

# What You Should Know About Grand Juries

## What a Grand Jury Does

Grand juries are one of the good intentions paving the road to our current legal system. Unlike a trial jury, which decides whether a suspect is guilty, a grand jury merely decides whether there's probable cause to prosecute a suspect on felony charges. The goal was to create a filter to catch unjustified felony cases and stop them at an early stage, so that the suspect wouldn't be wrongfully prosecuted (and have to spend unnecessary time in jail and unnecessary money on lawyers).<sup>1</sup> But it all went very wrong.

Grand juries are generally composed of six to twenty-three members, depending on the jurisdiction. In the federal system and in most states, grand jurors serve for eighteen months and judge many different cases (but they usually meet just once a week or even once a month). At a grand jury hearing, the only official is the prosecutor—there's no judge and no defense attorney. The jurors sit there listening to witnesses and reviewing exhibits in a prospective or pending felony case, and then vote on whom to prosecute.<sup>2</sup> Once the grand jury decides there's probable cause, the prosecutor can issue an indictment (*in-dit'mənt*), a document specifying the felony charge(s) against a particular defendant.

The prosecutor selects all the witnesses and other materials, and then presents them to the grand jury. Defense attorneys aren't even allowed in same room as the grand jury, let alone permitted to put on defense witnesses, question the prosecution witnesses, or make any statements to the jurors. So grand juries nearly always just “rubber stamp” the cases brought before them. For example, in fiscal year 2000, federal grand juries voted to indict a total of 59,472 suspects<sup>3</sup> and chose not to indict 29 suspects<sup>4</sup>—only one out of every 2,000 suspects was left un-indicted. An additional factor in grand juries' unwholesome compliance with prosecutorial plans is the

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<sup>1</sup> Grand juries are mandated by the Fifth Amendment to the U.S. Constitution, which also includes protection against self-incrimination, the right to due process, and other eroded liberties.

<sup>2</sup> There are “special grand juries” that actively investigate crime or corruption, but these are rarely instituted, compared to regular grand juries.

<sup>3</sup> Sourcebook of criminal justice statistics Online, “Grand jury and grand juror utilization in U.S. District Courts,” Table 1.74, <http://www.albany.edu/sourcebook/1995/pdf/t174.pdf> (accessed October 16, 2003).

<sup>4</sup> Bureau of Justice Statistics, U.S. Department of Justice, Compendium of Federal Justice Statistics, 2000, “Basis for declination of prosecution by U.S. Attorneys,” Table 2.4, 30, <http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs0002.pdf> (accessed October 16, 2003).

frequent lack of diversity among the jurors. Occasionally—but not often enough—this is brought to light by a case challenging the constitutionality of a grand jury that doesn't reflect the demographics of its county or federal district.<sup>5</sup>

Some of the people who are called as witnesses at grand jury hearings are prosecuted afterward. If you're ordered to appear before a grand jury, immediately seek the advice of an attorney who has experience in grand jury matters. Unfortunately, as a grand jury witness, you're not entitled to a court-appointed attorney, even if you're low-income. Nonetheless, it's really important to get a lawyer: you don't want to gamble when the stakes are this high and the game is rigged.

## Being Served With a Subpoena

A subpoena<sup>6</sup> (*sə-pē'nə*) is an order requiring you to be present at a legal proceeding, such as a trial or a grand jury hearing. (See sample grand jury subpoena, included herein.) Usually you're summoned to testify, but sometimes you're required to bring documents or other items with you. A subpoena with an order that you bring something is a subpoena duces tecum (*dū'səs tā'koom*). If you don't appear when you're told (bringing any specified items), a judge can have you taken into custody and brought to the hearing from jail.

Once in a great while, a lawyer may be able to persuade a judge to “quash” a grand jury subpoena, but the subpoenas are nearly always upheld.

A subpoena must be served on you before you're bound by it. Normally, grand jury subpoenas are delivered to you, in person, by a law enforcement officer, who can come and find you at your home, work, school, etc.

## Appearing Before a Grand Jury

Although your lawyer can't accompany you into the grand jury room, she can usually wait outside the door, ready to advise you. And you can go get legal advice before answering each and every question. For example, a person can write down the first question as soon as it's asked, leave the room and talk to his lawyer, and then go back into the hearing room and give his response to that question. Then he would

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<sup>5</sup> Racially biased grand juries are sufficiently frequent and widespread that in 1977, the U.S. Supreme Court set forth specific grounds for determining whether a grand jury has been improperly composed (*Castaneda v. Partida*, 430 U.S. 482 (1977)).

<sup>6</sup> Subpoena is a Medieval Latin word combining *sub* (under) + *poena* (penalty); that is, “under penalty of law.”

listen to the next question, write it down, go out and talk to his lawyer, and come back to give his response. Then he would write down the third question, go talk to his lawyer, and so on....

Once you're in front of a grand jury, you can testify or you can "take the Fifth" (exercise your right to remain silent).

**Warning:** If you decide to testify, don't expect to get away with evading any of the questions or saying, "I can't remember" over and over. The person doing the questioning will be a prosecutor who's used to squeezing details out of reluctant witnesses. Remember that if you're caught lying under oath, you can be prosecuted for the crime of perjury. And don't imagine that your testimony might somehow help the person under investigation—remember that grand jurors issue indictments for over 99% of the suspects they review. This is not an opportunity to persuade or politicize the jurors.

If you take the Fifth, you won't have to say so more than a few times. Once you've exercised your right to remain silent in response to several questions, and it's clear that you're not going to give any further answers, you'll be excused. However, there's a hitch. Sometimes, the prosecutor grants immunity to a witness who's exercising her right to remain silent, to try to force her to testify. It doesn't matter whether or not you've requested immunity. The prosecutor or judge can just impose immunity on you—and then you're no longer entitled to the protection of the Fifth Amendment (because if you're immune, what you say can't be used against you).

However, there are two kinds of immunity. The good kind is called "transactional immunity" and it means that you can't be prosecuted for the incident(s) you testify about. The bad kind is "use immunity" and it means that the prosecutor can't use your own testimony against you—but he can use other people's testimony and evidence against you. So if the prosecutor makes a bunch of people testify, they'll likely end up providing enough evidence to convict each other, like a circular firing squad. Naturally, grand jury witnesses are almost always given use immunity, not transactional immunity.

If you refuse to testify after being granted immunity, you'll normally be held in contempt and locked up. Some people who've chosen not to comply have had to stay in custody until all the grand jury proceedings were ended<sup>7</sup> or the case was over. This can take months or even years.

## The Grand Jury as a Political Tool

Since their inception, both in England and in the United States, grand juries have been used against political

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<sup>7</sup> Typically, a grand jury serves for 18 months, and then a new set of jurors is chosen to take up where the old ones left off. You can be subpoenaed to appear before this new grand jury, and if you still refuse to testify, you can be jailed for contempt *again*.

dissidents, the jurors often being hand-picked to ensure indictment. A modern variation on this abuse of power relies on political activists' reluctance to turn informant. Activists are subpoenaed with the expectation that they will refuse to testify, and thus end up in jail for lengthy periods. The person who was subpoenaed is thereby immobilized, while other activists are deterred from further participation (because it's risky even to go to meetings or put your name on a phone list, since that might result in your being subpoenaed, too).<sup>8</sup>

An activist who's been subpoenaed by a grand jury needs and deserves community support. She or he must either betray friends or acquaintances, or face imprisonment. One subpoenaed activist framed it this way:

Temptations to communicate with those who are after us, hesitations about appearing overly militant and thus closing some doors which might otherwise remain open, begin to disappear. One principle takes precedent in all these situations: don't talk. Tell them nothing for it will all be used against you and your brothers and sisters. Don't talk—but what tactics should we use in facing the Grand Jury investigating the demonstrations at the Democratic national convention in 1968? We were reasonably sure that we would not face eventual indictment, for Grand Juries do not customarily subpoena those they are considering for indictment. But we were worried that the most casual admission of the most innocent sounding fact would come up in court a month later as one piece in a pattern which spelled out inter-state conspiracy to riot.

[Witness before grand jury]: "Yes, I had dinner at some point in the last year with Mr. Davis."

[Prosecutor at trial]: "Ladies and Gentlemen of the jury, I will seek to prove that Mr. Davis, did informally and covertly meet with instigators of disruption in Boston, New York, Chicago, and other cities in the months preceding . . ."<sup>9</sup>

It's unnecessary for a subpoenaed activist to make a hasty decision or to deal with the matter in isolation. There's time to consult friends and lawyers. In particular, those activists who've been subpoenaed by the same grand jury should meet and discuss what each of them intends to do...because that decision has to be lived with for the rest of one's life.

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<sup>8</sup> For a comprehensive, yet stirring, article on the history and corruption of grand juries, see Michael Deutsch, *The Improper Use of the Federal Grand Jury: An Instrument for the Internment of Political Activists*, 75 *Journal of Criminal Law & Criminology* 1159 (1984). This article is also on the Just Cause Law Collective website: <http://www.lawcollective.org/>.

<sup>9</sup> Kathy Boudin *et al.*, *The Bust Book: What to Do Till the Lawyer Comes*, rev. ed. (New York: Grove, 1969), 99–100.

## United States District Court

Eastern

DISTRICT OF

South Virginia

TO: Christine Smith

### SUBPOENA TO TESTIFY BEFORE GRAND JURY

SUBPOENA FOR:



PERSON



DOCUMENT(S) OR OBJECT(S)

YOU ARE COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

<p>PLACE</p> <p style="text-align: center;">UNITED STATE DISTRICT COURT 401 Courthouse Square Iskandaria, South Virginia 20500</p>	<p>COURTROOM</p> <p style="text-align: center;">GRAND JURY ROOM</p> <hr/> <p>DATE AND TIME</p> <p style="text-align: center;">4/1/03 9:30 A.M.</p>
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YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

See attachment.

Please see additional information on reverse

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

<p>MAGISTRATE JUDGE OR CLERK OF COURT</p> <p style="text-align: center;">BARTLEBY T. SCRIVENER, CLERK OF THE COURT</p> <p>(By) Deputy Clerk <i>B. T. Scrivener</i></p>	<p>DATE</p> <p style="text-align: center;">March 15, 2003</p>
<p>This subpoena is issued on application of the United States of America</p> <p style="text-align: center;">I. JAVERT UNITED STATES ATTORNEY</p>	<p>ATTORNEY'S NAME, ADDRESS and PHONE NUMBER</p> <p style="text-align: center;">I. JAVERT 400 Courthouse Square Iskandaria, South Virginia 20500 (202) 456-1111</p>

ATTACHMENT

You are hereby required to bring with you and produce the following documents and things referring or relating to protest activities or preparation for protest activities on March 20 and 21, 2003. These documents and things should include, but not be limited to, the following:

1. Any and all hardcopy or electronic letters, notes, email, or other correspondence referring or relating to protest activities or preparation for protest activities on March 20 and 21, 2003.
2. Any and all photographs, videotapes, audiotapes, voice messages, or other recordings referring or relating to protest activities or preparation for protest activities on March 20 and 21, 2003.
3. Any and all hardcopy or electronic diaries, journals, calendars, appointment books, address books, or address lists used at any time after January 1, 2002.
4. Any and all agendas, notes, or attendance lists from meetings referring or relating to protest activities or preparation for protest activities on March 20 and 21, 2003.
5. Any and all organizational staff lists, membership lists, mailing lists, email lists, telephone trees, or schedules used at any time after January 1, 2002.
6. Any and all personal or organizational budgets, financial records, bank statements, credit card bills, receipts, pay stubs, or records of donations after January 1, 2002.
7. Any and all fundraising letters or other correspondence relating to fundraising, grant applications or grants, or lists of individual or institutional donors after January 1, 2002.
8. Any and all posters, handbooks, handouts, leaflets, postcards, or other printed material referring or relating to protest activities or preparation for protest activities on March 20 and 21, 2003.
9. Any and all banners, signs, armbands, costumes, masks, puppets, or other props relating to protest activities or preparation for protest activities on March 20 and 21, 2003.