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The Federal Grand Jury

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Charles Doyle
Senior Specialist
American Law Division

The Federal Grand Jury

Summary

The federal grand jury exists to investigate crimes against the United States and to secure the constitutional right of grand jury indictment. Its responsibilities require broad powers.

As an arm of the United States District Court which summons it, upon whose process it relies, and which will receive any indictments it returns, the grand jury's subject matter and geographical jurisdiction is that of the court to which it is attached.

Ordinarily, the law is entitled to everyone's evidence. Witnesses subpoenaed to appear before the grand jury, therefore, will find little to excuse their appearance. Once before the panel, however, they are entitled to benefit of various constitutional, common law and statutory privileges including the right to withhold self-incriminating testimony and the security of confidentiality of their attorney-client communications. They are not, however, entitled to have an attorney with them in the grand jury room when they testify.

The grand jury conducts its business in secret. Those who attend its sessions may ordinarily disclose its secrets only when the interests of justice permit.

Unless the independence of the grand jury is overborne, irregularities in the grand jury process ordinarily will not result in dismissal of an indictment, particularly where dismissal is sought after conviction.

The concurrence of the attorney for the government is required for the trial of any indictment voted by the grand jury. In the absence of such an endorsement or when a panel seeks to report, the court enjoys narrowly exercised discretion to dictate expungement or permit distribution of the report.

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Introduction

"The grand jury [has] a unique role in our criminal justice system."[1] It was born of a desire to identify more criminals for prosecution and thereby to increase the King's revenues. But the exclusive power to accuse is also the power not to accuse and early on the grand jury became both the "sword and the shield of justice."[2]

This dual character marks the federal grand jury to this day. As the sword of justice, it enjoys virtually unfettered power to secretly investigate the mere possibility that federal laws may have been broken. Yet it remains a potential shield for it must give its approval before anyone may be brought to trial for a serious federal crime.[3]

What follows is a brief general description of the federal grand jury, with particular emphasis on its more controversial aspects — relationship of the prosecutor and the grand jury, the rights of grand jury witnesses, grand jury secrecy, and rights of targets of a grand jury investigation.

Background

The grand jury is an institution of antiquity. When William the Conqueror sought to compile the Domesday Book, he called upon the most respected men of each community. Their reports were collected to form an inventory of England's property, real and personal, and served as the foundation of the Crown's tax rolls. Almost a century later in the Assize of Clarendon, the ancestor of the modern grand

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[1] *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297 (1991).

[2] *United States v. Cox*, 342 F.2d 167, 186 n.1 (5th Cir. 1965)(Wisdom, J., concurring), quoting American Bar Association, FEDERAL GRAND JURY HANDBOOK 8 (1959) (reprinted in *Federal Grand Jury: Hearings Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 277, 283 (1976)).

[3] "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. . . ." U.S. Const. Amend. V. A defendant is free to waive grand jury indictment for any crime that does not carry the death penalty; and the government may prosecute misdemeanors and other minor federal crimes by either by indictment or by information, F.R.Crim.P. 7.

jury, Henry II used the same approach to unearth reports of crime,[4] and thereby increase the flow of fines and forfeitures into his treasury.[5]

From the power to accuse, the power to refuse to accuse eventually developed. By the American colonial period, the grand jury had become both an accuser and a protector. It was the protector the Founders saw when they enshrined the grand jury within the Bill of Rights and the reason it has been afforded extraordinary inquisitorial powers and exceptional deference.

The Fifth Amendment right to grand jury indictment is only constitutionally required in federal cases.[6] In a majority of the states prosecution may begin either with an indictment or with an information or complaint filed by the prosecutor.[7]

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[4] Most commentators, after making reference to earlier similar institutions in ancient Greece, Rome, Scandinavia, Normandy and/or among the Saxons, trace the emergence of the modern grand jury to the issuance of the Assize of Clarendon by Henry II in 1166, 1 Stephen, A HISTORY OF THE CRIMINAL LAW OF ENGLAND, 251-52 (1883); 1 Holdsworth, HISTORY OF ENGLISH LAW, 147-48 (1903); Stubbs, SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY, 143 (1888); 2 Pollack & Maitland, HISTORY OF ENGLISH LAW, 642 (1923); Plucknett, A CONCISE HISTORY OF THE COMMON LAW 112 (1956); Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AMERICAN CRIMINAL LAW REVIEW 701, 703 (1972); Boudin, *The Federal Grand Jury*, 61 GEORGETOWN LAW JOURNAL 1 (1972); Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLORIDA STATE UNIVERSITY LAW REVIEW 1, 5-6 (1996).

In the Assize of Clarendon and the later Assize of Northampton (1176), "twelve knights of the hundred or, if there are no knights, . . . twelve free and lawful men, . . . and . . . four men from each township of the hundred" were assembled and "by their oath" identified from their own knowledge those reputed to have committed crimes. Plucknett, *supra* at 112; 3 Stephen, *supra* at 251; 1 Holdsworth, *supra* at 147.

"Assize" literally means "to sit together" and comes from the practice of gathering several knights or men of high repute to sit together and resolve some dispute or other legal matter from their own investigations or knowledge. Later the term was used (a) to designate the decree or statute that ordered the group to assemble, (b) to refer to the assemblage itself, and finally (c) to identify the court, time or place where the trial judges assembled throughout the country side to hear cases. BLACK'S LAW DICTIONARY, 120-21 (1990).

[5] Plucknett, *supra* at 112. At common law, anyone convicted and "attained" for treason or felony forfeited all his land and goods to the Crown, 4 Blackstone, COMMENTARIES 376-81 (1813 ed.); 1 Hale, HISTORY OF PLEAS OF THE CROWN, 354-67 (1778 ed.).

[6] The Fifth Amendment right to grand jury indictment is not binding upon the states, *Hurtado v. California*, 110 U.S. 516 (1884); *Freeman v. City of Dallas*, 242 F.3d 642, 667 (5th Cir. 2001); *Holman v. Gilmore*, 126 F.3d 876, 884 (7th Cir. 1997); *United States v. Doherty*, 126 F.3d 769, 777 (6th Cir. 1997); *Cooksey v. Delo*, 94 F.3d 1214, 1217 (8th Cir. 1996); *Minner v. Kerby*, 30 F.3d 1311, 1318 (10th Cir. 1994); *Jeffries v. Blodgett*, 5 F.3d 1180, 1188 (9th Cir. 1993); cf., *Rose v. Mitchell*, 443 U.S. 545, 557 n.7 (1979).

[7] Ala. Const.[I], §8 (Amend.No. 598); Ala.R.Crim.P. 2.1, 2.2(e); Ariz. Const. Art.II, §30; Ariz.R.Crim.P. 2.2; Ark. Const. Amend. 21, §1; Cal. Const. Art.I, §14, Cal.Penal Code §§737, 859; Colo. Const. Art.II, §8, Colo.Rev.Stat. §16-5-101; Conn. Gen.Laws Ann. §§54-45, 54-46; Fla. Const. Art. I, §15; Hawaii Const. Art.I, §10; Hawaii Rev.Stat.Ann. §801-1; Idaho Const. Art.I, §8; Ill. Const. Art.I, §7, Ill. Comp.Stat.Ann. ch.725 §5/111-2; Ind.Stat.

Although abolition of the right to indictment in the states and abolition of the grand jury itself in England were primarily matters of judicial efficiency,[8] most of the contemporary proposals to change the federal grand jury system are the product of concern for the fairness of the process or for perceived excesses caused by prosecutorial exuberance.[9]

Organizational Matters

Jurisdiction

The authority of a federal grand jury is sweeping, but it is limited to the investigation of possible violations of federal criminal law triable in the district in which it is sitting.[10] This does not include the power to investigate conduct known

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Ann. §35-34-1-1; Iowa Code §813.2, Rules 4, 5; Kan.Stat.Ann. §22-3201; La. Const. Art.I, §15; Md.Ann.Code Art.27 §592; Mich.Comp.Laws Ann. 767.1; Minn.R.Crim.P. 17.01; Mo. Const. Art.I, §17; Mont. Const. Art.II, §20, Mont.Code Ann. §46-11-101; Neb. Const. Bill of Rts. §10; Neb.Rev.Stat. §29-1601; Nev. Const. Art.I, §8; N.M. Const. Art.II, §14; N.D. R.Crim.P. 7; Okla. Const. Art.II, §17; R.I. Const. Art. I, §7; S.D. Const. Art.VI, §10; S.D.Comp.Laws Ann. §23A-6-1; Utah Const. Art.I, §13; Vt.R.Crim.P. 7; Wash. Const. Art.I, §25; Wis.Stat.Ann. §967.05; Wyo. Const. Art.I, §13.

Several states do continue to recognize a right to grand jury indictment in felony cases, Alaska Const. Art. I, §8; Del. Const. Art. I, §8; Ga.Code Ann. §§17-7-70; Ky. Bill of Rts. §12; Me.Const. Art.I, §7; Mass.Gen.Laws Ann. ch. 263, §4; Miss. Const. Art.III, §27; N.H.Rev.Stat.Ann. §601:1; N.J. Const. Art.I, §8; N.Y. Const. Art. I, §6; N.C. Const. Art. I, §22; Ohio Const. Art.I, § 10; Ore. Const. Art.VII, §5; Pa.Const. Art.I, §10; S.C. Const. Art. I, §11; Tenn. Const. Art. I, §14; Tex. Const. Art. I, §10; Va.Code §§19.2-216, 19.2-217; W.Va. Const. Art. III, §4. And a few others require it in cases punishable by death or life imprisonment, Ala.Const.[I], §8 (Amend.No. 598); Fla. Const. Art. I, §15; La. Const. Art.I, §15; Minn.R.Crim.P. 17.01; R.I. Const. Art. I. §7.

[8] "The obituary of the English grand jury might well read: Born in 1166 to increase accusations of crime, lived to be termed the palladium of justice, and died in 1933 of inutility on a wave of economy." Elliff, *Notes on the Abolition of the English Grand Jury*, 29 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 3 (1938), quoted in Calkins, *Abolition of The Grand Jury Indictment in Illinois*, 1966 UNIVERSITY OF ILLINOIS LAW FORUM 423, 428.

[9] Brenner, *Is the Grand Jury Worth Keeping?* 81 JUDICIATURE 190 (1998); Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL LAW REVIEW 260 (1995); Poulin, *Supervision of the Grand Jury: Who Watches the Guardian?*, 68 WASHINGTON UNIVERSITY LAW QUARTERLY 885, 927 (1990); Braun, *The Grand Jury — Spirit of the Community?*, 15 ARIZONA LAW REVIEW 893, 915 (1973); Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AMERICAN CRIMINAL LAW REVIEW 701, 770 (1972); *contra*, Antell, *Modern Grand Jury: Benighted Supergovernment*, 51 AMERICAN BAR ASSOCIATION JOURNAL 153, 154; Campbell, *Eliminate the Grand Jury*, 64 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 174 (1973).

[10] *Brown v. United States*, 245 F.2d 549, 554-55 (8th Cir. 1957); *United States v. Brown*, 49 F.3d 1162, 1168 (6th Cir. 1995).

to have no connection to the court's jurisdiction, but does encompass the authority to inquire whether a case is within its jurisdiction.[11]

The grand jury may begin its examination even in the absence of probable cause or any other level of suspicion that a crime has been committed within its reach. In the exercise of its jurisdiction, the grand jury may "investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not,"[12] and its inquiries "may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors."[13]

Unrestrained "by questions of propriety or forecasts of the probable result of the investigation or by doubts whether any particular individual will be found properly subject to an accusation,"[14] its "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."[15]

Selection

The various United States District Courts are instructed to "order one or more grand juries to be summoned at such time as the public interest requires."[16] In addition, the Attorney General may request the District Court to summon a special grand jury in any of the larger districts or when he or she believes the level of criminal activity in the district warrants it.[17]

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[11] *United States v. Brown*, 49 F.3d at 1168 (6th Cir. 1995); *United States v. Williams*, 993 F.2d 451, 454-55 (5th Cir. 1993); *In re Marc Rich & Co.*, 707 F.2d 663, 667 (2d Cir. 1983); *Blair v. United States*, 250 U.S. 273, 283 (1919); *United States v. Neff*, 212 F.2d 297, 301-302 (3d Cir. 1954).

[12] *United States v. Williams*, 504 U.S. 36, 48 (1992), quoting, *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297 (1991) and *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950).

[13] *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972).

[14] *Blair v. United States*, 250 U.S. 273, 282 (1919).

[15] *Branzburg v. Hayes*, 408 U.S. at 701.

[16] F.R.Crim.P. 6(a).

[17] 18 U.S.C. 3331. The districts eligible by size (those with populations of more than 4 million) appear to include: the District for Arizona; the Central, Eastern and Northern Districts for California; the Middle and Southern Districts for Florida; the Northern District for Georgia; the Northern District for Illinois; the District for Maryland; the District for Massachusetts; the Eastern District for Michigan; the District for Minnesota; the District for New Jersey; the Eastern and Southern Districts for New York; the Northern and Southern Districts for Ohio; the Eastern and Western Districts for Pennsylvania; the Northern, Southern, and Western Districts for Texas; the Eastern District of Virginia; and the Western District for Washington, 28 U.S.C. 81-131; *Census 2000 PHC-T-4, Ranking Tables for Counties: 1999 and 2000 - Table 2: Counties Ranked by Population: 2000*, at www.census.gov.

Special grand juries are distinctive in that they may serve for longer terms than a regular grand jury and have explicit reporting authority, 18 U.S.C. 3331-3334.

Historically, the responsibility of choosing those to be named to the grand jury fell to the sheriff.[18] Selection of the members of the grand jury by the sheriff of the county continued for some time and was used generally in colonial America, although grand jurors were elected in some colonies.[19]

Until fairly recently, the law governing the selection, qualifications and exemptions of federal grand jurors was determined largely by reference to the law of the state in which the grand jury was to sit.[20] These matters are now the responsibility of the court, governed by the Jury Selection and Service Act of 1968,[21] and the selection plan established for the district in which they are to sit.

Federal grand jurors must be citizens of the United States, eighteen years of age or older and residents of the judicial district for at least a year, be able to read, write and understand English with sufficient proficiency to complete the juror qualification form, be able to speak English, and be mentally and physically able to serve; those charged with or convicted of a felony are ineligible.[22]

Discrimination in selection on the basis of race, color, religion, sex, national origin, or economic status is prohibited,[23] and grand jurors must be "selected at random from a fair cross section of the community in the district or division wherein the court convenes."[24] Either a defendant, an attorney for the government, or a member of an improperly excluded group may challenge the selection of a grand jury panel contrary to these requirements.[25]

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[18] 1 Holdsworth, HISTORY OF ENGLISH LAW, 148 (1903); 2 Hale, HISTORY OF PLEAS OF THE CROWN, 154 (1778 ed.).

[19] Younger, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941, 5-26 (1963); Goebel & Naughton, LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664-1776), 333-34 n.29 (1970); BOOK OF GENERAL LAWS AND LIBERTYES CONCERNING THE INHABITANTS OF THE MASSACHUSETTS, 47 (1660).

[20] 1 Stat. 88 (1789); 2 Stat. 82 (1800); 5 Stat. 394 (1840); 21 Stat. 43 (1879); 36 Stat. 1164 (1911); 28 U.S.C. 411, 412 (1946 ed.).

[21] 28 U.S.C. 1861-1869.

[22] 28 U.S.C. 1865.

[23] 28 U.S.C. 1862.

[24] 28 U.S.C. 1861.

[25] 28 U.S.C. 1867; F.R.Crim.P. 6(b); *Carter v. Jury Commission of Greene County*, 396 U.S. 320 (1970); *Turner v. Fouche*, 396 U.S. 346 (1970); *United States v. Raszkiewicz*, 169 F.3d 459, 462-63 (7th Cir. 1999); *United States v. Artero*, 121 F.3d 1256, 1260 (9th Cir. 1997)("To establish a prima facie case for violation of the fair cross section requirement a person challenging the venire must show distinctiveness of the group excluded, unreasonable representation of tat group, and that the underrepresentation of that group was caused by systematic exclusion"); *see also, Campbell v. Louisiana*, 523 U.S. 392 (1998) (white criminal defendant has standing to raise equal protection and due process challenges to state grand jury practices which unconstitutionally excluded members of racial minorities).

Since the grand jury began with indictments based upon the personal knowledge of the members of the panel, there is some historical justification for the position that bias or want of impartiality should not disqualify a potential grand juror. The drafters of the Federal Rules of Criminal Procedure seemed to confirm this view when they rejected proposed language permitting a challenge of the grand jury based on "bias or prejudice."[26]

One commentator points out, however, that language in several Supreme Court cases has led the lower courts to assert that grand juries must be unbiased, or at least they must not be exposed to improper influences that would create bias.[27] The case law also seems to focus on any contamination of the panel as a whole and to rely upon each grand juror's faithfulness to his or her oath to avoid the adverse consequences of individual bias.[28]

Grand jury panels consist of sixteen to twenty-three members,[29] sixteen of whom must be present for a quorum,[30] and twelve of whom must concur to indict.[31] The size of grand jury panels is a remnant of the common law,[32] but the common law treatises and the cases provide little indication of why those particular numbers were

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[26] "A preliminary draft of Rule 6(b) would have permitted challenge of grand jurors on the grounds of bias and prejudice. This was not included in the final draft, apparently on the view that the grand jury, which merely prefers the charge, should be scrupulously fair but not necessarily uninformed or impartial. Thus cases have held that an attack for bias will not lie." 1 Wright, FEDERAL PRACTICE & PROCEDURE: CRIMINAL 3D, §102 (1999), citing *Estes v. United States*, 335 F.2d 609 (5th Cir. 1964); *In re Grand Jury*, 508 F.Supp. 1210 (S.D.Ala. 1980); *United States v. Partin*, 320 F.Supp. 275 (E.D. La. 1970); *United States v. Knowles*, 147 F.Supp. 19 (D.D.C. 1957).

[27] 1 Wright, FEDERAL PRACTICE & PROCEDURE: CRIMINAL 3D, §102 (1999); see also *United States v. Moore*, 811 F.Supp. 112, 117 (W.D.N.Y. 1992); *United States v. Finley*, 705 F.Supp. 1297, 1306 (N.D. Ill. 1988); *United States v. Burke*, 700 F.2d 70, 82 (2d Cir. 1983); *United States v. Serubo*, 604 F.2d 807, 816 (3d Cir. 1979).

[28] In the oath commonly used, grand jurors swear "not to present or indict any persons through hatred, malice nor ill will; nor leave any person unpresented or unindicted through fear, favor, or affection, nor for any reward, or hope or promise thereof. . . ." 1 Beale et al., GRAND JURY LAW AND PRACTICE, §4:4 (1998).

[29] 18 U.S.C. 3321; F.R.Crim.P. 6(a).

[30] Id.; *United States v. Leverage Funding Systems, Inc.*, 637 F.2d 645 (9th Cir. 1980).

[31] F.R.Crim.P. 6(f).

[32] "The sheriff of every county [was] bound to return to every session of the peace, and every commission of oyer and terminer, and of general gaol delivery, twenty-four good and lawful men of the county, some out of every hundred, to inquire, present, do, and execute all those things, which on the part of our lord the king shall then and there be commanded of them. . . . As many as appear upon this panel are sworn upon the grand jury, to the amount of twelve at least, and not more than twenty-three. . . ." 4 Blackstone, COMMENTARIES 276 (1813 ed.); 1 Hale, HISTORY OF PLEAS OF THE CROWN, 161 (1778 ed.).

chosen.[33] Of course, when the grand jury's accusations were based primarily upon the prior knowledge of the panel's members, larger panels were more understandable.

The movement which lead to abolition of the right to indictment in many of the states also resulted in a reduction in the size of most state grand jury panels.[34] Perhaps because of a reluctance to dilute the federal constitutional right to indictment, there have been few suggestions for a comparable reduction in the size of the federal grand jury.[35]

The selection of twenty-three members for a panel which requires only the presence of sixteen to conduct its business would seem to obviate the need for alternate grand jurors. This is not the case, however, and the rules permit the court

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[33] The Supreme Court has referred to "Lord Coke's explanation that the number of twelve is much respected in holy writ, as 12 apostles, 12 stones, 12 tribes, etc. . . ." in an effort to explain why the number 12 was chosen for the size of the petit jury, *Williams* v. *Florida*, 399 U.S. 78, 81 (1970). Blackstone alludes to the importance of concurrence of twelve grand jurors in the indictment, "for so tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the king of any capital offense, unless by the unanimous voice of twenty-four of his equals and neighbors: that is, by twelve at least of the grand jury. . . and afterwards, by the whole petit jury, of twelve more," 4 Blackstone, *supra* at 279. This, in turn he finds to explain the maximum size of the grand jury panel, "As many as appear upon this panel are sworn upon the grand jury, to the amount of twelve at least, but not more than twenty-three; *that twelve may be a majority*," *id*. at 276 (emphasis added). Blackstone's view is reflected in some of the earlier cases:

"By the act of congress of March 3, 1865 (13 Stat. 500), it is provided that grand juries in the courts of the United States 'shall consist of not less than sixteen and not exceeding twenty-three persons, . . . and that no indictment shall be found without the concurrence of at least twelve grand jurors.' The earlier authorities show that the accusing body now called the grand jury originally consisted of twelve persons, and all were required to concur. The number was subsequently enlarged to twenty-three, which was the maximum. Undoubtedly one reason why both at common law and by act of congress more jurors are required to be summoned, and by the act of congress to be impaneled than are necessary to find a bill, is to prevent, on the one hand, the course of justice from being defeated if the accused should have one or more friends on the jury; and on the other hand, the better to protect persons against the influence of unfriendly jurors on the panel." *United States v. Williams*, 28 F.Cas.666, 670 (No. 16,716) (C.C.D.Minn. 1871).

"The requiring of twenty-three to be summoned, though we have found no reasons stated in the books, was probably in order to make sure of obtaining a full jury of twelve; possible to be sure of having a few over, so that if the accused should have a friend or two upon the panel, the course of justice might not be defeated; possible to prevent a dissolution of the jury by the death or sickness or absence of one or more of the jurors, or it may be for all these reasons combined." *State v. Ostrander*, 18 Iowa 435, 443 (1865).

[34] *See*, 1 Beale et al., GRAND JURY LAW AND PRACTICE, §4:8 n.7 (1998) for a survey of state provisions, only a half dozen of which reduce the size of grand jury panels below twelve.

[35] One of the few to do so recommended reduction to panels of seven, nine or eleven, with the concurrence of seven required for indictment, Sullivan & Bachman, *If It Ain't Broke, Don't Fix It: Why the Grand Jury's Accusatory Function Should Not Be Changed*, 75 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 1047, 1068-69 (1984).

to direct the selection of alternate grand jurors at the same time and in the same manner as other members of the panel are selected.[36]

Tenure

After selection, members of the grand jury are sworn in,[37] the court names a "foreperson and deputy foreperson,"[38] and instructs the grand jury.[39] Federal grand juries sit until discharged by the court, but generally not for longer than 18 months with the possibility of one six month extension.[40] Special grand juries convened in large districts with severe crime problems also serve until discharged or up to 18 months but may be extended up to 36 months and in some cases beyond.[41]

Proceedings Before the Grand Jury

Grand Jury and the Prosecutor

The grand jury does not conduct its business in open court nor does a federal judge preside over its proceedings.[42] The grand jury meets behind closed doors with only the jurors, attorney for the government, witnesses, someone to record testimony, and possibly an interpreter present.[43]

In many cases, the government will have already conducted an investigation and the attorney for the government will present evidence to the panel. In other cases, the investigation will be incomplete and the grand jury, either on its own initiative or at the suggestion of the attorney for the government, will investigate.

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[36] F.R.Crim.P. 6(a)(2).

[37] *Hale v. Hensel*, 201 U.S. 43, 60 (1906); for a model grand jury oath *see*, note 28, *supra*.

[38] F.R.Crim.P. 6(c).

[39] Although there is no requirement that the court charge the jury, it is a practice of long standing, *Charge to the Grand Jury*, 30 F. Caves. 992 (No. 18255) (C.C.D.Cal. 1872)(Field, J.); 1 Beale et al., GRAND JURY LAW AND PRACTICE, §4:5 (1998) (model grand jury charge).

[40] F.R.Crim.P. 6(g).

[41] 18 U.S.C. 3331, 3333.

[42] "Although the grand jury normally operates, of course, in the courthouse and under judicial auspices, its institutional relationship with the Judicial Branch has traditionally been, so to speak, at arm's length. Judges' direct involvement in the functioning of the grand jury has generally been confined to the constitutive one of calling the grand jurors together and administering their oaths of office." *United States v. Williams*, 504 U.S. 36, 47 (1992); *In re Grand Jury Proceedings (John Roe, Inc.)*, 142 F.3d 1416, 1425 (11th Cir. 1998); *In re Impounded*, 241 F.3d 308, 312 (3d Cir. 2001).

[43] At one time, only members of the grand jury could be present when the panel was deliberating or voting, F.R.Crim.P. 6(d), the rule has been changed to permit the presence during deliberations and voting of interpreters assigned to assist hearing or speech impaired jurors.

Originally, the grand jury brought criminal accusations based exclusively on the prior knowledge of its members. Today, the grand jury acts on the basis of evidence presented by witnesses called for that purpose and only rarely on the personal knowledge of individual jurors.[44]

The attorney for the government will ordinarily arrange for the appearance of witnesses before the grand jury, will suggest the order in which they should be called, and will take part in questioning them.[45] The prosecutor is the most common source of legal advice and will draft most of the indictments returned by the grand jury.[46]

Subpoenas

Grand jury witnesses usually appear before the grand jury under subpoena.[47] The rule calls for subpoenas to be available in blank for the "parties" to the proceedings before the court, but "no one is meaningfully a party in a grand jury proceeding."[48] Nevertheless, there seems little question that subpoenas may be issued and served at the request of the panel itself,[49] although the attorney for the government ordinarily "fills in the blanks" on a grand jury subpoena and arranges the case to be presented

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[44] *United States v. Zarattini*, 552 F.2d 753, 756 (7th Cir. 1977); *In re April 1956 Term Grand Jury*, 239 F.2d 263, 268-69 (7th Cir. 1957).

[45] *United States v. Wadlington*, 233 F.3d 1067, 1075 (8th Cir. 2000); *United States v. Wiseman*, 172 F.3d 1196, 1204-205 (10th Cir. 1999).

[46] *United States v. Sigma Intern, Inc.*,, 196 F.3d 1314, 1323 (11th Cir. 1999)("A prosecutor's job is to present evidence of criminal activity to a grand jury. In so doing, the prosecutor may explain why a piece of evidence is legally significant. . ."); *see generally*, 1 Beale et al., GRAND JURY LAW AND PRACTICE §4.15 (1998).

[47] A subpoena is an order of the court demanding that an individual appear at one of its proceedings and produce evidence on a matter then under consideration. There are two kinds of subpoenas – subpoenas ad testificandum and subpoenas duces tecum. The first is simply a command to appear and testify, the second not only demands the witness's presence at a certain time and place but requires him to bring certain evidence with him. Federal law with regard to subpoenas in criminal cases is governed in large measure by Rule 17 of the Federal Rules of Criminal Procedure:

> A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. . . .
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> Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. . . . F.R.Crim.P. 17(a), (g).

[48] *In re Snoonian*, 502 F.2d 110, 112 (1st Cir. 1974).

[49] *United States v. Calandra*, 414 U.S. 338, 343 (1974); cf., *United States v. Williams*, 504 U.S. 36, 48-9 (1992).

to the grand jury.[50] Unjustified failure to comply with a grand jury subpoena may

[50] *Coronado v. Bank Atlantic Bancorp, Inc.*, 222 F.3d 1315, 1320 (11th Cir. 2000); *Doe v. DiGenova*, 779 F.2d 74, 80 n.12 (D.C.Cir. 1985). Subpoenas duces tecum will in fact frequent permit alternative means of compliance under which the witness to given the option of presenting the documents to the attorney for government who is assisting the grand jury, *see e.g.*, the appendices in *In re Grand Jury Proceedings (B&J Peanut Co.)*, 887 F.Supp. 288, 291 (M.D.Ga. 1995), and *United States v. International Paper Co.*, 457 F.Supp. 571, 577 (S.D.Tex. 1978). *But see, United States v. Wadlington*, 233 F.3d 1067, 1075 (8th Cir. 2000)("The Government rests on its authority to subpoena witnesses in advance of their presentation to the grand jury in order to allow for the efficient presentation of evidence and to save time for grand jurors. *See United States v. Universal Mfg. Co.*, 525 F.2d 808, 811-12 (8th Cir. 1975)(holding that the Government may have advance access to documents and other evidentiary matter subpoenaed by or presented to a federal grand jury); *see also In re Possible Violations of 18 U.S.C. §§201, 371*, 491 F.Supp. 211, 213 (D.D.C. 1980)(holding that the Government may call a grand jury witness to its offices pursuant to subpoena on the day of grand jury proceedings for a consensual interview so that government attorneys may identify the nature of the proposed testimony). . . . Rule 17(a) of the Federal Rules of Criminal Procedure states that a subpoena 'shall command each person to whom it is directed to attend and give testimony at the time and place specified therein.' This language has been interpreted to mean that witnesses may be subpoenaed to vie testimony at formal proceedings, such as grand jury proceedings, preliminary hearings, and trials. It does not authorize the Government to use grand jury subpoenas to compel prospective grand jury witnesses to attend private interviews with government agents").

result in a witness being held in civil contempt,[51] convicted for criminal contempt,[52] or both.[53] A witness who lies to a grand jury may be prosecuted for perjury,[54] or for making false declarations before the grand jury.[55]

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[51] "Whenever a witness in any proceeding before. . . any. . . grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information. . . the court. . . may summarily order his confinement at a suitable place until such time as the witness is willing to given such testimony or provide such information. . . ." 28 U.S.C. 1826(a).

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority. . . as . . . [d]isobedience or resistance to its lawful . . . order. . . ." 18 U.S.C. 401.

"[C]ivil contempt . . . is remedial, and for the benefit of the complainant. [C]riminal contempt . . . is punitive to vindicate the authority of the court. . . . [T]he relief . . .is remedial if the defendant stands committed unless and until he performs the affirmative act required by the court's order. . . ." *Hicks v. Feiock*, 485 U.S. 624, 631-32 (1988). Civil contempt is imposed "for the obvious purpose of compelling the witnesses to obey the orders to testify. . . . However, the justification for coercive imprisonment as applied to civil contempt depends upon the ability of the contemnor to comply with the court's order. Where the grand jury has been finally discharged a contumacious witness can no longer be confined since he then has no further opportunity to purge himself of contempt." *Shillitani v. United States*, 384 U.S. 364, 368, 371 (1966).

In the case of civil contempt under section 1826, the recalcitrant witness must be released after eighteen months even if the grand jury has not been discharged.

While fear is no just cause for failure to obey a grand jury subpoena, the witness's fear is a factor to be considered in determining whether civil contempt is likely to induce compliance. *In re Grand Jury Proceeding (Doe)*, 13 F.3d 459, 461 (1st Cir. 1994); *In re Grand Jury Proceedings*, 914 F.2d 1372, 1374-75 (9th Cir. 1990); *In re Grand Jury Proceedings of Dec., 1989*, 903 F.2d 1167, 1169 (7th Cir. 1990); *In re Grand Jury Proceedings*, 862 F.2d 430, 432 (2d Cir. 1988).

[52] "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as . . . (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command," 18 U.S.C. 401(3).

[53] *United States v. Marquardo*, 149 F.3d 36, 39-41 (1st Cir. 1998); *In re Grand Jury Proceedings (Goodman)*, 33 F.3d 1060, 1061 (9th Cir. 1994); *In re Grand Jury Witness*, 835 F.2d 437 (2d Cir. 1987); *United States v. Ryan*, 810 F.2d 650 (7th Cir. 1987).

[54] "Whoever. . . having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify. . . truly, . . . willfully and contrary to such oath states. . . any material matter which he does not believe to be true . . . is guilty of perjury and shall . . . be fined under this title or imprisoned not more than five years, or both. . . ." 18 U.S.C. 1621.

[55] "(a) Whoever under oath. . . in any proceeding before. . . any . . . grand jury of the United States knowingly makes any false material declaration. . . shall be fined under this title or imprisoned not more than five years, or both. . . .

"(c). . . . In any prosecution under this section, the falsity of a declaration . . . shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before. . . any . . . grand jury. It shall be a defense . . . . that the defendant at the time he made each declaration believed the declaration was true.

"(d) Where, in the same continuous . . . grand jury proceeding in which a declaration is

Conversely, others with information they wish to convey to the grand jury are prohibited from doing so except through the court or the attorney for the government.[56] Consequently neither a potential defendant nor a grand jury target nor any of their counsel has any right to appear before the grand jury unless invited or subpoenaed.[57]

Grand jury appearances, however, are more likely to be fought than sought. Resistance is ordinarily futile. Absent self-incrimination or some other privilege, the law expects citizens to cooperate with efforts to investigate crime. Even when armed with an applicable privilege a witness' compliance with a grand jury subpoena is only likely to be excused with respect to matters protected by the privilege. A witness subpoenaed to testify rather than merely produce documents is compelled to appear before the grand jury and claim the privilege with respect to any questions to which it applies.

Witnesses also enjoy the benefit of fewer checks on the grand jury's exercise of investigative power than might be the case if the inquisitor were a government official rather than a group of randomly selected members of the community.[58] Thus as a general rule, the grand jury is entitled to every individual's evidence even though

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made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest hat such falsity has been or will be exposed. . . ." 18 U.S.C. 1623 .

[56] *In re Application of Wood*, 833 F.2d 113 (8th Cir. 1987); *In re New Haven Grand Jury*, 604 F.Supp. 453 (D.Conn. 1985). Section 1504 of title 18 of the United States Code provides, "Whoever attempts to influence the action or decision of any grand. . . juror of any court of the United States upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his duties, by writing or sending to him any written communication, in relation to issue or matter, shall be fined under this title or imprisoned not more than six months, or both. Nothing in this section shall be construed to prohibit the communication of a request to appear before the grand jury."

[57] *United States v. Williams*, 504 U.S. 36, 52 (1992); *United States v. Arena*, 894 F. Supp. 580, 585 (N.D.N.Y. 1995); *United States v. Mandujano*, 425 U.S. 564, 581 (1976); *United States v. Fritz*, 852 F.2d 1175 (9th Cir. 1988); *United States v. Pabian*, 704 F.2d 1533 (11th Cir.1983); *United States v. Ciambrone*, 601 F.2d 616 (2d Cir. 1979); but see, *In re Application of Wood*, 833 F.2d 113 (8th Cir. 1987).

It has been suggested that targets be afforded the opportunity to appear before the grand jury as a matter of right, Arnella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICHIGAN LAW REVIEW 463, 569 (1980). In some instances, notice of the grand jury's attention or intentions might enhance the prospects of flight or obstructions of justice. In other cases, the right of a target to appear would only be meaningful if accompanied by disclosure of matters occurring before the grand jury inconsistent with the reasons for grand jury secrecy.

[58] *E.g., In re Sealed Case (Lewinsky)*, 162 F.3d 670, 674 n.4 (D.C. Cir. 1998)("[Exception as noted below,] [n]o grand jury witness may refuse to answer questions on the ground that the questions are based on illegally obtained evidence").

testimony may prove burdensome, embarrassing or socially and economically injurious for the witness.[59]

A grand jury subpoena may even "trumps" a pre-exist protective court order under some circumstances.[60] This is not to say that the grand jury's authority is without limit, or that excessive prosecutorial zeal before the grand jury is unknown, or that there is never any just cause for a witness's refusal to answer a question or provide a document, but simply that the restraints on the grand jury's authority have been narrowly drawn and applied.

Common Law Privileges. Grand jury subpoenas are subject to the maxim that, "the grand jury. . .may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law."[61] In the context of grand jury subpoenas, as in most others, federal evidentiary privileges are governed by the Federal Rules of Evidence.[62]

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[59] *United States v. Calandra*, 414 U.S. 338, 345 (1974)("In *Branzburg v. Hayes*, [408 U.S. 665,] 682 and 688, the Court noted `[c]itizens generally are not constitutionally immune from grand jury subpoenas . . .' and that `the longstanding principle that the public . . . has a right to every man's evidence . . . is particularly applicable to grand jury proceedings.' The duty to testify may on occasion be burdensome and even embarrassing. It may cause injury to a witness' social and economic status. Yet the duty to testify has been regarded as `so necessary to the administration of justice' that the witness' personal interest in privacy must yield to the public's overriding interest in full disclosure"); *Grand Jury Proceedings (Williams) v. United States*, 995 F.2d 1013, 1016 (11th Cir. 1993).

[60] The question of whether a protective order arising out of federal civil litigation takes precedence over a grand jury subpoena for material covered by the order has divided the federal courts of appeal. One approach requires the demonstration of a compelling need or of extraordinary circumstances before the secrecy of a protective order can be breached, while others take the position that grand jury subpoenas trump protective orders. *In re Grand Jury Subpoena (Roach)*, 138 F.3d 442 (1st Cir. 1998) describes the split among the circuits over precisely when a pre-existing protective order should take precedence over a grand jury subpoena. The Fourth, Ninth, and Eleventh Circuits have adopted a per se rule under which "the existence of an otherwise valid protective order [is] not sufficient grounds to quash the subpoena duces tecum issued by the grand jury," 138 F.3d at 444, citing *In re Grand Jury Subpoena*, 836 F.2d 1468, 1478 (4th Cir. 1988); *In re Grand Jury Subpoena*, 62 F.3d 1222, 1224 (9th Cir. 1995); and *In re Grand Jury Proceedings*, 995 F.2d 1013, 1020 (11th Cir. 1993). The Second Circuit has espoused a balancing test thought to prefer the protective order over the grand jury subpoena, 138 F.2d at 444-45, citing *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291, 295 (2d Cir. 1979); *see also, In re Grand Jury Subpoena Dated April 19, 1991*, 945 F.2d 1221, 1223-224 (2d Cir. 1991). The First Circuit has endorsed a modified per se rule under which "[a] grand jury's subpoena trumps a Rule 26(c) protective order unless the person seeking to avoid the subpoena can demonstrate the existence of exceptional circumstances that clearly favor subordinating the subpoena to the protective order," 138 F.3d at 445.

[61] *United States v. Calandra*, 414 U.S. at 346.

[62] F.R.Evid. 1101(c), (d)(2), 501; *In re Grand Jury Investigation*, 918 F.2d 374, 378-79 (3d Cir. 1990); *In re Impounded*, 241 F.3d 308, 313 (3d Cir. 2001).

The Rules do not articulate specific privileges. Instead, they declare that federal law concerning privileges is "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[63]

Although the standard is clearly evolutionary, present federal law seems to reflect three levels of privilege recognition. Some privileges like doctor-patient, have been refused recognition, some like journalist-source have been recognized for limited purposes that may or may not provide the basis for a motion to quash a grand jury subpoena, and some like clergy-communicant have been recognized as evidentiary privileges for grand jury purposes.

Thus, the federal courts have said that for purposes of federal law no evidentiary privilege exists in cases of:

- physician-patient;[64]
- accountant-client;[65]
- researcher-source;[66]
- parent-child;[67]
- employer-stenographer;[68]
- banker-depositor;[69]

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[63] F.R.Evid. 501. ("Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rule prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law").

[64] *United States v. Sutherland*, 143 F.Supp.2d 609, 611 (W.D.Va. 2001) *Galarza v. United States*, 179 F.R.D. 291, 294 (S.D.Cal. 1998); *Patterson v. Caterpillar, Inc.*, 70 F.3d 503, 506 (7th Cir. 1995); *Perkins v. United States*, 877 F.Supp. 330, 332 (E.D.Tex. 1995); *Gilbreath v. Guadalupe Hospital Foundation Inc.*, 5 F.3d 785, 791 (5th Cir. 1993).

[65] *United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984); *In re Grand Jury Proceedings(Tullen)*, 220 F.3D 568, 571 (7th Cir. 2000); *Inspector General v. Glenn*, 122 F.3d 1007, 1012 (11th Cir. 1997); *In re Subpoena to Testify Before Grand Jury*, 787 F.Supp. 722, 724 (E.D.Mich. 1992);

[66] *In re Grand Jury Proceedings (Scarce)*, 5 F.3d 397, 403 (9th Cir. 1993); *Un ited States v. Doe*, 460 F.2d 328, 333-34 (1st Cir. 1972); *but see*, *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714-15 (1st Cir. 1998)(recognizing qualified journalist-like privilege).

[67] *United States v. Dunford*, 148 F.3d 385, 390-91 (4th Cir. 1998); *In re Grand Jury*, 103 F.3d 1140. 1146 (3d Cir. 1997); *United States v. Duran*, 884 F.Supp. 537, 541 (D.D.C. 1995); *contra, In re Grand Jury Proceedings, Unemancipated Minor Child*, 949 F.Supp. 1487, 1497 (E.D.Wash. 1996).

[68] *United States v. Schoenheinz*,548 F.2d 1389, 1390 (9th Cir. 1977).

[69] *American Elec. Power Co.*, 191 F.R.D. 132, 141 (S.D.Ohio 1999); *Delozier v. First National Bank*, 109 F.R.D. 161, 163-64 (E.D.Tenn. 1986); *Harris v. United States*, 413 F.2d

- draft counselor-client;[70]
- police observation post location;[71]
- probation officer-probationer;[72]
- insurance company-client;[73]
- academic peer review;[74]
- medical peer review;[75]
- unwaivable confidentiality of child abuse and juvenile records;[76]
- agricultural loan mediation;[77]
- union officials-union members;[78] or
- Secret Service protective function.[79]

A second group consists of recognized but qualified privileges, whose effectiveness against a grand jury subpoena may be uncertain at best. Membership includes privileges for:

- journalists (not generally recognized for grand jury purposes);[80]
- critical self-evaluation;[81]

316, 319-20 (9th Cir. 1969);

[70] *In re Verplank*, 329 F.Supp. 433, 436-37 (S.D.N.Y. 1970).

[71] *United States v. Foster*, 986 F.2d 541, 542-44 (D.C.Cir. 1993).

[72] *United States v. Simmons*, 964 F.2d 763, 768-79 (8th Cir. 1992).

[73] *Linde Thompson Langworthy Kohn & Van Dyke v. RTC*, 5 F.3d 1508, 1514 (D.C.Cir. 1993); *Petersen v. Douglas County Bank & Trust Co.*, 967 F.2d 1186, 1188 (8th Cir. 1992).

[74] *University of Pennsylvania v. EEOC*, 493 U.S. 182, 188-95 (1990); *Leon v. County of San Diego*, 202 F.R.D. 631, 637 (S.D.Cal. 2001).

[75] *Virmani v. Novant Health Inc.*, 259 F.3d 284, 286-93 (4th Cir. 2001); *Mattice v. Memorial Hospital*, 203 F.R.D. 381, 384-86 (N.D.Ind. 2001)(collecting cases).

[76] *Pearson v. Miller*, 211 F.3d 57, 69 (3d Cir. 2000).

[77] *In re Grand Jury Subpoena Dated Dec. 17, 1996*, 148 F.3d 487, 492-93 (5th Cir. 1998); other than in cases of grand jury subpoenas, two lower federal courts have recognized a qualified mediation privilege, *Sheldone v. Pennsylvania Turnpike Comm.*, 104 F.Supp.2d 511, 512-18 (W.D.Pa. 2000); *Folb v. Motion Picture Industry Pension & Health Plans*, 16 F.Supp.2d 1164, 1170-181 (C.D.Cal. 1998).

[78] *In re Grand Jury Subpoenas Dated Jan. 20, 1998*, 995 F.Supp. 332, 334-37 (E.D.N.Y. 1998).

[79] *In re Sealed Case (Secret Service)*, 148 F.3d 1073, 1079 (D.C.Cir. 1998).

[80] *Branzburg* v. *Hayes*, 408 U.S. 665 (1972); *In re Grand Jury Empaneled February 5, 1999*, 99 F.Suupp.2d 496, 500-501 (D.N.J. 2000); *In re Grand Jury Subpoena ABC, Inc.*, 947 F.Supp. 1314, 1317-321 (E.D.Ark. 1996); *In re Grand Jury Proceedings (Scarce)*, 5 F.3d 397, 403 (9th Cir. 1993); *Storer Communications, Inc. v. Giovan*, 810 F.2d 580, 584-85 (6th Cir. 1987).

[81] *In re Kaiser Aluminum and Chemical Co.*, 214 F.3d 586, 593 (5th Cir. 2000) (declining to recognize privilege when asserted against the government); *Bredice v. Doctor's Hospital, Inc.*, 50 F.R.D. 249, 251 (D.D.C.1970), *aff'd*, 479 F.2d 920 (D.C.Cir. 1973)(privilege recognized); *Reichhold Chemicals, Inc. v. Textron, Inc.*, 157 F.R.D. 522, 524-25 (N.D.Fla.

- presidential communications;[82]
- state legislators;[83]
- state secret/national security;[84]
- bank examiners;[85]
- state recognized privileges;[86]
- intra-agency, government deliberative process;[87] and
- ombudsman.[88]

The handful of privileges that provide the grounds for quashing a grand jury subpoena include:

- attorney-client;[89]
- attorney work product;[90]
- clergyman-communicant;[91]

1994); *In re Grand Jury Proceedings (File Sealed)*, 861 F.Supp. 386, 389-91 (D.Md. 1994)(privilege not applicable to grand jury matters).

[82] *In re Sealed Case (Espy)*, 121 F.3d 729, 742-57 (D.C.Cir. 1997)(recognizing qualified privilege may be available to quash grand jury subpoena); *In re Lindsay*, 158 F.3d 1263, 1266 (D.C.Cir. 1998).

[83] *Orange v. City of Suffolk*, 855 F.Supp. 620, 622-24 (E.D.N.Y. 1994).

[84] *United States v. Reynolds*, 345 U.S.1, 6-7 (1953)(recognizing privilege); *Crater Corp. v. Lucent Technologies, Inc.*, 255 F.3d 1361, 1370 (Fed.Cir. 2001); *In re Sealed Case (Epsy)*, 121 F.3d at 736; *Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1141 (5th Cir. 1993).

[85] *Schneiber v. Society for Savings Bancorp, Inc.*, 11 F.3d 217, 220 (D.C.Cir. 1993)(recognizing privilege); *Principle v. Crossland Savings, FSB*, 149 F.R.D. 444, 447 (E.D.N.Y. 1993).

[86] *In re Production of Records to Grand Jury*, 618 F.Supp. 440 (D.Mass. 1985)(social worker communications); *In re Grand Jury Subpoena*, 144 F.Supp.2d 540, 541-42 (W.D.Va. 2001)(state tax records).

[87] *Dept. of Interior v. Klamath Water Users*, 121 S.Ct. 1060, 1065-66 (2001)(recognizing privilege); *United Sstates v. Fernandez*, 231 F.3d 1240, 1246-247 (9thj Cir. 2000); *Texaco Puerto Rico v. Department of Consumer Affairs*, 60 F.3d 867, 884-885 (1st Cir.1995); *A.Michael's Piano, Inc. v. F.T.C.*, 18 F.3d 138, 147 (2d Cir. 1994).

[88] *Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. 570, 571 (E.D.Mo. 1991)(recognizing privilege).

[89] *In re Grand Jury Subpoena (Newparent, Inc.)*, 274 F.3d 563, 571 (1st Cir. 2001); *In re Subpoenaed Grand Jury Witness*, 171 F.3d 511, 513 (7th Cir. 1999); *Ralls v. United States*, 52 F.3d 223, 225-27 (9th Cir. 1995);*cf., Swidler & Berlin v. United States*, 524 U.S. 399, 410-11 (1998) (holding that the attorney-client privilege survives the death of the client where the privilege had been asserted in the face of a grand jury subpoena); attorney work product, *In re Grand Jury Proceedings (Rogers & Wells)*, 43 F.3d 966, 972 (5th Cir. 1994).

[90] *United Kingdom v. United States*, 238 F.3d 1312, 1321 (11th Cir. 2001); *In re Grand Jury Proceedings (John Doe Corp.)*, 219 F.3d 175, 190-92 (2d Cir. 2000).

[91] *In re Grand Jury Investigation*, 918 F.2d 374, 384-85 (3d Cir. 1990).

- informer identity;[92]
- spousal immunity;[93]
- spousal communications;[94] and
- psychotherapist-patient.[95]

Perhaps the two most commonly cited privileges in motions to quash grand jury subpoenas are the attorney-client privilege and the closely related attorney work product privilege. The attorney-client privilege covers "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance."[96] The privilege does not foreclose grand jury inquiry into attorney-client communications which are themselves criminal or are in furtherance of some future criminal activity.[97] Nor, as a general rule, does the privilege cover the identity of the client nor details concerning payment of the attorney's fee,[98] and thus the privilege will usually not constitute grounds to quash a grand jury subpoena directed to secure that information.[99]

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[92] *In re Grand Jury Investigation (Detroit Police Department Special Cash Fund)*, 922 F.2d 1266, 1270-272 (6th Cir. 1991); *Does I thru XXII v. Advanced Textile Corp., 214 F.3d 1058, 1072 (9th Cir. 2000).*

[93] *Trammel v. United States*, 445 U.S. 40, 53 (1980); *United States v. Bad Wound*, 203 F.3d 1072, 1075 (8th Cir. 2000); *United States v. Yerardi*, 192 F.3d 14, 17-8 (1st Cir. 1999); *United States v. Morris*, 988 F.2d 1335, 1338-341 (4th Cir. 1993); *A.B. v. United States*, 24 F.Supp.2d 488, 489-92 (D.Md. 1998).

[94] *Blau* v. *United States*, 340 U.S. 332 (1951); *United States v. Lea*, 249 F.3d 632, 641 (7th Cir. 2001); *United States v. Bey*, 188 F.3d 1, 4-5 (1st Cir. 1999).

[95] *In re Zuniga*, 714 F.2d 632 (6th Cir. 1983); *cf.*, *Jaffee v. Redmond*, 518 U.S. 1 (1996)(recognizing a generally applicable federal privilege in another context and leaving development of the dimensions of the privilege for another day); *In re Grand Jury Proceedings (Gregory P. Violette)*, 183 F.3d 71, 73-9 (1st Cir. 1999)(recognizing in a grand jury setting a crime-fraud exception to the privilege); *In re Grand Jury Investigation (Doe)*, 114 F.Supp.2d 1054, 1055 (D.Ore. 2000)(holding that a grand jury target had waived his psychotherapist-patient privilege).

[96] *Fisher v. United States*, 425 U.S. 391, 403 (1976); *In re Grand Jury Subpoena (Newparent, Inc.)*, 274 F.3d 563, 571 (1st Cir. 2001); *In re Lindsey*, 148 F.3d 1100, 1103 (D.C.Cir. 1998).

[97] *In re Grand Jury Subpoena (No. 00-1622)*, 223 F.3d 213, 217-19 (3d Cir. 2000); *In re Grand Jury Subpoenas(Jane Roe and John Doe)*, 144 F.3d 653, 659-62 (10th Cir. 1998); *In re Grand Jury Proceedings (Rogers & Wells)*, 43 F.3d 966, 972 (5th Cir. 1994); cf., *United States v. Zolin*, 491 U.S. 554, 562-63 (1989).

[98] *Gerald B.Lefcourt, P.C. v. United States*, 125 F.3d 79, 86-88(2d Cir. 1997); *United States v. Ellis*, 90 F.3d 447, 450-51 (11th Cir. 1996).

[99] *Ralls v. United States*, 52 F.3d 223, 225-26 (9th Cir. 1995); *In re Grand Jury Proceedings No.92-4*, 42 F.3d 876, 878-79 (4th Cir. 1994); *Vingelli v. United States (DEA)*, 992 F.2d 449, 451-54 (2d Cir. 1993).

The motion to quash is no more likely to be granted because the prosecutor failed to comply with the guidelines of the United States Attorneys' Manual concerning the issuance of grand jury subpoenas seeking client information, *In re Grand Jury Proceedings No. 92-4*, 42 F.3d 887, 880 (4th Cir. 1994).

This last general rule may be subject to any of three exceptions. The privilege may extend to information concerning the identity of the client or the particulars of the fee arrangement when (1) "disclosure would implicate the client in the very criminal activity for which legal advice was sought; . . . [(2)] disclosure of the client's identity by his attorney would have supplied the last link in an existing chain of incriminating evidence likely to lead to the client's indictment; . . . [or (3)] the payment of the fee itself is unlawful . . . [or] the fee contract contain[s] any confidential communication."[100]

The attorney "work product privilege protects any material obtained or prepared by a lawyer in the course of his legal duties, provided that the work was done with an eye toward litigation."[101] Like the attorney-client privilege it is subject to a crime/fraud exception.[102] Unlike that privilege, however, "the work product privilege belongs to both the client and the attorney, either one of whom may claim it. An innocent attorney may claim the privilege even if a prima facie case of fraud or criminal activity has been made as to the client."[103]

Constitutional Privileges. The cases which give rise to attorney-client and attorney work product claims not infrequently include Sixth Amendment invocations as well.[104] At first blush, the Sixth Amendment right to the assistance of counsel might be thought to afford but scant ground upon which to base a motion to quash a grand jury subpoena since the right does not ordinarily attach until an individual has been accused of a crime, i.e., after indictment.[105] This is in fact a very real limitation,

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[100] *In re Grand Jury Subpoenas (Anderson)*, 906 F.2d 1485, 1488, 1489, 1492 (10th Cir. 1990); *In re Grand Jury Proceedings (Goodman)*, 33 F.3d 1060, 1063-64 (9th Cir. 1994); *Ralls v. United States*, 52 F.3d 223, 225-26 (9th Cir. 1995) ; *In re Subpoenaed Grand Jury Witness*, 171 F.3d 511, 514 (7th Cir. 1999).

[101] *In re Sealed Case*, 29 F.3d 715, 718 (D.C.Cir. 1994); *In re Grand Jury Proceedings Thursday Special Grand Jury*, 33 F.3d 342, 348 (4th Cir. 1994); *In re Sealed Case, No. 98-3032*, 146 F.3d 881, 884-87 (D.C.Cir. 1998); *In re Subpoenaed Grand Jury Witness ("Tom Hagen")*, 171 F.3d 511, 514 (7th Cir. 1999); *In re Grand Jury Subpoena (Newparent, Inc)*, 274 F.3d 563, 574 (1st Cir. 2001) .

[102] *In re Sealed Case (RNC)*, 223 F.3d 775, 778-79 (D.C.Cir. 2000); *In re Richard Roe, Inc.*, 168 F.3d 69, 70-72 (2d Cir. 1999); *In re Grand Jury Proceedings (Rogers & Wells)*, 43 F.3d 966, 972 (5th Cir. 1994).

[103] *In re Grand Jury Subpoena (No. 99-41150 et al.)*, 220 F.3d 406, 408 (5th Cir. 2000); *In re Grand Jury Proceedings (Rogers & Wells)*, 43 F.3d at 972; *In re Grand Jury Proceedings Thursday Special Grand Jury*, 33 F.3d at 349.

[104] "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S.Const. Amend.VI.

[105] "[U]ntil such time as the 'government has committed itself to prosecute, and . . . the adverse positions of the government and defendant have solidified' the Sixth Amendment right to counsel does not attach.' *Moran v. Burbine*, 475 U.S. 412, 432 (1986), quoting *United States v. Gouveia* , 467 U.S. 180, 189 (1984) and *Kirby v. Illinois*, 406 U.S. 682, 689 (1972); *United States v. Hayes*, 231 F.3d 663, 675 (9th Cir. 2000); *In re Grand Jury Investigation (Kiernan)*, 182 F.3d 668, 671 (9th Cir. 1999).

but one which admits to exception where either the client has already been indicted or where the vitality of the right requires pre-attachment recognition. [106]

As a general rule, a grand jury subpoena will only be quashed on Sixth Amendment grounds on those rare instances where it is shown to have been motivated solely by intent to harass or where compliance would unnecessarily result in an actual conflict of interest between the attorney and his or her client.[107] The Sixth Amendment, however, does not assure a grand jury witness of the right to have an attorney present when the witness testifies before the grand jury.[108]

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[106] "The preindictment investigation of Kravit could violate the Sixth Amendment therefore, only if it affected his representation of Van Engel at the later stages of the case, in particular the trial." *United States v. Van Engel*, 15 F.3d 623, 630 (7th Cir. 1993).

"The district court's exercise of its discretion to quash the subpoena because it created a serious interference with Reyes-Requena's relationship with his attorney is justified for several reasons. Reyes-Requena's Sixth Amendment rights had attached. The prosecution against him was moving swiftly – an indictment issued within three weeks of Reyes-Requena's detention hearing. DeGeurin's representation of Reyes-Requena was effectively stalled during the two-to-three week interval that he contested the subpoena. The government made no effort to explain, even rhetorically, why it was necessary to subpoena DeGeurin during that critical juncture in his representation of the defendant. The government made not a single argument in the district court or before this court to suggest that a brief delay in the process, until a lull in the Reyes-Requena prosecution or until after his conviction would have been imprudent." *In re Grand Jury Subpoena for Reyes-Requena*, 913 F.2d 1118, 1128 (5th Cir. 1990).

[107] *In re Grand Jury Proceedings (Goodman)*, 33 F.3d 1060, 1062-63 (9th Cir. 1994); *In re Grand Jury Matter (Special Grand Jury Narcotics)*, 926 F.2d 348, 351 (4th Cir. 1991).

[108] *Conn v. Gabbert*, 526 U.S. 286, 292 (1999); *United States v. Mandujano*, 425 U.S. 564, 581 (1976). Although the lower federal courts have generally recognized the right of a grand jury witness to suspend his or her testimony in order to consult with an attorney immediately outside the grand jury room, *In re Grand Jury Subpoena (McDougal)*, 97 F.3d 1090, 1092-93 (8th Cir. 1996); *Gabbert v. Conn*, 131 F.3d 793, 801 (9th Cir. 1997), *rev'd on other grounds*, 526 U.S. 526 (1999), as the Supreme Court observed in *Conn* the Court itself has never held that such an accommodation is constitutionally required, *Conn v. Gabbert*, 526 U.S. at 292; *In re Grand Jury Investigation (Kiernan)*, 182 F.3d 668, 671 n.3 (9th Cir. 1999).

Subject to various limitations, a number of states permit state grand jury witnesses to have an attorney present when they testify: Ariz. R.Crim.P. 12.6), Ariz.Rev.Stat.Ann. §21-412 (only targets of investigation); Colo.Rev.Stat.Ann. §16-5-204(4)(d); Conn.Gen.Stat. Ann. §54-47f; Fla.Stat.Ann. §905.17; Ill.Comp.Laws Ann. ch.725, §5/112-4.1; Ind.Code Ann. §35-34-2-5.5; Kan.Stat.Ann. §22-3009; La.Code Crim.P.Ann. art.433 (only targets of an investigation); Mass. Gen.Laws Ann. ch.277 §14A; Mich.R.Crim.P. 6.005(J), Mich. Comp.Laws Ann. §767.3; Minn.R.Crim.P. 18.04 (only witnesses who have waived or been granted immunity); Neb.Rev.Stat. §29-1411; Nev.Rev.Stat. §172.239; N.M.Stat. §31-6-4; N.Y.Crim.P.Law §190.52 (only witnesses who have waived immunity); Okla.Stat.Ann. tit.22 §340; Pa.Stat.Ann. tit.42 §4549; S.D.Cod.Laws Ann. §23A-5-11; Utah Code Ann. §77-10a-13; Va.Code Ann. §19.2-209; Wash.Rev.Code Ann. §10.27.120 (unless the witness has been granted immunity); Wis.Stat.Ann. §968.45.

A successful motion to quash, based upon the First Amendment guarantees of the freedoms of the press, association, or expression,[109] is even more rare. Under extreme circumstances, it will provide the grounds to quash a federal grand jury subpoena,[110] ordinarily it will not.[111]

The Fourth Amendment prohibits unreasonable governmental searches and seizures.[112] What might be unreasonable under other circumstances, may well be considered reasonable in a grand jury environment. For example, grand jury subpoenas are not considered per se unreasonable simply because they require neither

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[109] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S.Const. Amend.I.

[110] "[N]ews gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporters' relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment. . . ." *Branzburg v. Hayes*, 408 U.S. 665, 707-8 (1972).

[111] *Branzburg v. Hayes*, 408 U.S. 665 (1972)(freedom of the press); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991)("the First Amendment does not relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a grand jury subpoena, even thought the reporter might be required to reveal a confidential source"); *In re Grand Jury Subpoena American Broadcasting Companies, Inc.*, 947 F.Supp. 1314, 1318-321 (E.D.Ark. 1996); *In re Grand Jury 87-3 Subpoena Duces Tecum*, 955 F.2d 229, 231-34 (4th Cir. 1992)(freedom of expression); *National Commodity and Barter Ass'n v. United States*, 951 F.2d 1172, 1174-175 (10th Cir. 1991)("when a party makes a prima facie showing of First Amendment infringement, the government must show a compelling need to obtain the documents identifying petitioner's members. Further, the government must show that the records sought bear a substantial relationship to this compelling interests . . . . A good-faith criminal investigation into possible evasion of reporting requirements through the use of a private banking system that keeps no records is a compelling interest"); *In re the Grand Jury Empaneling of the Special Grand Jury*, 171 F.3d 826, 835 (3d Cir. 1999)(freedom of religion).

Reporters, academics and others have periodically suggested adjustments in the law in this area, *e.g.*, Langley & Levine, *Branzburg Revisited: Confidential Sources and First Amendment Values*, 57 GEORGE WASHINGTON LAW REVIEW 13 (1988); Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 18 COLUMBIA HUMAN RIGHTS LAW REVIEW 57 (1985); Rood & Grossman, *The Case for a Federal Journalist's Testimonial Shield Statute*, 18 HASTINGS CONSTITUTIONAL LAW QUARTERLY 779 (1981), an effort which may not be without its own pitfalls, see, *Are Oliver Stone and Tom Clancy Journalists: Determining Who Has Standing to Claim the Journalist's Privilege*, 69 WASHINGTON LAW REVIEW 739 (1994).

[112] "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." U.S.Const. Amend. IV.

probable cause nor the filter of an approving neutral magistrate. The opportunity to be heard on a motion to quash before complying makes the grand jury subpoena in many respects less intrusive than the warrant.[113]

Even "forthwith" subpoenas, where the opportunity to quash may be minimized,[114] have generally been thought to pass constitutional muster, either because the party to whom they were address complied, i.e., consented,[115] or because the circumstances presented exigencies similar to those to which Fourth Amendment demands have traditionally yielded.[116]

The shadow of the Fourth Amendment is visible in Rule 17(c) of the Federal Rules of Criminal Procedure, which supplies the grounds most often successfully employed to quash a grand jury subpoena:

> A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive.

However, a "'grand jury proceeding is accorded a presumption of regularity, which generally may be dispelled only upon particularized proof of irregularities in the grand jury process.' Consequently, a grand jury subpoena issued through normal channels is presumed to be reasonable."[117]

A subpoena is "unreasonable or oppressive" if (1) it commands the production of things clearly irrelevant to the investigation being pursued; (2) it fails to specify the things to be produced with reasonable particularity; or (3) it is unreasonable in terms of the relative extent of the effort required to comply.[118]

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[113] *Zurcher v. Stanford Daily*, 436 U.S. 547, 575-76 (Stewart, J. dissenting).

[114] Forthwith subpoenas command the witness to appear immediately, thereby reducing the possibility of filing a timely motion to quash or to seek the assistance of counsel, and raising questions as to when a forthwith subpoena is really an arrest or search warrant available without the necessities of the Fourth Amendment.

[115] *United States v. Suskind*, 4 F.3d 1400, 1401 (6th Cir. 1993), adopting Part IV of its previously vacated opinion reported at 965 F.2d 80, 85-7 (6th Cir. 1992); *United States v. Allison*, 619 F.2d 1254, 1257 (8th Cir. 1980).

[116] *United States v. Lartey*, 716 F.2d 955, 962 (2d Cir. 1983)(evidence suggested that delay might well have resulted in the destruction or alteration of the subpoenaed records); *United States v. Wilson*, 614 F.2d 1224, 1228 (9th Cir. 1980)(evidence indicated that delay might have afforded an opportunity to forge documents).

[117] *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 301 (1991), quoting *United States v. Mechanik*, 475 U.S 66, 75 (1986)(O'Connor, J., concurring in the judgment); *United States v. Salameh*, 152 F.3d 88, 109 (2d Cir. 1998).

[118] *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 299-301 (1992); *In re Grand Jury Subpoenas*, 906 F.2d 1485, 1496 (10th Cir. 1990); *In re Grand Jury Subpoena Duces Tecum Dated November 15, 1993*, 846 F.Supp. 11, 12-4 (S.D.N.Y. 1994)(quashing as overbroad a grand jury subpoena for all computer hard disk drives and floppy diskettes without any

It is not unreasonable under the Fourth Amendment nor contrary to the Fifth Amendment privilege against self-incrimination to subpoena a witness to appear before the grand jury in order to furnish a voice exemplar,[119] a handwriting exemplar,[120] or to sign a consent form authorizing the disclosure of bank records.[121] Consequently, the courts will not quash an otherwise valid subpoena issued for any those purposes.

Although the Fifth Amendment privilege against self-incrimination[122] precludes requiring a witness to testify at his or her criminal trial,[123] it does not "confer an absolute right to decline to respond in a grand jury inquiry."[124] Once before the grand jury, a witness may decline to present self-incriminating testimony.[125] The right does not include the option to protection of pre-existing, voluntarily prepared personal papers on the ground that they are self-incriminatory,[126] but a witness may refused to produce that documents where the act of production (rather than the mere content of the documents) would itself be incriminating.[127] The privilege, nevertheless, is a

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particular reference to their content). In *R. Enterprises*, the Court held that the party seeking to quash bears the burden of establishing that a particular subpoena is unreasonable because it is unduly burdensome or because of its want of specificity or relevancy and that a motion to quash on grounds of relevancy "must be denied unless 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." 498 U.S. at 301; *In re Sealed Case (Espy)*, 121 F.3d 729, 759 (D.C.Cir. 1997); *In re Grand Jury Subpoena*, 175 F.3d 332, 339 (4th Cir. 1999).

Here again, failure to comply with guidelines in the United States Attorneys' Manual or other internal directives will not per se render a grand jury subpoena subject to being quashed, *In re Grand Jury Proceedings No.92-4*, 42 F.3d 876, 880 (4th Cir. 1994).

[119] *United States v. Dionisio*, 410 U.S. 1 (1973).

[120] *United States v. Mara*, 410 U.S. 19 (1973).

[121] *Doe v. United States*, 487 U.S. 201 (1988).

[122] ". . . [N]or shall any person . . . be compelled in any criminal case to be a witness against himself. . . ." U.S.Const. Amend.V.

[123] *United States v. Garzon*, 119 F.3d 1446, 1451 (10th Cir. 1997); *cf., Griffin v. California*, 380 U.S. 609, 613-14 (1965)(prosecutors are constitutionally barred from making uninvited comments on the defendants failure to testify to the jury.

[124] *United States v. Mandujano*, 425 U.S. 564, 572 (1976). Nor is a witness entitled to *Miranda* warnings even if he or she is a target of the grand jury's investigation, 425 U.S. at 579; *United States v. Byram*, 145 F.3d 405, 409 (1st Cir. 1996); *United States v. Gomez*, 237 F.3d 238, 241-42 (3d Cir. 2000).

[125] *United States v. Gomez*, 237 F.3d 238, 240 (3d Cir. 2000).

[126] *United States v. Hubbell*, 167 F.3d 552, (D.C.Cir. 1999), citing, *Fisher v. United States*, 425 U.S. 391, 409 (1976) and *United States v. Doe*, 465 U.S. 605, 612 (1984).

[127] *United States v. Hubbell*, 167 F.3d at 567-85; *In re Grand Jury Witness*, 92 F.3d 710, 712-13 (8th Cir. 1996).

personal one, and as a result provides no basis to quash a grand jury subpoena duces tecum for the records of corporate or other legal entities rather than of individuals.[128]

The Fifth Amendment due process clause,[129] with and like the unreasonable or oppressive standard of Rule 17, supplement other grounds for a motion to quash grand jury subpoenas when confronted with potential abuse of the grand jury process or practices that are fundamentally unfair. Thus, a grand jury subpoena is subject to a motion to quash if issued for the sole or dominant purpose of preparing the government's case against a previously indicted target, but not if there is a possible valid purpose for the subpoena.[130] Nor may the grand jury subpoena be used as a discovery device for civil cases in which the government has an interest.[131]

Finally, the Constitution provides that "for any speech or debate in either House, they [the members of Congress] shall not be questioned in any other place."[132] The privilege precludes questioning before the grand jury of a Member's legislative acts.[133]

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[128] *Braswell v. United States*, 487 U.S. 99 (1988); cf., *Bellis v. United States*, 417 U.S.85 (1974)(upholding the contempt citation of an attorney for failure to comply with a grand jury subpoena for his law firm's business records); *In re Grand Jury Witness*, 92 F.3d at 712.

[129] ". . .[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S.Const. Amend. V.

[130] *United States v. Flemmi*, 245 F.3d 24, 28 (1st Cir. 2001)("if a grand jury's continuing indagation results in the indictment of parties not previously charged, the presumption of regularity generally persists. So too when the grand jury's investigation leads to the filing of additional charges against previously indicted defendants"); *United States v. Wadlington*, 233 F.3d 1067, 1074 (8th Cir. 2000); *United States v. Brothers Const. Co.*, 219 F.3d 300, 314 (4th Cir. 2000); *United States v. Alred*, 144 F.3d 1405, 1413 (11 Cir. 1998); *In re Grand Jury Proceedings (Diamante)*, 814 F.2d 61, 70-72 (1st Cir. 1987); *cf., United States v. Salameh*, 152 F.3d 88, 109 (2d Cir. 1998)("it is improper for the government to use a grand jury subpoena for the sole and dominant purpose of preparing for trial [under a pending indictment]. However, where there is some proper dominant purpose for the postindictment subpoena the government is not barred from introducing evidence obtained thereby") (internal citations and quotation marks omitted).

[131] *In re Grand Jury Subpoena Under Seal*, 175 F.3d 332, 339-40 (4th Cir. 1999); *In re Grand Jury Proceeding No.92-4*, 42 F.3d 876, 878 (4th Cir. 1994); cf., *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 432 (1983)("If prosecutors in a given case knew that their colleagues would be free to sue the materials generated by the grand jury in a civil case, they might be tempted to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in the civil suit, or even to start or continue a grand jury inquiry where no criminal prosecution seemed likely. Any such use of grand jury proceedings to elicit evidence for use in a civil case is improper per se"). The attorney for the government, however, need not seek court approval to use the knowledge he gained by assisting in a grand jury in a related civil matter, *United States v. John Doe, Inc.*, 481 U.S. 102 (1987).

[132] U.S. Const. Art.I, §6, cl.2.

[133] *United States v. Rostenkowski*, 59 F.3d 1291, 1300 (D.C.Cir. 1995); *United States v. Swindall*, 971 F.2d 1531, 1543 (11th Cir. 1992).

Statutory & Other Limitations of Grand Jury Subpoena Authority. Federal law prohibits the use of evidence tainted by illegal wiretapping.[134] The prohibition provides just cause for the refusal of a grand jury witness to respond to inquiries based on illegal wiretapping information.[135] Similarly, a grand jury subpoena directed towards earlier testimony secured under a promise of immunity from prosecution may be quashed if sought solely for the purpose of indicting the witness.[136] Conflicting authority indicates the difficulty of determining whether particular statutes that classify information as confidential thereby take the information beyond the reach of a federal grand jury subpoena, or otherwise confine its authority.[137]

The vitality of regulatory limitations upon the grand jury subpoena power are equally unclear. The courts have consistently held that the government's failure to comply with the guidelines in the United States Attorneys' Manual concerning grand jury subpoenas does not constitute valid ground upon which to quash or modify a grand jury subpoena,[138] but implications of ethical rules purporting to proscribe the

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[134] "Whenever any wire or oral communications has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence . . . before . . . any grand jury . . . if the disclosure of that information would be in violation of this chapter [18 U.S.C. 2510-2522]." 18 U.S.C. 2515.

[135] *Gelbard v. United States*, 408 U.S. 41 (1971); *In re Grand Jury Proceedings, Doe*, 988 F.2d 211, 213 (1st Cir. 1992); *In re Grand Jury*, 111 F.3d 1066, 1077-79 (3d Cir. 1997).

[136] *In re Grand Jury Proceedings (Kinamon)*, 45 F.3d 343, 347-48 (9th Cir. 1995)(interpreting 18 U.S.C. 6002).

[137] For instance one court has suggested that a grand jury subpoena does not constitute "court order" sufficient to trigger the exception to the confidentiality requirements of the Privacy Act, 5 U.S.C. 552a, with respect to records maintained by the federal government, *Doe v. DiGenova*, 779 F.2d 74, 85 (D.C.Cir. 1985), while another court has reached a contrary conclusion, *In re Grand Jury Subpoena Issued to the United States Postal Service*, 535 F.Supp. 31, 32-33 (E.D.Tenn. 1981). In the course of its opinion the *Doe* court noted a similar divergence of views on the question of whether a grand jury subpoena constituted a court order sufficient to trigger an exception in the Fair Credit Reporting Act (15 U.S.C. 1681), *Doe*, 779 F.2d at 81 n.16 citing *In re Grand Jury Subpoena Duces Tecum Concerning Credit Bureau, Inc.*, 498 F.Supp. 1174 (N.D.Ga. 1980) and *in re Application of Credit Information Corp. of New York to Quash Grand Jury Subpoena*, 526 F.Supp. 1253 (D.Md. 1981), in contrast to, *In re Grand Jury Proceedings*, 503 F.Supp. 9 (D.N.J. 1980) and *In re Subpoena Duces Tecum to Testify Before Grand Jury Directed to TRW, Inc.*, 460 F.Supp. 1007 (E.D.Mich. 1978); compare also, *United States v. 218 3rd St.*, 805 F.2d 256, 60-62 (7th Cir. 1986), with *In re Castiglione*, 587 F.Supp. 1210 (E.D.Cal. 1984), with respect to exceptions to the confidentiality requirements of the Right to Financial Privacy Act (12 U.S.C. 3420). *In re August, 1993 Regular Grand Jury*, 854 F.Supp. 1380, 1382-385 (S.D.Ind. 1994) recognizes the authority to quash a grand jury subpoena to preserve the confidentiality of hospital records concerning drug abuse treatment patients under 42 U.S.C. 290dd-2.

[138] *In re Grand Jury Proceedings No. 92-4*, 42 F.3d 876, 880 (4th Cir. 1994); *In re Grand Jury Proceedings (Chesnoff)*, 13 F.3d 1293, 1296 (9th Cir. 1994).

manner in which government attorneys may act with respect grand jury subpoenas and other matters arising out of their duties are less clear.[139]

Secrecy

Federal grand juries conduct their business in a secrecy defined by rules which limit who may attend,[140] and the circumstances under which matters involving the conduct of their business may be disclosed.[141] Grand jury secrecy predates the arrival of the grand jury in this country and the Supreme Court has said that "the proper functioning of our grand jury system depends upon" it.[142] On the other hand, it has always been freely acknowledged that there are circumstances when, in balancing the interests of justice, the interests to be served by disclosure will outweigh the interests in secrecy.

The cloak surrounding the grand jury's business serves several interests:

> (1) to prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witness who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect [the] innocent accused who is exonerated from disclosure of the fact that he has been under investigation and from the expense of standing trial where there was no probability of guilt.[143]

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[139] *Compare, Whitehouse v. United States District Court*, 53 F.3d 1349 (1st Cir. 1995), *with, Stern v. United States District Court*, 214 F.3d 4 (1st Cir. 2000).

[140] "Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting." F.R.Crim.P. 6(d).

[141] "General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court." F.R.Crim.P. 6(e)(2).

[142] *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 424 (1983), quoting, *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979).

[143] *United States v. John Doe, Inc.*, 481 U.S. 102, 109 n.5 (1987), quoting *United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954) and *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681-82 n.6. (1958); *Douglas Oil Co. v. Petrol Stops Northwest*, 441, U.S. 211, 219 n.10 (1979).

Douglas Oil Co. offered an alternative formulation, "First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover,

Conversely, circumstances may exist under which evidence of what occurred before the grand jury could prevent a miscarriage of justice or serve some other public interest. These conditions may develop in any environment in which evidence unearthed by the grand jury might be relevant. They can arise in the federal criminal trials which often follow from a grand jury investigation, in state criminal investigations and proceedings, in civil litigation, and in administrative and legislative proceedings.

The boundaries of grand jury secrecy have been defined by balancing the public interest in the confidentiality of grand jury proceedings against the public interest in disclosure in a particular context.[144] In some cases such as disclosure to a second grand jury, the rule permits disclosure without court approval; in other cases such as disclosure to a civil litigant, the rule requires court approval after balancing the conflicting interests represented in a particular request for disclosure.

The areas beyond the cloak of grand jury secrecy may include instances where: (1) the individual with the information is not bound to maintain the grand jury's secrets; (2) disclosure does not constitute disclosure of "matters occurring before the grand jury"; (3) subsequent use of the information presented to the grand jury is not a "disclosure;" (4) the disclosure is to an attorney for the government or a government employee for use in the performance of the attorney's duties; (5) disclosure is "directed by the court preliminary to or in connection with a judicial proceeding;" (6) a defendant seeks to dismiss an indictment because of grand jury irregularities; (7) an attorney for the government discloses the information to another grand jury; (8) disclosed to state officials for purposes of enforcing state law; (9) disclosure is expressly permitted by statute; and (10) continued secrecy would be inconsistent with history of the grand jury's relationship with the court and of the common law origins of the rule.

Those Who Need Not Keep the Grand Jury's Secrets. Rule 6 expressly declares that "[n]o obligation of secrecy may be imposed on any person except in accordance with" its provisions,[145] and only proscribes disclosures by members of the grand jury, its stenographers and interpreters, the attorney for the government, and

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witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule," *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. at 219. The two are obviously similar and subsequent lower court decisions seem to show no real preference, *In re Petition of Craig*, 131 F.3d 99, 102 (2d Cir. 1997); *In re Newark Morning Ledger Co.*, 260 F.3d 217, 221 (3d Cir. 2001); *In re Grand Jury Proceedings (Ballas)*, 62 F.3d 1175, 1179 n.2 (9th Cir. 1995); *In re North*, 16 F.3d 1234, 1242 (D.C.Cir. 1994); *In re Grand Jury Proceedings (MIFB)*, 158 F.Supp.2d 96, 100 (D.Mass. 2001).

[144] *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218-19 (1979)("disclosure is appropriate only in those cases where the need for it outweighs the public interest in secrecy"); *United Kingdom v. United States*, 238 F.3d 1312, 1320 (11th Cir. 2001).

[145] F.R.Crim.P. 6(e)(2).

any personnel to whom grand jury matters are disclosed so that they may assist the attorney for the government.

Thus, a grand jury witness may ordinarily disclose his or her grand jury testimony,[146] and those not listed in Rule 6 generally need not keep the grand jury's secrets even if they learned of the matter from someone bound by the rule of secrecy.[147]

Matters. Grand jury secrecy shrouds "matters occurring before the grand jury".[148] It does not ordinarily bar disclosure of information because the information might be presented to the grand jury at some time in the future.[149] The rule protects the workings of the grand jury not the grist for its mill. The fact of disclosure to the grand jury, rather than the information disclosed, is the object of protection, but the two are not always easily separated. Clearly, grand jury secrecy does not bar disclosure of information previously presented to a grand jury but sought for an unrelated purpose by a requester unaware of its earlier presentation. On the other hand, it does cover instances where information is sought because it has been

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[146] *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 425 (1983)("Witnesses are not under the prohibition unless they also happen to fit into one of the enumerated classes [e.g., grand juror, interpreter, stenographer, attorney for the government, etc.]"); *Butterworth v. Smith*, 494 U.S. 624 (1990)(holding unconstitutional, as a violation of the First Amendment, a Florida statute that prohibited a witness from ever disclosing his or her grand jury testimony); *cf., In re Sealed Motion*, 880 F.2d 1367, 1373 (D.C. Cir. 1989)(holding that "a grand jury witness has a general right to a transcript of [his or her own] testimony absent the government demonstrating countervailing interests which outweigh the right to release of a transcript")(*contra*, *In re Grand Jury Subpoena*, 72 F.3d 271, 275-76 (2d Cir. 1995), (holding that grand jury witnesses do not have a presumptive right to a copy of their grand jury testimony on demand).

[147] *Fund for Constitutional Government v. National Archives*, 656 F.2d 856, 870 n.33 (D.C. Cir. 1981); *United States v. Forman*, 71 F.3d 1214, 1217-220 (6th Cir. 1995); *In re Polyprophylene Carpet Antitrust Litigation*, 181 F.R.D. 680, 692-94 (N.D.Ga. 1998); Beale et al., GRAND JURY LAW AND PRACTICE §5.4 (1998). Under some circumstances, however, such disclosures may constitute violations of 18 U.S.C. 641 (theft of federal property) or 1503 (obstruction of justice), see *United States v. Jeter*, 775 F.2d 670 (6th Cir. 1985) (upholding convictions under both sections of a defendant who had sold information, obtained from carbon paper used to type transcripts of grand jury proceedings, to the targets of the grand jury investigations).

[148] F.R.Crim.P. 6(e)(2); see generally, *What Are "Matters Occurring Before the Grand Jury" Within Prohibition of Rule 6(e) of the Federal Rules of Criminal Procedure*, 50 ALR Fed 675; *FRCrP 6(e) and the Disclosure of Documents Reviewed by a Grand Jury*, 57 UNIVERSITY OF CHICAGO LAW REVIEW 221 (1990); 1 Beale et al., GRAND JURY LAW AND PRACTICE §5.6 (1998).

[149] *United States v. Eastern Air Lines, Inc.*, 923 F.2d 241, 244 (2d Cir. 1991); *but see*, *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 500 (D.C.Cir. 1998)("The phrase — 'matters occurring before the grand jury'— includes not only what has occurred and what is occurring, but also what is like to occur").

presented to the grand jury. In between, the distinctions become more difficult and the cases do not reflect a single approach.[150]

Rule 6(e) also shields ancillary proceedings and records to avoid frustration of its purpose during the course of litigation concerning the proper scope of the rule.[151]

Disclosure .

The rule contemplates disclosure of matters occurring before the grand jury under a number of circumstances. Some require court approval; others do not.

Government Attorneys and Employees. Government attorneys and other employees may benefit from access to matters occurring before the grand jury in a number of instances. For example, grand jury secrecy does not prevent a government attorney (who acquired information and prepared documents while assisting a grand jury) from reviewing and using the information and documents, without disclosing them to anyone else, in preparation for civil litigation.[152]

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[150] *See e.g.*, *United States v. Dynavac, Inc.*, 6 F.3d 1407, 1411-414 (9th Cir. 1993), which first notes that "Rule 6(e) is intended only to protect against disclosure of what is said or takes place in the grand jury room . . . it is not the purpose of the Rule to foreclose from all future revelations to proper authorities the same information or documents which were presented to the grand jury. Thus, if a document is sought for its own sake rather than to learn what took place before the grand jury, and if its disclosure will not compromise the integrity of the grand jury process, Rule 6(e) does not prohibit its release." The *Dynavac* court then goes on to discuss the several, various different tests used by other circuits to determine when business records subpoena by the grand jury should be considered covered by Rule 6(e); see also, *In re Grand Jury Investigation (Missouri)*, 55 F.3d 350, 353-54 (8th Cir. 1995); *Kersting v. United States*, 206 F.3d 817, 821 (9th Cir. 2000)("The law, however, is clear that business records sought for intrinsic value are admissible, even if the same documents were also presented to the grand jury. The only exception . . . is if the material reveals a secret aspect of the grand jury's workings").

[151] "(5) Closed Hearing. Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury.

"(6) Sealed Records. Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury," F.R.Crim.P. 6(e)(5), (6). These provisions have withstood First Amendment challenges in at least three circuits, *In re Newark Morning Ledger Co.*, 260 F.3d 217 (3d Cir. 2001); *In re Motions of Dow Jones & Co.*, 142 F.3d 496 (D.C.Cir. 1998); *In re Grand Jury Subpoena (John Doe No. 4)*, 103 F.3d 234 (2d Cir. 1996).

[152] *United States v. John Doe, Inc. I*, 481 U.S. 102 (1987). But individual use may not include disclosure to the court before whom the civil litigation is pending without prior judicial approval, *In re Sealed Case (Qui Tam)*, 250 F.3d 764, 768 (D.C.Cir. 2001)("The Government . . . takes the untenable and disturbingly cavalier position a sealed, ex parte, conveyance of grand jury information to a federal who is acting in his judicial capacity is not a disclosure within the meaning to the grand jury secrecy rule").

Moreover, disclosure to government attorneys and employees assisting the grand jury without court approval is likewise possible under 6(e)(3)(A).[153] The Supreme Court has made it clear that such disclosures are limited to attorneys and employees assisting in the criminal process which is the focus of the grand jury's inquiry.[154] Grand jury material may be disclosed without court approval under (3)(A) to enable state police officers to assist a federal grand jury investigation, but apparently not private contractors.[155]

Finally, USA PATRIOT Act amendments to Rule 6(e)(3)(C) authorize disclosure of grand jury information concerning foreign nations, their agents and activities to federal officials without court approval, although the court must be notified after the fact.[156]

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[153] "(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to – (i) an attorney for the government for use in the performance of such attorney's duty; and (ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

"(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule," F.R.Crim.P. 6(e)(3)(A), (B).

[154] *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 427 (1983) ("The Government contends that all attorneys in the Justice Department qualify for automatic disclosure of grand jury materials under (A)(i), regardless of the nature of the litigation in which they intend to use the materials. We hold that (A)(i) disclosure is limited to use by those attorneys who conduct the criminal matters to which the materials pertain").

[155] *In re November 1992 Special Grand Jury for the Northern District of Indiana*, 836 F.Supp. 615, 616-17 (N.D.Ind. 1993); *United States v. Pimental*, 199 F.R.D. 28, 34 (D.Mass. 2001).

[156] "(C)(i) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made . . . (V) when the matters involve foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 401a)["'foreign intelligence' means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons . . . [and] 'counterintelligence' means information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities"]), or foreign intelligence information (as defined in clause (iv) of this subparagraph), to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties.

* * *

"(iii) Any federal official to whom information is disclosed pursuant to clause (i)(V) of this subparagraph may use the information only as necessary in the conduct of that person's

Judicial Proceedings. Rule 6(e)(3)(C)(i)(I) permits court approved disclosure of grand jury matters "preliminary to or in connection with a judicial proceeding."[157] Historically, the courts concluded, with some dissent, that the exception applied not only to the trial which followed the grand jury's investigation but to variety of proceedings range from state bar and police disciplinary investigations,[158] to parole hearings,[159] state criminal investigations,[160] Congressional inquiries,[161] federal administrative proceedings,[162] civil litigation,[163]and other grand jury investigations.[164] In *United States v. Baggot*, however, the Supreme Court provide guidance as to when disclosure might be considered "preliminary to or in connection with" an appropriate proceeding and some indication of what kinds of proceedings might be considered "judicial":

> [T]he term "in connection with," in (C)(i) . . . refer[s] to a judicial proceeding already pending, while "preliminary to" refers to one not yet initiated. . . . The "judicial proceeding" language . . . reflects a judgment that not every beneficial purpose, or even every valid governmental purpose, is an appropriate reason for breaching grand jury secrecy. Rather, the rule contemplates only uses related fairly directly to some identifiable litigation,

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official duties subject to any limitations on the unauthorized disclosure of such information. Within a reasonable time after such disclosure, an attorney for the government shall file under seal a notice with the court stating the fact that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.

"(iv) In clause (i)(V) of this subparagraph, the term "foreign intelligence information" means– (I) information, whether or not concerning a United States person, that relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (cc) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of foreign power; or (II) information, whether or not concerning a United States person, with respect to a foreign power or foreign territory that relates to – (aa) the national defense or the security of the United States; or (bb) the conduct of the foreign affairs of the United States," F.R.Crim.P. 6(e)(3)(C)(i),(iii), (iv)..

[157] "(C)(i) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made –

"(I) when so directed by a court preliminary to or in connection with a judicial proceeding," F.R.Crim.P. 6(e)(3)(C)(i)(I).

[158] *Doe v. Rosenbery*, 225 F.2d 118 (2d Cir. 1958); *In re Special February 1977 Grand Jury v. Conlisk*, 490 F.2d 894 (7th Cir. 1973).

[159] *United States v. Shillitani*, 345 F.2d 290 (2d Cir. 1965).

[160] *Gibson v. United States*, 403 F.3d 166 (D.C.Cir. 1968).

[161] *Haldeman v. Sirica*, 501 F.2d 714 (D.C.Cir. 1974)(impeach inquiry); *In re Grand Jury Investigation of Ven-Fuel*, 441 F.Supp. 1299 (M.D.Fla. 1977)(legislative investigation).

[162] *In re Grand Jury Proceedings (Daewoo)*, 613 F.Supp. 673 (D.Ore. 1985)(Customs Service proceedings).

[163] *In re Grand Jury Investigation*, 414 F.Supp. 74 (S.D.N.Y. 1976).

[164] *In re 1979 Grand Jury Proceedings*, 479 F.Supp. 93 (E.D.N.Y. 1973).

> pending or anticipated. Thus, it is not enough to show that some litigation may emerge form the matter in which the material is to be used, or even that litigation is factually likely to emerge. The focus is on the *actual* use to be made of the material. If the primary purpose of disclosure is not to assist in preparation or conduct of a judicial proceeding, disclosure under (C)(i) is not permitted. 463 U.S. 476, 479-80 (1983)(emphasis of the Court).

Using this criterion, *Baggot* concluded that disclosure of grand jury matter to the government for purposes of a tax audit, after which any tax liability could be enforced nonjudicially, could not be considered "preliminary to or in connection with a judicial proceeding" and thus could not be permitted under (C)(i).[165]

Baggot found it unnecessary to address "the knotty question of what, if any, sorts of proceedings other than the garden-variety civil actions or criminal prosecutions might qualify as judicial proceedings under (C)(i)."[166] The case's description of disclosures in an administrative context, however, hardly supports the notion that "judicial proceedings" include those before administrative tribunals.[167]

Particularized Need. Court approved disclosures require "a strong showing of particularized need."[168] Petitioners seeking disclosure "must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed."[169]

Since any examination begins with a preference for preservation of the grand jury's secrets, the particularized need requirement cannot be satisfied simply by demonstrating that the information sought would be relevant or useful or that

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[165] Interestingly, (C)(i),(now (C)(i)(I)) might have permitted disclosure in *Baggot* if the tax payer, rather than the IRS, had sought disclosure in anticipation of a judicial challenge of the results of the audit: "Of course, the matter may end up in court if Baggot chooses to take it there, but that possibility does not negate the fact that the primary use to which the IRS purposes to put the materials it seeks is an extrajudicial one – the assessment of a tax deficiency by the IRS," 463 at 481.

[166] 463 U.S. at 479 n.2; the D.C. Circuit subsequently found the exception extended to the proceedings conducted to determine the extent to which final reports of Independent Counsels should be made public, *In re North*, 16 F.3d 1234, 1244-245 (D.C.Cir. 1989); *In re Espy*, 259 F.3d 725, 728 (D.C.Cir. 2001).

[167] 463 U.S. at 480-81 n.5.

[168] *United States v. Sells Engineering, Inc.*, 463 U.S. at 443; *Right of Party in Civil Action to Obtain Disclosure, Under Rule 6(e)(3)(C)(i) of the Federal Rules of Criminal Procedure, of Matters Occurring Before Grand Jury*, 71 ALR FED 10.

[169] *Douglas Oil Co. v. Northwest Petrol Stops*, 441 U.S. at 222; *United Kingdom v. United States*, 238 F.3d 1312, 1320-321 (11th Cir. 2001); *In re Special Grand Jury 89-2*, 143 F.3d 565, 569-70 (10th Cir. 1998); *In re Grand Jury Proceedings (Ballas)*, 62 F.3d 1175, 1179 (9th Cir. 1995); *United States v. Miramontex*, 995 F.2d 56, 59 (5th Cir. 1993).

acquiring it from the grand jury rather than from some other available source would be more convenient.[170]

While the test remains the same whether the government or a private party seeks disclosure,[171] "the concerns that underlie the policy of grand jury secrecy are implicated to a much lesser extent when the disclosure merely involves government attorneys."[172]

In the balance to be struck in the process of determining whether "the need for disclosure is greater than the need for continued secrecy,"[173] the district court enjoys discretion to judge each case on its own facts,[174] but some general trends seem to have developed.

The need to shield the grand jury's activities from public display is less compelling once it has completed its inquiries and been discharged,[175] especially if the resulting criminal proceedings have also been concluded.[176] Of course, there must still be a counterbalancing demonstration of need,[177] a requirement that becomes more difficult if the grand jury witnesses whose testimony is be disclosed still run the risk of retaliation.[178]

"Courts have consistently distinguished the requests for documents generated independent of the grand jury investigation from the request for grand jury minutes or witness transcripts reasoning that the degree of exposure of the grand jury process

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[170] *In re Grand Jury 95-1*, 118 F.3d 1433, 1437 (10th Cir. 1997); *In re Grand Jury Investigation (Missouri)*, 55 F.3d 350, 354-55 (8th Cir. 1995); *Cullen v. Margiotta*, 811 F.2d 698, 715 (2d Cir. 1987); *Hernly v. United States*, 832 F.2d 980, 883-85 (7th Cir. 1987); *In re Grand Jury Proceedings GJ-76-4 & GJ-75-3*, 800 F.2d 1293, 1302 (4th Cir. 1986).

[171] *United States v. John Doe, Inc.I*, 481 U.S. 102, 112 (1987); citing, *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 443-44 (1983); and *Illinois v. Abbott & Associates, Inc.*, 460 U.S. 557 (1983).

[172] *United States v. John Doe, Inc. I*, 481 U.S. at 112; cf., *In re Grand Jury Investigation (Missouri)*, 55 F.3d 350, 353-54 (8th Cir. 1995).

[173] *Douglas Oil Co.v. Northwest Petrol Stops*, 441 U.S. at 222; *United States v. Nix*, 21 F.3d 347, 351 (9th Cir. 1994).

[174] *In re Grand Jury Proceedings (Ballas)*, 62 F.3d 1175, 1180 (9th Cir. 1995).

[175] *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940); *In re Grand Jury Investigation (Missouri)*, 55 F.3d 380, 354 (8th Cir. 1995); *In re Grand Jury Proceeding Relative to Perl*, 838 F.2d 304, 307 (8th Cir. 1988).

[176] *United States v. Blackwell*, 954 F.Supp. 944, 966 (D.N.J. 1997); *In re Grand Jury Proceedings GJ-76-4 & GJ-75-3*, 800 F.2d at 1301 (4th Cir. 1986); *In re Shopping Cart Antitrust Litigation*, 95 F.R.D. 309, 312-13 (S.D.N.Y. 1982).

[177] *Hernly v. United States*, 832 F.2d 980, 985 (7th Cir. 1987); *In re Grand Jury Testimony*, 832 F.2d 60, 64 (5th Cir. 1987).

[178] *Cullen v. Margiotta*, 811 F.2d 698 (2d Cir. 1987); *In re Grand Jury Investigation (Missouri)*, 55 F.3d 350, 355 (8th Cir. 1955).

inherent in the revelation of subpoenaed documents is lesser than the degree of disclosure attributable to publication of witness transcripts."[179]

Moreover, the courts seem responsive to requests to disclose matters occurring before the grand jury in order to resolve some specific inconsistency in the testimony of a witness or to refresh a witness's collection during the course of a trial.[180] In the same vein, they are more disposed to the interests supporting disclosure if the petitioner's opponent already enjoys the benefit of the information sought.[181]

Defendant's Motion to Dismiss.[182] Rule 6(e)(3)(C)(ii) permits court approved disclosure upon a defendant's request "showing grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury," and upon a showing of particularized need.[183]

Second Grand Jury.[184] Grand jury matters may be disclosed to another federal grand jury without court approval under Rule 6(e)(3)(C)(iii). Prior to enactment of this part of the Rule, disclosure to another federal grand jury was possible upon a showing of particularized need "preliminary to or in connection with a judicial proceeding" under (C)(i). Neither particularized need nor court approval are apparently any longer required and disclosure is permitted whether the two panels are sitting within the same district or not.[185]

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[179] *In re Grand Jury Proceeding Relative to Perl*, 838 F.2d 304, 306-307 (8th Cir. 1988); *In re Grand Jury Investigation (Missouri)*, 55 F.3d at 354 (8th Cir. 1995); *In re Sealed Case*, 801 F.2d 1379, 1381 (D.C.Cir. 1986); *In re Grand Jury Investigation*, 630 F.2d 996, 1000 (3d Cir. 1980).

[180] *Douglas Oil Co.*, 441 U.S. at 222 n.12; *United States v. Rockwell International Corp.*, 173 F.3d 757, 759 (10th Cir. 1999); *In re Grand Jury*, 832 F.2d 60, 63 (5th Cir. 1987); *Lucas v. Turner*, 725 F.2d 1095, 1105 (7th Cir. 1984); *United States v. Fischbach and Moore, Inc.*, 776 F.2d 839, 845 (9th Cir. 1985).

[181] *Douglas Oil Co.*, 441 U.S. at 222 n.13; *In re Grand Jury Proceedings GJ-76-4 & GJ-75-3*, 800 F.2d 1293, 1302-303 (4th Cir. 1986); *United States v. Fischbach and Moore, Inc.*, 776 F.2d 839, 844 (9th Cir. 1985).

[182] "(C)(i) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made . . .(II) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury," F.R.Crim.P. 6(e)(3)(C)(i)(II).

[183] *United States v. Wilkinson*, 124 F.3d 971, 977 (8th Cir. 1997); *United States v. Perez*, 67 F.3d 1371, 1381 (9th Cir. 1995); *United States v. Puglia*, 8 F.3d 478, 480 (7th Cir. 1993); *United States v. Miramontez*, 995 F.2d 56, 59 (5th Cir. 1993); *United States v. Gibson*, 175 F.Supp.2d 532, 535 (S.D.N.Y. 2001).

[184] "(C)(i) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made . . . (III) when the disclosure is made by an attorney for the government to another federal grand jury," F.R.Crim.P. 6(e)(3)(C)(i)(III).

[185] *In re Grand Jury Subpoenas Aug. 1986*, 658 F.Supp. 474, 478-80 (D.Md. 1987).

State Law Enforcement.[186] Where the grand jury matters may show evidence of a violation of state law, the attorney for the government may petition the court for disclosure to state enforcement authorities under Rule 6(e)(3)(C)(iv).[187]

Express Authority Under Statute or Other Rule. A criminal defendant is entitled to inspect and copy that portion of the transcript of his or her own testimony before a grand jury which relates to a crime with which he or she has been charged.[188] And, under the Jencks Act, after a witness has testified against a defendant at trial, the defendant is entitled to request and receive a copy of the witness' relevant grand jury testimony.[189]

Congress has expressly authorized the disclosure of grand jury matters in connection with enforcement of some of the banking laws.[190] In the case of civil penalties for bank fraud, false statements and embezzlement and civil forfeiture for money laundering, the attorney for the government may receive information concerning grand jury matters from the attorney who assisted the grand jury or any of his or her assistants. Bank regulatory agency personnel may receive grand jury information concerning such misconduct upon a motion by the government showing substantial need.

But Congress's intent to breach the general rule of secrecy must be clear. Thus the disclosure of grand jury matters is not authorized by those provisions of the Clayton Act which in certain antitrust instances compel the United States Attorney General to provide state Attorneys General with "any investigative files or other materials which are or may be relevant or material" to a cause action under the Act.[191]

Consistence with the Historical Dimensions of Grand Jury Secrecy. Several courts, conscious of a responsibility over the grand jury subpoenas and indictments and of the common law origins of Rule 6(e), have permitted or asserted that under the proper circumstances they would permit disclosure without reference to any particular express exception within Rule 6(e) or elsewhere.[192] Others, for much

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[186] "(C)(i) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made . . . (IV) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law," F.R.Crim.P. 6(e)(3)(C)(i)(IV).

[187] *United States v. McVeigh*, 157 F.3d 809, 814-15 (10th Cir. 1998).

[188] F.R.Crim.P. 16(a)(1)(A).

[189] 18 U.S.C. 3500; see also F.R.Crim.P. 26.2.

[190] 18 U.S.C. 3322.

[191] *Illinois v. Abbott & Associates, Inc.*, 460 U.S. 557 (1983); *see also, In re North*, 16 F.3d 1234, 1243 (D.C.Cir. 1994) holding that the statutory obligation of Independent Counsel to submit a final report of their investigations and prosecutions, 28 U.S.C. 585(b), did not relieve them of the obligations of government attorneys under Rule 6(e).

[192] *In re Grand Jury Investigation (John Doe)*, 59 F.3d 17, 19-20 (2d Cir. 1995)(permitting access to documents held by the grand jury when sought in response to the legitimate needs

the same reasons, have noted that under the appropriate circumstances, a court might restrict disclosure of grand jury matters even in instances where Rule 6(e) would ordinarily permit disclosure.[193]

Enforcement of Grand Jury Secrecy. "A knowing violation of Rule 6 may be punished as a contempt of court."[194] Since the Rule speaks of punishment, it might be fair to assume that it contemplates criminal contempt. And it does, but the courts have also held that violations of grand jury secrecy may subject offenders to civil contempt and to the injunctive power of the court.[195] Government employees and members of the bar who improperly disclose the grand jury's secrets may be subject

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of the entity that created the documents); *In re Report & Recommendation of June 5, 1972 Grand Jury*, 370 F.Supp. 1219, 1227-230 (D.D.C. 1974) (permitting disclosure of grand jury material relevant to an impeachment inquiry to the House Judiciary Committee); *In re Grand Jury Investigation of Ven-Fuel*, 441 F.Supp. 1299, 1302-304 (M.D.Fla. 1977) (permitting disclosure of grand jury material a House legislative subcommittee); *In re Petition to Inspect & Copy Grand Jury Materials*, 735 F.2d 1261, 1270 (11th Cir. 1984)(upholding disclosure of grand jury matter to an committee of the Eleventh Circuit Judicial Council investigating allegations of judicial misconduct on the grounds of the district court's inherent supervisory power over the grand jury).

The Second Circuit offered a "non-exclusive list of factors that a trial court might want to consider when confronted with these highly discretionary and fact-sensitive special circumstance motions [for disclosure of grand jury information on grounds other than those specified in Rule 6(e)(3)]: (i) the identity of the party seeking disclosure; (ii) whether the defendant to the grand jury proceeding or the government opposes the disclosure; (iii) why disclosure is being sought in the particular case; (iv) what specific information is being sought for disclosure; (v) how long ago the grand jury proceeding took place; (vii) the current status of the principals of the grand jury proceedings and that of their families; (vii) the extent to which the desired material — either permissibly or impermissibly — has been previously made public; (viii) whether witnesses to the grand jury proceedings who might be affected by disclosure are still alive; and (ix) the additional need for maintaining secrecy in the particular case in question," *In re Petition of Craig*, 131 F.3d 99, 106 (2d Cir. 1997).

[193] *In re Charlotte Observer*, 921 F.2d 47, 50 (4th Cir. 1990), citing, *Matter of Special March 1981 Grand Jury*, 753 F.2d 575, 577 (7th Cir. 1985); *In re Subpoena to Testify Before Grand Jury*, 864 F.2d 1559, 1563-64 (11th Cir. 1989); *In re Grand Jury Subpoena (John Doe No.4)*, 103 F.3d 234, 240 n.8 (2d Cir. 1996).

[194] F.R.Crim.P. 6(e)(2); *Bank of Nova Scotia v. United States*, 487 U.S. at 263; *United States v. Holloway*, 991 F.2d 370 (7th Cir. 1993); *Relief, Remedy, or Sanction for Violation of Rule 6(e) of Federal Rules of Criminal Procedure Prohibiting Disclosure of Matters Occurring Before Grand Jury*, 73 ALR FED 112.

[195] *McQueen v. Bullock*, 907 F.2d 1544, 1551 (5th Cir. 1990); *In re Grand Jury Investigation (Lance)*, 610 F.2d 202, 213 (5th Cir. 1980); *Barry v. United States*, 865 F.2d 1317 (D.C.Cir. 1989); contra, *In re Grand Jury Investigation (90-3-2)*, 748 F.Supp. 1188 (E.D. Mich. 1990). The Eleventh Circuit panel in *Blalock v. United States*, 844 F.2d 1546 (11th Cir. 1988), felt itself bound by precedent of the Fifth Circuit before that circuit was split in two to create the Eleventh and Fifth, but two of the three members of the panel make it clear that they would have held otherwise if not bound, 844 F.2d at 1551-553 (Tjoflat & Roettger, JJ. concurring). See generally, *Federal Rule of Criminal Procedure 6(e): Criminal or Civil Contempt for Violations of Grand Jury Secrecy?*, 12 WESTERN NEW ENGLAND LAW REVIEW 245 (1990).

to disciplinary proceedings.[196] Under some circumstances, improper disclosure of grand jury matters may also violate the obstruction of justice provisions of 18 U.S.C. 1503 (corruptly impeding or endeavoring to impede the administration of justice in connection with a judicial proceeding).[197]

Final Grand Jury Action

There are four possible outcomes of convening a grand jury – (1) indictment, (2) a vote not to indict, to find ""no bill"" or "no true bill", or to endorse the indictment "ignoramus", (3) discharge or expiration without any action, (4) submission of a report to the court.

Indictment

In an indictment the grand jury accuses a designated person with a specific crime. It contains a "plain, concise and definite written statement of the essential facts constituting the offense charged" and bears the signature of the attorney for the government, and of the grand jury foreperson.[198] An indictment (1) "must contain a statement of the essential facts constituting the offense charged, (2) it must contain allegations of each element of the offense charged, so that the defendant is given fair notice of the charge that he must defend, and (3) its allegations must be sufficiently distinctive so that an acquittal or conviction on such charges can be pleaded to bar a second prosecution for the same offense."[199]

Every defendant to be tried for a federal capital or "otherwise infamous crime" has a constitutional right to demand that the process begin only after the concurrence of twelve of his or her fellow citizens reflected in an indictment. It is a right,

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[196] *Bank of Nova Scotia v. United States*, 487 U.S. at 263. The civil relief available against government for violations of grand jury secrecy does not include the right to monetary damages or attorneys' fees, *In re Sealed Case, No. 98-3077*, 151 F.3d 1059, 1070 (D.C.Cir. 1998); *McQueen v. United States*, 5 F.Supp.2d 473, 482 (S.D.Tex. 1998).

[197] *United States v. Jeter*, 775 F.2d 670 (6th Cir. 1985); *United States v. Howard*, 569 F.2d 1331 (5th Cir. 1978); *United States v. Peasley*, 741 F.Supp. 18 (D.Me. 1990); *In re Grand Jury Proceedings, Special Grand Jury 89-2*, 813 F.Supp. 1451, 1465 n.10 (D.Colo. 1992).

[198] F.R.Crim.P. 7(c)(1), 6(c). The foreman's failure to endorse the indictment is not fatal unless it reflects the absence of a concurrence of twelve grand jurors in the indictment, *Hobby v. United States*, 468 U.S. 339, 345 (1984), citing, *Frisbie v. United States*, 157 U.S. 160, 163-65 (1895).

The signature or assent of the attorney for the government, however, is required before a prosecution can go forward, *United States v. Cox*, 342 F.2d 167, 171-72 (5th Cir. 1965); *United States v. Laboy*, 909 F.2d 581, 585 (1st Cir. 1990).

[199] *United States v. Cisneros*, 26 F.Supp.2d 24, 45 (D.D.C. 1998); *In re Smith*, 44 F.3d 1259, 1263 (4th Cir. 1995); *United States v. Santeramo*, 45 F.3d 622, 624 (2d Cir. 1995); each citing *Hamling v. United States*, 418 U.S. 87, 117(1974), *inter alia*; *see also, United States v. Cabrera-Teran*, 168 F.3d 141, 143 (5th Cir. 1999).

however, which the defendant may waive in noncapital cases.[200] Misdemeanors may, but need not, be tried by indictment.[201]

The grand jury may indict only upon the vote of twelve of its members,[202] and upon its conclusion that there is probable cause to believe that the accused committed the crime charged.[203]

Defendants have urged dismissal of their indictments based upon a wide array of alleged grand jury irregularities. They are rarely successful. The irregularities which warrant dismissal are few and the obstacles which must be overcome to establish them substantial.

The courts are most hospitable to dismissal motions predicated upon constitutional violations. Thus, indictments returned by grand jury panels whose selection has been tainted by racial or sexual discrimination will be dismissed.[204] The courts will likewise dismiss indictments which charge a defendant on basis of his or her immunized testimony taken pursuant to an order entered in lieu of his or her Fifth Amendment self-incrimination privilege;[205] which are defective for failure to state an offense contrary to the Fifth Amendment right of indictment before trial for a

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[200] F.R.Crim.P. 7(b); *Ornelas v. United States*, 840 F.2d 890, 892 n.3 (11th Cir. 1988); *United States v. Moore*, 37 F.3d 169, 173 (5th Cir. 1995); *cf.*, *United States v. Littlefield*, 105 F.3d 527, 528 (9th Cir. 1997).

[201] F.R.Crim.P. 7(a); *United States v. Brewer*, 681 F.2d 973, 974 (5th Cir. 1982); *United States v. Cocoman*, 903 F.2d 127, 129-30 (2d Cir. 1990); *United States v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 986 (7th Cir. 1999).

[202] F.R.Crim.P. 6(f); *United States v. Byron*, 994 F.2d 747, 748 (10th Cir. 1993), but some courts have held that the requirement is not jurisdictional and may be waived or, if harmless, provides inadequate grounds to vacate a conviction, *United States v. Enigwe*, 17 F.Supp.2d 390, 392 (E.D.Pa. 1998).

[203] *United States v. Calandra*, 414 U.S. 338, 343 (1974), citing *Branzburg v. Hayes*, 408 U.S. 665, 686-87 (1972); *United States v. Cabrera-Teran*, 168 F.3d 141, 143 (5th Cir. 1999).

[204] *Bank of Nova Scotia v. United States*, 487 U.S. 250, 257 (1988); *Vasquez v. Hillary*, 474 U.S. 254, 260-64 (1986).

[205] *In re Sealed Case (No. 98-3054)*, 144 F.3d 74, 75 (D.C.Cir. 1998); *United States v. Nanni*, 59 F.3d 1425, 1432-433 (2d Cir. 1995); *Grand Jury Subpoena Dated Dec. 7 and 8*, 40 F.3d 1096, 1103 (10th Cir. 1994); *In re Grand Jury Proceedings (Kinamon)*, 45 F.3d 343, 347-48 (9th Cir. 1995); but see, *United States v. Schmidgall*, 25 F.3d 1533, 1538-539 (11th Cir. 1994)(disclosure of immunized testimony to an indicting grand jury does require dismissal if the disclosure is shown to have been harmless).

felony;[206] which are tainted by violations of the Speech or Debate privilege;[207] or which are based *solely* on evidence secured in violation of the Fourth Amendment.[208]

They will also dismiss indictments in the name of due process where the prosecution sought indictment selectively for constitutionally impermissible reasons;[209] or for reasons of vindictive retaliation;[210] where the prosecution has secured the indictment through outrageous conduct which shocks the conscience of the court;[211] where the prosecution has unjustifiably delayed seeking an indictment to the detriment of the defendant;[212] where the government knowingly secures the indictment through the presentation of false or perjured testimony;[213] or where a witness is called before

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[206] *United States v. Cochran*, 17 F.3d 56, 57 (3d Cir. 1994), citing, *United States v. Russell*, 369 U.S. 749, 763-64 (1962); *United States v. Brown*, 995 F.2d 1493, 1505 (10th Cir. 1993).

Indictments defective on their face may include those returned after the expiration of the grand jury's tenure, but whether apparent from the face of the indictment or not a purported indictment returned by a grand jury's whose term has expired is a nullity, *United States v. Fein*, 504 F.2d 1170, 1173 (2d Cir. 1974); *United States v. Armored Transport Inc.*, 629 F.2d 1313, 1316 (9th Cir. 1980); *United States v. Clemenic*, 886 F.2d 332 (7th Cir. 1989), opinion appended to *United States v. Daniels*, 902 F.2d 1238, 1240 (7th Cir. 1990).

[207] *United States v. Swindall*, 971 F.2d 1531, 1543 (11th Cir. 1992); *United States v. Helstoski*, 635 F.2d 200, 204-6 (3d Cir. 1980); cf., *United States v. Rostenkowski*, 59 F.3d 1291, 1298-299 (D.C.Cir. 1995)(noting that at some point presentation of speech or debate material to a grand jury will contaminate the resulting indictment but declining to identify that point).

[208] *United States v. MacDonald*, 435 U.S. 850, 860 n.7 (1978), citing *Abney v. United States*, 431 U.S. 651, 663 (1977); *Cogen v. United States*, 278 U.S. 221, 227 (1920); and *Heike v. United States*, 217 U.S. 423, 430 (1910).

[209] *United States v. Jennings*, 991 F.2d 725, 730 (11th Cir. 1993)("In order to prevail in a selective prosecution defense, a defendant must meet the heavy burden of (1) making a prima facie showing that he has been singled out for prosecution although other similarly situated persons who have committed the same acts have not been prosecuted; and (2) demonstrate that the government's selective prosecution was unconstitutional because actuated by impermissible motives such as racial or religious discrimination"); cf., *United States v. Estrada-Plata*, 57 F.3d 757, 760 (9th Cir. 1995); *United States v. Cooks*, 52 F.3d 101, 105 (5th Cir. 1995).

[210] *United States v. Meyer*, 810 F.2d 1242, 1249 (D.C.Cir. 1987), vac'd, 816 F. 2d 695, reinstated, 824 F.2d 1240; cf., *United States v. Cyprian*, 23 F.3d 1189, 1196 (7th Cir. 1994)("prosecution is vindictive, in violation of the Fifth Amendment Due Process Clause, if it is undertaken in retaliation for the exercise of a legally protected statutory or constitutional right"); *United States v. Aggarwal*, 17 F.3d 737, 743-44 (5th Cir. 1994).

[211] *United States v. Montoya*, 45 F.3d 1286, 1300 (9th Cir. 1995); cf., *United States v. Sneed*, 34 F.3d 1570, 1576-578 (10th Cir. 1994); *United States v. LaPorta*, 46 F.3d 152, 160 (2d Cir. 1994).

[212] *United States v. Marion*, 404 U.S. 307, 324 (1971); *United States v. Benshop*, 138 F.3d 1229, 1232 (8th Cir. 1998); *United States v. West*, 58 F.3d 133, 136 (5th Cir. 1995); *United States v. Manning*, 56 F.3d 1188, 1194 (9th Cir. 1995).

[213] *United States v. Spillone*, 879 F.2d 514, 524 (9th Cir. 1989); *United States v. Levine*, 700 F.2d 1176, 1180 (8th Cir. 1983).

the grand jury for the sole purpose of building perjury prosecution against the witness.[214]

In the absence of one of these rarely found causes for constitutional challenge, a facially valid indictment returned by a legally constituted grand jury is almost uniformly immune from dismissal. "*Bank of Nova Scotia v. United States*, [however,] makes it clear that the supervisory power can be used to dismiss an indictment because of misconduct before the grand jury, at least where the misconduct amounts to a violation of one of those few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury functions."[215]

Bank of Nova Scotia also makes it clear, nevertheless, that such supervisory authority to dismiss an indictment is only appropriately exercised where "'it is established that the violations substantially influenced the grand jury's decision to indict' or if there is 'grave doubt' that the decision was free from such substantial influence."[216] If the error is harmless the indictment may not be dismissed;[217] "a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants."[218] Timing is also important. After a trial jury has found sufficient evidence to convict a defendant, a claim of prejudice based on grand jury irregularities may lose must of its force.[219]

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[214] *United States v. Chen*, 933 F.2d 793, 796-97 (11th Cir. 1991)("[a] perjury trap is created when the government calls a witness before the grand jury for the primary reason of obtaining testimony from him in order to prosecute him later for perjury"); *United States v. Brown*, 49 F.3d 1162, 1168 (6th Cir. 1995). As with most of the due process grounds, the perjury trap is most often spoken of in the abstract in a case where the court finds no due process violation.

[215] *United States v. Williams*, 504 U.S. 36, 46 (1992)("Rule 6 of the Federal Rules of Criminal Procedure contains a number of such rules, providing, for example, that 'no person other than the jurors may be present while the grand jury is deliberating or voting,' Rule 6(d), and placing strict controls on disclosure of 'matters occurring before the grand jury,' Rule 6(e). Additional standards of behavior for prosecutors (and others) are set forth in the United States Code. (See 18 U.S.C. §§6002, 6003 (setting forth procedures for granting a witness immunity from prosecution; §1623 (criminalizing false declarations before the grand jury); §2515 (prohibiting grand jury use of unlawfully intercepted wire or oral communications); §1622 (criminalization of perjury). . . ." 504 U.S. at 46 n.6).

[216] *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988), quoting *United States v. Mechanik*, 475 U.S. at 78 (O'Connor, J., concurring); *United States v. Sigma Industries, Inc.*, 244 F.3d 841, 874 (11th Cir. 2001); *United States v. Lamantia*, 59 F.3d 705, 707 (7th Cir. 1995); *People v. Palomo*, 35 F.3d 368, 371-72 (9th Cir. 1994).

[217] *United States v. Williams*, 504 U.S. 56, 64 (1992), citing, *United States v. Mechanik*, 475 U.S. 66, 71-2 (1986) and *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988).

[218] *Bank of Nova Scotia v. United States*, 487 U.S. at 254; *United States v. Lennick*, 18 F.3d 814, 817-18 (9th Cir. 1994).

[219] *United States v. Mechanik*, 475 U.S. 66, 73 (1986); *United States v. Flores-Rivera*, 56 F.3d 319 (1st Cir. 1995); *United States v. Mills*, 995 F.2d 480, 487 (4th Cir. 1993); cf., *United States v. McDonald*, 61 F.3d 248, 252-53 (4th Cir. 1995).

Finally, the supervisory power to dismiss an indictment does not appear to extend beyond those areas where it is reinforced by the Constitution, statute or rule.[220] As a consequence of these limitations, indictments will not ordinarily be dismissed because: (1) the prosecutor failed to present evidence favorable to the defendant;[221] (2) the prosecutor failed to properly instruct the panel on applicable law;[222] (3) the prosecutor presented the grand jury with a signed indictment for its consideration and approval or rejection;[223] (4) of breached grand jury secrecy;[224] (5) of the presence of unauthorized individuals while the grand jury conducted its business;[225] (6) of the presentation of hearsay evidence;[226] (7) of the presentation of unreliable or false evidence;[227] (8) of the presentation of evidence secured in violation of the Fourth Amendment;[228] (9) of the presentation of evidence secured by intrusion into the

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[220] *United States v. Williams*, 504 U.S. at 46-7 ("We did not hold in *Bank of Nova Scotia*, however, that the courts' supervisory power could be used, not merely as a means of enforcing or vindicating legally compelled standards of prosecutorial conduct before the grand jury, but as a means of *prescribing* those standards of professional conduct in the first instance. . . . Because the grand jury is an institution separate from the courts, over whose functioning the courts do not preside, we think it clear that, as a general matter at least, no such `supervisory' judicial authority exists. . . ")(emphasis of the court).

[221] *United States v. Williams*, 504 U.S. at 45; *United States v. Haynes*, 216 F.3d 789, 798 (9th Cir. 2000); *United States v. Gilbert*, 198 F.3d 1293, 1304 (11th Cir. 1999); *United States v. McDonald*, 61 F.3d 248, 253 (4th Cir. 1995).

[222] *United States v. Warren*, 16 F.3d 247, 252-53 (8th Cir. 1994); *United States v. Zangger*, 848 F.2d 923, 925 (8th Cir. 1988); *United States v. Buchanan*, 787 F.2d 477, 487 (10th Cir. 1986).

[223] *United States v. Singer*, 660 F.2d 1295, 1302 (8th Cir. 1981); *United States v. Levine*, 457 F.2d 1186, 1189 (10th Cir. 1972); *United States v. Conley*, 826 F.Supp. 1533, 1534 (W.D.Pa. 1993).

[224] *United States v. Lamantia*, 59 F.3d 705, 707-8 (7th Cir. 1995); *United States v. Kilpatrick*, 821 F.2d 1456, 1468-469 (10th Cir. 1987), aff'd on other grounds sub nom., *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1987); *United States v. Malatesta*, 583 F.2d 748, 753-54 (5th Cir. 1978).

[225] *United States v. Mechanik*, 475 U.S. 66 (1986); *United States v. Fowlie*, 24 F.2d 1059, 1065-66 (9th Cir. 1994); *United States v. Busch*, 795 F.Supp. 866, 868 (N.D.Ill. 1992); *United States v. Hart*, 779 F.Supp. 883 (E.D.Mich. 1991).

[226] *United States v. Costello*, 350 U.S. 359, 363-64 (1956); *United States v. Roach*, 28 F.3d 729, 739 (8th Cir. 1994); *Wilkerson v. Whitley*, 28 F.3d 498, 503 (5th Cir. 1994); *Virgin Islands ex rel. A.M.*, 34 F.3d 153, 161 (3d Cir. 1994); *United States v. Brown*, 872 F.2d 385, 387-88 (11th Cir. 1989).

[227] *United States v. Haynes*, 216 F.3d 789, 798 (9th Cir. 2000); *United States v. McDonald*, 61 F.3d 248, 252 (4th Cir. 1995); *United States v. Claiborne*, 765 F.2d 784, 791 (9th Cir. 1985); *United States v. Adamo*, 742 F.2d 917, 940 (6th Cir. 1984).

[228] *United States v. Calandra*, 414 U.S. 338, 349-52 (1974); *Wilkerson v. Whitley*, 28 F.3d 498, 503 (5th Cir. 1994); *Williams v. Poulous*, 11 F.3d 271, 290 (1st Cir. 1993); *Baylson v. Disciplinary Board*, 975 F.2d 102, 110 n.3 (3d Cir. 1992).

attorney-client relationship;[229] (10) of the presentation of evidence secured in violation of the Constitution's speech and debate clause;[230] or (11) because no twelve grand jurors heard all the evidence upon which the indictment was based.[231]

In addition to dismissal of the indictment at the request of the accused, the government may move for dismissal of the indictment under Rule 48(a). Although the rule requires "leave of court," prosecutorial discretion is vested in the executive and the court cannot effectively compel prosecution. The authority of the courts to deny dismissal is therefore limited to instances where dismissal would be " Clearly contrary to manifest public interest."[232] In most instances dismissal is without prejudice to the government and the prosecutor may seek to reindict for the same offense as long as neither the statute of limitations nor the double jeopardy clause pose a bar.[233]

Refusal to Indict

The decision to indict rests with the grand jury. It may indict in the face of probable cause, but it need not; it cannot be required to indict nor punished for failing to do so.[234] On the other hand, the prosecution is free to resubmit a matter for

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[229] *United States v. Haynes*, 216 F.3d 789, 797-98 (9th Cir. 2000)("Haynes and Denton also argue that the district court should have exercised its supervisory power to dismiss the indictment on the ground that the government engaged in various acts of misconduct before the grand jury. To the extent that their argument is based on privileged testimony improperly elicited from Fairbanks [defense counsel's investigator], the challenge fails because a grand jury is permitted to consider evidence obtained in violation of a privilege, whether the privilege is established by the Constitution, statute, or the common law. *See United States v. Calandra*, 414 U.S. 338, 346 (1974) ").

[230] *United States v. Williams*, 644 F.2d 950, 952 (2d Cir. 1981)(where the violations were not "wholesale"); *United States v. Helstoski*, 635 F.2d 200, 205-206 (3d Cir. 1980).

[231] *United States v. Overmyer*, 899 F.2d 457, 465 (6th Cir. 1990); *United States v. Cronic*, 675 F.2d 1126, 1130 (10th Cir. 1982); *United States v. Leverage Funding Systems Inc.*, 637 F.2d 645, 649 (9th Cir. 1980).

[232] *Rinaldi v. United States*, 434 U.S. 22, 30 (1977); *United States v. Gonzalez*, 58 F.3d 459 (9th Cir. 1995); *United States v. Smith*, 55 F.3d 157 (4th Cir. 1995); *United States v. Robertson*, 45 F.3d 1423, 1437-38 n.14 (10th Cir. 1995).

[233] *United States v. Colombo*, 852 F.2d 19, 24-6 (1st Cir. 1988); *United States v. Dyal*, 868 F.2d 424, 429 (11th Cir. 1989); *United States v. Reardon*, 787 F.2d 512, 518 (10th Cir. 1986).

[234] *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986), citing Judge Friendly's dissent in *United States v. Ciambrone*, 601 F.2d 616, 629 (2d Cir. 1979). There Judge Friendly repeats the words of Judge Wisdom:

> By refusing to indict, the grand jury has the unchallengeable power to defend the innocent from government oppression by unjust prosecution. And it has the equally unchallengeable power to shield the guilty, should the whims of the jurors or their conscious or subconscious response to community pressures induce twelve or more jurors to give sanctuary to the guilty. *United States v. Cox*, 342 F.2d 167, 189-90 (5th Cir. 1965).

reconsideration by the same grand jury or by a subsequent panel and a grand jury panel is free to reexamine a matter notwithstanding the prior results of its own deliberations or those of another panel.[235]

Reports[236]

The law regarding the last alternative available to the grand jury, the authority to send forward "reports" or "presentments," is somewhat obscure. At common law "indictments" were returned by the grand jury based upon evidence presented to the grand jury, while "presentments" were "the notice taken by the grand jury of any offense from their own knowledge or observation, without any bill of indictment laid before them at the suit of the king."[237] It is clear that in the limited case of the special grand juries convened under 18 U.S.C. 3331-3334, the grand jury has statutory authority to report on organized crime.[238] Most federal grand jury panels, however, have no express authority to issue reports.

They nevertheless appear to have common law authority to prepare reports, at least under some circumstances.[239] The district court which empanels the grand jury

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Consistent with the independence of the grand jury, it need not indict everywhere it finds probable cause, *United States v. Ciambrone*, 601 F.2d 616, 629 (2d Cir. 1979), cited in *Vasquez v. Hillary*, 474 U.S. 254, 263 (1986); *United States v. Cotton*, 261 F.3d 397, 407 (4th Cir. 2001).

[235] F.R.Crim.P 6(e)(3)(C)(iii); *United States v. Williams*, 504 U.S. 36, 49 (1992); *United States v. Thompson*, 251 U.S. 407, 413-14 (1920); *United States v. Claiborne*, 765 F.2d 784, 793-94 (9th Cir. 1985); *United States* v. *Pabian*, 704 F.2d 1533, 1537 (11th Cir. 1983); *In re Grand Jury Proceedings*, 658 F.2d 782, 783 (10th Cir. 1981); *United States v. Gakoumis*, 624 F.Supp. 655, 656 (E.D.Pa. 1985).

[236] *See generally*, Stern, *Revealing Misconduct by Public Officials Through Grand Jury Reports*, 136 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 73 (1987); *Reviving Federal Grand Jury Presentments*, 103 YALE LAW JOURNAL 1333 (1994); *The Grand Jury Report as an Infringement on Private Rights*, 23 HASTINGS LAW JOURNAL 561 (1972).

[237] 4 Blackstone, COMMENTARIES 275 (1813 ed.). Reports, on the other hand, involved statements of the grand jury on the conduct of the King's officials and the conditions of the public jails and highways. Over time, however, grand jury reports came to include those "presentments" upon which the grand jury had voted to indict but which could not be considered indictments because the attorney for the government would not sign them, *In re Grand Jury January, 1969*, 315 F.Supp. 662 (D.Md. 1970).

[238] Some state grand juries have more extensive reporting authority, *see e.g.*, *Adding Bite to the Watchdog's Bark: Reforming the California Civil Grand Jury System*, 28 PACIFIC LAW JOURNAL 1115 (1997).

[239] *In re Grand Jury Sitting in Cedar Rapids, Iowa*, 734 F.Supp. 875, 876 (N.D. Iowa 1990); *United States v. Christian*, 660 F.2d 892 (3d Cir. 1981); *Application of Jordan*, 439 F.Supp. 199 (S.D.W.Va. 1977); *United States v. Briggs*, 514 F.2d 794 (5th Cir. 1975); *In re Report and Recommendation of June 5, 1972 Grand Jury*, 370 F.Supp. 1219 (D.D.C. 1974); *Application of Johnson*, 484 F.2d 791 (7th Cir. 1973); *In re Presentment of Special Grand Jury Impaneled January, 1969*, 315 F.Supp. 662 (D.Md. 1970); *United States v. Cox*, 342 F.2d 167, 188-89 (5th Cir. 1965)(Wisdom, J. concurring); *In re Petition for Disclosure of Evidence Before the October 1959 Grand Jury*, 184 F.Supp. 38 (E.D.Va. 1960); contra,

receives such communications and enjoys the discretion to determine the extent to which the reports should be sealed, expunged or disclosed. Some of the factors considered in making that determination include: "whether the report describes general community conditions or whether it refers to identifiable individuals; whether the individuals are mentioned in public or private capacities; the public interest in the contents of the report balanced against the harm to the individuals named; the availability and efficacy of remedies; whether the conduct described is indictable;"[240] and whether the report intrudes upon the prerogatives of state and local governments.[241]

Discharge

The court has the power to discharge a grand jury panel at any time within its term for any reason it sees fit.[242] The court's authority to discharge a panel, quash its subpoenas, seal or expunge its reports or dismiss its indictments afford a check on "runaway" grand jury panels.[243]

Application of United Electrical, Radio & Machine Workers, 111 F.Supp. 858 (S.D.N.Y. 1953).

[240] *In re Grand Jury Sitting in Cedar Rapids, Iowa*, 734 F.Supp. 875, 876 (N.D. Iowa 1990), quoting *In re Report of the Grand Jury Proceedings Filed on June 15, 1972*, 479 F.2d 458, 460 n.2 (5th Cir. 1973); *In re Grand Jury Proceedings (Rocky Flats)*, 813 F.Supp. 1451, 1466 (D.Colo. 1992).

[241] *In re Petition for Disclosure of Evidence Before the October 1959 Grand Jury*, 184 F.Supp. 38 (E.D.Va. 1960).

[242] F.R.Crim.P. 6(g)("A grand jury shall serve until discharged by the court. . ."); *Korman v. United States*, 486 F.2d 926, 933 (7th Cir. 1973); *Petition of A & H Transportation Inc.*, 319 F.2d 69, 71 (4th Cir. 1963); *In re Investigation of World Arrangements, etc.*, 107 F.Supp. 628, 629 (D.D.C. 1952).

[243] *What Do You Do With a Runaway Grand Jury? A Discussion of the Problems and Possibilities Opened Up by the Rocky Flats Grand Jury Investigation*, 71 SOUTHERN CALIFORNIA LAW REVIEW 617 (1998); Roots, *If It's Not a Runaway, It's Not a Real Grand Jury*, 33 CREIGHTON LAW REVIEW 821 (2000).

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