

# CRS Report for Congress

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## Federal Grand Juries: The Law in a Nutshell

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### 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 the 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. 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 grand jury conducts its business in secret, although witnesses are not bound and the rules permit disclosure of matters occurring before the grand jury under limited circumstances with court approval.

Citations for the quotations and statements in this report may be found in CRS Report 95-1135, *The Federal Grand Jury*, from which this report has been abridged.

### Background

The grand jury is an institution of antiquity that dates back to the twelfth century. 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 right to grand jury indictment is only constitutionally required in federal cases. In a majority of the states prosecution may begin either with an indictment or with an information or complaint filed by the prosecutor.

Although abolition of the right to indictment in the states and abolition of the grand jury itself in England came primarily as a matter of judicial economy, most of the contemporary calls to change the federal grand jury system are a reaction to perceived instances of prosecutorial exuberance.

## **Organization**

The federal grand jury enjoys sweeping authority. It 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," and its inquiries "may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors." 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," 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."

Federal grand juries are selected by the court in each federal judicial district. 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.

Discrimination in selection on the basis of race, color, religion, sex, national origin, or economic status is prohibited, 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."

Grand jury panels consist of sixteen to twenty-three members, sixteen of whom must be present for a quorum, and twelve of whom must concur to indict. They sit until discharged by the court, but generally not for longer than 18 months or in the case of some grand juries in the more populous districts for 36 months.

## **Proceedings Before the Grand Jury**

The grand jury does not conduct its business in open court nor does a federal judge preside over its proceedings. 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.

In many cases, the government will have already conducted an investigation and the attorney for the government will present evidence. 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.

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. The prosecutor is the most common source of legal advice and will draft most of the indictments returned by the grand jury.

Grand jury witnesses usually appear before the grand jury under subpoena. Although subpoenas may be issued and served at the request of the panel itself, the attorney for the government ordinarily "fills in the blanks" on a grand jury subpoena and arranges the case to be presented to the grand jury.

Unjustified failure to comply with a grand jury subpoena may result in a witness being held in civil contempt, convicted for criminal contempt, or both. Justifications for failure to comply are limited. 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.

Grand jury subpoenas are subject to rule that, "the grand jury. . . may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law." Matters that might be considered privileged under other circumstances are not always recognized as privileged before the grand jury. 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 attorney-client have been recognized as evidentiary privileges for grand jury purposes.

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, ". . . The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive." 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.

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, a handwriting exemplar, or to sign a consent form authorizing the disclosure of bank records. Consequently, the courts will not quash an otherwise valid subpoena issued for any of those purposes.

Although the Fifth Amendment privilege against self-incrimination precludes requiring a witness to testify at his or her criminal trial, it does not "confer an absolute right to decline to respond in a grand jury inquiry." Once before the grand jury, a witness may decline to present self-incriminating testimony.

## Secrecy

Grand jury proceedings are conducted behind closed doors and the rules cloak "matters occurring before the grand jury" in secrecy. Violations of grand jury secrecy are punishable as a contempt of court. The rules, however, are not all encompassing. Grand jury witnesses are free to disclose their testimony.

While "matters occurring before the grand jury" are secret, the rules do not ordinarily bar disclosure of information because the information might be presented to the grand jury at some time in the future. 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.

The rules specifically permit government attorneys who acquire information while assisting a grand jury to disclose it to government attorneys and employees assisting in the criminal process which is the focus of the grand jury's inquiry. They allow disclosure of foreign intelligence information to government officers and employees. They also permit the court to authorize disclosure (1) "preliminary to or in connection with a judicial proceeding;" (2) upon a defendant's request "showing grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;" (3) to a second grand jury; and (4) to state enforcement authorities. Limited disclosure may also be possible under separate statutory or common law authority.

## 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.

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. 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."

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

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

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. 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; which are defective for failure to state an offense contrary to the Fifth Amendment right of indictment before trial for a felony; which are tainted by violations of the Speech or Debate privilege; or which are based *solely* on evidence secured in violation of the Fourth Amendment.

They will also dismiss indictments in the name of due process where the prosecution sought indictment selectively for constitutionally impermissible reasons; or for reasons of vindictive retaliation; where the prosecution has secured the indictment through outrageous conduct which shocks the conscience of the court; where the prosecution has unjustifiably delayed seeking an indictment to the detriment of the defendant; where the government knowingly secures the indictment through the presentation of false or perjured testimony; or where a witness is called before the grand jury for the sole purpose of building perjury prosecution against the witness.

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. "[T]he supervisory power [of the courts] 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."

The supervisory authority to dismiss an indictment, however, 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." If the error is harmless the indictment will not be dismissed; "a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants." 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 much of its force.

In addition to dismissal of the indictment at the request of the accused, the government may move for dismissal of the indictment. 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." 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.

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. On the other hand, the prosecution is free to resubmit a matter for 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.

The law regarding the last alternative available to the grand jury, the authority to send forward "reports" or "presentments," is somewhat obscure. It is clear that in the limited case of the special grand juries in populous districts the grand jury has statutory authority to report on organized crime. 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. The district court which empaneled the grand jury 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;" and whether the report intrudes upon the prerogatives of state and local governments.

The court has the power to discharge a grand jury panel at any time within its term for any reason it sees fit. 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.