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A Grand Façade
How the Grand Jury Was Captured by Government

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Executive Summary

The grand jury is perhaps the most mysterious institution in the American criminal justice system. While most people are generally familiar with the function of the police officer, the prosecutor, the defense lawyer, the judge, and the trial jury, few have any idea about what the grand jury is supposed to do and its day-to-day operation. That ignorance largely explains how some overreaching prosecutors have been able to pervert the grand jury, whose original purpose was to *check* prosecutorial power, into an inquisitorial bulldozer that *enhances* the power of government and now runs roughshod over the constitutional rights of citizens.

Like its more famous relative, the trial jury, the grand jury consists of laypeople who are summoned to the courthouse to fulfill a civic duty. However, the work of the grand jury takes place well before any trial. The primary function of the grand jury is to inquire into the commission of crimes within its jurisdiction and then determine whether an indictment should issue against any particular person. But, in sharp contrast to the trial setting, the jurors hear only one side of the story and there is no judge overseeing the process. With no judge or opposing counsel in the room, grand jurors naturally defer to the prosecutor since he is the most knowledgeable official on the scene. Indeed, the single most important fact to appreciate about the grand jury system is that it is the prosecutor who calls the shots and dominates the entire process. The grand jurors have become little more than window dressing.

At present, Congress seems to be interested only in proposals that will further expand the powers of the grand jury. Recent "anti-terrorism" proposals, for example, have sought to remove critical limitations on the dissemination of grand jury material. Because the grand jury can easily function as a stalking horse for prosecutors to bypass the constitutional rights of individuals and organizations, it is imperative that its powers be scaled back, not unleashed.

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Introduction and Background

The grand jury is perhaps the most mysterious institution in the American criminal justice system. While most people are generally familiar with the function of the police officer, the prosecutor, the defense lawyer, the judge, and the trial jury, few have any idea about what the grand jury is supposed to do and its day-to-day operation. At first blush, that ignorance seems counterintuitive because the newspapers regularly report on grand juries in action. Here are a few recent examples:

- January 2003: Zakaria Soubra was about to be deported to Lebanon for immigration violations, but he has now been summoned to testify before a federal grand jury investigating terrorism.[1]
- February 2003: Rhode Island attorney general Patrick Lynch plans to empanel a grand jury to investigate the deaths in a nightclub fire, which was sparked by the pyrotechnics of a heavy metal band.[2]
- February 2003: Two former Kmart Corporation executives are indicted by a federal grand jury on securities fraud charges for overstating revenue.[3]
- March 2003: After a 10-month grand jury investigation, New Hampshire prosecutors announce that the Roman Catholic Diocese of Manchester was "willfully blind" to pedophile priests, making no effort to restrict or monitor their activities even after those priests admitted sexual misconduct.[4]
- March 2003: Three high-ranking officials in the administration of Gov. John Rowland (R-Conn.) will soon testify before a federal grand jury that is investigating the extent of a bribery scheme involving lucrative government construction projects.[5]
- April 2003: San Francisco Superior Court Judge Kay Tsenin dismisses grand jury indictments against five police supervisors accused of obstruction of justice. Judge Tsenin criticizes prosecutors for leaving "the grand jury adrift in a sea of innuendo."[6]

For every case that is reported in the media, there are dozens of grand jury investigations that go unmentioned. And because of the constraints of time and space, the media can only skim the surface of most investigations and prosecutions. Moreover, few books and movies have ever dramatized the role of the grand jury for a popular audience. Thus, the widespread ignorance with respect to the grand jury is not altogether surprising. And yet, because of the awesome powers that it wields, it is vitally important that this mysterious institution become more widely understood.

Because the American criminal justice system is decentralized among the 50 states, the rules and regulations pertaining to grand juries can vary from one jurisdiction to another. In general, the primary purpose of the grand jury is to inquire into the commission of crimes within its jurisdiction and then determine whether an indictment should issue against any particular person. The grand jury consists of a body of laypeople who are summoned to the courthouse to fulfill their civic duty. In most jurisdictions the process by which grand jurors are summoned is no different from the procedure by which trial jurors are called to serve—their names are drawn from voter lists and motor vehicle license lists. However, many laypeople are somewhat startled to learn about the term of service for which they have been called. Citizens can be summoned to serve a few days a month for a term that can last up to two years in some states.[7]

In addition to the term of jury service, another distinguishing feature of grand jury proceedings has been their secrecy. Unlike criminal and civil trials, which are open to the public, grand jury proceedings are closed to outside observers, including reporters. And grand jurors are sworn to secrecy regarding what takes place during their service. The

purpose of the secrecy is twofold. First, secrecy protects the reputation of the people who fall under suspicion but whom the grand jury ultimately declines to indict because of insufficient evidence. Second, it is believed that if secrecy is maintained witnesses will have more of an incentive to be cooperative and candid with grand jurors with respect to what they know.

At the time of America's Founding, the grand jury acted as a buffer between the government and the citizenry. That role is often referred to as the grand jury's "screening" function: the grand jurors are supposed to "check" government prosecutors by evaluating the evidence and then making the pivotal decision as to whether or not an indictment will be filed against a particular individual. If an indictment is issued, the person accused can be taken into custody and jailed until trial. If an indictment is not issued, the person who was under suspicion will retain his liberty. The screening function of the grand jury is explicitly recognized in the Fifth Amendment to the Constitution, which provides, "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." The amount of power behind that "check" has been drawing derision for years, not because the original concept was a bad one, but because of the manner in which modern proceedings are actually conducted.

As a practical matter, the prosecutor calls the shots and dominates the entire grand jury process. The prosecutor decides what matters will be investigated, what subpoenas will issue, which witnesses will testify, which witnesses will receive "immunity," and what charges will be included in each indictment. Because defense counsel are barred from the grand jury room and because there is no judge overseeing the process, the grand jurors naturally defer to the prosecutor since he is the most knowledgeable official on the scene. That overbearing presence explains the old saw that a competent prosecutor can "get a grand jury to indict a ham sandwich" if he is really determined to do so.

Even if the prosecutor has the highest ethical standards and is very fair-minded, the crushing caseloads in the modern criminal justice system can overwhelm grand jurors who want to do the right thing. Unlike trial juries, who deal with a single case that has been fully investigated before trial, grand juries must deal with incomplete, on-going investigations. To economize their time, prosecutors may attempt to develop several different cases before a grand jury in a single afternoon. The barrage of information can be very difficult to process. In 1998 a former Brooklyn, New York, grand juror said the way in which cases were presented to her panel was disorderly, confusing, and monotonous: "It's like reading 100 short stories all out of order and in bits and pieces. . . . We were all like, 'This is a drug case, right?'"[8] Some of the more apathetic jurors approve all of the prosecutor's requests, adopting the following go-along-to-get-along attitude: "Let's leave it up to the trial jury to decide. If we're wrong, we're wrong."[9] Since congenial panels are the norm, law professor Andrew Leipold observes that no one should be surprised that the "staunchest defenders of the [grand jury] institution are prosecutors."[10]

Even more controversial than the screening function is the grand jury's "investigatorial" function.[11] Grand juries routinely employ coercive inquisitorial powers to develop information that may be useful in determining whether or not sufficient evidence exists to issue an indictment.[12] The grand jury has come to possess sweeping subpoena powers that the police and prosecutors do not have outside of that process.[13] As one legal treatise explains, "The solemn nature of the special responsibilities which service on the grand jury entails and the absence of a professional or occupational bias in favor of law enforcement have been regarded as sufficient to prevent abuse of the grand jury's investigatorial powers, at least in light of the disruption and cost entailed in any efforts to regulate those powers by legal means."[14]

Criminal defense attorneys and civil liberties lawyers have been trying for years to curb

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the awesome powers of the grand jury—for example, by arguing that the constitutional rules pertaining to illegally obtained evidence and the right to counsel ought to apply to grand jury proceedings. The Supreme Court has firmly rejected those arguments. In *United States v. Williams* (1992), the Court balked at what it described as an invitation to "judicially reshape" the grand jury institution.[15] Curiously, however, the Court seemed to suggest that there was no constitutional problem in a situation where lawmakers might choose to "legislatively reshape" the grand jury.[16] The implications of that stance are potentially ominous. For example, Congress might try to "redefine" the present meaning of "grand jury" by delegating its powers to a single functionary, such as the attorney general or perhaps the director of the Office of Homeland Security.[17] One should note that Congress and several states have already established legal precedents that point in that direction.[18] On the other hand, under the Court's precedents, Congress also has the policy option of reshaping the grand jury by *curtailing* its powers. In any event, the Supreme Court has made it abundantly clear that, if there is to be any fundamental change in the way in which the American grand jury operates in the foreseeable future, that change will have to come from legislative action, not judicial action.[19]

This paper will critique the modern grand jury system, with particular emphasis on how its so-called investigatory powers operate in the federal criminal justice system. The paper will begin with a brief history of the grand jury—from its origins in England all the way up to present-day "anti-terrorism" proposals. The paper will then examine the commonly heard complaint that grand jurors are the pawns of the prosecutor and will conclude that that observation is not only accurate but ought to be patently obvious to any neutral observer of the system. Moreover, the phrase "pawns of the prosecutor" does not fully convey the depth of the problem. In truth, the government has been using the façade of the "grand jury process" to subvert the Bill of Rights—especially the Fourth Amendment's ban on unreasonable seizures of private papers and the Fifth Amendment's ban on compulsory examination under oath. Policymakers who care about the Bill of Rights and civil liberties must roll back the powers of the grand jury until the protections set forth in the Fourth and Fifth Amendments are restored.

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A Brief History of the Grand Jury

Legal historians have traced the origins of the modern grand jury to the 12th century and, in particular, to the reign of the English King Henry II.[20] At that time a legislative enactment, called the Assize of Clarendon, was adopted—and the assize established juries of 12 persons who were to be selected from the local community and who were directed to level formal accusations against people who were suspected of breaking the law. The aim of the assize was not to curb governmental power but to help the Crown identify lawbreakers. To motivate the jurors to be vigilant and aggressive, the assize called for fines against jurors who were perceived to be soft and lenient on their neighbors.

Over time the English began to use a jury of laypeople to make the pivotal decision of guilt or innocence after a trial. Thus, the jury began to serve two distinct functions. The "petit" jury was made up of 12 persons and it would evaluate a person's guilt or innocence. The accusatory jury expanded to a group of 23 persons and became known as "le graunde inquest," and later, simply, the grand jury.[21] Sometimes the grand jury would review charges that were brought to it by a Crown officer; sometimes the grand jury would level its own accusations based on the grand jurors' own knowledge of local incidents.

The grand jury came to be seen as a "useful buffer between the state and the individual, infusing an effective community voice into the early judicial process."[22] Magna Carta guaranteed the right of individuals to

go before grand juries to see if there was any basis for accusations of wrongdoing. The popularity of the institution kept growing. By the 18th century, the grand jury was being extolled by the great English lawyers of the day, including Sir Edward Coke and William Blackstone.

In America, colonial grand juries became well known for their independence. In addition to reviewing accusations, the American grand jury became a political vehicle that allowed citizens to gather together and discuss local matters. When outright criminal activity was found to be lacking, grand juries often issued reports that condemned local administrators for malfeasance and incompetence. In the 1760s and 1770s, English officials had enormous difficulty enforcing unpopular policies in the colonies because the grand jurors would simply decline to approve Crown indictments—even though the evidence of guilt seemed clear.[23] English judges resorted to haranguing the grand jurors about their oaths and invoking the specter of eternal damnation if they failed to approve indictments against enemies of the Crown.[24] When Boston grand juries not only refused to indict leaders of the Stamp Act Riots but started indicting British soldiers for criminal conduct, the Crown tried to bypass the grand juries by expanding the jurisdiction of its admiralty courts.[25]

After the American Revolution, the grand jury system was as popular as ever. As author Richard Younger noted: "The grand jury entered the post-Revolutionary period high in the esteem of the American people. The institution had proved valuable indeed in opposing the imperial government and indictment by a grand jury has assumed the position of a cherished right."[26] When the Bill of Rights was ratified in 1791, the right to an indictment by a grand jury was incorporated into the Fifth Amendment. That provision, however, applied only to the federal government.[27] The states were free to establish whatever procedures they deemed appropriate, and in the early years all states retained the popular grand jury institution.

There have been dramatic shifts since the ratification of the federal Constitution. The popularity of grand juries began to wane on the state level as the institution came under fire for being outmoded, inefficient, expensive, and too inquisitorial.[28] In 1859, Michigan became the first state to create an alternative legal mechanism that allowed prosecutors to bring an indictment outside the grand jury process. As the years passed, many other states followed suit, and some went even further by abolishing the screening function of grand juries entirely.[29] After years and years of mounting criticisms, England itself abolished the grand jury in 1933.[30]

Conversely, the *federal* grand jury has been assuming a larger and more prominent role in the American legal system over the years. In 1791, when the Bill of Rights was ratified, the federal grand jury had a diminutive presence simply because the federal government itself had a very limited criminal jurisdiction. State and local governments were expected to enforce laws dealing with murder, rape, assault, theft, and so forth. The criminal jurisdiction of the federal government exploded during the 20th century as Congress pushed the envelope on its enumerated power "To regulate Commerce . . . among the several States."[31] There are now thousands of federal criminal offenses on the books.[32] And as the criminal jurisdiction of the federal government expanded, so did the investigative apparatus—federal police agents, federal prosecutors, and federal grand juries. Because the grand jury wields special inquisitorial powers (features that will be discussed in greater detail below), the federal grand jury is widely regarded as the most powerful investigative agency in the federal criminal justice system.[33]

The grand jury institution remains an enigma to most people. Controversies involving the grand jury are rare and fleeting. In recent times, many of the most high-profile controversies have involved political figures. In 1984, Raymond Donovan, secretary of labor under Reagan, was indicted by a grand jury. Prosecutors charged that Donovan's

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construction company had defrauded the New York City Transit Authority on a project in 1978. Donovan was later quickly acquitted by a trial jury. After months of innuendo and negative publicity, Donovan bitterly complained to the prosecutor and the press, asking, "Which office do I go to get my reputation back?" and "Who will reimburse my company for the economic jail it has been in for two and half years?"[34] Donovan implored policymakers to examine and reform the workings of the modern grand jury system, but his case was soon forgotten.

In the late 1990s, the grand jury was repeatedly in the headlines as Independent Prosecutor Kenneth Starr investigated President Bill Clinton and First Lady Hillary Clinton.[35] Because it was such a high-profile case, many people discovered for the first time that a grand jury could subpoena just about anyone and anything, including video "outtakes" from network television interviews and customer records from bookstores.[36] Clinton's political supporters railed against such intrusive investigative tactics, lambasting the entire affair as a "Starr Chamber" proceeding. But as Congress began its impeachment proceedings against Clinton, the brief controversy over grand jury powers was forgotten.

After the September 11, 2001, terrorist attacks and the ensuing frenzy to pass legislation to curb future attacks, the Bush administration and Congress quickly concluded that there were too many *limitations* on the federal grand jury and that several of those limitations would have to be removed in order to wage a more effective war on terrorism. Grand jury secrecy, perhaps the most important limitation sacrificed under the so-called PATRIOT Act, was a central tenet of grand jury proceedings. Because the grand jury has unparalleled power to obtain information, secrecy rules have always prevented the widespread dissemination of information acquired by the exercise of its inquisitorial powers. If the Justice Department wanted to share information with another government agency, prosecutors had to persuade a court that they had a very good reason for wanting to do so. However, under the PATRIOT Act, grand jury material can be disclosed without the approval or supervision of a court to a long list of federal agencies with duties unrelated to federal law enforcement.[37] The Department of Justice can now disclose grand jury material to a swath of federal agencies—from the Postal Inspection Service to the U.S. Navy to the Department of Energy to the Central Imagery Office, to name only a few.[38]

Since the passage of the PATRIOT Act, more "anti-terrorism" proposals have emerged, and they generally seek to transfer still more power to the federal government and, in particular, to federal police agents and prosecutors. Indeed, some proposals seek to transfer the powers of the grand jury directly into the hands of the attorney general.[39]

The Problem: Grand Juries Are Used to Bypassing Constitutional Rights

Under the current federal grand jury system, law enforcement may bypass the constitutional ban on unreasonable seizures and the ban on compulsory self-incrimination. Before examining the details, one must observe the deceptive nature of the language that has been employed to rationalize the government's power grab. Calling current procedures a "charade," legal affairs columnist Stuart Taylor writes of the all-too-common "habit of lawyers, judges, journalists, and others of routinely using the 'grand jury' prefix to lend a false patina of solemn, communitarian legitimacy to investigations, subpoenas, and indictments that are, in fact, essentially unilateral decisions by prosecutors."[40] To clearly understand what is really going on in the American legal system, Taylor suggests substituting the phrase "politically appointed prosecutor" wherever the term "grand jury" appears.

Taylor's provocative suggestion can help one to critically examine the so-called inves-

tigative powers that have been conferred upon grand juries over the years. Conscientious judges, legislators, and legal scholars should not gloss over the fact that there is no "grand jury exception" to the constitutional safeguards set forth in the Bill of Rights. That fact should, at the very least, give one pause with respect to the direction of the modern legal trend, which subordinates the Constitution's explicit guarantees of rights to the unmentioned investigatory powers of the prosecutor and grand jury.[41]

Bypassing the Constitutional Ban on Unreasonable Seizures

Police agents and prosecutors are always anxious to acquire the personal papers of suspects and witnesses. That is not surprising. Incriminating documents typically constitute powerful evidence in court because there is an air of undeniable objectivity surrounding their contents. In a free society, however, the key question is this: Under what circumstances should the government be able to *seize* someone's personal papers?

In America, the government's police powers are circumscribed by the Fourth Amendment, which provides, "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." According to the terms of that amendment, there would appear to be only two ways by which American police agents should be able to acquire personal papers: consent or via the execution of a search warrant.[42] Thus, the Federal Bureau of Investigation can send a letter to any individual and ask for his financial records, computer disks, correspondence, diaries, books, photographs, and homemade videos. But since the letter would be nothing more than a request, carrying no legal obligation, the recipient would retain three options: (1) he could send all of the requested items to FBI headquarters; (2) he could send some of the items to the FBI offices; or (3) he could send nothing at all.

If FBI officials wish to acquire someone's papers and personal effects coercively, the Fourth Amendment establishes the procedure to be followed. First and foremost, the FBI agent must submit a search warrant application to a judicial officer. Second, the application must establish probable cause that a crime has been committed (or is about to be committed) and that incriminating documents are likely to be found at a certain location. Rumor, gossip, and hunches are an insufficient basis for a warrant to issue.[43] Third, the agent must submit a sworn statement to a judicial officer. That "Oath or affirmation" requirement is designed to deter deceitful applications. An agent who makes up a story to procure a search warrant by fraud can be prosecuted for perjury.[44] Last, the "particularity" requirement is designed to prevent "fishing expeditions" into someone's papers on the chance that something damning might turn up. The Framers of the Constitution wanted the police to have enough power to apprehend and punish criminals—but no so much power that the government would harass and oppress the people under the pretext of simply "enforcing the law."

In early American history, the courts vigorously defended the Fourth Amendment from various depredations. For example, in *Boyd v. United States* (1886), the Supreme Court confronted the question of whether a subpoena for documents violated the Fourth Amendment's ban on unreasonable seizures. In that case, the government suspected that a man named Boyd had violated the custom revenue laws. Boyd was served with a subpoena that commanded him to deliver invoices for certain merchandise to a federal prosecutor for inspection. Under the federal law in question, if Boyd did not comply with the subpoena and produce the invoices, the allegations against him would be considered to have been proven true in the eyes of the law. The Supreme Court declared such a legal

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procedure to be inconsistent with the Fourth Amendment. Here is an excerpt from the *Boyd* ruling:

> Any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of a crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom.[45]

The Court applied the same reasoning to investigations conducted by administrative agencies. When the Federal Trade Commission launched an investigation of the American Tobacco Company in the early 1920s, the firm challenged the constitutionality of a subpoena that demanded all of the letters and telegrams received from or sent to its customers during 1921. The Supreme Court was unanimous in finding such a sweeping demand for documents to be unconstitutional. Justice Oliver Wendell Holmes declared:

> Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire . . . and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. . . . It is contrary to the first principles of justice to allow a search through all the respondent's records, relevant or irrelevant, in the hope that something will turn up.[46]

Unfortunately, the federal government now possesses the power to bypass the terms and procedures set forth in the Fourth Amendment. The courts have gradually yielded to the government's plea that it has to have the power to get information so that it can govern a modern, industrial society. District courts, legislative committees, administrative agencies, and federal prosecutors now wield sweeping powers to demand documents. While the Fourth Amendment's standards still apply to search warrants for documents, the constitutional limits on grand jury subpoenas have been "thrown into the fire," to use Justice Holmes's words. Here is how the Supreme Court has summarized the state of the law:

> The grand jury occupies a unique role in our criminal justice system. It is an investigatory body charged with the responsibility of determining whether or not a crime has been committed. Unlike this Court, whose jurisdiction is predicated on a specific case or controversy, the grand jury can investigate merely on suspicion that the law is being violated, or *even just because it wants assurance that it is not*. The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred. As a necessary consequence of its investigatory function, the grand jury paints with a broad brush. A grand jury investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed. . . . In short, the Government cannot be required to justify the issuance of a grand jury subpoena by presenting evidence sufficient to establish probable cause because the very purpose of [demanding] the information is to ascertain whether probable cause exists. . . . A grand jury may compel

> the production of evidence or the testimony of witnesses as it considers appropriate, and its operation is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials.[47]

The Court's choice of terms is somewhat misleading. To appreciate the way in which our modern legal system really operates, one must understand that the "grand jury process" is actually a façade for the actions of federal prosecutors and law enforcement agencies like the FBI and the Internal Revenue Service. Arthur Burns, a deputy attorney general in the Reagan administration, admits that the grand jury is "100 percent in the control of the prosecutor."[48] Federal prosecutors do not go before the grand jury and humbly request a majority vote to authorize the execution of a legal document (subpoena) that will interfere with the liberty and privacy of individuals, families, businesses, and other organizations. On the contrary, prosecutors typically do not even apprise the grand jurors of the subpoena process. Subpoenas are issued by a court clerk *in blank* to prosecutors, who then fill in their demands before service.[49] Prior judicial approval is not needed for grand jury subpoenas.[50] Since the subpoenas are obtained and executed outside the grand jury room, the grand jurors are completely oblivious to what is done in their name.[51] The executive branch (police, prosecutors) has thus acquired unbridled power to issue subpoenas for people, documents, and personal effects.

To the extent that the grand jurors ever learn about the subpoena process at all, they hear only about useful or incriminating information that has come to light because of a subpoena; but, even in those situations, the jurors typically remain oblivious to the coercive means that were necessarily involved in the acquisition of such information. Many people are startled to learn that prosecutors can and will subpoena the home telephone records of reporters, customer records from bookstores, patient medical records from physicians, and even personal diaries.[52]

Further, if a subpoena for documents is not complied with, the government is fully prepared to jail people for "noncompliance."[53] In 2001, federal prosecutors served a grand jury subpoena on freelance writer Vanessa Leggett for notes she had made in preparation for a book. When Leggett refused to surrender her notebooks because she wanted to protect the confidentiality of people who had confided information to her, federal prosecutors saw to it that she was imprisoned.[54]

Defenders of the grand jury system point out that subpoenas are typically much less intrusive than a team of police officers, armed with a search warrant and a local television news crew, banging on the front door of an individual's home, yelling, "Search warrant, open up!" That much is true. And, in theory at least, an individual who is served with a subpoena will have an opportunity to challenge the legality of the subpoena in court before surrendering his personal papers. Such an opportunity does not exist when the police arrive to execute a search warrant. When search warrants are executed, any legal action against the government will be after the fact. However, the legal option of challenging a subpoena before the fact is, in reality, largely illusory.

As noted above, because the investigative powers of the grand jury are so broad, the courts have created a virtually insurmountable hurdle for the citizen to overcome. In order to "quash" a subpoena, the citizen must prove to a judge that there is "no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation."[55] Because there are thousands of federal criminal offenses and because the grand jury has the authority to investigate any matter—even if only to assure itself that the law has not been broken—one judge has observed that an individual would essentially have to "put his whole life before the court in order to show" that a subpoena must be quashed.[56] Given

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that nearly impossible standard, legal challenges to subpoenas almost always fail.

Even though the standards for obtaining and serving subpoenas have become far too lax, officials in the various law enforcement agencies are convinced that they still do not possess enough power. J. Edgar Hoover, as director of the FBI, repeatedly asked Congress to give all of his agents subpoena authority so that they would not have to bother going to federal prosecutors and seeking their help to obtain grand jury subpoenas.[57] Although Congress has not yet taken that step, it has conferred that power on agents of the Drug Enforcement Administration in the hope that it will help to win the drug war.[58] Unlike ordinary police officers, DEA field agents can, on their own authority, issue demands for records and documents. If experience is any guide, that precedent will expand as rival agencies like the FBI, the Bureau of Alcohol, Tobacco and Firearms, and the Border Patrol tell Congress that they could be much more "effective" if only they had what the DEA already possesses, namely, subpoena authority.

In the Declaration of Independence, the American Revolutionaries complained that the British government had been sending "Swarms of Officers to harass our People, and eat out their Substance." James Otis and John Adams railed against the general search warrants of the British customs officers because they "placed the liberty of every man in the hands of every petty officer."[59] The Fourth Amendment's safeguards of probable cause, particularity, and judicial review were put in place to make sure that general, roving, searches for personal papers would be impossible in America. And yet, under modern Supreme Court precedents, Congress could delegate the subpoena power directly to *tens of thousands* of individual federal police agents, who could, in turn, demand all manner of personal documents from business firms, nonprofit organizations, and individual citizens. Such a step is closer than many people realize. The Justice Department has proposed that Congress delegate subpoena authority to the attorney general in the so-called PATRIOT II anti-terrorism legislation.[60] And it is safe to say that elected officials do not relish the thought of casting a vote against any bill that is packaged as an "anti-terrorism" measure—especially after the September 11 atrocities. After all, only a single senator voted against the PATRIOT I anti-terrorism law.

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Bypassing the Constitutional Ban on Compulsory Examination

The Fifth Amendment prohibits compulsory self-incrimination. In criminal prosecutions, the accused cannot be compelled to take the witness chair and forced to answer questions posed by the prosecutor. And the Supreme Court has repeatedly noted that citizens are under no legal obligation to speak with police officers.[61] For example, FBI agents may stop you on the street or knock on the door of your home and *request* an interview, but you are perfectly free to decline. Because police and prosecutors spend their time and attention on trying to detect and punish lawbreakers, they often come to view constitutional principles as "problems" and "obstacles" to be overcome. The primary method by which the federal government gets around the Fifth Amendment's prohibition on self-incrimination and the principle of voluntary cooperation with law enforcement is the grand jury subpoena.[62]

Although citizens can decline an invitation to go "downtown to police headquarters to answer a few questions," they are not free to decline a subpoena to appear before a grand jury.[63] And it is an open secret that it is fairly easy for an FBI agent or federal prosecutor to obtain a grand jury subpoena for just about any person. (In a telling twist, executive branch personnel sometimes claim that they are beyond the reach of grand juries!)[64] Like subpoenas for documents, the subpoena to testify is issued *in blank* by the clerk of the court to the prosecutor, who will then fill in the name of the person before service.[65] The prosecutor does not have to seek the approval of a judge or the grand jurors

themselves to summon a witness.[66]

Once the subpoena is served upon a person, his constitutional right to remain silent essentially evaporates. Consider the legal minefield that awaits a grand jury witness:

- It is a federal crime for a person who has been served with a subpoena to decline to appear before the grand jury. In fact, this is a crime for which a person can be punished "summarily," which means a judge can mete out a jail sentence without a jury trial, bench trial, or any trial at all.[67]
- Once a federal grand jury witness makes an appearance, he must answer the questions that are posed by the prosecutor. Most laypeople are shocked to discover that there is essentially no limit to the types of questions that can be put to witnesses. To take one prominent example, during the scandal-plagued Clinton administration, federal prosecutors demanded that Marcia Lewis reveal to a grand jury any information about sexual liaisons that her daughter, Monica Lewinsky, had confided to her. Of course, most cases receive no publicity whatsoever, but it is not uncommon for prosecutors to demand that parents and siblings reveal information about close relatives. Any witness who appears before the grand jury but declines to answer questions may be summarily jailed without a trial if a judge determines that a valid claim of privilege does not apply.[68]
- Witnesses who have been forced to appear and forced to testify ordinarily know that perjury is a crime. But unsophisticated individuals or individuals who do not speak English very well and are unfamiliar with American culture may not fully appreciate the ramifications of their statements. Lying to a federal grand jury is a felony under federal law. Moreover, even intelligent laypersons may not be aware of the fact that prosecutors sometimes deliberately use the grand jury proceeding to lay what has come to be known as a "perjury trap." The trap works like this: First, the witness is led to believe that the government is investigating some other person, which has the effect of psychologically disarming the individual. Next, with the witness's guard down, the prosecutor asks dozens of boring and harmless questions about a variety of subject matters. After an hour of tedious questioning, the prosecutor will raise another, seemingly minor subject, but it is an item that the prosecutor knows will be awkward or embarrassing to the witness. The witness denies (or is not fully candid about) the seemingly minor matter and is then subsequently indicted for "lying to a federal grand jury."[69]
- Witnesses usually have some general familiarity with their right to invoke the Fifth Amendment and to refuse to answer questions that might incriminate them. However, the law does not permit the witness to determine what is a valid invocation of his constitutional right. The prosecutor has the power to drag a witness from the grand jury room to a regular courtroom to see a judge. The judge has the power to overrule the witness and compel him to answer the prosecutor's questions. If the witness declines, he can be summarily jailed.[70]
- Witnesses are also expected to know precisely the right moment during compulsory examination to invoke their right against self-incrimination. If a witness is *too* cooperative and answers a few questions on a particular topic, but then chooses to invoke his constitutional right against self-incrimination, the prosecutor can argue that the "door has already been opened" and that the witness has "waived" his right to maintain silence. If the witness declines to answer additional questions

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in such circumstances, he can be summarily jailed. This explains why some attorneys advise their clients to invoke the Fifth Amendment in response to every single question. Witnesses who do not have the benefit of legal counsel in such situations will be bewildered by this "sorry, you just gave up your rights" procedure and will likely find themselves indicted—either for their silence or for their judicially mandated "confession."[71]

- Federal prosecutors have the power to separate witnesses from their attorneys, which, of course, makes the legal minefield even more treacherous. It is standard practice to prevent grand jury witnesses from consulting with attorneys during the compulsory examination. Unlike witnesses who appear before legislative committees, or depositions in civil litigation, witnesses are not allowed to have their attorneys accompany them into the grand jury room and give cautionary advice as questions are posed.[72]

The explicit rights set forth in the Constitution have slowly been subordinated to powers that are nowhere mentioned in either the state or federal constitutions.

Given this body of law, is it any wonder that the grand jury has been described as "the most powerful weapon in law enforcement's arsenal"?[73] Judge Learned Hand once noted that, except for torture, "it would be hard to find a more effective tool of tyranny than the power of unlimited and unchecked ex parte examination."[74] And yet that is precisely what can go on in the grand jury room in modern America. Behind the façade of the "grand jury process," federal prosecutors and FBI agents enjoy enormous leverage over individual citizens. That leverage allows them to detect more crimes and punish more criminals, but such powers also allow the government to bypass the constitutional prohibition on self-incrimination and jail people who are perceived to be "uncooperative."[75] The law enforcement bureaucracy is often indifferent to whether a grand jury witness is trying to shield a friend or relative, or even whether the witness fears for his own life should his cooperation with the police be discovered.

Righting the Wrongs of Grand Jury Practice

The grand jury has been substantially corrupted.[76] It would be a mistake, however, to try to pinpoint a dramatic moment when that corruption occurred—because such an event never took place. Instead, the institution slowly and imperceptibly has been turned inside out and upside down. Far from *checking* prosecutorial power, the grand jury can be easily transformed into an inquisitorial bulldozer that runs roughshod over the constitutional rights of citizens. If policymakers are obliged to "preserve, protect, and defend" the Constitution and the Bill of Rights, and they are, they must take affirmative steps to change the status quo. Waiting for the courts to act—especially given the modern trend—would amount to a willful abdication of constitutional responsibility.

Given the government's tendency to expand its power, it is not surprising that, even in the states where the grand jury's screening role has fallen by the wayside, the grand jury remains a functioning institution so that the police and prosecutors can exploit its special inquisitorial powers when it suits their convenience.[77] For all of the reasons previously mentioned, its unchecked investigative powers are the central problem with the modern grand jury. The explicit rights set forth in the Constitution have slowly been subordinated to powers that are nowhere mentioned in either the state or federal constitutions. To remedy that problem, policymakers should consider several reform options. The most far-reaching remedy, which is the position of one of the authors, Timothy Lynch, is simply to abolish the subpoena powers of the grand jury. Note that the Fifth Amendment contains no reference to the grand jury's "investigative" or "inquisitorial" subpoena powers. Here is the pertinent provision of the Fifth Amendment: "No per-

son 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." Although the Fifth Amendment clearly preserves a functioning grand jury, that amendment contemplates only the grand jury's screening function. Thus, Congress can and should abolish the grand jury's inquisitorial subpoena powers and reject any suggestion of "transferring" such powers to executive branch police agents or prosecutors. In a free society, the police can and should rely on the voluntary cooperation of citizens. If the police wish to obtain evidence by force, they must submit applications for search warrants to independent judges, at least in non-emergency situations.[78]

Such a far-reaching and principled reform would be fiercely resisted, not only by the federal and state law enforcement bureaucracies that have grown accustomed to wielding inquisitorial powers, but by many legislators as well. Accordingly, it is worth considering a few second-best reforms, reforms that are endorsed by all three authors.

First, anyone who is compelled to appear before a grand jury ought to have the right to be accompanied by counsel. This idea has been proposed before, most recently by Rep. William Delahunt (D-Mass.).[79] Not surprisingly, the Justice Department balked at Delahunt's proposal. To be fair, there is a legitimate concern about converting the grand jury proceeding into a "minitrial," but that concern should not be overblown. Rules can be fashioned in a way that can accommodate both sides. For example, defense counsel could be permitted to advise his witness-client but prohibited from taking an active part in the proceedings, such as addressing the grand jurors or objecting to questions.[80] The fact that many states have already adopted such a reform shows that it is not unworkable, despite what some prosecutors have argued.[81]

Interestingly, in Georgia, state officials, including police officers, have been given special privileges that are denied to ordinary citizens. Police agents who have been accused of wrongdoing are not only allowed to bring their attorneys into the grand jury room when they have been subpoenaed to testify, the attorneys are permitted to attend all of the grand jury's proceedings in the matter and are even permitted to give a closing statement to the jurors after the prosecutor has presented his case.[82] If such prerogatives are available to employees of the government, then surely such prerogatives can be offered to citizens generally.

Second, judicial review must be restored whenever prosecutors wish to disseminate grand jury material to the military or intelligence services. Plausible arguments are now being made that the traditional line between law enforcement and national security is unworkable when foreign terrorists wearing civilian garb are on American soil plotting to slaughter office workers, housewives, and children. Even though the danger is real, it was profoundly unwise for Congress to give the Department of Justice a blank check to share grand jury material. That is a prescription for the destruction of privacy. The genius of the American constitutional system lies in its system of checks and balances. Policymakers should not throw that system away in a blind panic. Judicial review curbs police excesses, and it is also necessary to curb prosecutorial excesses with respect to the dissemination of grand jury evidence.[83]

Third, one problematic aspect of grand jury investigations that receives virtually no attention whatsoever is the financial burden associated with complying with subpoenas.[84] Every day innocent businesspeople are served with subpoenas that demand hotel records, bank records, phone records, credit card records, rental car records, and other transactional data. Some firms spend millions of dollars every year in an effort to comply with such demands. One telecom attorney says that, since passage of the PATRIOT Act, the number of subpoenas that carriers receive "is doubling every month . . . we're talking about

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hundreds of thousands of subpoenas for customer records stuff that used to require a judge's approval."[85] If law enforcement agencies like the FBI had to pay the costs of their own subpoenas, they would have an incentive to curtail their insatiable demand for information and a modicum of reasonableness would be restored.[86]

Although more dramatic changes are needed, those three simple reforms ought to find support across the political spectrum. Moreover, translating them into specific legislative proposals is not terribly difficult. There is, in short, no excuse for inaction.

Conclusion

When the American colonies declared their independence from England, the grand jury was a vibrant institution that protected individual citizens from overweening government. The modern grand jury not only fails to perform the function for which it was originally designed, it does the complete opposite. Federal prosecutors now use the façade of the "grand jury process" to initiate and pursue investigations of which the grand jury has little or no knowledge and over which it has no oversight or control. Regrettably, that façade has also been used to bypass the constitutional rights of citizens.

Prosecutors defend their actions by reminding everyone that legislators have approved the procedures. Legislators defend what they have done by reminding everyone that the courts have approved the procedures. Judges defend what they have done by reminding everyone that prosecutors and legislators are free to do otherwise—and that the people seem content since they have not revolted against the elected officials who run the system. Citizens, in turn, too often assume that someone in the government is looking out for their welfare, including their constitutional rights. No one takes responsibility for the fact that constitutional rights are slipping away.

Since the September 11 catastrophe, too many policymakers have seen weakening constitutional protections as a means of enhancing security. The political class in Washington, D.C., seems to think it is capable of finding the right balance between "liberty" and "security." But, instead of working within the framework established by the Constitution, too many policymakers believe that the framework itself can and should be adjusted with mere legislation. That is a profoundly misguided approach to liberty and homeland security. Policymakers ought to heed the wisdom of Justice Joseph McKenna:

> A limitation by construction of any of the constitutional securities for personal liberty is to be deprecated. A people may grow careless and overlook at what cost and through what travail they acquired even the least of their liberties. The process of deterioration is simple. It may even be conceived to be advancement, and that intelligent self-government can be trusted to adapt itself to occasion, not needing the fetters of a predetermined rule. It may come to be considered that a constitution is the cradle of infancy, that a nation grown up may boldly advance in confident security against the abuses of power, and that passion will not sway more than reason. But what of the end when the lessons of history are ignored, when the barriers erected by wisdom gathered from experience are weakened or destroyed?[87]

To preserve liberty, Congress must not only stop expanding the powers of the federal grand jury, it must scale back the grand jury's existing powers so that the guarantees that are set forth in the Bill of Rights will be restored for this and future generations of Americans.

Notes

1. Greg Krikorian, "Detainee Facing Deportation Summoned to Probe," *Los Angeles Times,* January

24, 2003.

2. Dan Barry and Paul von Zielbauer, "Scrutiny Is on Club's Owners," *New York Times,* February 25, 2003.

3. See Amy Merrick, "Kmart Ex-officials Indicted for Fraud," *Wall Street Journal,* February 27, 2003.

4. Pamela Ferdinand and Alan Cooperman, "N.H. Prosecutors Report Diocese Ignored Sex Abuse," *Washington Post,* March 4, 2003.

5. Paul von Zielbauer, "Bribery Inquiry Expanding beyond Rowland's Office," *New York Times,* March 17, 2003.

6. Quoted in Tim Reiterman and John M. Glionna, "5 S.F. Officers' Indictments Rejected," *Los Angeles Times,* April 5, 2003.

7. See *State Court Organization—1998* (Washington: U.S. Department of Justice, Bureau of Justice Statistics, 1998), www.ojp.usdoj.gov/ bjs/pub/pdf/sco9806.pdf.

8. Quoted in David Rohde, "Former Grand Jurors Call Current System 'Degrading,'" *New York Times,* October 9, 1998.

9. Ibid.

10. Andrew D. Leipold, "Why Grand Juries Do Not (And Cannot) Protect the Accused," *Cornell Law Review* 80 (1995): 261.

11. "The Grand Jury—Its Investigatory Powers and Limitations," Note, *Minnesota Law Review* 37 (1953): 586–607.

12. William H. Dession and Isadore H. Cohen, "The Inquisitorial Functions of Grand Juries," *Yale Law Journal* 41 (1932): 687–712.

13. "The grand jury has tremendous power the police do not have," notes David Schertler, who was head of the homicide section of the U.S. Attorney's Office in Washington, D.C., from 1992 to 1996. Quoted in Petula Dvorak and Allan Lengel, "Missing Intern's Parents Hire Investigators," *Washington Post,* June 22, 2001.

14. Frank W. Miller et al., *The Police Function* (Mineola, N.Y.: Foundation Press, 1986), p. 547.

15. *United States v. Williams,* 504 U.S. 36, 50 (1992).

16. Ibid., p. 55. Interestingly, Justice Clarence Thomas joined the more liberal members of the Court in dissenting in this case.

17. This is not an outlandish scenario. Congress has already delegated unique subpoena powers to the attorney general in an effort to "win" the war against American drug users. The attorney general, in turn, delegated that power to all of the police agents working for the Drug Enforcement Administration. See 21 U.S.C.A. § 876.

18. In 2000, Kennedy cousin Michael Skakel was arrested after an investigation by a Massachusetts one-man grand jury. See John Christofferson, "Skakel Gets 20 Years to Life," Associated Press, August 29, 2002. See also Robert L. Howard, "The Inquisition in Kansas—Its Use, Disuse, and Abuse," *Kansas Law Review* 6 (1958): 452–73; and Glenn R. Winters, "The Michigan One-Man Grand Jury," *Journal of the American Judicature Society* 29 (1945): 137–51. Wisconsin has a similar procedure, but it is referred to as "John Doe Investigations." See Wisconsin Statutes § 968.26.

19. See *Williams;* and Sam Skolnik, "Grand Juries: Power Shift?" *Legal Times,* April 12, 1999.

20. See Yale Kamisar et al., *Modern Criminal Procedure* (St. Paul: West, 2002), pp. 651–53.

21. Ibid.

22. Susan W. Brenner, "The Voice of the Community: A Case for Grand Jury Independence," *Virginia Journal of Social Policy and the Law* 3 (1995): 69.

23. For background, see Clay Conrad, *Jury Nullification: The Evolution of a Doctrine* (Durham, N.C.: Carolina Academic Press, 1998).

24. Richard Younger, *The People's Panel* (Providence, R.I.: Brown University Press, 1963), pp. 28–29.

25. Ibid., pp. 27–40.

26. Ibid., p. 41.

27. *Hurtado v. California,* 110 U.S. 516 (1884).

28. See generally Younger.

29. Kamisar et al..

30 Younger, pp. 224–26.

31. See *United States v. Lopez,* 514 U.S. 549 (1995) (Thomas, J., concurring). See also Edwin Meese III, "The Dangerous Federalization of Crime," *Wall Street Journal,* February 22, 1999; John S. Baker, "Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper?" *Rutgers Law Journal* 16 (1985): 495–588; and Kathleen F. Brickey, "Criminal Mischief: The Federalization of American Criminal Law," *Hastings Law Journal* 46 (1995): 1135–74.

32. See *The Federalization of Criminal Law*

(Washington: American Bar Association Criminal Justice Section, 1998).

33. Sara Sun Beale and James E. Felman, "The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA Patriot Act's Changes to Grand Jury Secrecy," *Harvard Journal of Law and Public Policy* 25 (2002): 700.

34. Quoted in George Lardner Jr., "Bronx Jury Acquits Donovan," *Washington Post,* May 26, 1987.

35. See Peter Canellos, "The Grand Jury's Power under Increased Scrutiny," *Boston Globe,* April 18, 1998.

36. See Felicity Barringer, "In a New Atmosphere, Press Is Silent on Subpoena Flurry," *New York Times,* April 24, 1998; James C. Goodale, "Special Prosecutor Scalps the Media," *New York Law Journal,* December 5, 1997; and Doreen Carvajal, "Book Industry to Fight 2 Subpoenas Issued by Starr," *New York Times,* April 2, 1998.

37. Beale and Felman, pp. 707–8.

38. Ibid., p. 709.

39. Someone within the Justice Department leaked a draft copy of a new anti-terrorism bill to the Center for Public Integrity. The center posted the draft legislation on its website, www.publicintegrity.org/dtaweb/downloads/Story_01_020703_Doc_1.pdf. See especially § 128. See also Robyn Blumner, "If You Liked Patriot Act I, Don't Miss the Sequel," *St. Petersburg Times,* February 16, 2003.

40. Stuart Taylor, "Enough of the Grand-Jury Charade," *Legal Times,* May 18, 1992.

41. For more background on the abuses that go on behind the scenes, see Barry Tarlow, "Grand Jury Misconduct—A Window of Opportunity," *Champion,* January–February 2002, p. 52.

42. Over the years, the courts have recognized that there are other circumstances in which the police can obtain documents. For a general overview, see John Wesley Hall, *Search and Seizure* (New York: Clark, Boardman, Callaghan, 1991), vol. 2, pp. 581–600 (exigent circumstances), pp. 659–92 (search incident to arrest).

43. *Berger v. United States,* 388 U.S. 41, 53 (1967).

44. See *Simon v. State,* 515 P.2d 1161, 1165 (1973).

45. *Boyd v. United States,* 116 U.S. 616, 631–32 (1886).

46. *Federal Trade Commission v. American Tobacco* Company, 264 U.S. 298, 305–6 (1924).

47. *United States v. R. Enterprises,* 498 U.S. 292, 297–99 (1991)(citations and internal quotation marks omitted).

48. Quoted in Skolnik.

49. See *In re Grand Jury Proceedings,* 486 F.2d 85, 90 (1973).

50. Ibid.

51. See *Commonwealth v. Cote,* 556 N.E.2d 45 (1990), where the Supreme Judicial Court of Massachusetts held that the grand jury process was not impaired when a prosecutor, without any prompting from the grand jury, used a grand jury subpoena to acquire telephone records, which were never presented to the grand jury.

52. See Susan Schmidt, "U.S. Subpoenas Phone Records of Reporter in Torricelli Probe," *Washington Post,* August 28, 2001; David Stout, "Lewinsky's Bookstore Purchases Are Now Subject of a Subpoena," *New York Times,* March 26, 1998; *State v. Fahner,* 794 So.2d 712 (2001) (hospital records); and Roger Parloff, "When Diaries Testify," *Legal Times,* January 12, 1998.

53. See Timothy Lynch, "A Businessman Stands Up for His Rights," *Wall Street Journal,* September 6, 1994.

54. See Paul Duggan, "For Jailed Writer, Prison Time Is Study in Ethics, Experience," *Washington Post,* December 15, 2001.

55. *R. Enterprises,* p. 301. The only other way to quash a subpoena is to show that it violates some other legal principle, such as the attorney-client privilege.

56. *Marston's, Inc. v. Strand,* 560 P.2d 778, 788 (1977) (opinion of Gordon, J.).

57. Richard Harris, *Freedom Spent* (Boston: Little, Brown, 1974), p. 392.

58. See *United States v. Hossbach,* 518 F. Supp. 759 (1980). See also Katherine Bishop, "New Front in Marijuana War: Business Records," *New York Times,* May 24, 1991.

59. James Otis, "Speech on the Writs of Assistance" (1761), quoted in Timothy Lynch, "In Defense of the Exclusionary Rule," *Harvard Journal of Law and Public Policy* 23 (2000): 722.

60. See PATRIOT II, § 128.

61. See *Florida v. Royer,* 460 U.S. 491, 497–98 (1983).

62. See Richard A. Nagareda, "Compulsion 'To Be a Witness' and the Resurrection of *Boyd*," *New York University Law Review* 74 (1999): 1575–1659; Robert Mosteller, "Simplifying Subpoena Law: Taking the Fifth Amendment Seriously," *Virginia Law Review* 73 (1987): 1–110; and Sara Denise Trujillo, "Are a Taxpayer's Private Papers Protected from an IRS Summons under the Fifth Amendment?" *Temple Law Quarterly* 59 (1986): 467–96.

63. After initially answering any and all questions from police detectives, the parents of JonBenet Ramsey came to the conclusion that the police were bent on blaming them for a crime that they did not commit. Thus, they declined to grant any more police interviews. The police responded by getting a prosecutor to convene a grand jury so that the couple could be hauled in for further questioning via subpoenas. See James Brooke, "Grand Jury Revives Interest in Ramsey Case," *New York Times,* April 22, 1998.

64. See *Appeal of John F. Hartranft, Governor of the Commonwealth,* 85 Pa. 433 (1877) (Chief Justice Agnew, dissenting). On the federal level, the Justice Department has attempted to carve out special privileges for federal agents. See Stephen Labaton, "Judges Turn Down Justice Dept. in Bid to Block Agents' Testimony," *New York Times,* July 17, 1998; and Jonathan Turley, "Praetorian Privilege," *Wall Street Journal,* April 27, 1998.

65. *In re Grand Jury Proceedings,* p. 90.

66. Ibid.

67. 28 U.S.C.A. § 1826 (recalcitrant witnesses). See "Lawyer Is Freed after Being Jailed Six Months for Refusing to Testify," *New York Times,* June 11, 1991. See also Harris.

68. Ibid. See also Dan Balz, "The Story So Far: In Fourth Week, Eyes Were on Grand Jury, Lewinsky's Mother," *Washington Post,* February 15, 1998; and Brooke A. Masters, "Girl Subpoenaed for Testimony against Father," *Washington Post,* May 31, 2001.

69. See 18 U.S.C.A. § 1623 (false declarations before grand jury or court); and Bennett L. Gershman, "The 'Perjury Trap,'" *University of Pennsylvania Law Review* 129 (1981): 624–700.

70. *Hoffman v. United States,* 341 U.S. 479 (1951). When a Texas trial court erroneously overruled a man's *perfectly valid* invocation of his constitutional right to silence and ordered him to answer the prosecutor's questions, the man gave false testimony. The Texas appellate court ruled that even though the trial judge had trampled the right against self-incrimination, the illegally obtained statements could be used against the man in a subsequent prosecution for perjury. See *Butterfield v. Texas,* 992 S.W.2d 448 (1999).

71. *Rogers v. United States,* 340 U.S. 367 (1951) (Black, J., dissenting).

72. *United States v. Mandujano,* 425 U.S. 564, 581 (1976).

73. Jim McGee, "In Federal Law Enforcement, 'All the Walls Are Down,'" *Washington Post,* October 14, 2001.

74. *United States v. Remington,* 208 F.2d 567, 573 (1953).

75. See *Braswell v. United States.* 487 U.S. 99 (1988) (Kennedy, Brennan, Marshall, Scalia, dissenting).

76. See William J. Campbell, "Eliminate the Grand Jury," *Journal of Criminal Law and Criminology* 64 (1973): 174–82; and Melvin P. Antell, "The Modern Grand Jury: Benighted Supergovernment," *American Bar Association Journal* 51 (1965): 153–56.

77. See, for example, Patricia Davis, "Va. Panel Backs Robust Grand Juries," *Washington Post,* November 21, 2000.

78. Abolishing the grand jury's inquisitional powers will not automatically make individual liberty and privacy more secure. The search warrant application process, as it stands, is far too lax. Too many judges and magistrates fail to check the requests that are submitted by law enforcement. Thus, any move to abolish the grand jury's inquisitional powers must be accompanied by a strengthening of the judicial check on the executive branch's search warrant applications.

79. See Skolnick.

80. See *The Federal Grand Jury Reform Report and "Bill of Rights"* (Washington: National Association of Criminal Defense Lawyers, 2000).

81. According to one legal treatise, about one-third of the states permit witnesses to bring counsel with them into the grand jury room. Sara Sun Beale, *Grand Jury Law and Practice,* 2d ed. (St. Paul: West, 1997), p. 1-28.

82. See Official Code of Georgia, Title 44-11-4.

83. The Justice Department abused its power over grand jury material even before the relaxation of standards went into effect under the PATRIOT Act. See, for example, *United States v. Kilpatrick,* 594 F. Supp. 1324 (1984), where prosecutors violated grand jury secrecy rules and gave IRS agents

access to grand jury information. Contrary to law, the "extraordinary powers of the grand jury were manipulated in order to obtain evidence useful in civil litigation." Ibid.

84. See Timothy Lynch, "The Paper Chase," *Forbes,* January 20, 2003.

85. Quoted in Miles Benson, "In the Name of Homeland Security, Telecom Firms Are Deluged with Subpoenas," Newhouse News Service, April 9, 2002, quoting Albert Gidari, a Seattle-based expert in privacy and security law.

86. See Gary Lawson and Guy Seidman, "Taking Notes: Subpoenas and Just Compensation," *University of Chicago Law Review* 66 (1999): 1081–1112.

87. *Wilson v. United States,* 221 U.S. 361 (1911) (McKenna, J., dissenting).

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