Investigating Grand Juries: A Comparison of Pennsylvania's Judicially and Legislatively Created Bodies

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Investigating Grand Juries: A Comparison of Pennsylvania's Judicially and Legislatively Created Bodies

I. INTRODUCTION AND TERMINOLOGY

The grand jury has been described by some as the "noblest check upon the malice and oppression of individuals and states,"¹ and by others as an unnecessary, untrained, time-consuming body acting merely as a rubber stamp upon the prosecutor's indictments.² Undoubtedly, the grand jury as an indicting body has declined in popularity.³ However, the grand jury as an investigatory body has developed into an effective crime detecting mechanism particularly well-suited to uncovering governmental corruption⁴ and organized


Allegations of government corruption within Pennsylvania have led to grand jury investigations into such matters as the conduct of employees of the Department of Transportation, see Commonwealth v. Bestwick, 396 A.2d 1311 (Pa. Super. Ct. 1978); alleged agreements among state police troopers to omit information from accident reports regarding the intoxication of troopers involved in automobile accidents, see Commonwealth v. Barger, 249 Pa. Super. Ct. 59, 375 A.2d 756 (1977); the unlawful appropriation of city labor and materials for private use by city officials, see Manko Appeal, 168 Pa. Super. Ct. 177, 77 A.2d 700 (1951); and the sale to the highest bidder of appointments to office by government officials, see Commonwealth v. Dietrich, 7 Pa. Super. Ct. 515 (1898). Probably the most celebrated case concerning the investigation of alleged government corruption occurred in 1938 when the legislature, called into emergency session by the governor, enacted legislation specifically designed to prevent the investigation of the government by a grand jury. See Dauphin County Grand Jury Investigation Proceedings (No. 1), 332 Pa. 289, 2 A.2d 783 (1938).
crime. Although other nonjudicial bodies have entered the investigating arena, it is questionable whether they can operate in a manner superior to that of the grand jury. The purpose of this comment is to explore the development of this judicially created body in Pennsylvania and to compare it to the investigatory body recently created by the state legislature.

The existence of various types of grand juries geared to uncovering crimes has created confusion regarding the proper title to be assigned a given investigatory body. Thus, it is not uncommon for a court to use the generic term "grand jury" without further specifying the particular body under discussion. As a result, it is often unclear whether a

It should be noted that although a grand jury investigation can be directed at alleged illegacies in a state agency or local government, it cannot be directed to review the quality of administration in government agencies. See Dauphin County Grand Jury Investigation Proceedings (No. 1), 332 Pa. at 295, 2 A.2d at 787; Appeal of Hartranft, 85 Pa. 433 (1878); Commonwealth v. Bestwick, 396 A.2d 1311, 1315 (Pa. Super. Ct. 1978); Grand Jury Investigation of Western State Penitentiary, 173 Pa. Super. Ct. 197, 203-04, 96 A.2d 189, 192 (1953).


6. Examples of nonjudicial investigative bodies include legislative committees, special administrative boards, the governor or Attorney General, the press, and private individuals and organizations. For a discussion comparing the investigatory abilities of grand juries to various types of nonjudicial bodies, see Dession & Cohen, supra note 4, at 694-712.

7. See Kuh, The Grand Jury "Presentment": Foul Blow or Fair Play, 55 COLUM. L. REV. 1103 (1955) [hereinafter cited as Kuh], where it is stated:

Investigatory committees, whether of the legislative or of the executive arm of government, suffer common defects. Their members, being either elected or appointed by elected officials, ordinarily are not completely free of political motivation. Elected officials and professional investigators are apt to find their own personal interests best fostered by publicity. Consequently, investigations are most often either conducted in full public spotlight, or are punctuated by frequent reports to the public of interim results. . . . As the outcome of all these investigations is probably influenced by political considerations, partiality and a deliberate lack of thoroughness are apt to be present.

Id. at 1118. See generally T. TAYLOR, GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS (1955). Additionally, investigations by legislative committees are repeatedly attacked on the ground that the committee lacks jurisdiction to investigate the matter. See Dession & Cohen, supra note 4, at 699-700; Discretionary Power in the Judiciary, supra note 4, at 956.


9. As stated by Justice Musmanno:

The confusion between a Special Grand Jury and a Regular Grand Jury conducting a special investigation has produced a terminological melange to which, unfortunately, even judges have contributed. Lamentably, even in the State Reports, the phrase "Special Grand Jury" is occasionally used when the writer really has in mind a Regular Grand Jury conducting a special investigation.

particular decision is applicable to all types of grand juries or is limited to the particular body involved in the decision. It is, therefore, necessary at the outset to suggest a definitional framework within which to operate.

At common law, a grand jury which was organized and returned indictments to the court in accordance with the terms of a statute was properly designated a "regular grand jury." The phrase "special grand jury" referred to one organized under an exercise of judicial discretion as opposed to a statutory scheme. An "investigating grand jury" was one, whether regularly or specially organized, engaged in conducting investigations in addition to simply returning indictments.

In Pennsylvania the courts have recognized two types of grand juries: namely, a special grand jury which is selected solely for performing investigatory duties; and an investigating grand jury, which is impaneled to return indictments (regular grand jury) and is also charged to conduct investigations. Unlike the common law definition, the term "special" in Pennsylvania does not indicate the manner in which the grand jury is impaneled, but rather the purpose for which it is convened. Throughout this comment, unless otherwise indicated, the phrases "grand jury investigating" and "grand jury conducting an investigation" will be used to designate both special and investigating grand juries.

Generally, after the grand jury has commenced its investigation, a series of reports or presentments may be issued. While a report is a written comment directed either at unwholesome, noncriminal activity

10. This statement is premised upon the notion that there is reason to suggest that different rules are applicable to the various types of grand jury investigations. One area where different rules have been held applicable depending upon the type of grand jury investigation involved concerns the effect of irregularities committed during the investigatory stage on the indicting stage of the proceedings. See notes 124-129 and accompanying text infra.


12. See Discretionary Power in the Judiciary, supra note 4, at 957.

13. Id.


15. Id. See also Ranney, Grand Juries in Pennsylvania, 37 U. PIT. L. REV. 1, 4 (1975).

16. A single grand jury conducting an investigation may issue as many presentments or reports as is necessary. For example, the grand jury convened in June, 1972, and charged by Judge Takiff, issued twenty-one presentments. See In Re: January 1974 Philadelphia County Grand Jury Investigation, 458 Pa. 586, 328 A.2d 485 (1974).
or at criminal activity for which prosecution is barred,\textsuperscript{17} a presentment is a written charge of a crime issued by the grand jury conducting an investigation.\textsuperscript{18} Practically speaking, a presentment is an instruction to the district attorney to submit a bill of indictment to the indicting grand jury.\textsuperscript{19} It is these two devices which provide the grand jury conducting an investigation with the means of publicizing the results of its investigation and bringing to trial those individuals suspected of wrongdoing. In light of the potentially oppressive nature of these dual powers, it is especially important to recognize the limits within which grand jury investigations must be conducted.

II. THE HISTORY OF THE GRAND JURY

The origins of the grand jury system, in which an individual is accused of wrongdoing by an independent body of jurors, has been the subject of considerable debate void of any definitive answers.\textsuperscript{20} Although the term "grand jury" (\emph{le graunde inquest}) was initially applied during the reign of Edward the Third,\textsuperscript{21} that body was merely a refinement of an already existing body of accusers known as the "hundred inquest."\textsuperscript{22} It is believed that as early as the rule of Ethelred the

\textsuperscript{17} See Discretionary Power in the Judiciary, supra note 4, at 958 n.30. See also Dession & Cohen, supra note 4, at 705-06; Kuh, supra note 7, at 1103; Note, The Grand Jury as an Investigatory Body, 74 Harv. L. Rev. 590, 593-96 (1961). For a listing of cases considering the issue whether a grand juror may be held liable for statements contained in a report see Annot., 48 A.L.R.2d 716 (1956).

\textsuperscript{18} See Dession & Cohen, supra note 4, at 705-06. See also 4 W. Blackstone, Commentaries *301.


\textsuperscript{20} Historians remain divided over whether the grand jury had its origin in Norman or Anglo-Saxon cultures. Compare Edwards, supra note 1, at 2 and 4 W. Blackstone, Commentaries *301 (Anglo-Saxon) with 1 W. Holdsworth, History of English Law 312 (7th rev. ed. 1899) and T. Plucknett, A Concise History of the Common Law 99 (1929) (Norman). See also Segal, Spivack & Costilo, Obtaining a Grand Jury Investigation in Pennsylvania, 35 Temp. L.Q. 73, 74 (1961) [hereinafter cited as Obtaining a Grand Jury Investigation].

\textsuperscript{21} Edwards, supra note 1, at 2.

\textsuperscript{22} Id. at 25-26. The term \emph{le graunde inquest} was used not to distinguish the grand from the petit or trial jury, but rather to distinguish the grand jury from the hundred in-
Second (A.D. 978-1016) the English system of frank pledge was supplemented by a body of twelve thanes of each hundred (wapentake) charged with the duty of identifying criminals. This system of indictment received statutory recognition in the Assize of Clarendon issued in 1166. The development of le graunde inquest caused the decline in influence of the hundred inquests until it no longer presented offenders. At this point in history, the grand jury was an arm of the government functioning as a public prosecutor charged with ferreting out crime.

The conception of the grand jury as the guardian of the rights and liberties of the people stems from the actions of two grand juries impaneled in 1681 where the jurors were confronted with indictments against Stephen College and the Earl of Shaftesbury for high treason. After hearing the testimony of witnesses in private, the jurors ignored the bills without explanation. Thus, the combination of the secrecy of its proceedings and the ability to act on indictments without explanation provided the grand jury with the ability to protect individual freedoms. As one writer concludes: "The grand jury emerged as a body which performed antithetical functions—a virtual janus who, at one moment acted as the vigilant prosecutor and at the next moment, acted as the defender of those who were unjustly accused." The failure of many courts to recognize the dual roles played by the grand jury explains the often contradictory results reached between

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23. Under the frank pledge system, each male member of a tithing was a surety to the king and was responsible for the good conduct of the others. Thus, each member had a duty to divulge to the king the criminal conduct of others. Edwards, supra note 1, at 3.

24. Id. at 4-5.

25. Id. at 7. But see Schwartz, Demythologizing the Historic Role of the Grand Jury, 10 Am. Crim. L. Rev. 701, 703-07 (1972) [hereinafter cited as Schwartz], where it is suggested that the true statutory ancestor of the modern grand jury was the Constitution of Clarendon signed by Thomas Becket in 1164 amid pressure from Henry the Second. That document gave the king's courts jurisdiction over clergymen accused of committing crimes. For a discussion of the procedural aspects of impaneling a hundred inquest see Edwards, supra note 1, at 19-20; Pleas of the Crown, supra note 22, at 164a-b.

26. See Edwards, supra note 1, at 27; Schwartz, supra note 25, at 710.


28. For a discussion of the secrecy surrounding grand jury actions, see 1 F. Wharton, Criminal Procedure § 221 (12th ed. 1974).

29. Edwards, supra note 1, at 28-30. For a thorough discussion of these two cases, see Schwartz, supra note 25, at 710-21.

30. Obtaining a Grand Jury Investigation, supra note 20, at 76. This was not to be the end of attacks directed at the power of grand juries. In 1783, a Pennsylvania grand jury received severe reproof from the Pennsylvania Supreme Court for refusing to return a true bill of indictment against the printer of the Independent Gazette for articles he published criticizing the conduct of that court. See Edwards, supra note 1, at 31.
majority and dissenting opinions regarding the extent of power held by the grand jury.\(^{31}\) A grand jury charged solely with handling indictments performs a protective function because it can refuse to return an indictment, thereby preventing prosecution of the accused. On the other hand, a grand jury conducting an investigation is cast in the role of a public prosecutor\(^{32}\) and, of necessity, must be afforded broad investigatory powers. The development of these powers is a subject on which historians are silent.\(^{33}\) In *McNair's Petition*,\(^{34}\) the Pennsylvania Supreme Court, speaking through Justice Kephart, traced the initial acknowledgment of the inquisitorial powers of the grand jury in Pennsylvania back to 1792.\(^{35}\) But regardless of its origin, the grand jury is presently well-equipped to act as an investigatory body.

III. JUDICIAL DEVELOPMENT OF GRAND JURY INVESTIGATIONS IN PENNSYLVANIA

A. Requirements for Convening a Grand Jury Investigation

Unlike other states,\(^{36}\) Pennsylvania severely restricts the use of grand jury investigations.\(^{37}\) In this respect, the Pennsylvania courts have consistently enumerated five minimum requisites for obtaining a grand jury investigation:\(^{38}\) specifically, that the subject matter of the investigation must affect the community as a whole rather than as in-

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31. See, e.g., the majority and dissenting opinions in Philadelphia County Grand Jury Investigation Case, 347 Pa. 316, 32 A.2d 199 (1943); Dauphin County Grand Jury Investigation Proceedings (No. 1), 332 Pa. 289, 2 A.2d 783 (1938). See also Obtaining a Grand Jury Investigation, supra note 20, at 76-77.

32. See *Obtaining a Grand Jury Investigation*, supra note 20, at 76-77.

33. Id. See also *McNair’s Petition*, 324 Pa. 48, 187 A. 498, 502-03 n.1 (1936).

34. 324 Pa. 48, 187 A. 498 (1936).

35. Id. at 57, 187 A. at 503. But see *Obtaining a Grand Jury Investigation*, supra note 20, at 75 n.22.


dividuals;\textsuperscript{39} that the investigation must be aimed at conditions as opposed to individuals;\textsuperscript{40} that the ordinary processes of law enforcement must be inadequate to deal with the alleged crimes;\textsuperscript{41} that the investigation must have a defined scope,\textsuperscript{42} directed at crimes,\textsuperscript{43} and supported by information indicating the existence of systematic crime or widespread conspiracy;\textsuperscript{44} and finally, that the information must come from direct

\textsuperscript{39} Examples of such subject matter include riots, general public nuisances affecting the public health, flagrant vices tending to debauch the public morals, "and the like." Matter of the Communication of the Grand Jury (Lloyd and Carpenter's Case), 5 Pa. L.J. 55, 58, 3 Clark 188, 192 (Quarter Sessions, Phila. 1845). See also \textit{Obtaining a Grand Jury Investigation}, supra note 20, at 80-82. Government corruption has proven a popular subject for grand jury investigations in Pennsylvania. See cases cited at note 4, supra.

\textsuperscript{40} The purpose of this requirement is to avoid the investigation of individuals on allegations of ordinary crimes which the regular police force is equipped to handle. \textit{See Obtaining a Grand Jury Investigation, supra} note 20, at 84-87. This is not to suggest that a petition cannot name specific individuals as allegedly having committed certain crimes. \textit{See, e.g., Commonwealth v. Kilgallen, 379 Pa. 315, 108 A.2d 780 (1954); Commonwealth v. Gross, 172 Pa. Super. Ct. 85, 92 A.2d 251 (1952). For an example of an investigation where this requirement was apparently ignored, see Commonwealth v. Hackney, 117 Pa. Super. Ct. 519, 178 A. 417 (1935) (allocatur refused).}

\textsuperscript{41} As was recognized by one group of commentators:

\textit{The principal reason for this requirement is that when the ordinary processes of law are sufficient, defendants will also be assured the usual protections of the law, including the right to a preliminary hearing. Resort to extraordinary proceedings are viewed as infringements on the rights of citizens which are to be avoided. \textit{Obtaining a Grand Jury Investigation, supra} note 20, at 87 (footnotes omitted). \textit{See also Commonwealth v. Field, 231 Pa. Super. Ct. 53, 331 A.2d 744 (1974) (since use of investigative grand jury dispenses with preliminary arraignment and preliminary hearing, the power to convene such a grand jury is a delicate one).}

\textsuperscript{42} The ordinary processes of law enforcement have been found inadequate for various reasons. \textit{See, e.g., Commonwealth v. Barger, 249 Pa. Super. Ct. 59, 68, 375 A.2d 756, 761 (1977) (subpoena power needed to acquire answers to questions which are essential for a full investigation and the parties are uncooperative in relinquishing the information sought); Commonwealth v. Rhey, 140 Pa. Super. Ct. 340, 344, 14 A.2d 192, 195 (1940) (allocatur refused) (public would suffer from delays incident to ordinary procedure).}

\textsuperscript{43} \textit{See Obtaining a Grand Jury Investigation, supra} note 20, at 90-92. The scope of the investigation must be limited by the charge from the court. \textit{See Smith v. Gallagher, 408 Pa. 551, 185 A.2d 135 (1962). A grand jury conducting an investigation has no authority to issue a presentment alleging crimes not within the scope of the charge. Commonwealth v. Soloff, 175 Pa. Super. Ct. 423, 107 A.2d 179 (1954) (presentment accusing police officers of having beaten a prisoner was not within charge to grand jury to investigate whether city police had protected criminals for financial gain). However, this requirement of a limiting charge has not gone without criticism. \textit{See The Grand Jury, supra} note 2, at 594 (objective of having available a body of interested citizens to independently check on the affairs of the community can only be satisfied if the grand jury is free to investigate matters of its own choosing).}

\textsuperscript{44} McNair's Petition, 324 Pa. 48, 58, 187 A. 498, 503 (1936) ("Une grand jury is an arm of the criminal court, and criminal acts alone must be the foundation of its deliberations"). \textit{See also Obtaining a Grand Jury Investigation, supra} note 20, at 90-92.

\textsuperscript{44} The Pennsylvania Supreme Court has held that a petition must allege the com-
knowledge or a trustworthy source.\textsuperscript{45} In light of these requirements, it is apparent that the Pennsylvania judiciary is reluctant to allow uncontrolled grand jury investigations. The courts have repeatedly expressed the fear that a grand jury conducting an investigation might, "if unrestrained and unguarded, encroach upon the very liberties which it was created to protect."\textsuperscript{46}

A grand jury investigation may be initiated in response to either a petition\textsuperscript{47} or a memorial.\textsuperscript{48} The difference between a petition and a memorial is that the latter is filed by a private citizen, and the former is filed by the district attorney or Attorney General.\textsuperscript{49} Although the Pennsylvania courts have traditionally attached no significance to this distinction,\textsuperscript{50} it was held in \textit{Hamilton Appeal}\textsuperscript{51} that a memorialist has no right to appeal the denial of a requested investigation. Here the Pennsylvania Supreme Court reasoned that because a memorial is not a pleading creating a litigable controversy, the individual presenting it has no standing to appeal its denial.\textsuperscript{52} Such reasoning seems to be equally applicable to petitions. In addition to being refused the right to

mission of at least one crime. Dauphin County Grand Jury Investigation Proceedings (No. 1), 332 Pa. 289, 2 A.2d 783 (1938).

45. This requirement is satisfied where it is alleged that as a result of a preliminary investigation, knowledge of facts and circumstances which establish the existence of corruption has been established. See Commonwealth v. Barger, 249 Pa. Super. Ct. 59, 68, 375 A.2d 756, 761 (1977). However, a general statement that one "has been informed and believes" that crimes have been committed is insufficient. See Philadelphia County Grand Jury Investigation Case, 347 Pa. 316, 321, 32 A.2d 199, 202 (1943). \textit{See also Obtaining a Grand Jury Investigation, supra} note 20, at 92-97.


50. \textit{Obtaining a Grand Jury Investigation, supra} note 20, at 78 n.36.


52. This reasoning was succinctly summarized by Justice Cohen as follows:

A memorial is not a pleading. Its presentation neither institutes a legal proceeding, nor does it bring any "parties" before the court. Merely because the court determines specially to charge a grand jury to undertake an investigation gives no right to the memorialists to control the investigation or even participate in it.

It follows that individuals filing a memorial with a court have no standing as litigants. . . . It is clear beyond doubt that the court's determination specially to
appeal the denial of a requested investigation, the Pennsylvania Supreme Court recently held in *In re Biester*\(^53\) that a private citizen, relying solely on his status as a taxpayer, lacks standing to challenge the validity of a grand jury investigation.\(^54\)

A petition, and presumably a memorial, can be amended.\(^55\) But the issue of whether a petition can be supplemented by additional sources after it has been filed has not been conclusively resolved. In *Grand Jury Investigation of Western State Penitentiary*,\(^56\) the Superior Court of Pennsylvania, without citing authority, stated that a petition "must be self-sustaining."\(^57\) This precise issue again confronted the superior court in *Commonwealth v. Bestwick*,\(^58\) where an equally divided court affirmed the conviction of a state employee for violation of the Anti-Macing Act. As a ground for appeal, the appellant had asserted that since the petition requesting the grand jury investigation was supplemented with information received during an *in camera* hearing, the entire investigation was invalid.\(^59\) In response to this assertion, three members of the court argued that neither authority nor reason exists for preventing a court from supplementing a petition.\(^60\) Arguing the contrary position, Judge Hester, joined by Judges Cercone and Vander Voort, maintained that the justification for convening an investigative grand jury must be found within the petition alone.\(^61\) Additionally, Judge Hester expressed the fear that without a self-sustaining petition, "the grand jury will lack 'a sound, solid basis on which to pro-

\(^{53}\) See Smith v. Gallagher, 408 Pa. 551, 185 A.2d 135 (1962), that a citizen's taxpayer status was sufficient to confer standing to challenge the validity of a grand jury investigation. The *Beister* court expressly overruled the *Smith* decision on this point.

\(^{54}\) *See Dauphin County Grand Jury Investigation Proceedings (No. 1),* 332 Pa. 289, 326, 2 A.2d 783, 800 (1938).

\(^{55}\) Id. at 370-71, 180 A.2d at 785 (Cohen, J., concurring).

\(^{56}\) 409 A.2d 848 (Pa. 1979).

\(^{57}\) Id. at 851-52. Prior to this decision, the court had held in Smith v. Gallagher, 408 Pa. 551, 185 A.2d 135 (1962), that a citizen's taxpayer status was sufficient to confer standing to challenge the validity of a grand jury investigation. The *Beister* court expressly overruled the *Smith* decision on this point.

\(^{58}\) Id. at 1315 (Price, J., supporting affirmance). Judge Spaeth argued that a court "should not hold a petition inadequate where, as here, its holes were filled in by information presented to the convening judge." Id. at 1319 (Spaeth, J., supporting affirmance). Judge Price later reiterated his argument in *Commonwealth v. Iacino*, 401 A.2d 1355 (Pa. Super. Ct. 1979). Although Price's opinion in *Iacino* represented the majority viewpoint, the case was not heard by the court en banc, but rather was heard by a four judge panel.

\(^{59}\) 396 A.2d at 1323 (Hester, J., supporting reversal).
ceed . . . and run the risk of becoming an uncontrolled instrument."

There seems to be little, if any, reason for denying supplementary proceedings to cure a defective petition, especially since a defective petition can be amended. The concern of Judge Hester in Bestwick that the investigation may become uncontrolled ignores the fact that the scope of a grand jury investigation is actually limited by the charge of the court. Moreover, the purpose of any supplementary proceedings is to assist the court in preparing a proper charge. Regardless of the contents of the petition, then, it is the duty of the court to limit the investigation and this duty can be effectively performed by allowing a petition to be supplemented.

Finally, although a court can sua sponte charge a regular grand jury to conduct a special investigation, it appears that no such authority exists for convening a special grand jury; nor, in any event, can a grand jury commence an investigation on its own motion. Regardless of the type of investigation sought, or the manner in which it is instigated, the requirements for convening a grand jury investigation must be met. Once properly convened, the grand jury is not restricted as to its duration, although it cannot become a permanent body. However, this sole prohibition can be easily averted by conven-

62. Id.
63. See note 55 and accompanying text supra.
64. See note 42 and accompanying text supra.
66. See In Re: January 1974 Philadelphia County Grand Jury Investigation, 458 Pa. 586, 328 A.2d 485 (1974). The court in that case divorced "the question of the power of the court to direct a grand jury investigation on its own motion from the question of the court's power to convene a special grand jury." Id. at 595, 328 A.2d at 489. However, in Smith v. Gallagher, 408 Pa. 551, 188 A.2d 135 (1962), the court argued that the "power to convene a special grand jury is not an inherent judicial power." Id. at 587, 185 A.2d at 153.
69. See Shenker v. Harr, 332 Pa. 382, 2 A.2d 298 (1938). Subsequent to Shenker, Rule 204 of the Pennsylvania Rules of Criminal Procedure was adopted. PA. R. CRIM. P. 204. This rule permits a grand jury to be retained to complete business presented to it during the period for which it was originally summoned. The impact of the rule was discussed by the court in In Re: January 1974 Philadelphia County Grand Jury Investigation, 458 Pa. at 599, 328 A.2d at 491.
70. See Shenker v. Harr, 332 Pa. 382, 2 A.2d 298 (1938). See also In Re: January 1974
B. Investigative Tools of the Grand Jury Conducting an Investigation

The tools available to the grand jury include the personal knowledge of the jurors, subpoenas, including subpoeanas 

*duces tecum,* the assistance and guidance of the district attorney, and the use of a stenographer. The grand jury may also seek immunity for a witness summoned to appear, and may request the court to issue contempt citations for recalcitrant witnesses. However, a grand jury cannot hire private counsel, special investigators, or private accountants. Finally, it is interesting to note that neither the exclusionary rule nor

Philadelphia County Grand Jury Investigation, 458 Pa. at 599, 328 A.2d at 491 (nine months not reaching admonition stated in Shenker).

71. See In Re: January 1974 Philadelphia County Grand Jury Investigation, 458 Pa. at 599, 328 A.2d at 491. The court reasoned that each time a new grand jury is convened "there is a judicial reevaluation of the prerequisites for maintaining a grand jury investigation." Id.

72. This stems from the early conception of the grand jury as a body whose function it was to report on the crimes known to its members to have been committed by others within their wapentake. See note 24 and accompanying text infra. See also The Grand Jury, supra note 2, at 595.

73. McNair's Petition, 324 Pa. 48, 58, 187 A. 498, 503 (1936). The court must first approve the request for a subpoena. Id. However, this appears to be a hollow requirement. See In re Grand Jury Proceedings, 486 F.2d 85 (3d Cir. 1973) (federal grand jury subpoenas are issued pro forma and in blank); Carabello Appeal, 238 Pa. Super. Ct. 479, 357 A.2d 628 (1976) (judge has no duty to investigate the propriety of each subpoena prior to its issuance).

74. Salvitti Appeal, 238 Pa. Super. Ct. 465, 357 A.2d 622 (1976) (government is required to make some preliminary showing that each item requested is relevant to the investigation). See also In re Grand Jury Subpoena Duces Tecum, 203 F. Supp. 575 (S.D.N.Y. 1961); In re Hawkins, 50 Del. 61, 123 A.2d 113 (1956).

75. See Commonwealth v. Brownmiller, 141 Pa. Super. Ct. 107, 113, 14 A.2d 907, 910 (1940) (allocatur refused) ("It is the duty of the district attorney, either personally or through his assistants, to attend upon a grand jury, lay before them all matters upon which they are to pass, aid them in the examination of witnesses and give general instructions as may be required").

76. See id. (where an investigation by a grand jury was of public concern, it was within power of court to appoint special assistants to the district attorney and to authorize the latter to engage additional stenographers).

77. Riccobene Appeal, 439 Pa. 404, 268 A.2d 104 (1970) (whether or not to grant immunity is primarily a matter between prosecutor and court, and not for witness' concern). Immunity of witnesses is presently governed by 42 PA. CONS. STAT. ANN. § 5947 (Purdon Supp. 1979).

78. See, e.g., Manko Appeal, 168 Pa. Super. Ct. 177, 77 A.2d 700 (1951) (contempt citation for refusal to answer after fifth amendment claim is rejected reversed because appellant stood in position of an accused before the grand jury).


the normal rules of evidence are applicable in grand jury investigations.

C. Rights of Subpoenaed Parties

The use of subpoena powers by the grand jury conducting an investigation has naturally prompted litigation delineating the rights and privileges of the party being summoned. In analyzing this subject, it is essential to isolate the rights or privileges involved and the relationship of the party being summoned to the purpose of the investigation. The rights and privileges generally sought to be protected include the right to refuse to appear and to testify, the right to counsel, and the exercise of the fifth amendment privilege against self-incrimination.

Essentially, there are three types of witness relationships in which these rights and privileges arise: a regular witness, a virtual or putative defendant, and an individual named in a petition but unindicted when subpoenaed. The courts have not, however, extended any additional rights or privileges to a virtual defendant greater than those already extended a regular witness; thus, the rights and privileges afforded a regular witness and a virtual defendant are the same. On the other hand, the rights and privileges of an individual named in a peti-

81. According to the majority opinion in Commonwealth v. Gross, 172 Pa. Super. Ct. 85, 92 A.2d 251 (1952) "[p]roof that a grand jury heard irrelevant testimony ... or hearsay evidence ... or incompetent witnesses ... will not invalidate an indictment where other proper evidence was adduced before it." Id. at 92, 92 A.2d at 254.


83. See notes 92-111 and accompanying text infra. See also United States v. Dionisio, 410 U.S. 1, 10 n.8 (1973) (no constitutional prohibition against summoning a potential defendant); Blair v. United States, 250 U.S. 273, 281 (1919) (attendance before grand jury is public duty every person is bound to perform upon being summoned).

84. See notes 92-111 and accompanying text infra.

85. See notes 117-119 and accompanying text infra.

86. See notes 112-115 and accompanying text infra.

87. A virtual or putative defendant is one whom the grand jury has targeted for indictment but who has not been indicted at the time he is summoned to appear and testify. See notes 92-111 and accompanying text infra.

88. See notes 40 & 47 supra.

89. See notes 120-129 and accompanying text infra.

90. See notes 92-111 and accompanying text infra.
tion differ and have been fashioned to reflect the fact that the named witness stands in the same position as an accused.91

The United States Supreme Court examined the status of a virtual defendant in a trilogy of cases beginning with United States v. Mandujano.92 There, the Court held that where a virtual defendant is apprised of his fifth amendment privilege and thereafter commits perjury before a grand jury, the perjured statements may be used against him in a trial for perjury.93 Below, the Court of Appeals for the Fifth Circuit had suppressed the perjured testimony because the respondent was not given the Miranda warnings which were thought to be required in light of his virtual defendant status.94 Chief Justice Burger, writing for himself and Justices White, Powell, and Rehnquist, stressed that to extend the concept of Miranda to a grand jury witness would necessitate warning the witness that he has an absolute right to silence. But, in the view of the Chief Justice, such a warning is not appropriate because a grand jury witness has an absolute duty to answer all questions, subject only to a valid fifth amendment claim.95

In a concurring opinion, Justice Brennan expressed the fear that prosecutors will employ the tactic of calling a putative defendant before a grand jury conducting an investigation to question him regarding the events for which he is about to be indicted.96 Accordingly, Justice Brennan concluded that in the absence of a proper waiver of the individual's known right to be free from compulsory self-incrimination, the virtual defendant should not be compelled to testify before the grand jury conducting an investigation.97

In the second case of the trilogy, United States v. Wong,98 the Supreme Court held that perjured testimony given by a virtual defen-

91. See notes 120-129 and accompanying text infra.
94. Id. at 569-70.
95. Id. at 580-81. The Chief Justice wrote:
   To extend the concept of Miranda . . . would require that the witness be told that there was an absolute right to silence, and obviously any such warning would be incorrect, for there is no such right before a grand jury. Under Miranda, a person in police custody has, of course, an absolute right to decline to answer any question, incriminating or innocuous, . . . whereas a grand jury witness, on the contrary, has an absolute duty to answer all questions, subject only to a valid Fifth Amendment claim.
96. Id. at 584-85 (Brennan, J., concurring in the judgment).
97. Id. at 598-99 (Brennan, J., concurring in the judgment). A waiver could not be established unless the putative defendant was warned that "he is currently subject to possible criminal prosecution for the commission of a stated crime." Id. at 600 (Brennan, J., concurring in the judgment).
The respondent argued that, without effective warnings, she was compelled to answer all questions and that her choice was confined either to self-incrimination or the commission of perjury. The Court, in rejecting this argument, flatly stated that the fifth amendment cannot be employed to protect perjury.

In the final case of the trilogy, United States v. Washington, the Court confronted the issue of whether testimony given by a virtual defendant before a grand jury may later be used against him in a prosecution for a substantive criminal offense despite the fact that the witness was not informed of his potential defendant status at the time he testified. Writing for a majority of the Court, Chief Justice Burger noted that by the time the respondent testified he was well aware of his potential defendant status. The Chief Justice suggested that no constitutional infirmity results from the failure to provide a potential defendant with warnings since status as a potential defendant neither enlarges nor diminishes one's protection against compelled self-incrimination. Therefore, according to the majority, such warnings would have no impact on the protection of fifth amendment rights.

In a dissenting opinion, Justice Brennan argued that the privilege against self-incrimination "is emptied of substance unless the witness is further advised by the prosecutor that he is a potential defendant." Justice Brennan would have held that unless a potential defendant is warned of his status, his self-incriminating testimony must be suppressed.

99. Id. at 177-79.
100. Id. at 177.
101. Id. at 179.
103. Id. at 189.
104. Id. at 189. The Chief Justice wrote:

However, all of this is largely irrelevant, since we do not understand what constitutional disadvantage a failure to give potential defendant warnings could possibly inflict on a grand jury witness. . . . It is firmly settled that the prospect of being indicted does not entitle a witness to commit perjury, and witnesses who are not grand jury targets are protected from compulsory self-incrimination to the same extent as those who are. Because target witness status neither enlarges nor diminishes the constitutional protection against compelled self-incrimination, potential defendant warnings add nothing of value to protection of Fifth Amendment rights.

Id.

105. Id. at 192 (Brennan, J., dissenting).
106. Id. at 194 (Brennan, J., dissenting).
The refusal of the United States Supreme Court, in this trilogy of cases, to recognize any distinction between a regular witness and a virtual defendant can be criticized on at least two grounds. First, as a result of the failure to recognize any distinction between the two types of witnesses, there exists an overextension of the investigatory powers of the grand jury, for interrogation of a virtual defendant is permitted without first informing him of the pending charges. A second criticism of the trilogy is that it violates the fundamental principle that the state must establish its case by evidence independently secured and not by evidence obtained through the interrogation of an accused party.

Despite these criticisms, the Supreme Court, led by the conservative members of the Court, remains firm in its view that a virtual defendant stands before the grand jury in essentially the same position as a regular witness. Consequently, a virtual defendant is required to appear and testify, subject only to a valid fifth amendment claim, and is not entitled to the Miranda warnings or to a warning regarding his virtual defendant status.

In delineating the rights and privileges afforded a virtual defendant, the Pennsylvania Supreme Court shares the restrictive view of the United States Supreme Court as to a witness' appearing and testifying. In fact, in Commonwealth v. Columbia Investment Corp., the court flatly stated that "a grand jury witness, virtual defendant or otherwise, does not have the right to refuse to appear before a grand jury and, once there, does not have an unqualified right to remain silent." Yet, the Pennsylvania judiciary, unlike the United States Supreme Court, appears to be cognizant of the potentially unfair situation confronting a virtual defendant and has provided two additional safeguards. First, the court has held that regular witnesses and virtual defendants summoned to appear before a grand jury must be informed of the fifth amendment privilege against compelled self-incrimination.

111. Id. at 366, 325 A.2d at 295. However, this statement is merely dictum since the court concluded that at the time of testifying the defendants "were in the same position as any other witness called before the investigating grand jury." Id. at 366-67, 325 A.2d at 296.
prior to testifying. Should the witness or virtual defendant refuse to answer after his fifth amendment claim is rejected, he is subject to contempt proceedings. The courts of Pennsylvania also adhere to the view that the privilege cannot be advanced as a defense to an indictment for perjury and that the failure to assert the privilege constitutes a waiver. In practical terms, this problem of waiver can be circumvented simply by granting the witness immunity. As the second protective measure, Pennsylvania permits the witness or virtual defendant a limited right to the assistance of counsel, for he can consult with counsel before and after testifying. The witness is, however, denied the right to the presence of counsel while testifying. In reviewing this right-to-counsel issue the court has rejected an innovative argument advanced by the legal profession that a witness should

113. See, e.g., Commonwealth v. Haines, 171 Pa. Super. Ct. 362, 90 A.2d 842 (1952). In Haines, the conviction was based on PA. CONST. of 1874, art. III, § 32, which provided that "no person may be compelled to testify in any lawful investigation or judicial proceeding against any person who may be charged with having committed the offense of bribery or corrupt solicitation . . . and shall not be permitted to withhold his testimony upon the ground that it may criminate himself. . . ." This section was eventually deleted from the Pennsylvania Constitution.
116. See Riccobene Appeal, 439 Pa. 404, 268 A.2d 104 (1970) (appellant held in contempt for refusal to testify after having been granted immunity). See also note 77 and accompanying text supra.
118. Id. The United States Supreme Court has yet to decide whether a witness or virtual defendant has a constitutional right to the assistance of counsel when subpoenaed to testify before a grand jury. In In re Groban, 352 U.S. 330 (1957), the Court stated that a witness "cannot insist, as a matter of constitutional right, on being represented by his counsel." Id. at 333. Chief Justice Burger, writing for himself and three other Justices in United States v. Mandujano, 425 U.S. 564 (1976), stated that since no criminal proceedings had been instituted against the witness (virtual defendant) when summoned to testify, "the Sixth Amendment right to counsel had not come into play." Id. at 581 (citing Kirby v. Illinois, 406 U.S. 682 (1972)).

Justice Brennan, in a concurring opinion joined by Justice Marshall, argued that a putative defendant should be entitled to counsel before testifying and may consult with his attorney prior to answering each question. Id. at 605 (Brennan, J., concurring in the judgment). For further discussion on this point, see Boudin, The Federal Grand Jury, 61 GEO. L.J. 1, 17 (1972); Friendly, The Fifth Amendment Tomorrow: The Case for Constitutional Change, 37 U. CIN. L. REV. 671, 701 (1968); Meshbesher, Right to Counsel Before Grand Jury, 41 F.R.D. 189, 193 (1966); Steele, Right to Counsel at the Grand Jury Stage of Criminal Proceedings, 36 Mo. L. REV. 193, 203 (1971).
be entitled to consult with counsel prior to answering each question.\textsuperscript{119} Where an individual has been accused by name in the petition for a grand jury investigation, the courts of Pennsylvania have decided questions relating to the rights possessed by the named individual without the benefit of United States Supreme Court precedent. In this instance the Pennsylvania judiciary has recognized the existence of other factors which alter the extent of the rights and privileges to be granted the identified party. Because a petition specifically identified individuals suspected of wrongdoing,\textsuperscript{120} the issue of whether such named individuals were to be extended any additional rights or privileges was considered early.\textsuperscript{121} It was decided that such witnesses stood in the position of an accused and, therefore, had the right to remain silent.\textsuperscript{122} The analysis employed to reach this conclusion was rather simple. The party named in the petition was one whose guilt or innocence in relation to a specific offense was actually being investigated, and consequently, his conduct became the main subject of the inquiry. Any question directed to the named party must have as its object the discovery of proof of the charge against him. Thus, the named individual was not found to have the status of a witness, but that of an accused.\textsuperscript{123} This view prevails today.

Initially, it was held that the remedy for violation of any of the accused's rights or privileges by the investigating grand jury was the quashing of any indictment against the accused resulting from the grand jury's presentment.\textsuperscript{124} Subsequent decisions have dissolved any notion of a per se remedy; whether a particular indictment is quashed

\textsuperscript{119} Commonwealth v. McCloskey, 443 Pa. 117, 144-45, 277 A.2d 764, 778, cert. denied, 404 U.S. 1000 (1971). The rationale offered by the court was that to hold otherwise "would cause undue delay and all but terminate the institution of the investigatory grand jury." \textit{Id.} at 145, 277 A.2d at 778. Justice Brennan, concurring in \textit{United States v. Mandujano}, flatly rejected this argument, citing a "plethora" of reported cases permitting the witness to leave the room at will. \textit{United States v. Mandujano}, 425 U.S. 564, 606 (1976) (Brennan, J., concurring in the judgment).

\textsuperscript{120} See note 40 supra.

\textsuperscript{121} The situation of an individual accused in a petition being called to testify is to be distinguished from that of an individual who, subsequent to being called to testify, is recommended for indictment in the presentment. This latter situation does not affect the regularity of the proceedings. See Commonwealth v. Rhey, 140 Pa. Super. Ct. at 345, 14 A.2d at 195.


\textsuperscript{123} \textit{Id.}

\textsuperscript{124} \textit{Id.} The \textit{Bane} decision, adopted by the Pennsylvania Superior Court in Manko Appeal, 168 Pa. Super. Ct. 177, 180, 77 A.2d 700, 702 (1951), was subsequently explained by the court in Commonwealth v. Gross, 172 Pa. Super. Ct. 85, 92 A.2d 251 (1952). There the court noted that the defendants in \textit{Bane} were indicted by the same grand jury before which they were called as witnesses. \textit{Id.} at 93, 92 A.2d at 255.
or not presently depends upon the nature of the irregularity in the investigating grand jury's proceedings and its effect upon the indicting grand jury.\(^2\) A violation of an accused's constitutional rights by the investigating grand jury is not necessarily sufficient cause, in and of itself, to quash an indictment returned by a separate\(^2\) indicting grand jury;\(^2\) nor, on the other hand, must there be a constitutional violation in order to quash an indictment.\(^2\) Rather, the determinative factor is that the irregularity encountered must be such that it causes prejudicial harm to the accused.\(^2\)

There is an irreconcilable disparity of treatment between an individual named in a petition and a virtual defendant. Just why an individual named in a petition is more akin to an accused than is a virtual defendant has yet to be explained by the courts. The rationale employed by Pennsylvania courts in *Commonwealth v. Bane*\(^1\) and *Manko Appeal*\(^1\) was that the named witness was, in essence, an accused and any attempt to gain testimony from him could only be in the hope of obtaining "proof of the criminal charges."\(^1\) This rationale, however, is

\(\text{125. Compare Commonwealth v. Gross, 172 Pa. Super. Ct. 85, 92 A.2d 251 (1952) (indictment not quashed where there is no evidence that the indicting grand jury was aware of irregularities in grand jury investigation) with Commonwealth v. Kilgallen, 379 Pa. 315, 108 A.2d 780 (1954) (motion to quash indictment should not have been dismissed where there was evidence that the indicting grand jury used evidence illegally obtained by the investigating grand jury).}\)

\(\text{126. It should be noted that a grand jury charged to conduct a special investigation may also act as the indicting grand jury for the return of indictments resulting from the investigation. See Commonwealth v. Bolger, 42 Pa. Super. Ct. 115 (1910), aff'd, 229 Pa. 597, 79 A. 113 (1911).}\)


\(\text{128. See Commonwealth v. Levinson, 480 Pa. 273, 389 A.2d 1062 (1978) (indictment based in part on the presentment of an investigating grand jury of which six of its members were added as a group in the middle of the investigation must be quashed). See also 17 DuQ. L. REV. 929 (1979).}\)

\(\text{129. See note 125 and accompanying text supra. Since a presentment in most instances provides the basis for the indictment, it seems rather clear that any irregularity which contributes to the contents of the presentment provides a sufficient reason for quashing the indictment. As stated by the Levinson court:}\)

\(\text{[A]n indictment based in part on the presentment of an investigating grand jury which did not function in accordance with law to the prejudice of appellant must be quashed. We therefore conclude that, having shown that that invalid presentment formed a part of the indicting grand jury's considerations prior to returning a true bill, appellee established that the indictment should be quashed.}\)

*Commonwealth v. Levinson, 480 Pa. at 290, 389 A.2d at 1070. See also Commonwealth v. McCloskey, 443 Pa. at 147, 277 A.2d at 779 (indictment quashed where based on presentment drafted in part from testimony obtained in violation of defendant's constitutional rights).\)

\(\text{130. 39 Pa. D. & C. 664 (1940).}\)

\(\text{131. 168 Pa. Super. Ct. 177, 77 A.2d 700 (1951).}\)

\(\text{132. Id. at 180, 77 A.2d at 701.}\)
equally applicable to virtual defendants. Further, this imprecise system of affording full rights only to defendants named in the petition leaves great room for abuse. Justice Brennan's opinion in Mandujano was correct in noting that the restrictions against compelling the named defendant to testify can easily be evaded by not including his name in the petition. This results in the witness' being relegated to the position of a virtual defendant in which, under the Supreme Court's trilogy, he has no more rights than a regular witness. In sum, the constitutional rights of a person about to be indicted are easily circumvented by simply neglecting to mention the name of the potential defendant in the petition.

One possible justification for continuing the disparity inherent in the present system is that it eliminates the burdensome problem of actually determining who is and who is not a virtual defendant. Since often only the prosecutor will know which witnesses he is about to indict, this problem is not easily resolved. However, the most amiable solution is to adopt a realistic test for determining when a grand jury witness is actually a virtual defendant and then to afford such virtual defendants the same rights as those rendered to an individual named in the petition. Remedying the lack of precision and manifest injustice of the present system would seem to outweigh the difficulty of establishing a framework within which to identify those witnesses who, in actuality, are potential defendants. In all fairness, they should be treated as having the same rights as a named defendant.

IV. LEGISLATIVE DEVELOPMENT OF THE GRAND JURY IN PENNSYLVANIA: THE INVESTIGATING GRAND JURY ACT

On November 22, 1978, the Pennsylvania Legislature enacted the Investigating Grand Jury Act, which provides a comprehensive scheme for impaneling and conducting grand jury investigations. The legislature's selection of the term "investigating grand jury" is bound to con-

133. See note 96 and accompanying text supra.
134. See notes 92-106 and accompanying text supra.
135. Various tests for determining which witness is a virtual defendant have been offered. For example, Justice Brennan suggests that a virtual defendant is an individual suspected of having committed a crime against whom the government has probable cause as measured by an objective standard. See United States v. Mandujano, 425 U.S. 564, 598 (1976) (Brennan, J., concurring in the result). Judge Frank suggested a test which would combine objective elements with the prosecutor's subsequent subjective intent to indict the individual. See United States v. Scully, 225 F.2d 113, 117 (2d Cir. 1955) (Frank, J., concurring in the result).
136. PA. STAT. ANN. tit. 19, §§ 265-278 (Purdon Supp. 1979). The complete title is "An Act providing for investigating grand juries." In addition, the Pennsylvania Supreme Court promulgated rules to supplement the Act. See PA. R. CRIM. P. 250-266.
tribute to the present "terminological melange."\footnote{137} Significant differences between the legislatively created body and the judicially developed investigatory grand juries now force the Pennsylvania community to be alert to the particular type of body involved because a ruling regarding the statutorily created body may not be applicable to the judicially created bodies.

The legislation provides for the summoning of investigating grand juries upon application of the attorney for the commonwealth\footnote{138} or by an order of a court acting upon its own motion.\footnote{139} Additionally, the Attorney General may make application for the convening of a multi-county investigating grand jury.\footnote{140} Unlike the judicially developed body, no provision is made for memorializing either of the two statutory bodies.\footnote{141} Since few if any grand jury investigations have resulted from memorials,\footnote{142} the absence of such a provision is of little consequence.\footnote{143}

According to the statutory prescription, the application for summoning the investigating grand jury must state that the convening of the grand jury is necessary because of the existence of criminal activity within the county which can best be fully investigated through the use of the resources available to that jury.\footnote{144} This provision incorporates only a few of the judicial requirements held applicable to the convening of grand juries conducting investigations.\footnote{145} Consequently, because

\footnote{137} See note 9 supra.
\footnote{138} Pa. Stat. Ann. tit. 19 § 267(b) (Purdon Supp. 1979). The attorney for the commonwealth is defined as the district attorney or his designee, or the Attorney General or his designee. Id. § 266.
\footnote{139} Id. § 267(c). The procedure for summoning and convening the grand jury is governed by id. § 269 and Pa. R. Crim. P. 251-258.
\footnote{140} Pa. Stat. Ann. tit. 19, § 268(a) (Purdon Supp. 1979). A multi-county investigating grand jury may only be convened to investigate organized crime or public corruption involving more than one county. Id. For a definition of organized crime and public corruption see id. § 266.
\footnote{141} See note 48 and accompanying text supra.
\footnote{143} However, one possible detrimental consequence should be noted: namely, a corrupt attorney for the commonwealth can prevent investigations by not filing an application. But because a court can impanel a grand jury under the act on its own motion, this consequence is for the most part eliminated. Additionally, a private citizen can still memorialize a court for a grand jury investigation. Thus, a variety of means outside the control of the attorney for the commonwealth exist for convening an investigation.
\footnote{145} A grand jury conducting an investigation can only be convened where the subject matter of the investigation affects the community as a whole; the investigation is aimed at conditions and not individuals; the ordinary processes of law enforcement are inadequate; and the investigation is directed at crimes, has a defined scope, and is supported by reli-
the statutory body can be more easily summoned, the possibility exists that investigations performed by judicially created grand juries will be eliminated.

The duration of a statutory investigating grand jury is limited to eighteen months\(^{146}\) unless its request for an extension, not to exceed six months,\(^{147}\) is granted by the court.\(^{148}\) Although the Act places a more definite limitation on the term of a grand jury than have the courts,\(^{149}\) it does not preclude the summoning of successive investigating grand juries directed to investigate the same subject.\(^{150}\) In fact, where the volume of work exceeds the capacity of a single investigating grand jury, additional investigating grand juries may be impaneled.\(^{151}\) In this respect, the limitation may be averted either by convening successive grand juries to continue the investigation or by impaneling several grand juries to assist in a single investigation.

Exploring the question of the proper scope of such an investigation, the statute broadly states that the subjects of investigations are to be “offenses against the criminal laws of the Commonwealth”\(^{152}\) which are brought to the attention of the jury either by the court\(^{153}\) or the attorney for the commonwealth.\(^{154}\) The statute prohibits “the investigating grand jury from inquiring into alleged offenses on its own.”\(^{155}\) However, the statute does provide that the “jurisdiction, powers and activities of an investigating grand jury shall not, if otherwise lawful, be limited in any way by the charge of the court.”\(^{156}\) The obvious conflict existing between these sections is rectified by section 273, which permits the attorney for the commonwealth to submit investigations to the jury after submitting notice to the supervising judge.\(^{157}\) These pro-

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\(^{146}\) See notes 38-45 and accompanying text supra. By way of comparison, the application for a statutorily created county investigating grand jury need only state that its convening is necessary “because of the existence of criminal activity . . . which can best be fully investigated using the investigative resources of the grand jury.” PA. STAT. ANN. tit. 19, § 287(b) (Purdon Supp. 1979). The pleading requirements for convening a multi-county investigating grand jury are set out in id. § 268(a).

\(^{147}\) Id. § 270(a) (Purdon Supp. 1979).

\(^{148}\) Id. § 270(b).

\(^{149}\) See notes 69-71 and accompanying text supra.

\(^{150}\) See note 71 and accompanying text supra.

\(^{151}\) PA. STAT. ANN. tit. 19, § 270(a) (Purdon Supp. 1979). The same requirements for convening the initial grand jury apply to the convening of additional grand juries. Id.

\(^{152}\) Id. § 271(a).

\(^{153}\) Id.

\(^{154}\) Id.

\(^{155}\) Id.

\(^{156}\) Id. § 271(c).

\(^{157}\) Id. § 273.
visions, read together, allow the grand jury to extend its investigation into areas unrelated to the subject for which it was convened, provided that the area of investigation is submitted by the attorney for the commonwealth. This is a clear departure from the judicial rules applicable to grand jury investigations.\textsuperscript{158} It remains to be seen whether this departure will give rise to the "unrestrained delving into the affairs of the whole community" of which the courts have been fearful.\textsuperscript{159}

The investigative resources allotted to the statutory body include the power to compel the attendance and testimony of witnesses, the power to take testimony from witnesses who have been granted immunity, the power to compel the production of documents, records and other evidence, the power to obtain the initiation of civil and criminal contempt proceedings, and every power available to any other grand jury.\textsuperscript{160} Additionally, the grand jury can issue presentments\textsuperscript{161} and reports,\textsuperscript{162} and can indict individuals.\textsuperscript{163} These resources are identical to those of judicially created grand juries.\textsuperscript{164} Moreover, the statute grants witnesses the right to the advice of retained or appointed counsel during such time as the witness is questioned.\textsuperscript{165} However, counsel may not object to the questions asked or in any way address the grand jury or the attorney for the commonwealth.\textsuperscript{166}

Finally, the statute is silent as to the rights and privileges to be afforded virtual defendants and individuals named in a petition for a grand jury investigation. Since the statute does not require allegation of a specific crime in the petition, it is unlikely that such petitions will explicitly name any individuals. Consequently, those individuals who in the past were extended the rights and privileges of an accused because the petition specifically named them will now most likely find themselves in the position of virtual defendants who are afforded no more rights and privileges than those granted regular witnesses. Whether this situation will lead to an increase in the use by prosecutors of the tactic of summoning such targeted individuals for the sole purpose of gathering evidence to indict them remains to be seen. Hopefully, should this unfair situation flourish, the courts of Pennsylvania will

\begin{thebibliography}{99}
\bibitem{158} See note 42 and accompanying text \textit{supra}.
\bibitem{159} Smith v. Gallagher, 408 Pa. 551, 579, 185 A.2d 135, 149 (1962).
\bibitem{161} \textit{Id.} § 274(a).
\bibitem{162} \textit{Id.} § 275. A report is defined as a document regarding conditions relating to organized crime or public corruption or proposing recommendations for legislative, executive, or administrative action. \textit{Id.} § 266.
\bibitem{163} \textit{Id.} §§ 271 & 274.
\bibitem{164} See notes 16-19 & 72-81 and accompanying text \textit{supra}.
\bibitem{166} \textit{Id.} § 272(c). See also \textit{Pa. R. Crim. P. 264}.
\end{thebibliography}
react by devising a test for determining when an individual is a virtual defendant and extending such individuals the rights of an accused.

V. CONCLUSION

The preceding comparison of the judicial and statutory grand juries indicates a fundamental difference in view between the Pennsylvania judiciary and the legislature regarding the role played by grand juries charged to conduct investigations. The courts have recognized the public prosecutor role by granting the grand jury powerful investigative tools. However, these tools are tempered by the restrictions which the courts have imposed on the convening of investigatory grand juries and on the scope of their investigations. This tempering reflects the role of the grand jury as the protector of individual rights and defender of freedom.

On the other hand, the legislature has created a potentially powerful and effective investigative body. Since the statutory investigating grand jury is more easily summoned and can have the scope of its investigation extended beyond the initial charge of the court, there is no doubt that the legislature fully intended to create a body akin to a public prosecutor. This is further evidenced by the extension of the right to counsel during questioning. The statutory body has the characteristics of a criminal proceeding for which witnesses summoned to testify will surely be in need of legal assistance. The future of this body is uncertain, but there can be no doubt that it has been specifically designed to play a major role in criminal investigations.

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167. See notes 20-32 and accompanying text supra.
168. See notes 144-145 and accompanying text supra.
169. See notes 156-159 and accompanying text supra.
170. See notes 165-166 and accompanying text supra.