

De-Mystifying the Federal Grand Jury

[The following is the first installment in a two-part series examining the role of the Grand Jury in America.]

The Grand Jury is an enigmatic exception to a legal system whose hallmark is public access. Closed doors, the exclusion of the media and oaths of secrecy combine to render the process clandestine to all but a select group of legal professionals. The mere utterance of the phrase is enough to strike fear into the hearts of common people, corporate executives and sitting presidents alike. Occasionally portrayed by the media as a modern incarnation of England's infamous Star Chamber, the Grand Jury is a formidable entity whose role and function is shrouded in mystery. Who are Grand Jurors? How are they selected? What are the limits of their power? Today we examine the composition of the federal Grand Jury.

Grand Juries play an important role in the fair administration of justice. Used in both the federal system and by the various state courts, the Grand Jury is a jurisprudential check against unbridled prosecutorial authority. The Fifth Amendment to the United States Constitution provides that "No citizen shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ...". The United States Supreme Court has interpreted the term "infamous crime" to mean "felony," an offense punishable by a term of imprisonment greater than one year. As a guarantee of this basic freedom, citizens are called to service for a period ranging from 18 months to three years. Unlike petit juries (those consisting of between six to 12 jurors), Grand Juries are each composed of between 16 and 23 individuals. Although not mandated by the Federal Rules of Criminal Procedure, courts have construed 16 to be the minimum number of Grand Jurors required to constitute a quorum. While petit jurors often serve for as little as one day or one trial, Grand Jurors serve a term defined by the discretion of the United States Attorney. In recognition of this substantial burden, the Grand Jury usually sits for one day a week or, in some jurisdictions, two days per month.

The Grand Jury serves two primary responsibilities: to investigate alleged criminal conduct, and to formally charge those individuals or corporate entities accused of such misdeeds. This determination, known as probable cause, is a finding greater than mere suspicion but less than conclusive. Attorneys universally recognize that probable cause is a low legal standard.

At common law (the body of law created by judicial decisions rather than statutes), a Grand Jury could act on its own. The resulting charge was known as a "presentment." Today, prosecutors guide a Grand Jury through a process of witness examination and the presentation of evidence. At the conclusion of the prosecutor's presentation, the Grand Jury votes. If a majority of the group finds probable cause, they issue a set of charges known as an "indictment" in a process known as "returning a true bill." If, however, the majority does not find probable cause to indict the individual, the Grand Jury is said to "return a bill of ignoramus" (literally, "we ignore").

Significantly, a "no bill" vote does not mean that the target of an investigation is out of peril. Unlike a trial, there is no protection against "double jeopardy" in the Grand Jury proceeding. The Fifth Amendment privilege only protects those who have been exposed to

jeopardy, a situation that occurs in a non-jury trial when the first witness is sworn. In a jury trial, the protection is available when the judge swears the jury to service. If a prosecutor is unable to persuade a particular Grand Jury, she or he may choose to simply present the case to another panel on another day. The process inevitably rewards the patient prosecutor. It is therefore not surprising that many individuals who are investigated by a Grand Jury are subsequently charged with criminal acts. Sol Wachler, a former Chief Judge of the New York Court of Appeals, agreed with this sentiment, once famously opining that “a good prosecutor can indict a ham sandwich.”

Next week, we will unveil the secret inner workings of the federal Grand Jury.

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