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GRAND JURIES IN AMERICA: RELIC OF THE PAST OR CONTINUING CONSTITUTIONAL INSTITUTION?

by
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U.S. District Court for the
Eastern District of North Carolina

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INTRODUCTION

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. . . .
>
> – U.S. CONST. AMEND. V

In the Eastern District of North Carolina, I once impaneled a grand jury that had to be disbanded before the end of its term. Around the midpoint of the 18-month term, I began receiving reports from attending Assistant U.S. Attorneys of a "runaway grand jury foreperson." It seemed this foreman had taken it upon himself to persistently direct the Assistant U.S. Attorneys' investigations, suggesting what charges should be brought, which witnesses should be called, and even going so far as to point out particular criminal activities that he perceived in his community that he wished to see presented to the grand jury! There was no known legal manner to address this foreman's conduct, so we collectively decided the

best way to resolve the matter was to discharge the grand jury. I met with the grand jury and, after expressing the gratitude of the court, explaining that there was no remaining business for them to address, and issuing certificates of appreciation, discharged it "for the sake of fiscal responsibility." We waited a month, impaneled a new grand jury, and started the process all over again.

My experience with this "renegade foreman" highlights the grand jury's independence, a trait alternately revered as its greatest asset and reviled as a grotesque lack of accountability. The American grand jury system places our "equals and neighbours," as Justice Scalia (quoting Blackstone) called jurors in a recent Supreme Court decision,[1] in positions of immense power within the criminal justice system. Recent controversies have brought the grand jury system under scrutiny. Are grand juries simply a relic of the past, long overdue for major reform or even abolition, or are they a continuing constitutional institution so imbedded in the American criminal justice system that they can and should endure, without substantial modification, for another 200 years?

I. HISTORY AND A HAM SANDWICH

Centuries before our Constitution was enacted, England developed a grand jury system steeped in secrecy and independence from the Crown,

[1] *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004).

foreshadowing the controversial elements in the current American system. Grand juries were first recognized in the Magna Carta, the English legal charter, in 1215. The original English grand juries consisted of twelve men selected from the knights and other freemen, summoned to inquire into crimes alleged to have been committed in their communities. Along with the many other legal institutions brought by our English forefathers, a variant of this system made its way to the New World. Even before the Revolution, colonists used the grand jury as a platform to assert their independence from the pressures of colonial governors. In 1735, the Colonial Governor of New York demanded that a grand jury indict the editor of a newspaper who had scorned the acts of the Royal Governor. The grand jury refused.

Contemporary critiques of grand juries stand in sharp contrast to this history, with observers worried that grand jurors are not sufficiently informed, legally and academically, to execute their constitutional duties and that they have become too dependent on the input of prosecutors, serving merely as "rubber stamps." These perceived problems are made all the worse by concerns about another key trait of grand juries – their secrecy – in an era where the public increasingly values transparency and accountability.

Once a prime example of grand jury independence, New York has more recently been a hotbed for the modern line of grand jury criticism. In

1985, Sol Wachtler, Chief Judge of the Court of Appeals of New York, expressed the sentiment of many within the legal profession when he famously quipped that a prosecutor in the United States could get a grand jury to "indict a ham sandwich." This aphorism has since become a favorite of opponents of the grand jury system. In an effort to bring greater accountability to the prosecutorial role in the criminal indictment process, Chief Judge Wachler proposed that the state of New York scrap the grand jury system altogether. Wachler's radical suggestion stands in marked contrast to colonial era reverence for grand juries' disregard of executive authority.

At the same time that voices like Wachler's have called for change, United States Supreme Court decisions in the last half-century have strengthened the existing grand jury system by bolstering prosecutorial independence and affirming the permissibility of hearsay and even double and triple hearsay by grand jury witnesses. The Court's decisions clash with the criminal defense bar's opinion that the grand jury is an institution adrift from its constitutional moorings and with the policy-based "ham sandwich" argument that grand juries are just fancy vehicles for prosecutorial discretion (or indiscretion).

II. NO LIMITS. . . TO THE COURSE OF THEIR INQUIRIES

The public in general, however, remains blissfully unaware of the grand jury's role in our criminal justice system. *The Benchbook for U.S. District Court Judges* (Mar. 2000 rev.), which I refer to when impaneling a grand jury, concisely summarizes the functions and purpose of the institution as follows:

> The functions of a grand jury are quite different from those of a trial jury. A grand jury does not determine guilt or innocence. Its sole function is to decide, after hearing the government's evidence and usually without hearing evidence from the defense, whether a person should be indicted and stand trial for a federal crime...
>
> The purpose of the grand jury is to determine whether there is sufficient evidence to justify a formal accusation against a person – that is, to determine if there is "probable cause" to believe the person committed a crime. If law enforcement officials were not first required to submit evidence of a person's guilt to an impartial grand jury, they would be free to arrest suspects and bring them to trial no matter how little evidence existed to support the charges.

The seemingly simple wording of the Fifth Amendment quoted at the outset of this WORKING PAPER belies an entire system of rules for the selection and operation of the United States' grand jury system. Each of the 94 federal district courts operates within the strictures of Section 3321 of Title 18 of the United States Code and Federal Rule of Criminal Procedure 6(a)(1), which provide that every grand jury shall consist of not fewer than

16 nor more than 23 members and that the court must order that enough legally qualified persons be summoned to meet this requirement. Federal grand juries are generally seated for an 18-month term and regularly convene on a monthly basis for one or more days, as needed, to address pending matters as requested by the Office of the United States Attorney. A grand jury, once impaneled, becomes an appendage of the court in which it sits, with the power to investigate any crime over which that court has jurisdiction. Within this framework, a 1906 case summarized the sweeping power of the grand jury as follows: "The oath of a grand juryman . . . assigns no limits, except those marked by diligence itself, to the course of his inquiries."[2] The grand jury is not beholden to anyone in the executive branch of government, and even the guidance provided by the supervising judge and the U.S. Attorney could best be termed "advisory."

Federal judicial districts often have multiple grand juries. In the Eastern District of North Carolina, which consists of the 44 counties in the eastern half of the state, four grand juries are impaneled at any point in time: two in Raleigh, the state capital, one on the coast in Wilmington, and another in my courthouse in Greenville. Each of these four grand juries meets monthly to hear cases chosen for their review by the Office of the U.S. Attorney (federal prosecutor). The fifty states have state grand jury systems

[2]*Hale v. Henkel*, 201 U.S. 43, 26 S. Ct. 370 (1906) (paraphrasing the grand jury charge given by Judge Addison, in 1791, at the session of the court of common pleas).

similar to the federal system. Accordingly, there are several hundred federal grand juries and several thousand state grand juries impaneled and sitting, across the country, at any moment in time.

III. CREATING THE MONSTER: IMPANELING A GRAND JURY

Just as the English grand jury was independent of the king, the federal grand jury under the United States Constitution is independent of the U.S. Attorney, as well as other government lawyers. The grand jury is not an arm of the Federal Bureau of Investigation; it is not an arm of the Internal Revenue Service; it is not an arm of the U.S. Attorney's office. While you would perform a disservice if you did *not* indict where the evidence justifies an indictment, you would violate your oath if you merely "rubber-stamped" indictments brought before you by government representatives.[3]

Next month, the grand jury sitting in our courthouse in Greenville, North Carolina, will conclude its term of service, and the judges of this court will set about the task of impaneling a new grand jury. The clerk of our court will summon between 40 and 50 citizens from within the district to our courthouse, to appear on a given date and time. On that date either I, as presiding U.S. District Judge, or a presiding U.S. Magistrate Judge will

[3]"Grand Jury Charge," BENCHBOOK FOR U.S. DISTRICT COURT JUDGES (Mar. 2000 rev.).

commence the process of impaneling the 23-person grand jury. An initial group of 23 individuals will be placed into the well of the courtroom and the presiding judge will advise those present of what is about to happen, stressing the length of service and the responsibilities of grand jurors, and highlighting the secrecy and independence of the grand jury. Often citizens have told me that they were proud to be called for service, and many have remarked that they became even more willing to give of their precious time once they heard that the presentation of cases to the grand jury and their deliberations would be conducted in secret. In my interactions with prospective grand jurors, I have noticed that many of them appear to be impressed or intrigued upon simply hearing the word "secret."

After the initial seating and instructions, the presiding judge will question these 23 people to see if they are qualified and competent to serve. Some may be excused from service due to anticipated relocations out of the area during the 18 month term, health impairments, or other personal hardships brought to the attention of the court. The presiding judge will exercise his or her individual judgment and excuse prospective jurors who present bona fide issues that prevent them from serving. Once, some years ago, when I was questioning prospective grand jurors, a young woman in the initial group of 23 raised her hand and told me that she wanted to be excused because she and her husband were "trying to start a family." After due thought and judicial deliberation, I reminded her that the grand jury

only worked from 9:00 in the morning until about 4:30 in the afternoon, with no evening or weekend work. She quickly responded, saying that she could serve . . . as long as she had her nights with her husband!

Although some prospective jurors will go to great lengths to avoid service, others struggle to overcome adversity in order to serve. Once, while I was seating a grand jury, I noticed a gentleman being led to one of the 23 seats in the well of the courtroom. When I questioned him, he told me that he was totally blind but that he nevertheless wanted to serve his country in this way. I inquired of the attending Assistant U.S. Attorney if the United States had any objection to his serving, and if the United States could and would be equipped to transpose any documents into Braille. The bewildered government attorney glanced around the room, perhaps looking for "inspiration," before stammering that the United States had no objection and that Braille translations would be provided as needed. In spite of his condition, which would have been cause for him to be excused from service if he had so desired, I seated him. I was later told that this individual was a model grand juror, taking notes on a handheld device and never missing a session or arriving even a minute late.

Once a judge has found 23 people qualified to serve, he or she selects four alternate grand jurors, any one of whom may be called to join the 23-member active grand jury in the event that a juror is excused during the term. The 23-member grand jury and the alternates are then impaneled,

with the jurors taking an oath to faithfully discharge their duties. After this, the presiding judge reads a rather lengthy "charge to the grand jury" that explains its function, the role of the U.S. Attorney, the secrecy provisions, and the right of individual grand jurors to recuse themselves from particular cases or matters.

When I have given the grand jury charge in the past, I have often found myself doubting whether the individual jurors can fully comprehend all of the information presented to them in this charge. I imagine what it must be like for them, sitting in an austere courtroom (many of them for the first time), staring at the court reporter, the deputy clerk of court, the attending Assistant United States Attorney, the judge's law clerks, and the U.S. Marshals, trying to figure out what they each do and how much they get paid, all the while only vaguely listening to the words coming out of the mouth of the man up on the pedestal in the black dress. The grand jurors are only given the charge once during their entire term, and I doubt that even then they can fully comprehend the charge and the information and sense of responsibility it is meant to convey.

When the selection process and impaneling is complete, the grand jury is dismissed into the custody and control of the attending Assistant United States Attorney, who leads the jurors to their secret grand jury room and commences the presentation of that day's business. After this, the only time that a judge will be in the presence of the grand jury will be for the

acceptance of the returns of the grand jury, a monthly formality that is usually completed quickly and without explanation or discussion.

IV. BUILDING A BETTER MOUSETRAP?

The system described above is fairly universally employed in the federal and state courts across the country. The pervading concern is whether prosecutors exert undue influence on the grand jury, causing true bills of indictment to be returned without the exercise of sufficient scrutiny; that is, whether the grand jurors are just a "rubber stamp" for the prosecutors. After all, it is the prosecutor who decides what cases the grand jury will hear, what evidence will and will not be presented, and what potentially exculpatory information will be considered, among other important details. How can one square the apparent power of the prosecutor with the duty of the grand jury "not to present or indict any person through hatred, malice, or ill will, nor to leave any person unpresented or unindicted through fear, favor, or affection or for any reward or hope or promise thereof, but in all [their] presentments and indictments to present the truth, the whole truth, and nothing but the truth. . . "?[4]

In attempting to answer this question, one must consider the alternatives, and whether there are reforms that would increase the fairness of the grand jury in its pursuit of truth and justice. Proponents of reform

[4]BENCHBOOK FOR U.S. DISTRICT COURT JUDGES (Mar. 2000 rev.).

offer many ways that, they claim, would create a more balanced process. Some suggest allowing witnesses to have counsel present in the grand jury room during their testimony, while others would place limits on the circumstances in which grand jury subpoenas can be issued. A third possibility would be to provide the grand jury with independent legal counsel to advise them outside the presence of the prosecutor. Unfortunately, the absence of alternative models means that the positive effects of change are touted largely on the basis of speculation, without serious consideration of the downside of reforms. Whatever the benefits, any of these proposed reforms would undoubtedly delay and complicate the indictment process, and most of these objections have been struck down, one after another, in decisions of the United States Supreme Court.

Military law provides a striking alternative to the grand jury system that is already operating in the United States federal and state courts. With roots in the 1774 British Articles of War and the courts-martial that were among the first courts in the American colonies, our military law is now defined primarily by the Uniform Code of Military Justice (UCMJ). This statutory authority, which became effective in 1951, established what is, in essence, a complete set of criminal laws and procedures for our military personnel analogous to the civilian system.

The military criminal justice system is unique in that you can do hard time or even receive the death penalty at a court-martial without having first

been indicted by a grand jury. In sharp contrast to the civilian grand jury indictment process, charges are "referred" against an individual soldier by the convening authority of his or her Commanding Officer – usually a Commanding General – after an investigation overseen by that Officer. The Commanding Officer appoints a commissioned officer, usually a non-lawyer (and *never* the accuser), as the investigative officer for a particular matter, to conduct an investigation of suspected violations of the UCMJ. Under Article 32 of the UCMJ, the investigating officer conducts the investigation himself and holds a hearing at which the accused may be present, with counsel if so desired, and may call witnesses, cross-examine witnesses called during the investigation, and submit evidence, all in the presence of this one officer. This process is ordinarily open to the public and the media. At the conclusion of the investigation, the investigating officer reports to the convening authority (usually the Commanding General) and recommends whether to refer the matter for court-martial. Article 32 investigations are standard fare under military law, but any of their supposedly "equalizing" characteristics would be seen as radical if transplanted from the military context into the operations of grand juries sitting in our state and federal systems.

CONCLUSION

Considering modifications proposed by the criminal defense bar and others, and the contrast provided by the military criminal justice system, one comes to realize that every available alternative would force us to part with some aspect of the efficiency, secrecy, or independence rooted in the history and current structure of our grand jury system.

I am convinced that the grand jury system as it exists in America today will continue for as long as our prosecutors adhere to prevailing standards of fairness. From its conceptual beginning with the Magna Carta, the grand jury system is one that has stood the test of time. Despite the scrutiny brought on by recent controversies, Congress, the Supreme Court, and state authorities are unlikely to instigate major changes to this established institution. For its benefits to individual rights through the check it provides on executive authority, the current grand jury system is laudable. While it is conceivable that minor changes in grand jury operations, such as restricting the subpoena power of the grand jury in certain circumstances or providing independent counsel for the grand jury, would improve citizens' rights, such changes would stir much debate in American legal circles and would ultimately be of dubious value to the grand jury system.

Pending any such initiatives, we must hope and trust that the

prosecuting attorneys appearing before grand juries realize their roles as advisors within this significant and historic legal institution and the great power and responsibility these roles entail, and that they adhere to their own oaths and responsibilities to ensure that they themselves do not bias or prejudice the system. Judges like myself can play an important role as well by maintaining a degree of judicial review over prosecutors' activities and by restating the grand jury charge periodically and reminding grand jurors of their responsibility and independence, and of the integral part they play as "equals and neighbors" to the accused within the American criminal justice system, all of which will serve to bolster and stabilize this "abiding and continuing" constitutional institution.