



NACDL's Common Sense Grand Jury Reform Proposals (Plus Two)

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The U.S. Constitution provides for the right to be indicted by a grand jury. Undergirding this right is the notion that the grand jury is a bulwark against overly aggressive prosecutors. As it has evolved, however, the grand jury process has instead become, in virtually all cases, simply a tool of the prosecution, presenting hardly a speed bump to prosecutors who wish to investigate, issue broad subpoenas for information, haul individuals in for boundless questioning, and, ultimately, issue indictments. Some might argue that the entire notion of the grand jury process is anachronistic. But a few common sense reforms could restore the federal grand jury to its intended role.

The National Association of Criminal Defense Lawyers (NACDL) has been on the leading edge of advocating for such reforms. Following significant study of the issue, NACDL issued a detailed report and proposed a “Bill of Rights for the Grand Jury.”

One of NACDL's most important proposed reforms addresses the right to counsel for witnesses before a grand jury. Currently, witnesses must testify before the grand jury alone; they may not be accompanied by counsel. There is and can be no rational justification for this. Accordingly, the NACDL Grand Jury Bill of Rights appropriately calls for the right of a witness to be accompanied by counsel. The Bill of Rights makes clear that the role of counsel for a grand jury witness is extremely limited: the witness's attorney could be present in the grand jury room with her client and provide the client advice. The witness's attorney would not, however, be permitted to address the grand jurors, stop the proceedings, object to questions, stop the witness from answering a question or otherwise take an active part in the proceedings. Given the significance of a witness's grand jury testimony, including potentially exposing the witness to criminal charges, it is difficult to imagine a just reason to oppose this proposed reform.

Another significant NACDL proposal is that a prosecutor be required to provide patently exculpatory information to the grand jury. In other words, if a prosecutor knows of information that would exonerate the target of an investigation, it would be improper for the prosecutor to obtain an indictment without first making the grand jurors aware of this information. As with the first proposal above, it is difficult to imagine a principled reason for opposing this reform.

In addition, NACDL's proposed Grand Jury Bill of Rights provides that witnesses shall have adequate advance notice of their appearance before the grand jury, identified in the NACDL proposal as 72 hours. This proposal would ensure that witnesses have adequate time to prepare and receive legal advice. In the event of a true emergency, this period could be reduced.

Another proposed grand jury reform that bears mentioning is the right of a grand jury witness to obtain a transcript of his testimony. While some courts have granted motions by witnesses for such transcripts, others have declined to do so. Thus, at present, a witness must generally rely on his memory for the details of his grand jury testimony, unless that witness is working with the government, in which case prosecutors often permit the witness to read a grand jury transcript or be read relevant portions. As NACDL pointed out in its Grand Jury Bill of Rights: “Allowing witnesses called by the prosecutor at trial to review their own transcripts, while denying this right to any other witnesses recalled to the grand jury or called as a defense witness at trial, fosters a system of mere gamesmanship that denigrates the integrity of federal grand jury proceedings.” Permitting grand jury witnesses to obtain a transcript of their testimony would remedy this unfairness.

Each of NACDL's proposed grand jury reforms reflects a thoughtful, balanced approach. In addition to the NACDL proposals, I would add two

other proposed grand jury reform measures, both of which apply primarily to corporations that receive grand jury subpoenas for documents.

I. Narrowly Tailored and Reasonably Timed Subpoenas

Grand jury subpoenas for documents shall be narrowly tailored to obtain potentially relevant information and shall provide reasonable time for response. With respect to electronically stored information (ESI), the government shall engage in a good faith effort to agree with the recipient of the subpoena on a list of custodians and search terms. Absent extraordinary circumstances, the government shall accept as reasonable searches performed through electronic predictive coding.

The cost and disruption associated with grand jury subpoena compliance can be devastating. All too often subpoenas are drafted with excessive breadth and ambiguity. The agent or prosecutor drafting the subpoena may assume that, at least in the first instance, more is better than less, and that the scope of the subpoena may be narrowed and tailored through negotiations with the recipient. The government often specifies an unrealistically early return date, hoping to get the attention of the recipient, and, again, likely assuming a more realistic date will be arrived at through negotiations.

These overly broad and aggressive subpoenas cause recipients understandable panic. Undue disruption and expense may result as the recipient scrambles to comply with the letter of the subpoena before the return date. Meanwhile, the government may neither expect nor demand compliance with the strict terms of the subpoena. And, in any event, such a broad, aggressive subpoena furthers no significant law enforcement objective. At the outset, therefore, the

government should specify a scope and timeframe that are realistic and justified based on the circumstances.

The government should also work with the recipient on a methodology for searching ESI. Leaving it to the recipient, particularly one that is unsophisticated, in such circumstances is, at best, potentially wasteful and, at worst, counterproductive. Worse is a refusal by the government to negotiate in good faith with a subpoena recipient regarding the search methodology and parameters. In light of recent advances, predictive coding may be the most efficient methodology to identify potentially responsive documents. Accordingly, the government should always consider predictive coding, when agreeable to a subpoena recipient, as a first option. Otherwise, the government should always engage in early, good faith negotiation of the custodians and search terms to be used to identify responsive documents.

II. Target Notifications for Corporations and Corporate Agents

Upon request, and absent compelling reasons to the contrary, the government shall disclose to counsel for a corporation that has received a federal grand jury subpoena whether the corporation or any corporate director, officer or employee is a target of a federal grand jury investigation.


A proper response by a corporation to a grand jury subpoena may depend on whether it is simply in possession of documents relevant to a criminal investigation of an unassociated third-party or, instead, the corporation itself, or one of its officers or agents, is a target of the grand jury investigation. Pursuant to the federal sentencing guidelines and current Department of Justice guidance, including the so-called “Yates Memo”, a corporation is rewarded for taking certain affirmative steps in response to grand jury

investigations, including by providing information about wrongdoing of its personnel. Moreover, a responsible corporation will endeavor to ensure that its subpoena compliance is prompt and complete, and not compromised by actions of corporate employees. Accordingly, absent compelling reason to the contrary, it is important and just that the government timely inform corporate recipients of grand jury subpoenas whether the corporation itself or one or more of its personnel is the subject or target of the investigation.

Conclusion

It is long past time for Congress to implement significant reform in the federal grand jury process. The NACDL proposals, in addition to those outlined above, would make the grand jury process more just and fair without impairing law enforcement.

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An icon depicting a silhouette of a person standing in the center of a complex maze, symbolizing navigating through challenges or legal proceedings.

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