



The Growing Problem of America's Grand Juries

December 16, 2014

By Glen Asher

While most of us have a fleeting acquaintance with the American grand jury system through television shows like Law and Order, many of us, myself included, do not have a thorough understanding of what is turning out to be a very powerful tool in the hands of one side of the American judicial system. The recent police shootings and resulting grand jury decisions in both the Staten Island and Ferguson police shootings have shown us one thing; the grand jury system is in bad need of repair. A [Policy Analysis by the CATO Institute](#) provides background on the grand jury system and how it has perverted justice in America. As you read this posting, I hope that you will gain a sense of how and why the two most recently publicized grand jury decisions were made.

The original function of grand juries was to act as a buffer between the power of government and the masses; grand juries were intended to reign-in the potentially unfettered power of prosecutors to indict citizens for crimes. The [Fifth Amendment of the Constitution](#) states that:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." (my bold)

The CATO analysis goes on to explain the institution of the grand jury, a function of the criminal justice system in the United States that is a mystery to many ordinary people, unlike judges, juries, prosecutors, defence lawyers and the police whose legal duties are all well understood. The grand jury consists of laypeople that are summoned to appear at a courthouse as part of their civic duty. Like their trial jury peers, grand jurors's names are drawn from voting and motor vehicle licence lists. Citizens can be summoned to serve as grand jurors for periods of time ranging from a day to a week to years in some states. Their function is to inquire into possible criminal activities within their jurisdiction and make a determination as to whether a criminal indictment should be issued by the legal system. To assist them in their determination, a grand jury can issue subpoenas, compelling witnesses to testify and produce evidence. The major difference between a grand jury and a regular jury is that the burden of proof on the government is a preponderance (majority) of the evidence in the case of a grand jury rather than proof beyond a reasonable doubt as is the case in a regular trial. This means that when

considering the laying of charges, in the case of a grand jury, the burden of proof is less stringent than in the case of a criminal or civil trial.

There are two additional contrasts between a grand jury and a regular jury:

1.) In the case of a grand jury, the grand jury members only hear one side of the story; the side that is presented to them by the prosecutor. And, in case you've forgotten, it is the prosecution side of the legal system that is in bed with the police, relying on them for both investigations and testimony before and during the trial process.

2.) In the case of a grand jury, the proceedings are held in [secret](#) and grand jurors are sworn to secrecy regarding what takes place during the proceedings. This is in contrast to criminal and civil trials where proceedings are open to the public. It is felt that the secrecy is necessary to:

a.) protect the reputation of the people that are under scrutiny for possible criminal activity, particularly if the grand jury elects not to indict.

b.) because it is believed that if the proceedings are held in secret, witnesses that are called will be more cooperative and open to testifying than if the grand jury proceedings were held in public.

c.) as well, by keeping the proceedings secret, those that may be indicted will have less of a chance to flee prosecution.

While grand jury secrecy has an upside, it also has a key downside which was noted in [United States v. R. Enterprises](#). I'll quote directly:

"A party who desires to challenge a grand jury subpoena thus may have no conception of the Government's purpose in seeking production of the requested information. Indeed, the party will often not know whether he or she is a primary target of the investigation or merely a peripheral witness. Absent even minimal information, the subpoena recipient is likely to find it exceedingly difficult to persuade a court that "compliance would be unreasonable."

Surprise! You've been issued a subpoena by a grand jury of your peers and you have no idea why!

One of the biggest modern-day changes to the inviolable secrecy of the grand jury system took place after September 11, 2001. Under the PATRIOT Act, grand jury material that formerly would have been considered secret to all government departments outside of Justice can now be disclosed without the approval or supervision of a court to federal agencies, even those departments that have no duties that are in any way related to federal law enforcement as long as the material contains "foreign intelligence information". Grand jury secrets of this type [can now be disclosed](#) to a wide selection of federal departments including the DEA, the Postal Inspection Service, the ATF, the Central Imagery Office, the Department of Energy and the INS among others. All of this is in the name of "protection from terrorists".

Each state is free to establish whatever legal procedures they deem necessary; initially, all states had very similar grand jury procedures, today, all but [two states and the District of Columbia](#) now use grand juries to indict. Both Connecticut and Pennsylvania have abolished the use of grand juries to return indictments but have kept the grand jury's powers of investigation of criminal activity, especially organized crime. Twenty-three states require that indictments be used to charge serious crimes and allow the use of information and complaints to charge in less serious crimes including felonies and misdemeanors.

In grand juries, as noted above, the prosecutor calls all of the shots. He or she, along with the grand jury, decides who will be called as witnesses, what subpoenas will be issued and to whom and for what evidence, what charges are included in each indictment and which witnesses, if any, will testify under a cloak of immunity from charges. Since there is no judge present, it is obvious that the one person in the room with the most legal knowledge is the prosecutor. This results in a situation where there is no legal balance.

Now, let's look at one key way that grand juries are used by prosecutors to circumvent the Constitution. As we know, police and prosecutors are always anxious to acquire the personal effects of suspects and witnesses that could be used in a prosecution. However, the [Fourth Amendment of the Constitution](#) reigns in the powers of the government to access our personal effects as such:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The aim of the Fourth Amendment is to protect Americans from having their homes unreasonably invaded and their property unreasonably seized by the government and its proxies. It's the "a man's home is his castle" Amendment. If an agent of the government wants to acquire your personal effects (i.e. your personal records, papers and property), it must submit a search warrant to a judicial officer which provides that officer with probable cause that a crime has been committed. The agent must also submit a sworn statement that is used to deter deceitful applications. The warrant has a particularity requirement, that is, it must be specific. This is to prevent government officers from going on "fishing expeditions" where they might accidentally turn up some evidence that is of interest. While the standards of the Fourth Amendment still apply to search warrants, the same cannot be said for the constitutional limits of grand jury subpoenas. Again, here's a quote from [United States v. R. Enterprises](#):

"The unique role of a grand jury makes its subpoenas much different from subpoenas issued in the context of a criminal trial. Thus, this Court has held that a grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and that its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials....Since a grand jury subpoena issued through normal channels is presumed to be reasonable, the burden of showing unreasonableness, as the above language indicates, must be on the recipient who seeks to avoid compliance, and the Court of Appeals erred to the extent that it placed an initial burden on the Government." (my bold)

Basically, if you are served with a subpoena (a command to produce) by a grand jury and do not wish to comply, the burden falls on you to prove that the request is unreasonable. This is complicated by the fact that, due to grand jury secrecy, you will have no idea why you are being investigated in the first place. Given that, requiring the government to explain why it is serving a subpoena to you in the first place would threaten to compromise the entire reasoning behind grand jury secrecy.

Now, if you keep in mind the fact that the grand jury is merely acting as an extension of prosecutors, the police and the court system, you'll see where the problem lies. The members of the public that serve as grand jurors are rarely aware of the unbridled power that police and prosecutors have at issuing subpoenas and how these very powerful "legal weapons" can be used to search telephone records, medical records, customer records and credit card records among many other personal things. [Failure to comply](#) with a grand jury subpoena can result in a witness being held in civil contempt, convicted for criminal contempt or both and is punishable by fine or imprisonment. Punishment for failure to comply with a grand jury subpoena can also be meted out without trial.

If a subpoenaed grand jury witness does testify, the prosecutor has the right to answer any number of wide-ranging questions including those that require witnesses to reveal information about family members. Federal prosecutors have the power to separate witnesses from their attorneys and witnesses are not allowed to consult with their attorneys at any point during the questioning. Witnesses do have the right to not incriminate themselves under the Fifth Amendment, however, a prosecutor has the right to drag a witness from the grand jury room to a regular courtroom to allow a judge to determine whether or not the witness can invoke his Fifth Amendment rights. As well, if a witness starts out by answering the prosecutor's questions and then elects to invoke his rights, the prosecutor can argue that "the door has already been opened" and that the witness waived his or her rights to be silent. If a witness is found to be lying or refuses to answer questions, they can be found guilty of perjury and summarily jailed.

Let's close this rather lengthy posting with a [quote](#) from Judge Learned Hand, a Judge in the United States Court of Appeals for the Second Circuit from 1924 to 1961 about the grand jury system:

"Save for torture, it would be hard to find a more effective tool of tyranny than the power of unlimited and unchecked [ex parte](#) (a judicial proceeding that is conducted for the benefit of only one party) examination."

It appears that without significant intervention by Congress, the original purposes of grand juries have been hijacked by the prosecutorial side of the American judicial system and, in the cases of both Staten Island and Ferguson, used to protect itself from further public scrutiny.