

**CHAPTER 4**

**FEDERAL GRAND JURY REFORM**

## THE ISSUE

In the words of William J. Campbell, a former federal chief judge in Chicago, “[t]he 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.”<sup>1</sup> This allocation of power is completely at odds with the constitutional responsibilities (not to mention considerable burdens) of grand jury service. Congress should work with the administration to empower federal grand jurors and address the institution’s long-neglected shortcomings. Most importantly, anyone facing the awesome power of a federal prosecutor armed with a federal grand jury should be allowed to have counsel.

## HISTORY OF THE PROBLEM

While the federal grand jury was originally intended to serve both a screening and investigative function,<sup>2</sup> modern grand jury procedures are incompatible with the screening function. It is only before a grand jury that the government can compel someone to appear and face questioning without an attorney.<sup>3</sup> 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.<sup>4</sup> The target of an 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.<sup>5</sup> Many states have fixed these and other flaws without impairing the effectiveness of their grand jury systems, as evidenced by a report from National Association of Criminal Defense Lawyers (NACDL) examining the experience in Colorado and New York.<sup>6</sup>

Congressional attempts at federal grand jury reform date back to the late 1970s. From 1977-1987, Representative John Conyers (D-MI), among others, introduced various bills incorporating reforms to grand jury procedures.<sup>7</sup> In 1998, Senator Dale Bumpers (D-AR) introduced the Grand Jury Due Process Act<sup>8</sup>, to provide a right to assistance of counsel in the grand jury room, and the more comprehensive Grand Jury Reform Act<sup>9</sup>. In July 1998, Senator Bumpers offered his right-to-counsel proposal as an amendment to an appropriations bill,<sup>10</sup> but it was defeated 59-41.<sup>11</sup>

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<sup>1</sup> William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 180 (1973).

<sup>2</sup> *Id.* at 175.

<sup>3</sup> John Weasley Hall, *A Fairer and More Democratic Federal Grand Jury System*, 20 FED. SENT’G REP. 334, 334 (June 2008).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> National Association of Criminal Defense Lawyers, *Proposals of Commission to Reform the Grand Jury*, <http://www.nacdl.org/public.nsf/freeform/grandjuryreform?opendocument> (last visited Jan. 21, 2011).

<sup>7</sup> *See id.* at note 27 (providing examples of various bills incorporating grand jury reforms).

<sup>8</sup> S. 2030, 105th Cong. (1998).

<sup>9</sup> S. 2289, 105th Cong. (1998).

<sup>10</sup> S. Amdt. 3243 to S. 2260, 105th Cong. (1998).

<sup>11</sup> National Association of Criminal Defense Lawyers, *Federal Grand Jury Reform*, <http://www.nacdl.org/public.nsf/freeform/grandjury?opendocument>.

In 1999, in the wake of alleged grand jury abuses by Independent Counsel Kenneth Starr, Representative Bill Delahunt (D-MA), a former state prosecutor, announced his intention to introduce a bill mandating comprehensive changes in the way federal grand juries operate.<sup>12</sup> In 2000, the House Constitution Subcommittee held a hearing on grand jury reform, but Rep. Delahunt's grand jury bill was never introduced.<sup>13</sup> Senator Arlen Specter, who had voted in favor of the 1998 Bumpers amendment, scheduled a Judiciary Committee hearing regarding the federal grand jury system for November 16, 2005, but other matters forced him to postpone.

The courts have largely abdicated any responsibility for policing the conduct of prosecutors within the grand jury room. Chapter 9-11 of the United States Attorneys' Manual (USAM), which contains the Department of Justice's (DOJ) policy on grand jury practice,<sup>14</sup> does not contain guidance on filling this power vacuum. Further, the USAM is not enforceable at law, and fails to address the most glaring grand jury inequities. Where the USAM does speak to a particular issue—such as the naming of an unindicted coconspirator or a target's request to testify—the policy is generally consistent with the proposals outlined here.<sup>15</sup> In these areas, DOJ's opposition, essentially an effort to avoid being bound by its own policies, is particularly unjustifiable.

As required by the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act of 1999<sup>16</sup>, the Advisory Committee on Criminal Rules of the Judicial Conference Committee on Rules of Practice and Procedure (Judicial Conference) submitted a report<sup>17</sup> evaluating whether an amendment to the Federal Rules of Criminal Procedure governing grand juries<sup>18</sup> to permit the presence of counsel for a witness testifying before the grand jury in the grand jury room would further the interests of justice and law enforcement. In recommending against such an amendment, the Judicial Conference's five-page report relies extensively on a 1975 Judicial Conference report, which identified the three principal reasons for not allowing an attorney in the attorney room as concern that such practice would result in : “(i) loss of spontaneity in testimony; (ii) transformation of the grand jury into an adversary proceeding; and (iii) loss of secrecy, with a resultant chilling effect on witness cooperation, particularly in cases involving multiple representation.”<sup>19</sup>

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<sup>12</sup> Sam Skolnik, *Grand Jury: Power Shift?*, LEGAL TIMES, Apr. 12, 1999, available at <http://truthinjustice.org/grandjury.htm>.

<sup>13</sup> See *Constitutional Rights and the Grand Jury: Oversight Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, available at <http://judiciary.house.gov/legacy/constitution.htm>.

<sup>14</sup> U.S. DEPT. OF JUST., U.S. ATTORNEYS' MANUAL, CRIMINAL DIVISION, GRAND JURY, § 9-11.000 (2002), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/11mcrm.htm#](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/11mcrm.htm#).

<sup>15</sup> *Id.* at §9-11.130.

<sup>16</sup> H.R. 4276, 105th Cong. (1998), § 622.

<sup>17</sup> U.S. Judicial Conference Committee on Rules of Practice and Procedure, Meeting Minutes (Jan. 7-8, 1999), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/jan1999.pdf>.

<sup>18</sup> FED. R. CRIM. P. 6, available at <http://www.law.cornell.edu/rules/frcrmp/Rule6.htm>.

<sup>19</sup> U.S. Judicial Conference, *supra* note 17, at 14 (noting time frame provided by Congress was too short for comprehensive study and indicating reliance on past study).

## RECOMMENDATIONS

### 1. A Fairer and More Democratic Federal Grand Jury System

#### A. *The Federal Grand Jury Process Fails to Respect the Constitutional Responsibilities and Burdens of Grand Jury Service and Fails to Protect Citizens and Businesses*

The federal grand jury today functions primarily as a tool of the federal prosecutor. Employing the power of compulsory process in a secret proceeding, the prosecutor investigates and determines, with virtually no check, who will be indicted and on what charges. The grand jury process is largely devoid of legal rules, allowing the prosecutor to exercise enormous power unrestrained by law or judicial supervision.

#### B. *Enhance the Role of Federal Grand Jurors and Address the Institution's Long-Neglected Shortcomings*

##### *Legislative*

Congress should pass comprehensive legislation to strengthen the grand jury's screening function; empower grand jurors; and protect the rights of witnesses, subjects, and targets of grand jury investigations. Congress should make the following changes to existing legislation:

- Amend Rule 6 of the Federal Rules of Criminal Procedure to allow a witness before the grand jury who has not received immunity to be accompanied by counsel in his or her appearance before the grand jury;<sup>20</sup>
- Amend Rule 6 of the Federal Rules of Criminal Procedure to require that prosecutors present evidence in their possession that tends to exonerate the target or subject (other than prior inconsistent statements or *Giglio* material);<sup>21</sup>
- Prohibit prosecutors from presenting to the federal grand jury evidence they know to be constitutionally inadmissible at trial because of a court ruling on the matter by amending Rule 6 of the Federal Rules of Criminal Procedure;<sup>22</sup>
- Amend Rule 6 of the Federal Rules of Criminal Procedure to provide a target or subject of a grand jury investigation the right to testify before the grand jury;<sup>23</sup>

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<sup>20</sup> FED. R. CRIM. P. 6(d), available at <http://www.law.cornell.edu/rules/frcrmp/>.

<sup>21</sup> *Id.* at 6.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

- Provide witnesses the right to receive a transcript of their federal grand jury testimony by amending Rule 6 of the Federal Rules of Criminal Procedure and 18 U.S.C. § 3500.<sup>24</sup>
- Amend Rule 7 of the Federal Rules of Criminal Procedure to prohibit the practice of naming persons in an indictment as unindicted co-conspirators to a criminal conspiracy;<sup>25</sup>
- Require that prosecutors give *Miranda* warnings to all non-immunized subjects or targets called before a federal grand jury by amending Rule 6 of the Federal Rules of Criminal Procedure;<sup>26</sup>
- Require that all subpoenas for witnesses called before a federal grand jury are issued at least 72 hours before the date of appearance, not to include weekends and holidays, unless good cause is shown for an exemption by amending Rule 6 or 17 of the Federal Rules of Criminal Procedure;<sup>27</sup>
- Amend Rule 6 of the Federal Rules of Criminal Procedure to: (i) give federal grand jurors meaningful jury instructions, on the record, regarding their duties and powers as grand jurors, and the charges they are to consider; (ii) record and make available to the accused all of the prosecutor’s instructions, recommendations, and commentary to grand jurors after an indictment and during pre-trial discovery; and (iii) grant the court discretion to dismiss an indictment, with or without prejudice, in the event of prosecutorial impropriety reflected in the transcript;<sup>28</sup> and
- Prohibit the practice of calling before the federal grand jury subjects or targets who have stated personally or through counsel that they intend to invoke the constitutional privilege against self-incrimination by amending Rule 6 of the Federal Rules of Criminal Procedure.<sup>29</sup>

### *Executive*

DOJ should amend the United States Attorney’s Manual (USAM). While the USAM States includes certain admonitions regarding the conduct of grand jury investigations,<sup>30</sup> the Executive has authority to strengthen the USAM’s language. Moreover, the existing guidelines do not adequately protect against grand jury abuse, in part because the manual is unenforceable.

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<sup>24</sup> *Id.*; 18 U.S.C. §3500.

<sup>25</sup> *Id.* at 7.

<sup>26</sup> *Id.* at 6.

<sup>27</sup> *Id.* at 6, 17.

<sup>28</sup> *Id.* at 6.

<sup>29</sup> *Id.*

<sup>30</sup> See generally, U.S. ATTORNEYS’ MANUAL, *supra* note 14, at §§ 9-11.101-9-11.140, 9-11.160.

## APPENDICES

## Experts

Larry Thompson, Sr. Vice President and General Counsel, PepsiCo; former Deputy Attorney General and U.S. Attorney ([http://www.pepsico.com/Download/Pepsico\\_Thompson.pdf](http://www.pepsico.com/Download/Pepsico_Thompson.pdf))

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June B. Kress, Executive Director, Council for Court Excellence (<http://www.courtexcellence.org/AboutUsNew/Final%20KressJune.htm>)

## Further Resources

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