

Frequently Asked Questions about the Grand Jury System

What is the purpose of the grand jury?

The primary function of the modern grand jury is to review the evidence presented by the prosecutor and determine whether there is probable cause to return an indictment.

The original purpose of the grand jury was to act as a buffer between the king (and his prosecutors) and the citizens. Critics argue that this safeguarding role has been erased, and the grand jury simply acts as a rubber stamp for the prosecutor.

Since the role of the grand jury is only to determine probable cause, there is no need for the jury to hear all the evidence, or even conflicting evidence. It is left to the good faith of the prosecutor to present conflicting evidence.

In the federal system, the courts have ruled that the grand jury has extraordinary investigative powers that have been developed over the years since the 1950s. This wide, sweeping, almost unrestricted power is the cause of much of the criticism. The power is virtually in complete control of the prosecutor, and is pretty much left to his or her good faith.

Does every jurisdiction use a grand jury?

The Fifth Amendment to the U.S. Constitution requires a grand jury indictment for federal criminal charges. Only about half the states now use grand juries.

What is the typical term of a grand jury?

In virtually every federal jurisdiction, there is at least one grand jury sitting every day. Generally, most federal indictments involve grand juries that sit for five days a week for a period of one month. For cases involving complex and long-term investigations (such as those involving organized crime, drug conspiracies or political corruption), "long term" grand juries will be impaneled. Such "long term" grand juries typically sit fewer days each week, and their terms can be extended in six month increments for up to three years. The schedules vary among the states that still have grand juries.

How are grand jurors selected?

In most jurisdictions, grand jurors are drawn from the same pool of potential jurors as are any other jury panels, and in the same

manner. The pool generally consists of names culled from various databases, such as national voter lists, motor vehicle license lists and public utilities lists.

Does anyone screen grand jurors for biases or other improper factors?

No. Unlike potential jurors in regular trials, grand jurors are not screened for biases or other improper factors.

How independent is the grand jury?

The grand jury is independent in theory, and although the instructions given to the grand jurors inform them they are to use their judgment, the practical realities of the situation mitigate against it.

The grand jury hears only cases brought to it by the prosecutor. The prosecutor decides which witnesses to call. The prosecutor decides which witnesses will receive immunity. The basic questioning is done by the prosecutor on a theory he or she articulates. The grand jury members are generally permitted to ask questions at the end of a witness's testimony. The prosecutor generally decides if he or she has enough evidence to seek an indictment. Occasionally the grand jurors may be asked whether they would like to hear any additional witnesses, but since their job is only to judge what the prosecutor has produced, they rarely ask to do so.

The prosecutor drafts the charges and reads them to the grand jury. There is no requirement that the grand jury be read any instructions on the law, and such instructions are rarely given.

Why are grand jury proceedings secret?

Rule 6(e) of the Federal Rules of Criminal Procedure provide that the prosecutor, grand jurors, and the grand jury stenographer are prohibited from disclosing what happened before the grand jury, unless ordered to do so in a judicial proceeding. Secrecy was originally designed to protect the grand jurors from improper pressures. The modern justifications are to prevent the escape of people whose indictment may be contemplated, to ensure that the grand jury is free to deliberate without outside pressure, to prevent subornation of perjury or witness tampering prior to a subsequent trial, to encourage people with information about a crime to speak freely, and to protect the innocent accused from disclosure of the fact that he or she was under investigation.

Why can a grand jury witness talk about his or her testimony?

In the federal courts, the witness is not sworn to secrecy, and may disclose whatever he or she wishes to whomever he or she wishes. The witness exemption was adopted in part because it was thought that requiring witness secrecy was unrealistic and unenforceable, and in part to allow the witness to rebut rumors concerning his or her testimony. There is a basic revulsion in the United States about secret testimony.

Are there any other exceptions to grand jury secrecy?

At one time, the defendant in a criminal trial was never given access to the grand jury testimony that resulted in the indictment. By the 1980s, in most jurisdictions, if a witness who testified before the grand jury was called to testify at the eventual trial, the defendant was given a copy of that witness's grand jury testimony to use for possible impeachment. Some jurisdictions also give the defendant a list of everyone who testified before the grand jury, and several give the defendant a full transcript of all relevant grand jury testimony. In the federal system, no such list is provided, and the grand jury transcripts of only those persons who testify on behalf of the prosecutor at trial are given to the defendant.

Who must testify before a grand jury?

A prosecutor can obtain a subpoena to compel anyone to testify before a grand jury, without showing probable cause and, in most jurisdictions, without even showing that the person subpoenaed is likely to have relevant information. In the federal system the prosecutor is not required to demonstrate any relevance. The person subpoenaed to testify then is compelled to answer questions unless he or she can claim a specific privilege, such as the marital privilege, lawyer/client privilege, or the privilege against self-incrimination.

Can a lawyer be called to testify about his or her client?

A lawyer might be called; but the lawyer/client privilege shields him or her from being compelled to testify about a conversation with a client unless the conversation related to an ongoing or future crime or fraud of the client.

Can a lawyer accompany his or her client inside the grand jury room?

In the federal system, a witness cannot have his or her lawyer present in the grand jury room, although witnesses may interrupt

their testimony and leave the grand jury room to consult with their lawyer. A few states do allow a lawyer to accompany the witness; some allow the lawyer to advise his or her client, others merely allow the lawyer to observe the proceeding.

What is a grant of immunity?

A grant of immunity to a grand jury witness overcomes the witness's privilege against self-incrimination, and the witness is then required to testify. The prosecutor is prohibited from using that testimony or leads from it to bring charges against the witness. If a subsequent prosecution is brought, the prosecutor bears the burden of proving that all of its evidence was obtained independent of the immunized testimony. In practice, it is difficult to successfully prosecute someone for criminal activity they discussed in immunized testimony unless the prosecution had a fully prepared case before immunity was granted.

Many states grant the witness "transactional immunity," barring prosecution for a transaction discussed in the immunized testimony regardless of whether there are independent sources of evidence.

Can a witness refuse to appear before the grand jury?

Not without risking being held in contempt of the court that issued the subpoena to compel their testimony.

What happens if a witness is found in contempt?

A witness who refuses to testify without legal justification will be held in contempt of court, and is subject to incarceration for the remaining term of the grand jury. A witness who testifies falsely may be separately prosecuted for perjury.

If the grand jury refuses to return an indictment, can the prosecutor come back and try again, or is that barred by double jeopardy?

Double jeopardy does not apply to the grand jury. In practice, however, it is uncommon for a prosecutor, having failed once, to try again without good reason. The Department of Justice requires the prosecutor to obtain permission of the Assistant Attorney General for the Criminal Division to present the case again.

Can a grand jury target offer evidence of his or her own?

For the most part, the subject of a grand jury investigation has no

right to testify unless subpoenaed, nor any right to compel the grand jury to hear certain witnesses or evidence. Often, however, if a target requests an opportunity to testify, he or she will be permitted by the prosecutor to do so but without a grant of immunity.

The prosecutor may refuse to present evidence submitted by a target. In federal grand juries, exculpatory evidence need not be presented, although in many states exculpatory evidence must be submitted for the grand jury's consideration. Prosecutors have the right in federal grand juries to introduce hearsay and to otherwise utilize evidence that would not be admissible in a regular trial.

Is there a judge in the grand jury room when testimony is being taken?

No. Normal rules of evidence do not apply to a grand jury investigation, and a judge is generally needed only to rule on privilege issues or issues relating to contempt.

What protection does a target have against witnesses lying to the grand jury, or against the use of unconstitutionally obtained evidence?

None. The target's only redress is to challenge the evidence at trial. One of the reasons a witness may assert the Fifth Amendment is that he or she does not know if the prosecutor has presented witnesses who have lied. The witness cannot risk testifying contrary to those witnesses, for fear of being charged with perjury if the prosecutor does not believe his or her testimony.