

Brief in Support of Proposed Oregon Senate Resolution

In Portland, ICE has injured or tear-gassed individuals for peacefully protesting. There is no indication that the Department of Justice will conduct a credible investigation. In Minneapolis, DOJ not only refused to investigate the killing of Renée Good by an ICE agent, but instead called to investigate Good's wife, a bystander, which caused dozens in the Civil Rights Division and in the office of the U.S. Attorney to resign in protest. In other cases, it is ICE victims who have been prosecuted. Working journalists have been prosecuted for covering protests. The Vice-President and the White House have improperly advised ICE agents that they are immune.

How can Americans find protection from DOJ's vindictive, political prosecutions, and what can communities do when the Department refuses to investigate crimes by federal agents? The answer lies with an institution given both the power to protect and the power to investigate: the federal grand jury.

The grand jury has 12th Century English origins. It soon developed secrecy and its accusatory and protective characteristics. It brought bills of indictment but also protected citizens from the Crown's excesses. American colonists imported the institution, and their grand juries exercised even more independence. The grand jury was initially omitted from the constitution but was later included in the ratification fight when Americans demanded a Bill of Rights and among those added rights was the Fifth Amendment, which included the grand jury. The grand jury would thus become our "sword and shield," adopting its traditional investigative and protective qualities.

The Supreme Court has consistently held that a federal grand jury functions "independently of either prosecuting attorney or judge." It is not part of the executive under Article II nor is it part of the judiciary in Article III. *Stirone v. United States*, 361 U. S. 212 (1960); *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983); and *United States v. Williams*, 504 US 36 (1992). See also, *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965) (en banc), cert. denied.

Since a grand jury's independence is beyond dispute, the rest is obvious.

Who controls grand jury proceedings? The grand jury itself. Unfortunately, grand jurors rarely know of their independence and do whatever prosecutors tell them to do. Allowing that to happen degrades its independence and its protective qualities. That needs to change. Clearly, grand jurors should be clearly informed regarding their independence.

What role does a prosecutor play in the grand jury? A grand jury is not under the direction of a prosecutor. A grand jury may investigate with or without government approval and with or without government assistance. The grand jury may follow a prosecutor's advice, but it is not obligated to do so. The Supreme Court noted that while a grand jury may be more effective with the assistance of a prosecutor, "the grand jury may itself decide to investigate a matter or to seek certain evidence." *Sells Engineering* at 430; and *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965) (en banc), cert. denied. Acting independently of a prosecutor may be advisable when the government fails or refuses to conduct credible investigations. What a grand jury cannot do is prosecute, since that is an executive function.

What protective power does a grand jury have? No limits have so far been defined. At a minimum, a grand jury can refuse to indict by voting a no bill, killing a proposed prosecution. Recently, the administration openly targeted several political enemies, which charges were rejected by grand juries in Virginia and Washington DC. But a grand jury's protective powers are obviously much broader than that. A grand jury can reject being misused as an investigatory weapon against an administration's political

opponents or in a targeted vindictive prosecution. The practical loss of independence has almost destroyed the institution's protective character. In 2016, there were only six no bills out of 155,5615 cases. https://www.jdsupra.com/legalnews/vengeance-of-the-ham-sandwich-recent-no-6736877/?utm_source=chatgpt.com

What are a grand jury's investigative powers? Those powers are almost unlimited. A grand jury may investigate whatever it wants in the manner it wants. It "can investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not." *United States v. Williams*, 504 U.S. 36 (1992). (emphasis added); and *United States v. R. Enterprises, Inc.*, 498 U. S. 292, 297 (1991). In *Sells Engineering* the Supreme Court stated: "No judge presides to monitor its proceedings. It deliberates in secret, and may determine alone the course of its inquiry."

Who can bring matters to the attention of a grand jury? Most federal courts, including the District of Oregon, use the national Handbook for Federal Grand Jurors, which provides that a grand jury may receive information to initiate an investigation from several sources:

(1) by the government attorney; (2) by the court that impaneled it; and (3) from the personal knowledge of a member of the grand jury or from matters properly brought to a member's personal attention.

The Handbook provides that "after the grand jurors have been sworn, the *presiding judge advises the grand jury of its obligations and how best to perform its duties.*" For the grand jury to discharge its duties, a court should advise the grand jury of the following:

- That the grand jury is independent of the court and the prosecutor.
- That the grand jury controls its own proceedings and can act independently of the prosecution.
- That its duties are to investigate crime and protect from improper government action. It is a sword and a shield.
- That it can call witnesses to appear and demand documentary production, question government officials and agencies as to their conduct and whether they are conducting expected investigations.
- That it can investigate, on its own, even if the government conducts its own separate investigation.

A court can thus advise a grand jury of specific reports that federal agents might have violated the law or individual civil rights, and a grand jury can inquire and investigate. Matters can also be "properly brought to a member's personal attention." There can be no more proper manner to advise a grand jury than having an elective body pass a public resolution bringing a matter to the attention of a grand jury or to a convening court, which can furnish the information to the grand jury.

We do not have to sit helplessly and watch the Department of Justice misuse the grand jury or fail to properly investigate federal agents who violate the law. The public can and should remind federal courts of their duty to help a grand jury properly discharge its independent functions.

Respectfully submitted,

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