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Proposal to Establish the Federal Civil Grand Jury System in America: Effective Civic Oversight of Federal Agencies and Government Personnel

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French jurist and philosopher Alexis de Tocqueville once declared that trial by jury is the instrument of the sovereignty of people and contributes to insure the best administration of justice in the government. However, the U.S. Government has never created an effective civic investigative institution to directly check and monitor the function of government agencies and their personnel. This paper then examines the possible establishment of a federal civil grand jury system in America. The proposal to institute the civil function of the federal grand jury is extremely important and timely, especially given the fact the former CIA IT consultant and whistleblower Edward Snowden recently exposed massive illegal surveillance of hundreds of millions of people in the U.S. and around the globe by the National Security Agency (NSA) and other intelligence sources in the federal government.

Today, the criminal function of the grand jury system at both state and federal levels has been firmly established by the Fifth Amendment to the U.S. Constitution. Nonetheless, the civil function of the federal grand jury has lost its ability to inquire into non-criminal matters, to investigate political corruption or state inefficiencies, or to issue official reports on their civil investigation of officers and agencies in the federal government. Similarly, the overwhelming majority of the individual states have also lost much of their civic oversight role of the grand jury. Today only handful of states, including California and Nevada, continue to require the annual empanelment of the grand jury to conduct the civil investigation of the actions of local governments and their officials.

The paper begins with the historical genealogy of the grand jury system in England and the U.S. and chronicles citizens' historical struggles against the government's abuse of power and authority. The second section examines the important socio-legal function of civil grand juries in California and their democratic impact on citizen empowerment in local communities. Finally the paper provides a set of recommendations and proposals to establish the federal civil grand jury system in the U.S.

Keywords: Civil Grand Jury; Direct Democracy; Grand Jury; Civic Oversight

Introduction

In May 2008, the Sacramento County grand jury released its annual report, recommending the ouster of the library director over alleged overbilling, credit card abuses, questionable travel expenses, excessive use of consultants, \$2.5 million in uncollected fines, and a kickback scheme involving former employees [1]. In April, San Diego County grand jury reported the horrific condition of local jails, where floors were caved in and walls had rotten wood frameworks, and recommended the construction of a larger and cleaner detention facility for women [2]. In the same month, a Kern County grand jury recommended the transfer of a county morgue from its present location to a remote area because an overwhelming stench of dead bodies was hurting near-by businesses, where customers complained of "smelling rotten garbage or dirty diapers [3]". In June 2013, the Los Angeles County grand jury recommended to reverse budget cuts made to the Fire Department and enact major reforms to the department's 911 call center, replacing the firefighters who answer 911 calls with lower skilled civilians during the economic downturn [4].

Unlike the grand jury in most states and in the federal system, the California grand jury is empowered to conduct many types of civil investigations in exposing corruption, mismanagement, and inefficiencies of all aspects of local government. The grand jury also serves as ombudsman for the citizens of the cities and the country [5]. Indeed grand juries in California spend most of their time exercising its direct civic oversight powers and submit annual reports on their investigative findings.

In California and Nevada, dual functions of both civil and criminal grand juries are clearly articulated in state law, but the civil investigative function of the federal grand jury has not been clearly defined in federal law. As a result, today's federal grand jury no longer exercises its power to inquire into the duties and abuses of government officials or their function of direct civic oversight of the federal government. This is despite the fact that recently the federal government has been accused of a series of acts of serious misconduct, mismanagement, and unethical or illegal conduct in their execution of both domestic and international policies -- including the reported mismanagement and misplacement of billions of dollars in war funding [6], illegal extrajudicial transfer of suspected terrorists [7], illegal torture of enemy combatants in secret sites in the world [8], massive illegal surveillance activities of citizens by the NSA [9], or even the mistreatment of illegal immigrants at detention centers [10]. While both the Congress and Senate have held numerous committee hearings on these allegations, it appears that political scrutiny and examination by elected officials and political elites have failed to deter various agencies and departments

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of the federal government from continuously engaging in illegal and egregious misconduct.

This paper then examines the possible establishment of the system for direct civic oversight of the federal government and calls for a serious dialogue about the possible establishment of a federal civil grand jury system in America. Just like the civil investigations of local government by California's civil grand jury, the federal civil grand jury would be empowered to investigate the operation, accounts, and registers of officers, departments, or agencies of the federal government. Thereby, the federal civil grand jury would function as a "fourth branch of government," acting autonomously as an important system of checks and balances in the name of the public.

Part I of the paper examines the history of the civil function of the grand jury system. Part II then reviews the history and the civic investigative role of the California civil grand jury. Lastly, Part III attempts to elucidate possible socio-political strategies necessary for the establishment of the civil investigative function of the federal civil grand jury.

Part I: History of the Civil Investigative Function of the Grand Jury

England

The roots of the first grand jury may be traced back to Ancient Greece, Scandinavia, and/or the Saxons [11]. The earliest forerunner of the modern grand jury was established by King Henry II in the form of the Assize of Clarendon in 1166 in order to exert his political influence, while reducing simultaneously the power of the church or local barons [12]. The Assize of Clarendon and the later Assize of Northampton in 1176 established an early judicial system in which judges traveled to different regions to select twelve knights of the hundred or twelve free and lawful men to identify potential criminal suspects "by their oath" [13]. The indictment was tantamount to conviction and death of the accused because the petit jury trial was not in existence and the defendant faced trial by ordeal [14]. The Assize's investigative function was only initiated at the request of King Henry II who devised the institution to wrest prosecutorial power away from the Church and its ecclesiastical courts. A division of courtly spoils was also involved. As the Church generated revenues from fines levied in its courts, so too did the King receive all fines and forfeitures as a result of grand jury accusations [15]. The grand jury institution was thus used to generate revenue for the Crown and was firmly under the control of the king who also imposed heavy fines on those who failed to respond to a summons and grand jurors who failed to make sufficient numbers of accusations necessary to maintain revenue for the royal treasury [16].

The original criminal function of the grand jury was then gradually modified by the development of new and related institutions. The origins of the grand jury's civil watchdog function first appeared during the fourteenth century England [17]. Grand juries were empowered to inquire into the duties of government officials to repair roads and bridges and to issue a report as to any neglect of these responsibilities, obligations, and duties. Grand juries also investigated and reported on prison escapes and any prisoners who failed to appear before a court [18].

American colonies

The grand jury institution was also transplanted to the American colonies. The first formal grand jury was impaneled in the Massachusetts Bay Colony in 1635 and performed its traditional indictment function

[19]. The early colonial grand jury also performed a civil watchdog and investigatory function. They publicly criticized officials for failing to maintain roads, bridges, public buildings, and jails [20]. The grand jury report also developed as a means to address and publicize the grand jury's concerns, compelling public officials to correct perceived wrongs, inefficiencies, or injustices. Similarly, the grand juries exposed governmental abuses, determined tax rates, and suggested price controls for essential goods and commodities [21].

Building up to the American Revolution, the grand jury also became antagonistic to the British Crown. They frustrated British authorities by continually refusing to indict individuals who opposed British rules, and grand jury members issued investigative reports charging the British with oppression when the climate turned toward war [22].

British sympathizers also became disqualified from grand jury service [23]. As the grand jury began to act as a judicial body that protected citizens from monarchical oppression, then, the civic institution of the grand jury emerged from the American Revolutionary War with greater prestige, public respect, trust, and support.

After the Revolution, the grand jury continued to perform its civil watchdog role in local government. Grand jury members suggested policies and regulations to improve the welfare of the local community and they became the only voice available to people in the new frontier areas lacking Congressional representation and governed by nonresident political appointees [24].

By the late 19th century, however, a strong movement to abolish the grand jury as a legal institution had emerged. Many opponents of the grand jury believed that the system had outlived its original purpose and usefulness and became inefficient and outdated [25]. Idaho, Montana, Washington, North Dakota, South Dakota, and Wyoming discontinued the use of the grand jury system [26]. But in California, a proposal to amend the state constitution to abolish grand jury inquests was rejected in 1902, mainly due to the fact that the grand jury had gained the popular respect for previously exposing municipal corruptions, governmental abuses, and wrongdoing [27].

At the federal level, Congress never has attempted to deprive grand juries of the power to inquire into civil matters and to issue reports on their findings. Thus it still remains technically a part of juror obligations, but the last reported use of the civil reporting power occurred in 1895, where a grand jury issued a report, at the request of the federal judge who impaneled it, calling attention to inadequate facilities, lack of stenographers and bailiffs, and insufficient material supplies to the federal court [28].

The refusal of courts and prosecutors to mobilize civil reporting power has effectively eliminated the civil role of the grand jury over time. Similarly, the rise of administrative agencies contributed to the elimination of the need for civil duties by ordinary citizens, as those agencies began to perform the oversight function that was once consigned to grand juries [29]. In other words, the direct civic oversight function of and by ordinary citizens, and the expression of a proactive community voice, have been effectively replaced by governmental oversight through administrative agencies and elected political officials.

Part II: The Civil Grand Jury in California

The first penal code in California specified provisions for the creation of the grand jury [30]. The civil investigative capacity of the California grand jury can be traced back to early statehood. The 1851 state statute gave the grand jury the power to inquire into "the condition and

management of public prisons” [31]. Early grand juries also promoted legislation designed to improve public accounting procedures [32]. In 1880, the grand jury was given statutory authorization to conduct civil investigations of county government [33]. This civil function was then extended to allow for the grand jury investigation of local governments and special districts [34].

While the same grand jury devoted their time in performing both civil investigative role and the indictment function, the power of the grand jury in the indictment capacity was dramatically reduced by the 1978 California Supreme Court decision of *Hawkins v. Superior court*, in which procedural disadvantages that resulted from an indictment by a grand jury, rather than by the prosecution, violated the equal protection provision of the state constitution [35]. Because of the considerable disparity in the procedural rights afforded to a defendant in open court proceedings and those prosecuted by grand jury indictment, the *Hawkins* court stated that (1) defendants were not afforded counsel in grand jury proceeding, (2) they were not able to cross-examine witnesses or put on evidence, (3) the overall secrecy of the proceedings disadvantaged defendants in an indictment procedure, and (4) excessive prosecutorial influence was present in grand jury indictment proceedings [36]. In contrast, defendants prosecuted by declaratory charges are entitled to a preliminary hearing before a judge, representation by counsel, confrontation of witnesses, and an opportunity to be present [37]. As results, the *Hawkins* court held that individuals indicted by a grand jury had an additional right to a post-indictment preliminary hearing; and after *Hawkins*, most prosecutors began to rely on preliminary hearings rather than on grand jury indictment proceedings to eliminate the duplication and expense of two procedures. As result, *Hawkins* left the grand jury with more time and resources to carry out its civic watchdog and investigative function, rather than performing its indictment function.

In 1990, California voters passed Proposition 115 and overruled *Hawkins*, in which a defendant is no longer entitled to a post-indictment preliminary hearing when prosecuted by grand jury indictment [38], thereby opening the door once again to the use of grand juries for criminal indictments, used today mostly in prominent cases.

Civil Powers and Duties of the California Grand Jury Investigation

California state law requires that all 58 counties impanel a grand jury for each fiscal or calendar year. The presiding judge of the superior court impanels the grand jury, whose members are selected from the registered voters [39]. The grand jury scrutinizes the conduct of public business by city and county government and issues a report with findings and recommendations, followed by presentations to the Board of Supervisors and the media.

Grand jury qualification and eligibility include U.S. citizenship, minimum age of 18, one-year minimum residency in the city and county, ordinary intelligence, good character, and a working knowledge of English. Grand jurors take an oath of permanent secrecy to protect those interviewed from possible retribution.

As stated earlier, California grand juries continue to spend much more of their time performing their civil oversight and watchdog functions than investigating crimes. Subsequently, in some counties, the grand jury’s civil role has been significantly undermined when the same grand jury was also asked to make criminal investigations leading to indictments. Under the current law, the regular grand jury and an additional grand jury may be established primarily to handle

criminal investigation [40]. The 2003 Final Recommendation Reform of California Grand Jury Statutes recommended that each county has two separate grand juries in order to facilitate the popular oversight and watchdog function of the civil grand jury [41]. The report also recommended that a district attorney makes an extra effort to impanel a separate criminal grand jury to handle criminal cases [42].

The California grand jury is thus given wide latitude and access while investigating and reporting on activities of local government. Section 925 of the California Penal Code specifically indicates that the grand jury shall investigate “operations, accounts and registers of the officers, departments, or functions of the county,” prison conditions and managements, any willful or corrupt conducts on the part of public officers within the county [43], and report on the offices, accounts and records of the officials or entities of the county, including any special or legislative district [44]. Thus California’s all-citizen grand juries are entitled to unlimited access to all public records in their civil investigation.

Part III: The Federal Civil Grand Jury

While the federal grand jury was empowered to inquire into civil matters of officers and agencies of the federal government, the watchdog and oversight function of the federal grand jury began to decline in the 19th century, and the civic investigative function was left out when the Federal Rules of Criminal Procedure were adopted in 1946. The federal grand jury thus lost its ability to inquire into civil matters, investigate non-criminal activities and conduct of public affairs, and issue an official report on their findings. As direct descendants of common law grand juries, however, regular federal grand juries theoretically still keep their common law tradition and ability to issue reports on civil matters. Congress has never tried to deprive grand juries of this ability and thus the grand jury’s power to report on civil matters still technically remains a part of juror obligations.

Today the grand jury concentrates on investigating and bringing criminal charges for federal crimes upon a federal prosecutor’s request. The current system of the federal criminal grand jury thus remains essentially a passive facilitator of inquiries directed by federal prosecutors, and criminal cases being reviewed and meeting schedules tend to be only responsive to prosecutors’ decisions and needs.

Currently two kinds of federal grand juries exist: (1) regular federal criminal grand juries and (2) special federal grand juries. The regular federal criminal grand jury examines evidence and considers indictments submitted to them by a federal prosecutor.

The special grand jury was created by the Congress as part of the 1970 Organized Crime Control Act [45]. This grand jury has the authority to investigate organized crime, to return charges if they find probable cause to believe that the crimes have been committed, and/or to issue final reports of their investigations. Unlike the regular criminal grand jury, the special grand jury may write reports “(1) concerning non-criminal misconduct, malfeasance, or misfeasance in office involving organized criminal activity by an appointed public officer or employee as the basis for a recommendation of removal or disciplinary action; or (2) regarding organized crime conditions in the district [46].”

The Organized Crime Control Act of 1970, however, failed to provide the full reporting ability of special grand juries and imposed several limitations on the grand jury reports because of the Congress’s concern about potential grand jury abuse of power. While reports must concern criminal activities, the reports must be based on information elicited by investigations authorized by the Act, and filed

with the federal district court that supervises the special grand jury. And the district court has the power to determine whether or not those special grand jury reports will be made public. Thus, despite its unique investigative capacity to look into “non-criminal” misconducts, the special grand jury fails to exert the civil oversight and watchdog function over government activities and actions of elected officials. In addition, the special grand jury is only impaneled upon the request by the Congress. Currently the federal grand jury, whether regular or special, must consist of between sixteen and twenty-three persons. Both regular and special grand juries are convened for a basic term of eighteen months, with an option for extension [47].

Federal Judicial Districts and Federal Civil Grand Juries

The proposed establishment of the federal civil grand jury will be radically different from the passive role of regular or special criminal grand juries because of the stronger commitment to the civic investigative capacity to continue their examinations and scrutiny of the functions and operations of all federal agencies throughout their terms. Such a commitment would then foster the proactive and more independent role that grand jurors play in their investigations and filing reports. This would also correct the major problem faced by regular and special grand juries, in which they do not initiate their own independent investigations.

Since the federal system is a national system, a civil function of the grand jury would involve the investigation of governmental activities such as the operation of the federal prison system, the prosecutors’ office, police functions, and other related agencies. While the investigation of all federal prisons may be a difficult task for the single federal civil grand jury to perform, it is possible to decentralize the bodies of federal civil grand juries at the regional level.

Similar to the ways in which the federal criminal grand jury is impaneled, the civil grand jury can be impaneled in each federal judicial district. While the geo-political scope of certain federal judicial districts may pose some potential problems in selecting a representative jury panel, the use of teleconferencing, web-based conferencing, and organized scheduled meetings could possibly overcome problems faced with the geographic constraints.

Multiple federal civil grand juries can perform the investigation of various agencies and departments simultaneously [48]. The specific number of grand juries needed for competent civil investigations should depend upon the extent of federal governmental operations and collaborative establishment within the district.

In the Northern Federal Judicial District of California, for instance, the federal civil grand jury could examine the federal offices of the Drug Enforcement Administration, FBI, Special Counsel, Organized Crime Strikeforce, Education, Veterans Affairs Department, National Oceanic and Atmospheric Administration, International Trade Administration, Labor Department, Federal Reserve Bank of San Francisco, and General Services Administration, including Inspector General in Investigations, Audits, Federal Supply Services, Fleet Management Services, Federal Real Estate Services, and Telecommunications Network Services.

The federal civil grand jury in the Eastern Federal Judicial District of California also could examine the operation of the Federal Correctional Institution (FCI) Her long, a medium security institution housing male inmates, with a satellite camp for minimum security of male prisoners.

What is important for competent and equitable investigations by the federal civil grand jury is the effective elimination of any political

constraints from the executive, legislative, or even judicial branches of government. In their investigative capacity, the civil grand jury is empowered to interview anyone germane to its operations, audit operations, accounts, records and financial expenditures of all federal agencies, and inspect government facilities. The grand jury’s empowerment to procure facts and testimony, including the right to subpoena, can create fertile dynamics for consensus and change.

Such a change means that civil grand jurors would also interact with federal leadership, agencies, and organizations, and in return they would receive an incomparable education in the operation and management of the federal institutions. Grand jurors might visit facilities and attend meetings, obtaining insights into the inner workings of federal institutions and agencies. Similar to the California state grand jury system, the legally mandated inspection of the federal prisons and other facilities of penal incarceration is particularly important. The civil responsibilities of the federal grand jury also would encompass the examination of all aspects of the federal government, including special districts, to ensure that the state is being governed properly and efficiently and the federal monies are being spent and handled appropriately.

Lastly, the federal civil grand jury is to be further charged with investigating complaints filed by citizens who reside within each and every federal judicial district. There will need to be a multiple number of federal civil grand juries to be impaneled, each of which will be given a specific task to examine a select group of agencies or related federal entities [49].

Potential Practical Problems for the Federal Civil Grand Jury

The creation of the federal civil grand jury for each federal judicial district will eliminate the potential problems of jury selection and travel that would otherwise plague a federal civil investigative grand jury. Without decentralizing the federal civil grand jury function, the examination of all federal prisons and detention centers and facilities, for example, will require the review of the operation of all the prisons in the federal system and it may be an extraordinarily difficult task for grand jurors to perform because of the extraordinary amount of technical documents and information involved and the time and effort needed to travel around the country to visit various federal prisons and detention facilities.

Similarly, the review of the Central Intelligence Agency, National Security Agency, or any other high security and intelligence agencies would be difficult and complex because investigative documents, materials, information, and testimony may be prohibited or classified for inspection, investigation, and analysis under the name of national security. Similarly, some financial and accounting records may not be available due to administrative constraints, legal reasons, or the complex nature of governmental accounts and their financial records.

Despite procedural difficulties, logistical problems, or limited information made available to the federal civil grand jury, the truthful statement about their experience and straightforward explanations on the availability of information, obstacles, and investigative difficulties need to be clearly articulated and included in their final report. The clear specification and acknowledgement of the unavailability of crucial information for civic investigations need to be explicitly made and clearly stated in the final report.

The congressional committee’s investigations of the federal agencies and their operations have been extremely useful and

considered an important tool in exposing corruptions, misconduct, and mismanagement of federal agencies and departments. However, the grand jury's final report, even though they may contain similar investigative findings like the congressional committee report, will have much greater ramifications and carry a far stronger message to the public because the grand jury's investigation is viewed as the "voice of the community."

As the California grand jury has successfully performed its civil watchdog duty for more than one hundred years, ordinary citizens in the federal civil grand jury are also equally capable of carrying out an effective, non-professional analysis and objective assessment of various agencies of the federal government and submitting a final report on their civil investigations. Similarly all-citizen federal jurors are also empowered to offer their own suggestions and policy recommendations in their reports. Indeed, the grand jury is asked to review matters within the understanding of ordinary citizens, not professional experts or political elites with special governmental knowledge and expertise. Whether or not federal agencies and departments acknowledge and follow grand jury's findings and recommendations remains secondary and not important, because the direct civic watchdog role of the federal civil grand jury should heighten its appeals to the larger community and attract far greater attention to its investigative report, findings, and recommendations.

The Grand Jury Legal Advisor

While a lack of technical expertise may possibly hamper the effectiveness of the investigative function of the federal civil grand jury, some legal scholar argues that a grand jury legal advisor or expert consultant will expedite the process with more efficiency and better coordination [50].

The state criminal grand jury, for example, is concerned with criminal offenses familiar to lay persons including homicide, arson, theft, sexual offenses, among others. The federal criminal grand juries, on the other hand, are asked to examine complex crimes and criminal offenses such as racketeering, money laundering, bank fraud, mail fraud, and environmental offenses.

One path for reform already exists. The criminal grand jury in Hawaii is now provided by the independent counsel, called the grand jury legal advisor. This requirement was introduced by a constitutional provision adopted in 1978 [51]. Providing grand juries a legal advisor was intended to increase their independence by eliminating the influence from the prosecutors who, otherwise, can wield as the grand jury's own legal counsel and advisor.

A similar advisor may be introduced in the federal civil grand jury in the investigation of various federal agencies and departments. For example, giving the civil grand jury their own special financial expert such as tax consultant or administrative accountant can facilitate their independent investigation and evaluation of documents, testimony, and other relevant materials.

Another option is to devise a number of specialized bodies of federal civil grand juries imbedded with a specific task. Such specialized federal civil grand juries were impaneled to investigate each of specific agencies and departments in the federal judicial district, such as offices of the Internal Revenue Service (IRS), and grand jurors may need the special assistance from the legal advisor, such as tax attorneys, accountants, or financial experts.

Conclusions

The grand jury has played an important political role in England and the U.S. Today, however, only a few states including California and Nevada maintain the system of the grand jury that investigates all aspects of governmental affairs. At the federal level, the grand jury lost its ability to inquire into civil matters and no longer investigates political corruption, misfeasance, and inefficiency of the government, or issues an official report on the findings of their investigations.

This paper examined the possible establishment of the system of the federal civil grand jury as people's direct oversight of the federal government. Similar to the investigations of local government by California's civil grand jury, the federal civil grand jury should be empowered to investigate all operations of officers, institutions, and agencies of the federal government. Furthermore, the federal civil grand jury can function as a "fourth branch of government," thereby acting autonomously as an important system of governmental checks and balances by the citizenry. While grand jury service may require a strong commitment on the part of civic participants, it also provides citizens with direct civic oversight of the federal government. And such public oversight of the government, not political supervision by elected officials, is especially crucial to prevent a recurrence of serious governmental misconduct and mismanagement in today's globally interconnected world.

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