Proper Federal Indictment Procedure

By Dan Meador (Rev. 1, April 14, 2000)
(Dan passed away in November, 2003)

People across the country have called for research concerning Federal indictments and how to defend against or attack them. So far as I can tell, there probably hasn't been a legitimate Federal indictment in the last two or three decades. Consequently, nearly all Federal criminal prosecution should be aborted and verdicts vacated, with the effect of defendants and prisoners being discharged. Therefore, this memorandum is timely.

I haven't completed research to support each position with case law, but the basic flaws in Federal prosecution default subject matter jurisdiction. If a court lacks subject matter jurisdiction, the action, judgment, or whatever is void, it is a nullity, so where there is a judgment, it should be vacated. Lack of subject matter jurisdiction can be raised at any time without time limit. Rule 60 of the Federal Rules of Civil Procedure is the key to opening old civil or criminal cases. Rule 12(a) & (b) of the Federal Rules of Criminal Procedure should be used for pre-trial motions. Lack of subject matter jurisdiction can be attacked within the existing action, or by an independent action, i.e., via extraordinary writs, including habeas corpus, writ of error *coram nobis*, writ of prohibition or whatever. See particularly, 28 U.S.C. 2201 et seq. for declaratory judgment, and 28 U.S.C. 2241 et seq., for the original writ of habeas corpus. Motions within an existing case where there is already judgment should be styled "Motion to Vacate Judgment", or within an active case, a simple motion to dismiss.

In the course of this memorandum, I will use the phrase "subject matter jurisdiction" to the point readers will probably be sick of it, but this is the key to the Federal prosecution riddle. The basic jurisdictional elements are jurisdiction over the person and jurisdiction over subject matter. Venue, or territorial jurisdiction, is also a consideration, but isn't treated exhaustively in this discourse.

When working within Federal rules of procedure, it is important to know that the rules preserve constitutionally secured rights. Authority for the Supreme Court to promulgate rules of procedure is at 28 U.S.C. 2072, and 2072(b) preserves rights: "(b) Such rules

shall not abridge, enlarge or modify any substantive right." Federal rules of civil and criminal procedure preserve constitutionally secured rights. Therefore, it is necessary to know and understand the three Amendments that govern Federal criminal prosecution. The Fourth, Fifth and Sixth Amendments follow: Amendment IV: 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.

Amendment V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The first thing to understand is that all Federal courts, including the Supreme Court, are courts of limited jurisdiction. So-called common law jurisdiction over contracts, historically recognized common crimes, etc., is reserved to courts of the several States within their respective territorial borders. The Tenth Amendment imposes this limitation: Tenth Amendment: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

If a power is not enumerated in the Constitution, primarily in Article I 8, Federal government lacks subject matter jurisdiction within the Union. This provides the framework for what is known as the "arising under clause" at Article III 2, clause 1 of the Constitution: Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.

View the Constitution as a corporate charter. It enumerates powers of the Government of the United States, with those powers distributed among three departments or branches, the legislative, executive and judicial. Except in very rare and limited cases, one branch cannot exercise power of another. This is called "separation of powers doctrine." Each of the powers enumerated, regardless of what branch it is enumerated for, must be set in motion by legislation, the legislation being in the form of a "statute" or law. This is specified at Article I 8, clause 18: [The Congress shall have Power] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Coming to grips with Article I 8.18 in the context of the "arising under clause" at Article III 2.1 sheds light on United States judicial power and understanding of "due process of law." Unless a law vests authority in Federal administrative agencies, or the courts themselves, courts of the United States do not have subject matter jurisdiction. And in nearly all cases, the law is complex, not simple. In other words, in very few instances does any given statute stand alone. Tax law serves as an example. United States v. Menk at 260 F.Supp.784 articulates the point: "It is immediately apparent that this section alone does not define the offense as the defendant contends. But rather, all three of the sections referred to in the information - Sections 4461, 4901 and 7203 - must be considered together before a complete definition of the offense is found. Section 4461 imposes a tax on persons engaging in a certain activity; Section 4901 provides that payment of the tax shall be a condition precedent to engaging in the activity subject to the tax; and Section 7203 makes it a misdemeanor to engage in the activity without having first paid the tax,

and provides the penalty. It is impossible to determine the meaning or intended effect of any one of these sections without reference to the others." Any of the crimes listed in Chapter 75 of the Internal Revenue Code (7201 et seq.) such as failure to file, failure to withhold, and the like, is not a stand-alone statute. In order to prosecute the Government must (1) identify a taxing statute, and (2) prove application of a liability statute, before a penalty statute is applicable. Without the first two elements, a Federal court lacks subject matter jurisdiction to impose a penalty, whether civil or criminal. This principle applies to nearly all Federal penalty statutes, whether relating to tax, commerce, securities or anything else. Without a preexisting liability to perform or refrain from any given activity, a Federal penalty statute doesn't apply. Unless all elements are in place, the Department of Justice, U.S. Attorney or whatever has failed to meet threshold criteria for burden of proof, with the effect being that the Federal court lacks subject matter jurisdiction.

Although I'm not going to get into the subject in this memorandum, it is also necessary for a department or agency of Federal government to prove standing. For instance, the Department of the Interior doesn't have authority to enforce revenue laws. If an agency isn't vested with authority by law, it lacks standing to bring a complaint, so the court lacks subject matter jurisdiction. We'll see this in the Code section that specifies who has authority to make complaints under revenue laws.

I'll restate the obvious: All courts of the United States are statutory courts, i.e., courts of limited jurisdiction. Due process of law is predicated on statutes of the United States that either compel or prohibit a given activity. The statutory authority is usually complex rather than simple, i.e., the need for all elements being on the table in order to establish subject matter jurisdiction.

There is also an additional important element of proof: What is the geographical application of any given law or set of laws? In Foley Brothers v. Filardo (1948) 336 U.S. 281, we find that "It is a well established principle of law that all federal legislation applies only within the territorial jurisdiction of the United States unless contrary intent

appears." Congress has two distinct characters: Where States of the Union are concerned, Congress may legislate only within the framework of constitutionally enumerated powers, but where territory belonging to the United States is concerned, Congress operates with the combined authority of state and national governments much on the order of European governments, and may do whatever the Constitution does not expressly or implicitly prohibit. Where States of the Union are concerned, Congress' authority is restrictive; where the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, and smaller insular possessions are concerned, Congress has plenary or near-absolute power.

It may be that Congress exercises a general power enumerated in Article I Section 8 of the Constitution, but application is limited to the geographical United States, i.e., territory belonging to the United States. This, then, is another element of burden of proof, i.e., proof of subject matter jurisdiction. The advocate, in this case the Attorney General or U.S. Attorney, must prove the venue or geographical application of any given statute.

Just because the Constitution enumerates powers United States Government may exercise doesn't mean the power has to be exercised. For example, prior to the Civil War, Congress exercised power to impose direct taxes only twice, and until after the Civil War, if then, Congress did not vest Federal courts, including the Supreme Court, with all available jurisdictional powers enumerated in Article III Section 2 of the Constitution. Although it is beyond the scope of this memorandum, I am convinced that by 1948 virtually all Federal statutory authority was withdrawn from the Union and ever since has been applicable only in United States maritime and territorial jurisdictions.

We will now turn to essentials of due process of law as prescribed in the Fourth, Fifth, and Sixth Amendments.

We saw at 28 U.S.C. 2072(b) that Federal rules of procedure may not deprive anyone of substantive rights. In a manner of speaking, rights secured by the Fourth, Fifth, and Sixth Amendments are carved in stone, and they are cumulative, they are not independent or

elective unless someone knowingly chooses to forfeit one of the specified rights. If one of the constitutionally secured rights is bypassed, administrative offices, including the Department of Justice and the U.S. Attorney, and courts of the United States, lack or lose subject matter jurisdiction. This is the essence of the Fifth Amendment guarantee that no person shall be deprived of life, liberty or property without "due process of law." Here we see two distinct elements: Not only does there have to be law which compels or prohibits any given activity, but procedure or process must conform to that prescribed by the "Constitution and laws of the United States." The Fourth, Fifth and Sixth Amendments secure mandatory minimum requirements of due process.

The Fourth Amendment requirement for probable cause, "supported by Oath or affirmation, "is the jumping-off point:" No Warrants shall issue, but upon probable cause, supported by Oath or affirmation.

Here are two secured rights: There must be an oath or affirmation, a complaint, that specifies key elements of a crime, and a committing magistrate must issue a warrant based on the complaint. The complaint is made in a probable cause hearing. Unless or until these threshold requirements are met, there can be no Federal prosecution.

We will use Federal tax law as an example. At 18 U.S.C. 3045 we find authorization for who may set the criminal prosecution process in motion via an affidavit of complaint: "Warrants of arrest for violations of internal revenue laws may be issued by United States magistrates upon the complaint of a United States attorney, assistant United States attorney, collector, or deputy collector of internal revenue or revenue agent, or private citizen; but no such warrant of arrest shall be issued upon the complaint of a private citizen unless first approved in writing by a United States attorney." This Code section needs an amount of qualification: Whoever makes the affidavit of complaint must have personal knowledge. In other words, an U.S. Attorney cannot make the affidavit of complaint unless he was personally involved with the investigation process and has hands-on involvement with securing and examining evidence.

Our concern is whether or not the Federal Rules of Criminal Procedure preserve this constitutionally secured right. We find that they do. Rule 3 of the F.R.Crim.P. is specific: "Rule 3. The Complaint "The Complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a magistrate judge." We then go to Rule 4, "Arrest Warrant or Summons Upon Complaint".

Rules 3 through 9 of the Federal Rules of Criminal Procedure preserve the proper procedural sequence of the Fourth, Fifth and Sixth Amendments. If any portion of any of these rules, i.e., of any of the three amendments, is defective, Courts of the United States lose subject matter jurisdiction.

Before continuing with what should happen, I'll review what normally happens.

The first most people know of a Federal investigation is when they receive a "summons" in the mail, with something akin to an "indictment" attached, or they are arrested on a warrant with an indictment attached. Occasionally a U.S. Attorney, the Criminal Division of the Internal Revenue Service, the FBI or another Federal agency will notify the target of an investigation, and sometimes the target will be offered the opportunity to testify to a grand jury. However, whether arrested or summoned, the target's first court appearance is at the alleged arraignment after the grand jury has supposedly issued an indictment. At the hearing, the defendant is asked to enter a plea. If the defendant refuses to enter a plea, the presiding magistrate, usually a United States Magistrate Judge enters a plea for him. After that ritual, the U.S. Magistrate Judge will either set or deny bond.

Where is the affidavit of complaint, probable cause hearing, et al? Has the defendant had the opportunity to examine witnesses and evidence against him, call his own witnesses and present contravening documentary or other evidence? As we will see, current Federal prosecution practice for all practical purposes trashes Fourth, Fifth, and Sixth Amendment due process rights, and it employs the services of quasi-judicial officers who don't have lawful authority to do what they're doing. In sum, current Federal prosecution practice amounts to a criminal conspiracy among administrative and judicial officers.

Federal criminal prosecution must begin with the affidavit of criminal complaint required by the Fourth Amendment and Rule 3 of the Federal Rules of Criminal Procedure. Without the affidavit of complaint, courts of the United States do not have subject matter jurisdiction, so whatever ensuing verdict, judgment and/or sentence there might be is a nullity, it is void and should be vacated.

We then go to Rule 4, the warrant issued subsequent to the probable cause hearing. Warrants for seizure and/or arrest must issue following, they cannot issue without a probable cause hearing.

The Federal courts are presently relying on Rule 9(a), "Warrant or Summons Upon Indictment or Information". Rule 9(a), in relative part, stipulates that, "Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in an information supported by a showing of probable cause under oath as is required by Rule 4(a), or in an indictment. More than one warrant or summons may issue for the same defendant. When a defendant arrested with a warrant or given a summons to appear initially before a magistrate judge, the magistrate judge shall proceed in accordance with the applicable divisions of Rule 5." They then jump to Rule 10, the arraignment, rather than dropping back to Rule 5, as Rule 9 specifies. Rule 5 is "Initial Appearance Before the Magistrate Judge." Grand juries have certain investigative powers. If in the course of investigating a cause of action that is lawfully before them, grand jury members may find evidence sufficient to recommend additional charges, or name additional defendants, by way of presentment. However, if the original complaint against the primary defendant for a specific offense is not before it, the grand jury has no basis for initiating an investigation. There must be original probable cause determined by a committing magistrate, with the finding of probable cause being predicated on the antecedent complaint.

We're going to use Rule 6(b)(1) to demonstrate this point: "(1) Challenges. The attorney for the government or a defendant who has been held to answer in the district court may

challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court." The right to challenge grand jury array (composition) and individual jurors is antecedent to individual jurors being administered the oath required prior to a grand jury being formally seated. The government attorney and the defendant, or the defendant's counsel, both have the right to challenge array and disqualify grand jury candidates prior to the grand jury being seated. If this right has been denied, there is a simple solution at Rule 6(b)(2): "(2) Motion to Dismiss. A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. It shall be made in the manner prescribed in 28 U.S.C. 1867(e) and shall be granted under the conditions prescribed in that statute. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment." Rule 6(c) requires the grand jury foreman to record the vote, and then file a letter or certificate of concurrence with the clerk of the court.

If the original defendant or his counsel did not have the opportunity to challenge the grand jury array (composition selection process) and individual grand jurors prior to the grand jury being seated, they're all disqualified as the qualification process is among the defendant's constitutionally secured due process rights. By consulting Chapter 121 of Title 28 generally, and 28 U.S.C. 1867 specifically, we find that there is no distinction in the voir dire examination and other jury qualification process for grand juries or petit trial juries: "(a) In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury." If a defendant doesn't know a grand jury is investigating him, he doesn't have the opportunity to

challenge the grand jury array, or individual grand jurors. Consequently, he has been deprived of substantive due process, which is expressly prohibited by 28 U.S.C. 2072(b).

We have an adversarial judicial system. All parties to any given action, the government included, stand on equal ground. The system isn't set up for convenience of the government. Government always has the burden of proof, whether in civil or criminal matters. The defendant has the right to challenge the qualifications and competency of everyone involved in the prosecution process, inclusive of grand and petit jurors selected from "peers" who ultimately have responsibility for determining indictable offenses and/or final liability. If and when government personnel deprive the Citizen of any of these rights, constitutionally secured due process of law is abridged. In that event, courts lose subject matter jurisdiction.

Now consider Rule 6(f), Federal Rules of Criminal Procedure (F.R.Crim.P.)

(f) Finding and Return of Indictment. An indictment may be found only upon concurrence of 12 or more jurors. The indictment shall be returned by the grand jury to a federal magistrate judge in open court. If a complaint or information is pending against the defendant and 12 jurors do not concur in finding an indictment, the foreperson shall so report to a federal magistrate judge in writing forthwith." This section of Rule 6 specifies foundation necessities: Federal government may prosecute felony crimes only on a valid affidavit of complaint that has been presented in a probable cause hearing (Rules 3 & 4). Only corporations can be prosecuted via "information." Rule 6(f) preserves the antecedent affidavit of complaint and probable cause hearing in the second sentence: The grand jury may proceed only on "complaint" or "information" that has previously been formally processed. Additionally, if the grand jury issues an indictment, the return must be made in open court to a magistrate judge.

The return should appear on the case docket, and a transcript of the hearing should be available. A return of an indictment is the same as the petit trial jury return of a verdict.

In practice, any given grand jury returns several indictments at once. However, when we understand the indictment process, it is clear that the grand jury pool may be held over for several months, but any given grand jury is empanelled to consider only one charge or set of charges in related cases. To date, we haven't found where an indictment for any single case or set of related cases has been returned in open court, and a transcript of the proceeding made available.

Rule 8 governs limits of the reach of any given grand jury, Rule 8 being "Joinder of Offenses and of Defendants." During any court or jury session, any given juror might sit on one or more grand or petit juries, but each jury has limited subject matter jurisdiction. Where the grand jury is concerned, it may proceed only from an original complaint where probable cause has been found to issue additional indictments and/or name additional defendants where the crimes "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." (Rule 8(a)) Rule 8(b) specifies criteria for naming additional defendants.

Here is where our reservation of rights in Rule 9(a) comes in: "When a defendant arrested with a warrant or given a summons appears initially before a magistrate judge, the magistrate judge shall proceed in accordance with the applicable subdivisions of Rule 5." We will first consider Rule 5(b) and the first portion of Rule 5(c): "(b) Misdemeanors and Other Petty Offenses. If the charge against the defendant is a misdemeanor or other petty offense triable by a United States magistrate judge under 18 U.S.C. 3401, the magistrate judge shall proceed in accordance with Rule 58.

"(c) Offenses not Triable by the United States Magistrate Judge. If the charge against the defendant is not triable by the United States magistrate judge, the defendant shall not be called upon to plead.

What is now known as the United States Magistrate Judge was originally a national park commissioner. The name of the office has changed, but the nature of the office hasn't.

This is an administrative, not a judicial office. It's equivalent to what used to be the police court magistrate. Today the only offenses triable by a United States Magistrate Judge are traffic violations and other misdemeanor and petty offenses committed on military reservations, in national parks and forests, etc., under regulations promulgated by the Department of Defense and the Department of the Interior. Don't capture wild burrows and mustangs in national parks without a permit, as that is a misdemeanor offense triable by a United States Magistrate Judge.

United States Magistrate Judges in the several States have "venue" jurisdiction solely over offenses committed on Federal enclaves where United States Government has exclusive or concurrent jurisdiction ceded by one of the several States. And as Rule 5(c) specifies, they cannot even ask for, much less make a plea for a defendant charged with a felony crime. This prohibition is effective under Rules 5, 9, 10 & 11. When and if a United States Magistrate Judge asks for or makes a plea for a defendant in a felony case, he has usurped power vested in Article III judges of the United States. When this quasi-judicial officer exceeds authority Congress vested in him by law, the United States loses subject matter jurisdiction and there are grounds to pursue lawful remedies, both civil and criminal. Government officials, regardless of capacity, enjoy the cloak of immunity only to the outer reaches of their lawful authority. The notion of blanket judicial or any other absolute immunity is nothing more than a convenient fiction.

Rule 5(c), second paragraph, also stipulates that, "A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court." We're going to continue with this subsection, but it is useful to understand the term "magistrate judge" as opposed to "United States Magistrate Judge" or "United States magistrate judge." The President of the United States is the nation's highest "magistrate." In other words, the "magistrate" is a ministerial, not a judicial office. All lawful judges function in a magistrate capacity when they preside at probable cause hearings, initial appearances and the like. In a sense, this is an "extra-judicial" capacity that within proper context can be vested in or exercised by administrative or judicial officers. The United States Magistrate Judge is an

administrative office with quasi-judicial capacity limited to specific subject matter, where the "district judge" of the United States is vested with the full range of United States judicial authority, i.e., his extra-judicial capacity as magistrate judge extends to Federal offenses of all stripes.

Essentials of the preliminary hearing or examination are prescribed at Rule 5.1(a) of the Federal Rules of Criminal Procedure: "(a) Probable Cause Finding. If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate judge shall forthwith hold the defendant to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine adverse witnesses and may introduce evidence.

Now we go back to Rule 5(c), second paragraph: "A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate judge shall forthwith hold the defendant to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate judge shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if the defendant is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination.

If a defendant is joined to an indictment under Rule 8, he has the right to a preliminary hearing under Rule 5.1. This assures his opportunity to challenge witnesses and present evidence before being subjected to the trial process. The right is particularly important where government prosecutors routinely play "let's make a deal" to secure incriminating testimony from questionable witnesses.

We will now summarize indispensable or "substantive" elements of Federal criminal prosecution: The criminal prosecution process may commence if and only if there is an affidavit of criminal complaint submitted under oath in a probable cause hearing. (Rule 3, F.R.Crim.P.) A committing magistrate judge must issue a warrant or summons after finding probable cause. (Rule 4, F.R.Crim.P.) The defendant may be arrested and "returned" by the appropriate Federal authority. (Rule 4, F.R.Crim.P.) The defendant then has an initial appearance at which he is asked to enter a plea, and bond, if any, is set. If the offense is a felony offense, a United States Magistrate Judge may not ask for or enter a plea. The defendant is entitled to a preliminary hearing unless an indictment or information (against a corporation) is returned prior to a preliminary hearing. In the event that the defendant is "joined" by a grand jury under Rule 8 and has not previously been arrested, the Federal criminal prosecution process begins here, and the defendant is entitled to a preliminary hearing. (Rule 5, F.R.Crim.P.) If the defendant exercises his right to a preliminary hearing, he has the opportunity to cross-examine adverse witnesses and he may introduce his own evidence, whether the evidence is via witnesses or is documentary in nature. (Rule 5.1, F.R.Crim.P.) The preliminary examination may be bypassed only in the event that the defendant waives the right, or indictment issues subsequent to the initial appearance.

The defendant, or his counsel, has the right to challenge array of the grand jury pool and voir dire individual grand jury candidates prior to the grand jury being sworn in. (Rule 6(b), F.R.Crim.P. & 28 U.S.C. 1867).

In the course of its investigation, based on an affidavit of complaint and the finding of probable cause, a grand jury may by "presentment" issue additional indictments and/or join additional defendants in compliance with provisions of Rule 8, F.R.Crim.P.

The grand jury must return indictments in open court, and the grand jury foreman must file a letter or certificate of concurrence with the clerk of the court. (Rule 6(f), F.R.Crim.P.) A warrant or summons may issue against additional parties joined to an original complaint under provisions of Rule 8 subsequent to grand jury deliberation and

return of indictment in accordance with Rule 6. (Rule 9, F.R.Crim.P.) After all previous conditions are met, as applicable, a defendant may be arraigned and called on to plead. (Rules 10 & 11, F.R.Crim.P.) From my research, it appears that the Department of Justice and United States Attorneys are convening grand juries under auspices of the "special grand jury" provisions in Chapter 216 (3331-3334) of Title 18. However, this is misapplication of law as special grand jury investigation authority extends only to criminal activity involving government personnel, and the grand jury is limited to issuing reports. Defendants and prospective defendants are afforded the opportunity to rebut or correct the reports prior to public release. Although evidence unearthed by the special grand jury may be used as the basis of criminal prosecution, the special grand jury does not have indictment authority.

It appears that the first steps toward securing secret indictments were taken during prohibition days to shield grand jury members from reprisal. Although secret indictments were and are patently unconstitutional, the extreme remedy in the midst of highly volatile and dangerous circumstance was rationalized in the midst of what amounted to domestic war with organized crime. Unfortunately, as other such rationalizations, those who found the extraordinary process convenient incorporated it as routine practice.

Rule 60(b) of the Federal Rules of Civil Procedure preserves causes to challenge judgments. They are as follows: Mistake, inadvertence, surprise, or excusable neglect; Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; The judgment is void; The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or Any other reason justifying relief from the operation of the judgment.

The rule then specifies, "The motion that shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding

was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of the court to entertain an independent action or relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. 1655, or to set aside a judgment, for fraud upon the court. Writs of *coram nobis*, bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action." There are two keys in Rule 60(b). First, Rule 60(b)(4), where the "judgment is void," opens the door to vacating a judgment at any time, and second, the void judgment may be attacked "by motion as prescribed in these rules or by an independent action." A judgment is void where the court lacked subject matter jurisdiction. The court lacks subject matter jurisdiction when and if the administrative agency has proceeded without statutory authority, or the administrative agency has deprived the defendant of substantive due process rights. Where the court lacked subject matter jurisdiction, the judgment is void; it has no lawful effect, so it should be vacated. The defendant may proceed by motion at any time, without the encumbrance of time limitation, or may initiate collateral attack via the extraordinary writs, i.e., an independent action.

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