it.'

**Back to the Creighton Law Review**: "A 'runaway' grand jury, loosely defined as a grand jury which resists the accusatory choices of a government prosecutor, has been virtually eliminated by modern criminal procedure. Today's "runaway" grand jury is in fact the common law grand jury of the past. Prior to the emergence of governmental prosecution as the standard model of American criminal justice, all grand juries were in fact "runaways," according to the definition of modern times; they operated as completely independent, self-directing bodies of inquisitors, with power to pursue unlawful conduct to its very source, including the government itself."

So, it's clear that the Constitution intended to giie the grand jury power to instigate criminal charges, and this was especially true when it came to government oversight. But something strange happened on the way to the present. That power was eroded by a lie enacted by the legislative branch. The 5th Amendment to the Constitution still contains the same words quoted above, but if you sit on a grand jury and return a "presentment" today, the prosecutor must sign it or it probably won't be allowed to stand by the judge and the criminal charges you have brought to the court's attention will be swept away. And the reason for this can be found in a legislative lie of epic proportions. Mr. Roots weighs in again:

"In 1946, the Federal Rules of Criminal Procedure were adopted, codifying what had previously been a vastly divergent set of common law procedural rules and regional customs.[86] In general, an effort was made to conform the rules to the contemporary state of federal criminal practice.[87] In the area of federal grand jury practice, however, a remarkable exception was allowed. The drafters of Rules 6 and 7, which loosely govern federal grand juries, denied future generations of what had been the well-recognized powers of common law grand juries: powers of unrestrained investigation and of independent declaration of findings. The committee that drafted the Federal Rules of Criminal Procedure provided no outlet for any document other than a prosecutor-signed indictment. In so doing, the drafters at least tacitly, if not affirmatively, opted to ignore explicit constitutional language."[88]" Rule 7 of the Federal Rules of Criminal Procedure (FRCP):

"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…"

No mention of "presentments" can be found in Rule 7. But they are mentioned in Note 4 of the Advisory Committee Notes on the Rules: "4. Presentment is not included as an additional type of formal accusation, since presentments as a method of instituting prosecutions are obsolete, at least as concerns the Federal courts."

**The American Juror published the following commentary with regards to Note 4:**

"[W]hile the writers of the federal rules made provisions for indictments, they made none for presentments. This was no oversight. According to Professor Lester B. Orfield, a member of the Advisory Committee on Rules of Criminal Procedure, the drafters of Federal Rules of Criminal Procedure Rule 6 decided the term presentment should not be used, even though it appears in the Constitution. Orfield states [22 F.R.D. 343, 346]: 'There was an annotation by the Reporter on the term presentment as used in the Fifth Amendment. It was his conclusion that the term should not be used in the new rules of criminal procedure. Retention might encourage

the use of the run-away grand jury as the grand jury could act from their own knowledge or observation and not only from charges made by the United States attorney. It has become the practice for the United States Attorney to attend grand jury hearings, hence the use of presentments have been abandoned.'"

That's a fascinating statement: "Retention might encourage…the grand jury [to] act from their own knowledge or observation." God forbid, right Ameria? The nerve of these people. They have the nerve to put on the record that they intended to usurp our Constitutional power, power that was intended by the founding fathers, in their incredible wisdom, to provide us with oversight over tyrannical government.

And so they needed a spin term to cast aspersions on that power. The term they chose was, "runaway grand jury", which is nothing more than a Constitutionally mandated grand jury, aware of their power, and legally exercising that power to hold the federal beast in check, as in "checks and balances".

The lie couldn't be inserted into the Constitution, so they put it in a statute and then repeated it. And scholars went on to repeat it, and today, as it stands, the grand jury has effectively been lied into the role of submissive puppet of the US Attorney. The American Juror publication included a very relevant commentary:

"Of course, no statute or rule can alter the provisions of the Constitution, since it is the supreme law of the land. But that didn't prevent the federal courts from publishing a body of case law affirming the fallacy that presentments were abolished. A particularly egregious example:

'A rule that would permit anyone to communicate with a grand jury without the supervision or screening of the prosecutor or the court would compromise, if not utterly subvert, both of the historic functions of the grand jury, for it would facilitate the pursuit of vendettas and the gratification of private malice. A rule that would open the grand jury to the public without judicial or prosecutorial intervention is an invitation to anyone interested in trying to persuade a majority of the grand jury, by hook or by crook, to conduct investigations that a prosecutor has determined to be inappropriate or unavailing.' [7]

What is the result? Investigating seditious acts of government officials can be deemed inappropriate or unavail-ing by the prosecutor, or the judge can dismiss the grand jurors pursuing such investigations. Consequently, corrupt government officials have few natural enemies and go about their seditious business unimpeded.

**By the way, they made a rule to take care of runaways too, in 1946: Rule 6(g):**

'At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused.' Now judges can throw anyone off a grand jury, or even dis-impanel a grand jury entirely, merely for exercising its discretion."

**Now let me add my two cents to this argument:**

Most of the discussion about Note 4 to Rule 7 of the FRCP takes for granted that the common law use of "presentments" (as codified in the 5th Amendment) was made "illegal" in 1946 by this act. Nothing could be more false. Note 4 does not contain language that makes the use of presentments "illegal", although it had chosen its words carefully to make it appear as if that is what the legislative branch intended. But let's look at Note 4 again:

"4. Presentment is not included as an additional type of formal accusation, since presentments as a method of instituting prosecutions are obsolete, at least as concerns the Federal courts."

The key word is, "obsolete". Obsolete means "outmoded", or "not in use anymore", but it does not mean "abolished" or "illegal". And therein lies the big lie. The legislature knew it could not directly overrule the Constitution, especially with something so clearly worded as the 5th Amendment, which grants a power to the people which has a long and noble purpose in criminal jurisprudence. But the federal beast legislative branch sought more power to protect themselves from the oversight of "we the people", and in its vampire like thirst for more governmental control, it inserted this insidious Note 4 in the hope that scholars and judges would play along

with their ruse, or in the alternative, their ruse would appear to be legally viable.

Let's look at some authoritative legal resources which discuss Note 4:

Susan Brenner, **THE VOICE OF THE COMMUNITY: A CASE FOR GRAND JURY INDEPENDENCE**: "Finally, federal grand juries' subservience to prosecutors was exacerbated when the federal system eliminated the use of presentments, which allowed a grand jury to bring charges on its own initiative. (N35) Now, federal grand jurors cannot return charges in the form of an indictment without a prosecutor's consent.

(N36) Elimination of the presentment demonstrates the historical trend towards elimination of proactive features in the grand jury system."

Did Brenner fall for the lie or did she cleverly further it when she said, "[T]he federal system eliminated the use of presentments"? The federal system did no such thing. Note 4 said the use of presentments was "obsolete". First of all, Note 4 is not a law in itself. It is a Note to a law, and the law as written, does not have anything to say about presentments. You see the leap Brenner has made? The Constitution provides for "presentments", then the FRCP are enacted and the Rules therein do not mention presentments, nor due they ban presentments, and if they did, such a ban would be unconstitutional, since an administrative enactment regarding procedure cannot overrule the Constitution.

Regardless, it's irrelevant, since the FRCP does not mention "presentments". Note 4 simply states that "presentments" allowed for in the 5th Amendment of the Constitution have become "obsolete", or outmoded, which is not to say that they were "eliminated". Shame on you Susan Brenner. You know damn well that the Constitution can only be changed by an official Amendment to it. Nothing can be "eliminated" from the Constitution by an administrative note. The use of presentments had become obsolete because the grand jurors were not aware of their power. So the use of "presentments" became more and more rare, and then in 1946 the legislative branch seized upon the moment to make this power disappear by waving its magic wand over the Constitution. Mr. Root got it wrong in the Creighton Law Review as well:

"Before the Federal Rules of Criminal Procedure — which made independently-acting grand juries illegal for all practical purposes — grand juries were understood to have broad powers to operate at direct odds with both judges and prosecutors…"

The FRCP did not make it "illegal for all practical purposes". That's patently false. Idon't know if Mr. Root, and/or Susan Brenner, were acting as the magician's assistant, but I can't imagine how these educated scholars could be so incredibly ignorant of basic Constitutional law. Give me a damn break. But if enough people repeat the lie, the lie appears to be the truth. But we have it on good authority, the Supreme Court, that the lie has no legal effect.

Justice Powell, in United States v. Calandra, 414 U.S. 338, 343 (1974), stated: "The institution of the grand jury is deeply rooted in Anglo-American history. [n3] In England, the grand jury [p343] served for centuries both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action. In this country, the Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by "a presentment or indictment of a Grand Jury." Cf. Costello v. United States, 350 U.S. 359, 361-362 (1956). The grand jury's historic functions survive to this day. Its responsibili-ties continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions. Branzburg v. Hayes, 408 U.S. 665, 686-687 (1972)."

The Note 4 lie is smashed on the altar of the U.S. Supreme Court, "The grand jury's historic functions survive to this day." Take that Note 4! Antonin Scalia effectively codified the unique independent power of the Fourth Branch into the hands of all citizens sitting as federal grand jurors. In discussing that power and unique indepen-

dence granted to the grand jury, the United States Supreme Court, in United States v. Williams, 504 U.S. 36 at 48 (1992), Justice Scalia, delivering the opinion of the court, laid down the law of the land:

"'[R]ooted in long centuries of Anglo-American history," Hannah v. Larche, 363 U.S. 420, 490 (1960) (Frankfurter, J., concurring in result), the grand jury is mentioned in the Bill of Rights, but not in the body of the Constitution. It has not been textually assigned, therefore, to any of the branches described in the first three Articles. It "`is a constitutional fixture in its own right.'" United States v. Chanen, 549 F.2d 1306, 1312 (CA9 1977) (quoting Nixon v. Sirica, 15 9 U.S. App. D.C. 58, 70, n. 54, 487 F.2d 700, 712, n 54 (1973)), cert. denied, 434 U.S. 825 (1977). ' "

I submit to you that this passage sets the stage for a revolutionary knew context necessary and Constitutionally mandated to "we the people", THE FOURTH BRANCH of the Government of the United States. Besides, the Legislative, Executive, and Jdicial branches, I submit that there is a fourth branch, THE GRAND JURY, and "we the people" when sitting as grand jurors, are, as Scalia quoted in US v. Williams, " a constitutional fixture in its own right". Yes, damn it. That is exactly what the grand jury is, and what it was always intended to be.

Scalia also stated, that "the grand jury is an institution separate from the courts, over whose functioning the courts do not preside..." Id.

And finally, to seal the deal, Scalia hammered the point home:

"In fact, the whole theory of its function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people. See Stirone v. United States, 361 U.S. 212, 218 (1960); Hale v. Henkel, 201 U.S. 43, 61 (1906); G. Edwards, The Grand Jury 28-32 (1906). Although the grand jury normally operates, of course, in the courthouse and under judicial auspices, its institutional relationship with the Judicial Branch has traditionally been, so to speak, at arm's length. Judges' direct involvement in the functioning of the grand jury has generally been confined to the constitutive one of calling the grand jurors together and administering their oaths of office.

See United States v. Calandra, 414 U.S. 338, 343 (1974); Fed.Rule Crim.Proc. 6(a). [504 U.S. 36, 48] " This miraculous quote says it all, "...the whole theory of its function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people." The Constitution of the United States, as interpreted by the Supreme Court, gives rise to a FOURTH BRANCH of Government, THE GRAND JURY. We the people have been charged with oversight of the government in our roles as grand jurors.

And at this critical time in American history, we must, for the protection of our constitutional republic, take back our power and start acting as powerful as the other branches of government.

The law is on our side. So please spread this knowledge as far and wide as you can. We the people havethe right and power under the 5th Amendment of the Constitution to charge this government with crimes by returning presentments regardless of whether the US Attorneys or the federal judges agree with us. As the Supreme Court has so brilliantly stated, we are the "buffer between the Government and the people."

Take the reins America. Pass it on. The Fourth Branch is alive and kickin'.