A Fairer and More Democratic Federal Grand Jury System

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The *Federal Sentencing Reporter* may seem an unusual place to discuss the need for federal grand jury reform, but the two topics are more closely related than it might seem. This is because *Booker* and its progeny have attached even more significance to the grand jury indictment; now, in addition to its putative role of protecting the accused against unfounded prosecution, the grand jury has an enhanced role in screening what used to be treated as judge-determined sentencing factors.

Notwithstanding this development, the federal grand jury's role remains more ministerial than meaningful. In the words of William J. Campbell, a former federal chief judge in Chicago, "The grand jury is the total captive of the prosecutor, who, if he is candid, will concede that he can indict anybody, at any time, for almost anything before any grand jury."[1] This allocation of power is completely at odds with the constitutional responsibilities (not to mention considerable burdens) of grand jury service.[2] Congress should work with a new administration to empower federal grand jurors and address the institution's long-neglected shortcomings.

I. Blueprint for Reform

Ten years ago, NACDL assembled a blue-ribbon committee, comprised of current and former prosecutors, academics, and practitioners, to examine the federal grand jury system. Among the distinguished committee members were Larry Thompson, who later became John Ashcroft's deputy attorney general, and William Murphy, past president of the National District Attorneys Association. Fourteen of the twenty-four committee members had served as prosecutors, eleven in the federal system. Consequently, the deliberation and drafting process paid due regard to the grand jury's investigative function.

The committee's work culminated in 2000 with the release of the Federal Grand Jury Reform Report & "Bill of Rights."[3] Based largely on the ABA's 1977 Grand Jury Policy and Model Act, this report sets forth ten carefully crafted proposals, including: (1) the right of witnesses to have counsel present with them in the grand jury room; (2) a requirement that prosecutors present evidence that may exonerate the target or subject of the investigation; and (3) the right of targets or subjects to testify.

Federal grand jury procedures contradict much of what Americans take for granted in their criminal justice system. Only before a grand jury can the government compel someone to appear and face questioning without an attorney. Witnesses needing to consult with counsel must go through the awkward and time-consuming process of stepping outside the grand jury room, and prosecutors may discourage or interfere with these interruptions. Although a witness fearing indictment may invoke the Fifth Amendment privilege against self-incrimination, prosecutors sometimes subpoena persons who they know will take the Fifth in order to intimidate or embarrass them.

It would be foolish to face this treacherous situation without adequate preparation, but even that is subject to prosecutorial manipulation. Prosecutors can arrange for witnesses to be subpoenaed "forthwith," precluding a meaningful opportunity to retain or consult with counsel. Any witness required to appear again—maybe weeks or months after the initial appearance—would certainly want to review the transcript of their prior testimony for purposes of refreshing their memory and correcting any misstatements. Prosecutors routinely deny such requests, although some courts have chipped away at this policy based on interpretation of the Federal Rules.[4] Still, given judicial reluctance to regulate grand jury practice, legislation is needed to ensure that all grand jury witnesses have a right to receive a copy of their testimony.

The rules of evidence that govern trials do not apply to grand jury proceedings, opening the door to illegally seized evidence, coerced statements, and hearsay. The target of the investigation has no right to testify or present evidence. Nor is the prosecutor required to present the grand jury with evidence that would exculpate the target.

This lawlessness cannot be reconciled with the grave consequences of a grand jury indictment. An indictment not only authorizes arrest without judicial review but also forecloses any judicial assessment of whether probable cause supports the charges. The notion that this interest is vindicated by a final adjudication of guilt or innocence at

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trial does not give proper weight to the devastating personal and financial consequences of criminal charges.

II. Reforms Would Strengthen the Grand Jury

Not surprisingly, federal prosecutors have doggedly sought to preserve the status quo. Brushing aside the experience of the states, the Justice Department, under prior administrations, has relied primarily on the claim that the proposed reforms would compromise the secrecy and efficiency of the grand jury system.

Prosecutors argue that without their unbridled authority, they cannot effectively investigate and prosecute complex federal crimes, but this is a familiar and misleading refrain. The McDade-Murtha law (28 U.S.C. § 530A), which clarified that federal prosecutors are not exempt from state rules governing attorney conduct, prompted similar alarmist predictions that did not come to pass.

Several states, including New York and Massachusetts, have successfully incorporated many of these proposals into their grand jury systems. At least twenty states allow a witness's attorney in the grand jury room, and a review of the case law from those states fails to reveal any problems.[5] In response, the Justice Department asserts that federal prosecutions are uniquely complex, which ignores the fact that states like New York and Massachusetts handle their share of complex crimes—just as the federal system handles its share (and then some) of traditional state crimes.

Prior administrations also have argued that "the number of cases of alleged prosecutorial overreaching is extremely small."[6] Given the excessive secrecy that surrounds grand jury proceedings the amazing thing is that some abuses actually do come to light. When they do, it is akin to the single visible termite that heralds more extensive, hidden problems.

But the merits of the various reform proposals do not depend on some quantitative assessment of prosecutorial misconduct, which the government would always find deficient. Supporters of the status quo could not seriously maintain that today's grand jury independently and vigorously reviews the prosecutor's charging decisions. One hears the argument that the grand jury process causes prosecutors to screen their own cases, but this self-monitoring is not what the framers had in mind when they required that citizens review and approve federal criminal charges.

III. Bipartisan Support

Irrespective of election outcomes, the political challenges posed by criminal justice reform are ever-present, which means bipartisan support will remain essential. Federal grand jury reform is not an issue belonging exclusively to Democrats or Republicans but is consistent with values embraced by both parties. As such, past congressional support for reform has come from both sides of the aisle, as well as from those with unimpeachable law-and-order credentials.

The secrecy of grand jury proceedings has largely spared the institution significant public scrutiny, allowing the Justice Department to portray these reforms as a windfall to the defense bar. This assertion tends to stifle rational debate about the state of the federal grand jury by obscuring an important goal of the reform proposals: a more robust role for the citizens who serve as federal grand jurors.

Meaningful citizen participation in grand juries would bring local community values and sentiments to the federal charging process, tempering the hegemony of policies set in Washington.[7] Reforms that would strengthen the independence of the grand jury are increasingly important given Congress's propensity to "federalize" criminal offenses traditionally prosecuted in state and local courts, which has been criticized by liberals and conservatives alike. Since 2000, Congress has enacted more than 450 new crimes—about fifty-seven new crimes per year—for a total of approximately 4,450 federal crimes in the U.S. Code.[8]

IV. Conclusion

For more than thirty years, the pressure to repair the federal grand jury system has been building. In 1977, the year the ABA first published its Grand Jury Policy and Model Act advocating numerous reforms, the federal government prosecuted 53,000 criminal cases. Three decades later, that number has climbed to 88,000.[9] As the reach of the federal criminal justice system continues to expand, so does the danger inherent in a charging system characterized chiefly by secrecy and unchecked government power.

Like many of the reforms prompted by revelations of wrongful convictions, grand jury reform is about strengthening our adversarial system. The end result would shift power not from the prosecutor to the defendant but back into the hands of citizens fulfilling their constitutional duty of standing between the accuser and the accused. It is time for Congress to enhance the role of citizens in the criminal charging process and rescue the democratic role of the federal grand jury. In light of the positive state experience with these reforms and the strong support of former Justice Department officials and prosecutors, the new administration should take an objective look at the current grand jury system instead of falling back on parochial policies that do not serve the ends of justice.

Notes

1 William J. Campbell, *Eliminate the Grand Jury*, 64 J. Crim. L. & Criminology 174, 180 (1973).

2 *Grand Juries: Indictment of a System*, ABA Journal, Jan. 2001; Stephen Rosenfeld, *Blind Justice: The Secretive Nature of the Grand Jury System Needs Review*, Wash. Post, Aug. 14, 2001.

3 Federal Grand Jury Reform Report and "Bill of Rights," *available at* http://www.nacdl.org/public.nsf/freeform/grandjuryreform.

4 *See In re Grand Jury*, 490 F.3d 978 (D.C. Cir. 2007).

5 Michael Vitiello & J. Clark Kelso, *Reform of California's Grand Jury System*, 35 Loy. L.A. L. Rev. 513, 563 & n. 352 (January 2002); Sara Sun Beale et al., Grand Jury Law and Practice § 6:27 (2d ed. 2001).

[6] *Constitutional Rights and the Grand Jury: Hearing before the House Subcommittee on the Constitution*, 106th Cong. (July 27, 2000) (statement of James K. Robinson & Loretta E. Lynch) *available at* http://commdocs.house.gov/committees/judiciary/hju67333.000/hju67333_0f.htm.

[7] *United States v. Navarro-Vargas*, 367 F.3d 896, 902 (9th Cir. 2004) (Kozinski, J., dissenting).

[8] John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Legal Memorandum #26 (Heritage Foundation, June 16, 2008) *available at* http://www.heritage.org/Research/LegalIssues/lm26.cfm.

[9] U.S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, tbl. 5.22.2007 "Defendants Disposed of in U.S. District Courts," *available at* http://www.albany.edu/sourcebook/pdf/t5222007.pdf.