

A Look Inside the Grand Jury Chamber

[The following is the second installment in a two-part series examining the role of the Grand Jury in the United States.]

Last week, we examined the structure of a federal Grand Jury. Today, we consider the mechanics of that body:

Most non-attorneys are stunned to learn that there is no judge present inside the Grand Jury Chamber. Since charges are not brought unless and until an indictment (“true bill”) is returned, there are no matters to be adjudged. As such, an assistant United States Attorney (“AUSA”) presents evidence to the Grand Jury by way of witnesses and documentary evidence. An instrument known as a subpoena (literally, “under penalty”) is prepared by the AUSA and issued by authority of the Grand Jury.

There are two varieties of subpoenae. The first commands the appearance of a person to provide live testimony. This is formally known as a subpoena *ad testificandum*. The other document, a subpoena *duces tecum*, requires the production of documents, *e.g.*, financial records, inventory ledgers, e-mails, etc. This command may be satisfied by producing the material in advance of the return date. Failure to comply with either device usually results in an application by the AUSA to a judge for a finding of civil contempt of court. Although not a crime, civil contempt can be an unpleasant experience. A judge may order the lawbreaker to be imprisoned until such time as (1) the individual complies with the subpoena, or (2) the expiration of the term of the sitting Grand Jury. In the latter instance, that could be a period of up to three (3) years. And even then, the AUSA can request the court to continue the incarceration for the term of the subsequently-emplanelled Grand Jury, another three (3) years.

An individual may attempt to resist compliance with a Grand Jury subpoena by making a “motion to quash.” To do this, the subpoenaed individual, through her or his attorney, appears before a federal judge and argues that the request is overly broad, unduly burdensome, or would impose significant hardship on the individual. If the court grants the motion, the subpoena will be declared null and void.

A testifying witness may not be accompanied by legal counsel inside the Grand Jury Chamber. Since a witness has not been indicted, the Grand Jury proceeding does not implicate the United States Constitution’s Sixth Amendment right to counsel. The attorney may wait in the hallway outside the Chamber. If the testifying witness wants to consult with counsel before answering a question, she or he may ask the AUSA for a break to do so. The witness then exits the Chamber and speaks with the attorney. This may happen as often as the witness perceives a need to do so. Moreover, the witness may invoke the Fifth Amendment privilege against self-incrimination rather than answer a particular question. If the individual cannot afford an attorney, she or he may request the court to appoint a federal public defender to represent the witness during the Grand Jury appearance.

Few individuals have ever witnessed a Grand Jury proceeding. Authorized attendees are limited to the Grand Jurors, the AUSA, witnesses, the court reporter and other essential court

personnel. Pursuant to Federal Rule of Criminal Procedure 6(e)(2)(B), matters occurring before the Grand Jury must be kept secret. Accordingly, all parties except the appearing witnesses swear an oath of secrecy. The penalty for violating the oath is criminal contempt, usually in the form of a fine, imprisonment, or both. Alternatively, the AUSA can charge the violator with obstruction of justice, a more Draconian punishment. The rationale underpinning Grand Jury secrecy is four-fold: (1) To prevent witness tampering by the subject of the investigation; (2) To encourage honest disclosure by testifying witnesses without fear of repercussion; (3) To decrease the likelihood of flight by the subject of the investigation; and (4) To protect the reputation of non-indicted individuals whose names surface during the investigation.

As a matter of common practice, the AUSA will advise Grand Jury witnesses not to reveal their testimony to the subject of the investigation. While the AUSA cannot prevent a witness from making such disclosure, testifying individuals often perceive a measure of coercion in the suggestion. The witness then has a significant decision to make: Refrain from disclosing the testimony, or reveal the information and thereby alert the subject. Some witnesses fear that disclosure would expose them to the risk of becoming the subject of an indictment themselves. The author of this article expresses no opinion as to the reality of such concern.

Skeptics may wonder why secrecy does not facilitate prosecutorial misconduct. Although the proceedings are secret, minutes are kept of every word uttered on the record in the Grand Jury Chamber. The minutes are kept under seal of confidentiality unless and until such time as an individual is indicted.

Federal courts have consistently held that the investigative power of a Grand Jury may not be used as a “stalking horse” to provide post-indictment evidence for the prosecution. Although an AUSA may request a Grand Jury to subpoena additional witnesses during the pendency of a criminal trial, the prosecutor may not unreasonably expand the scope of investigation as a substitute for independent fact finding.

The federal Grand Jury is a powerful entity in the search for truth. Greater understanding of the process can result in a less harrowing experience for both witnesses and subjects.

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