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The Federal Grand Jury

Updated July 3, 2025

Congressional Research Service
https://crsreports.congress.gov
95-1135

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

The federal grand jury exists to investigate crimes against the United States and to preserve the constitutional right of grand jury indictment. Its responsibilities require broad powers.

As an arm of the U.S. 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.

As a general rule, 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.

The grand jury conducts its business in secret. Those who attend its sessions other than witnesses may disclose its secrets only when a court determines the interests of justice permit.

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 concurrence of the attorney for the government is required for the trial of any indictment voted by the grand jury. In the absence of such an endorsement or when a panel seeks to issue a report, the court enjoys narrowly exercised discretion to dictate expungement or permit distribution of the report.

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Introduction

"The grand jury [has] a unique role in our criminal justice system."[1] It was born of a desire to identify more criminals for prosecution and thereby to increase the King's revenues. With the exclusive power to accuse also comes the power not to accuse, and early on the grand jury became both the "sword and the shield of justice."[2]

This dual character marks the federal grand jury to this day. As the sword of justice, it enjoys virtually unfettered power to secretly investigate the mere possibility that federal laws may have been broken. Yet it remains a potential shield for it must give its approval before anyone may be brought to trial unwillingly for a serious federal crime.[3]

What follows is a brief general description of the law relating to the federal grand jury, with particular emphasis on its more controversial aspects—relationship of the prosecutor and the grand jury, the rights of grand jury witnesses, grand jury secrecy, and rights of the targets of a grand jury investigation.

[1] United States v. R. Enters., Inc., 498 U.S. 292, 297 (1991).

[2] United States v. Cox, 342 F.2d 167, 186 n.1 (5th Cir. 1965) (Wisdom, J., concurring) (quoting AMERICAN BAR ASSOCIATION, FEDERAL GRAND JURY HANDBOOK 8 (1959), *reprinted in Federal Grand Jury: Hearings Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 94th Cong. 277, 283 (1976))).

[3] "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.... " U.S. CONST. amend. V. A defendant is free to waive grand jury indictment for any crime that does not carry the death penalty; and the government may prosecute misdemeanors and other minor federal crimes by either by indictment or by information, FED. R. CRIM. P. 7; United States v. Cotton, 535 U.S. 625, 630 (2002).

Background

The grand jury is an institution of antiquity that dates back to the twelfth century. When William the Conqueror sought to compile the Domesday Book, he called upon the most respected men of each community. Their reports were collected to form an inventory of England's property, real and personal, and served as the foundation of the Crown's tax rolls.[4]

Almost a century later in the Assize of Clarendon, the ancestor of the modern grand jury, Henry II used the same approach to unearth reports of crime,[5] and thereby increase the flow of fines and forfeitures into his treasury.[6]

From the power to accuse, the power to refuse to accuse (i.e., to protect) eventually developed. By the American colonial period, the grand jury had become both an accuser and a protector. It was this protector the Founders saw when they enshrined the grand jury within the Bill of Rights[7] and the reason it has been afforded extraordinary inquisitorial powers and exceptional deference.[8]

[4] William Searle Holdsworth, 2 HISTORY OF ENGLISH LAW, 158-61 (1903).

[5] Most commentators, after making reference to earlier similar institutions in ancient Greece, Rome, Scandinavia, Normandy and/or among the Saxons, trace the emergence of the modern grand jury to the issuance of the Assize of Clarendon by Henry II in 1166, 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 251–52 (1883); 1 WILLIAM SEARLE HOLDSWORTH, HISTORY OF ENGLISH LAW 147–48 (1903); WILLIAM STUBBS, SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY 143 (1888); 2 FREDERICK POLLACK & FREDERIC WILLIAM MAITLAND, HISTORY OF ENGLISH LAW 642 (1923); THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 112 (1956); Helene E. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701, 703 (1972); Leonard B. Boudin, *The Federal Grand Jury*, 61 GEO. L. J. 1 (1972); Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1, 5–6 (1996).

In the Assize of Clarendon and the later Assize of Northampton (1176), "twelve knights of the hundred or, if there are no knights, ... twelve free and lawful men, ... and ... four men from each township of the hundred" were assembled and "by their oath" identified from their own knowledge those reputed to have committed crimes. PLUCKNETT, *supra* note 4, at 112; 3 STEPHEN, *supra* note 4, at 251; 1 HOLDSWORTH, *supra* note 4, at 147.

"Assize" refers to "[a] session of a court or council." *Assize*, BLACK'S LAW DICTIONARY (12th ed. 2024). In the Assize of Clarendon and the later Assize of Northampton (1176), "twelve knights of the hundred or, if there are no knights, ... twelve free and lawful men, ... and ... four men from each township of the hundred" were assembled and "by their oath" identified from their own knowledge those reputed to have committed crimes. PLUCKNETT, *supra* note 4, at 112; 1 STEPHEN, *supra* note 4, at 251; 1 HOLDSWORTH, *supra* note 4, at 147.

[6] PLUCKNETT, *supra* note 4, at 112. At common law, anyone convicted and "attained" for treason or felony forfeited all his land and goods to the Crown, 4 WILLIAM BLACKSTONE, COMMENTARIES 376–81; 1 MATTHEW HALE, HISTORY OF PLEAS OF THE CROWN 354–67 (1778 ed.).

[7] United States v. Caruto, 663 F.3d. 394, 398 (9th Cir. 2011) (quoting Wood v. Georgia, 370 U.S. 375, 390 (1962)) ("Historically, [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, ... to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.") (alterations in original) (quoting United States v. Marcucci, 299 F.3d 1156, 1161 (9th Cir. 2002) (per curiam))); *see also* Henderson v. Dep't of Vet. Aff., 878 F.3d 1044, 1048 (Fed. Cir. 2017).

[8] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1779, at 658 (1833 ed.); United States v. Williams, 504 U.S. 36, 47–48 (1992) ("In fact the whole theory of [the grand jury's] function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people.").

The Fifth Amendment right to grand jury indictment is only constitutionally required in federal cases.[9] In a majority of the states, prosecution may begin either with an indictment or with an information or complaint filed by the prosecutor.[10]

Although abolition of the right to indictment in many U.S. states and abolition of the grand jury itself in England were primarily matters of judicial efficiency,[11] most of the more contemporary proposals to change the federal grand jury system are the product of concern for the fairness of the process or for perceived excesses attributed to prosecutorial manipulation or exuberance.[12]

[9] The Fifth Amendment right to grand jury indictment is not binding upon the states, Hurtado v. California, 110 U.S. 516 (1884); Romansky v. Superintendent Greene SCI, 933 F.3d 293, 297–98 (3d Cir. 2019); Ashburn v. Korte, 761 F.3d 741, 758 (7th Cir. 2014); Stevenson v. City of Seat Pleasant, 743 F.3d 411, 418 n.4 (4th Cir. 2014); Peterson v. California, 604 F.3d 1166, 1170 (9th Cir. 2010); Goodrich v. Hall, 448 F.3d 45, 49 (1st Cir. 2006); Williams v. Haviland, 467 F.3d 527, 531 (6th Cir. 2006); LanFranco v. Murray, 313 F.3d 112, 118 (2d Cir. 2002); Freeman v. City of Dallas, 242 F.3d 642, 667 (5th Cir. 2001) (en banc); Cooksey v. Delo, 94 F.3d 1214, 1217 (8th Cir. 1996); Minner v. Kerby, 30 F.3d 1311, 1318 (10th Cir. 1994); *cf*. Rose v. Mitchell, 443 U.S. 545, 557 n.7 (1979); *see also* Andrew E. Taslitz & Stephen E. Henderson, *Reforming the Grand Jury to Protect Privacy in Third Party Records*, 64 AM. U. L. REV. 195, 229 (2014) ("[T]he grand jury right is the *only* criminal procedure provision in the Bill of Rights that has been held not to apply as against the states.") (emphasis in the original) (citing McDonald v. City of Chicago, 561 U.S. 742, 764–65 nn.12, 13 (2010)); Roger A. Fairfax, *Interrogating the Nonincorporation of the Grand Jury Clause*, 43 CARDOZO L. REV. 855 (2022); *Incorporation, Fundamental Rights, and the Grand Jury*: Hurtado v. California *Reconsidered*, 108 VA. L. REV. 1613 (2022).

[10] ARIZ. CONST. art. II, § 30; Ariz. R. Crim. P. 2.1, 2.2; ARK. CONST. art. 2, § 8; CAL. CONST. art. I, § 14, CAL. PENAL CODE § 737 (2025); COLO. CONST. art. II, § 8, COLO. REV. STAT. § 16-5-101 (2025); CONN. GEN. STAT. 54-45, 54-46 (2025); FLA. CONST. art. I, § 15; HAWAII CONST. art. I, § 10; HAW. REV. STAT. ANN. § 801-1 (2025); IDAHO CONST. art. I, § 8; ILL. CONST. art. I, § 7, 725 ILL. COMP. STAT. ANN. § 5/111-2 (West 2025); IND. STAT. ANN. § 35-34-1-1 (2024); KAN. STAT. ANN. § 22-3201(2025); LA. CONST. art. I, § 15; MD. CONST. DECL. OF RTS. art. 21, MD. ANN. CODE, CRIM. PROC. § 4-102 (West 2025); MICH. COMP. LAWS § 767.1 (2025); MINN. R. CRIM. P. 17.01; MO. CONST. art. I, § 17; MONT. CONST. art. II, § 20, MONT. CODE ANN. § 46-11-101 (2025); NEB. CONST. BILL OF RTS. § 10; NEB. REV. STAT. § 29-1601 (2025); NEV. CONST. art. I, § 8; N.M. CONST. art. II, § 14; N.D. R. Crim. P. 7; OKLA. CONST. art. II, § 17; OR. CONST. art. VII, § 5; R.I. CONST. art. I, § 7; S.D. CONST. art. VI, § 10; S.D. CODE ANN. § 23A-6-1 (2024); UTAH CONST. art. I, § 13; Vt. R. Crim. P. 7; WASH. CONST. art. I, § 25; WASH. REV. CODE § 10.37.015 (2025); WIS. STAT. § 967.05 (2025); WYO. CONST. art. I, § 13, Wyo. R. Crim. P. 3.

Several states continue to recognize a right to grand jury indictment in felony cases, *e.g.*, ALASKA CONST. art. I, § 8; DEL. CONST. art. I, § 8; KY. BILL OF RTS. § 12; ME. CONST. art. I, § 7; MASS. GEN. LAWS ch. 263, § 4 (2024); MISS. CONST. art. III, § 27; N.H. REV. STAT. ANN. § 601:1 (2025); N.Y. CONST. art. I, § 6; N.C. CONST. art. I, § 22; OHIO CONST. art. I, § 10; PA. CONST. art. I, § 10; S.C. CONST. art. I, § 11; TENN. CONST. art. I, § 14; TEX. CONST. art. I, § 10; VA. CODE ANN. § 19.2-217 (2024). And a few others require it in cases punishable by death or life imprisonment, ALA. CONST. art. I, § 8; CONN. GEN. STAT. § 54-45 (offenses punishable by death or life imprisonment committed prior to May 26, 1983); FLA. CONST. art. I, § 15; LA. CONST. art. I, § 15; Minn. R. Crim. P. § 17.01; R.I. CONST. art. I. § 7.

[11] "The obituary of the English grand jury might well read: 'Born in 1166 to increase accusations of crime, lived to be termed the palladium of justice, and died in 1933 of inutility on a wave of economy.'" Nathan T. Elliff, *Notes on the Abolition of the English Grand Jury*, 29 J. CRIM. L. & CRIMINOLOGY 3 (1938).

[12] Maris Medina, *From Bulwark to Puppet: A Call to Democratize the Archaic Grand Jury*, 29 PUB. LINT, L. REP. 292 (2024); Brett Raffish, *Making the Fourth Amendment "Real" in Grand Jury Proceedings*, 19 GEO. J. L. & PUB. POL'Y 529 (2021); Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury's Shield*, 98 J. CRIM. & CRIMINOLOGY 1171 (2008); Niki Kuckes, *the Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1 (2004); Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System*, 82 B. U. L. REV. 1 (2002); Susan W. Brenner, *Is the Grand Jury Worth Keeping?* 81 JUDICATURE 190 (1998); Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260 (1995); Anne Bowen Poulin, *Supervision of the Grand Jury: Who Watches the Guardian?*, 68 WASH. U. L. Q. 885, 927 (1990); Richard L. Braun, *The Grand Jury—Spirit of the Community?*, 15 ARIZ. L. REV. 893, 915 (1973); Schwartz, *supra* note 4, at 770; *contra*, Melvin P. Antell, *Modern Grand Jury: Benighted Supergovernment*, 51 ABA J. 153, 154 (1965); William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174 (1973).

Organizational Matters

Jurisdiction

The federal grand jury enjoys sweeping authority, but it is limited to the investigation of possible violations of federal criminal law triable in the district in which it is sitting.[13] The grand jury does not have the power to investigate conduct known to have no connection to the court's jurisdiction, but it may inquire whether such a connection exists.[14]

The grand jury 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 "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not,""[15] and its inquiries "may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors."[16]

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,"[17] the grand jury's "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."[18]

Selection

The various United States district courts each summon one or more grand jury panels.[19] In addition, the Attorney General may request the district court to summon a special grand jury in any of the larger districts or when he or she believes the level of criminal activity in the district warrants it.[20]

Originally under the English tradition the sheriff selected the members of the grand jury.[21] The practice of having the sheriff of the county select the members of the grand jury continued for some time in England and in colonial America, although grand jurors were elected in some

[13] *Cf.* United States v. Cessa, 856 F.3d 370, 372 (5th Cir. 2017) ("[A] grand jury should return an indictment only in a district where venue lies."); United States v. Brown, 49 F.3d 1162, 1168 (6th Cir. 1995); Brown v. United States, 245 F.2d 549, 554–55 (8th Cir. 1957); *see also* 1 SUSAN W. BRENNER & LORI E. SHAW, FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE § 3.2 (2d ed. 2006 & 2014 Supp.) (noting that the jurisdiction of the court with which the grand jury is associated includes both territorial and extraterritorial jurisdiction).

[14] Blair v. United States, 250 U.S. 273, 283 (1919); *Brown*, 49 F.3d at 1168; *In re* Marc Rich & Co., 707 F.2d 663, 667 (2d Cir. 1983); United States v. Neff, 212 F.2d 297, 301–02 (3d Cir. 1954).

[15] United States v. Williams, 504 U.S. 36, 48 (1992) (quoting United States v. R. Enterprises, Inc., 498 U.S. 292, 297 (1991) and United States v. Morton Salt Co., 338 U.S. 632, 642–43 (1950)); *In re* Grand Jury Proceeding, 971 F.3d 40, 54 (2d Cir. 2020); United States v. Erickson, 561 F.3d 1150, 1161 (10th Cir. 2009); *In re* Grand Jury, 478 F.3d 581, 584 (4th Cir. 2007).

[16] Branzburg v. Hayes, 408 U.S. 665, 701 (1972); *In re* Grand Jury Subpoena, 597 F.3d 189, 196 (4th Cir. 2010); United States v. York, 428 F.3d 1325, 1332 (11th Cir. 2005).

[17] *Blair*, 250 U.S. at 282.

[18] *Branzburg*, 408 U.S. at 701; *see also R. Enters., Inc.*, 498 U.S. at 297 (The grand jury may "inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred"); *In re Grand Jury*, 478 F.3d at 584.

[19] FED. R. CRIM. P. 6(a)(1).

[20] 18 U.S.C. § 3331. Special grand juries are distinctive in that they may serve for longer terms than a regular grand jury and have explicit reporting authority, *id.* §§ 3331–3334.

[21] 1 HOLDSWORTH, *supra* note 4, at 148; 2 HALE, *supra* note 5, at 154.

colonies.[22] At one time, federal law addressed matters governing the selection, qualifications and exemptions of federal grand jurors largely by reference to the law of the state in which the grand jury was to be convened.[23] These matters are now the responsibility of the court, governed by the Jury Selection and Service Act of 1968,[24] and the selection plan established for the district in which the grand jury is to be convened.

Federal grand jurors must be citizens of the United States; be eighteen years of age or older; be 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. [25] Those facing pending felony charges and those convicted of a felony (if their civil rights have not been restored) are ineligible.[26]

Discrimination in selection on the basis of race, color, religion, sex, national origin, or economic status is prohibited.[27] Grand jurors must be "selected at random from a fair cross section of the community in the district or division wherein the court convenes."[28] Either a defendant, an attorney for the government, or a member of an improperly excluded group may challenge the selection of a grand jury panel contrary to these requirements.[29]

Since the grand jury began with indictments based upon the personal knowledge of the members of the panel, there is some historical justification for the position that bias or want of impartiality should not disqualify a potential grand juror. The drafters of the Federal Rules of Criminal Procedure seemed to confirm this view when they rejected proposed language permitting a challenge of the grand jury based on "bias or prejudice."[30] The case law seems to focus on any

[22] RICHARD D. YOUNGER, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES 1634–1941, at 5–26 (1963); JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664–1776), at 333–34 n.29 (1970); BOOK OF GENERAL LAWS AND LIBERTYES CONCERNING THE INHABITANTS OF THE MASSACHUSETTS 47 (1660).

[23] 1 Stat. 88 (1789); 2 Stat. 82 (1800); 5 Stat. 394 (1840); 21 Stat. 43 (1879); 36 Stat. 1164 (1911); 28 U.S.C. §§ 411, 412 (1946 ed.).

[24] 28 U.S.C. §§ 1861–1869.

[25] *Id.* § 1865.

[26] *Id.*

[27] *Id.* § 1862; United States v. Savage, 970 F.3d 217, 259 n.40 (3d Cir. 2020).

[28] 28 U.S.C. § 1861. At least one commentator has criticized this "cross-section," Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2379 (2008) ("In a society that is far more heavily populated and much more diverse, we ask too much from a grand jury that is culled from an entire county or judicial district. The representation of each community in such a grand jury is diluted to the point that the grand jury is effectively homogenized.").

[29] 28 U.S.C. § 1867; FED. R. CRIM. P. 6(b); Carter v. Jury Comm'n of Greene County, 396 U.S. 320 (1970); Turner v. Fouche, 396 U.S. 346 (1970); Duren v. Missouri, 439 U.S. 357, 364 (1979); United States v. Johnson, 95 F.4th 404, 410–11 (6th Cir. 2024) (To make a prima facie showing that the fair cross section requirement has been violated, "a defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process") (quoting Duren v. Missouri, 439 U.S. 357, 364 (1979)); *see also* United States v. Slaughter, 110 F.4th 569, 578–79 (2d Cir. 2024); United States v. Hernandez-Estrada, 749 F.3d 1154, 1159 (9th Cir. 2014); United States v. Kamahele, 748 F.3d 984, 1123 (10th Cir. 2014).

[30] "A preliminary draft of Rule 6(b) would have permitted challenge of grand jurors on the grounds of bias, but the provision was not included in the final draft, apparently on the view that the grand jury should be scrupulously fair but not necessarily uninformed." 1 WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE: CRIMINAL § 103 (5th ed. 2025) (citing United States v. Waldbaum, Inc., 593 F. Supp. 967, 969 (E.D. N.Y. 1984) and United States v. Partin, 320 F. Supp. 275, 282 (E.D. La. 1970)).

contamination of the panel as a whole and to rely upon each grand juror's faithfulness to his or her oath to avoid the adverse consequences of individual bias.[31]

Federal grand jury panels consist of sixteen to twenty-three members,[32] sixteen of whom must be present for a quorum,[33] and twelve of whom must concur to indict.[34] The size of grand jury panels is a remnant of the common law,[35] but the common law treatises and the cases provide little indication of why those particular numbers were chosen.[36] Of course, when the grand jury's accusations were based primarily upon the prior knowledge of the panel's members, larger panels were more understandable.

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[31] In the oath commonly used, grand jurors swear "not to present or indict any persons through hatred, malice nor ill will; nor leave any person unpresented or unindicted through fear, favor, or affection, nor for any reward, or hope or promise thereof.... " SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 4:4 (2024) (reprinting the text of the federal model jury oath); *see e.g.*, United States v. Ziesman, 409 F.3d 941, 949 (8th Cir. 2005) (quoting Costello v. United States, 350 U.S. 359, 363 (1956)) ("[I]t cannot be assumed that grand jurors will violate their oath 'to indict no one because of prejudice solely because an individual has lied to them on a matter material to the grand jury's investigation.'").

[32] FED. R. CRIM. P. 6(a); 18 U.S.C. § 3321.

[33] The statements in 18 U.S.C. § 3321 and Federal Rule of Criminal Procedure 6(a) that federal grand juries shall consist of sixteen to twenty-three members has apparently led to the conclusion that after a panel is convened it is in session only if sixteen or more of its members are present, 1 SUSAN W. BRENNER & LORI E. SHAW, FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE, § 5:17 (2d ed. 2006 & 2014 Supp.); DOJ, 1 FEDERAL GRAND JURY PRACTICE MANUAL 5 (1983); United States v. Leverage Funding Sys., Inc., 637 F.2d 645, 648 (9th Cir. 1980). But for this deeply held view which neither Congress nor the Court has sought to change, an argument might be made for a quorum of twelve, the number required for indictment. Otherwise, it might be argued that dissenting panel members, unable to prevent indictment by their votes, might do so by their absence or departure.

[34] FED. R. CRIM. P. 6(f).

[35] "The sheriff of every county [was] bound to return to every session of the peace, and every commission of oyer and terminer, and of general gaol delivery, twenty-four good and lawful men of the county, some out of every hundred, to inquire, present, do, and execute all those things, which on the part of our lord the king shall then and there be commanded of them.... As many as appear upon this panel are sworn upon the grand jury, to the amount of twelve at least, and not more than twenty-three.... " 4 WILLIAM BLACKSTONE, *supra* note 5, at 276; 1 HALE, *supra* note 5, at 161.

[36] The Supreme Court has referred to "Lord Coke's explanation that the number of twelve is much respected in holy writ, as 12 apostles, 12 stones, 12 tribes, etc." in an effort to explain why the number twelve was chosen for the size of the petit jury, Williams v. Florida, 399 U.S. 78, 81 (1970). Blackstone alludes to the importance of concurrence of twelve grand jurors in the indictment, "for so tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the king of any capital offense, unless by the unanimous voice of twenty-four of his equals and neighbors: that is, by twelve at least of the grand jury ... and afterwards, by the whole petit jury, of twelve more," 4 BLACKSTONE, *supra* note 5, at 279. This, in turn he finds to explain the maximum size of the grand jury panel, "As many as appear upon this panel are sworn upon the grand jury, to the amount of twelve at least, but not more than twenty-three; *that twelve may be a majority*." *Id.* at 276 (emphasis added). Blackstone's view is reflected in some of the earlier cases, e.g., United States v. Williams, 28 F. Cas. 666, 670 (C.C.D. Minn. 1871) ("By the act of congress of March 3, 1865 (13 Stat. 500), it is provided that grand juries in the courts of the United States 'shall consist of not less than sixteen and not exceeding twenty-three persons, * * * and that no indictment shall be found without the concurrence of at least twelve grand jurors.' The earlier authorities show that the accusing body now called the grand jury originally consisted of twelve persons, and all were required to concur. The number was subsequently enlarged to twenty-three, which was the maximum. Undoubtedly one reason why both at common law and by act of congress more jurors are required to be summoned, and by the act of congress to be impaneled than are necessary to find a bill, is to prevent, on the one hand, the course of justice from being defeated if the accused should have one or more friends on the jury; and on the other hand, the better to protect persons against the influence of unfriendly jurors on the panel." (citation omitted) (quoting Act Regulating Proceedings in Criminal Cases and for Other Purpose, ch. 86, § 1, 13 Stat. 500, 500 (1865)). *See* Iowa v. Ostrander, 18 Iowa 435, 443 (1865) "The requiring of twenty-three to be summoned, though we have found no reasons stated in the books, was probably in order to make sure of obtaining a full jury of twelve; possibly to be sure of having a few over, so that if the accused should have a friend or two upon the panel, the course of justice might not be defeated; possibly to prevent a dissolution of the jury by the death or sickness or absence of one or more of the jurors, or it may be for all of these reasons combined.").

The movement, which led to abolition of the right to indictment in many of the states, also resulted in a reduction in the size of most state grand jury panels.[37] Perhaps because of a reluctance to dilute the federal constitutional right to indictment, there have been few suggestions for a comparable reduction in the size of the federal grand jury.[38]

The selection of twenty-three members for a panel which requires only the presence of sixteen to conduct its business would seem to obviate the need for alternate grand jurors. This is not the case, however, and the rules permit the court to direct the selection of alternate grand jurors at the same time and in the same manner as other members of the panel are selected.[39]

Tenure

After selection, the court swears in members of the grand jury;[40] names a "foreperson and deputy foreperson,"[41] and instructs the panel.[42] Federal grand juries sit until discharged by the court, but generally for no longer than eighteen months, with the possibility of a six-month extension.[43] Special grand juries convened in large districts or in districts with severe crime problems also serve until discharged or up to eighteen months, but may be extended up to thirty-six months and in some cases beyond.[44]

[37] *See* SARA SUN BEALE ET AL., *supra* note 30, § 4:8 n.8 for a survey of state provisions, only a half dozen of which reduce the size of grand jury panels below twelve.

[38] One of the few to do so recommended reduction to panels of seven, nine or eleven, with the concurrence of seven required for indictment. Thomas P. Sullivan & Robert D. Nachman, *If It Ain't Broke, Don't Fix It: Why the Grand Jury's Accusatory Function Should Not Be Changed*, 75 J. CRIM. L. & CRIMINOLOGY 1047, 1068–69 (1984).

[39] FED. R. CRIM. P. 6(a)(2).

[40] Hale v. Henkel, 201 U.S. 43, 60 (1906), *overruled by* Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52 (1964).

[41] FED. R. CRIM. P. 6(c).

[42] Although there is no requirement that the court charge (i.e., instruct) the grand jury, it is a practice of long standing, Charge to the Grand Jury, 30 F. Cas. 992 (No. 18,255) (C.C.D. Cal. 1872) (Field, J.); SARA SUN BEALE ET AL., *supra* note 30, § 4:5 (model grand jury charge); United States v. Navarro-Vargas, 408 F.3d 1184, 1208 (9th Cir. 2005) (en banc) (upholding the constitutionality of the model charge); United States v. Knight, 490 F.3d 1268, 1272 (11th Cir. 2007) (same).

[43] FED. R. CRIM. P. 6(g).

[44] 18 U.S.C. §§ 3331, 3333.

Proceedings Before the Grand Jury

Grand Jury and the Prosecutor

The grand jury does not conduct its business in open court, nor does a federal judge preside over its proceedings.[45] The grand jury meets behind closed doors with only the jurors, the attorney for the government, witnesses, someone to record testimony, and possibly an interpreter, present.[46]

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

Originally, the grand jury brought criminal accusations based exclusively on the prior knowledge of its members. Today, the grand jury acts on the basis of evidence presented by witnesses called for that purpose and only rarely on the personal knowledge of individual jurors.[47]

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.[48] The grand jury most often turns to the prosecutor for legal advice[49] and to draft most of the indictments, which the grand jury returns.[50]

Subpoenas

Grand jury witnesses usually appear before the grand jury under subpoena.[51] The rule calls for subpoenas to be available in blank for the "parties" to proceedings before the court, but "no one is

[45] United States v. Williams, 504 U.S. 36, 47 (1992) ("Although the grand jury normally operates, of course, in the courthouse and under judicial auspices, its institutional relationship with the Judicial Branch has traditionally been, so to speak, at arm's length. Judges' direct involvement in the functioning of the grand jury has generally been confined to the constitutive one of calling the grand jurors together and administering their oaths of office."); United States v. Navarro, 608 F.3d 529, 536 (9th Cir. 2010) ("Grand juries operate secretly. All the judge does, unless a motion comes to him, is swear in and charge the grand jury before it begins its work, and days, weeks, or months later, receive the indictments it hands down. A district judge does not preside in or even enter the grand jury room. The only contact the grand jurors have with the court is the charge the judge gives before they begin, and the use of a room in the courthouse" (footnotes omitted)); *In re* Grand Jury Proceedings, 142 F.3d 1416, 1425 (11th Cir. 1998); *In re* Grand Jury Proceedings, 241 F.3d 308, 312 (3d Cir. 2001).

[46] At one time, only members of the grand jury could be present when the panel was deliberating or voting, FED. R. CRIM. P. 6(d) (18 U.S.C. App. (1994 ed.)). The rule has been changed to permit the presence during deliberations and voting of interpreters assigned to assist hearing or speech impaired jurors, FED. R. CRIM. P. 6(d).

[47] United States v. Zarattini, 552 F.2d 753, 756 (7th Cir. 1977); *In re* April 1956 Term Grand Jury, 239 F.2d 263, 268-69 (7th Cir. 1956).

[48] United States v. Merrill, 685 F.3d 1002, 1013 (11th Cir. 2012); Lopez v. DOJ, 393 F.3d 1345, 1349 (D.C. Cir. 2005); United States v. Wadlington, 233 F.3d 1067, 1075 (8th Cir. 2000).

[49] United States v. Wahib, 578 F. Supp. 3d 951, 957 ("As legal advisor to the grand jury, the prosecutor must give the grand jury sufficient information concerning the relevant law to enable it intelligently to decide whether a crime has been committed.").

[50] United States v. Sigma Int'l, Inc., 196 F.3d 1314, 1323 (11th Cir. 1999), *vacated on other grounds*, 251 F.3d 1358 (11th Cir. 2001) ("A prosecutor's job is to present evidence of criminal activity to a grand jury. In so doing, the prosecutor may also explain why a piece of evidence is legally significant ... ").

[51] A subpoena is an order of the court demanding that an individual appear at one of its proceedings and produce evidence on a matter then under consideration. There are two kinds of subpoenas—subpoenas ad testificandum and subpoenas duces tecum. The first is simply a command to appear and testify; the second not only demands the witness's presence at a certain time and place but also requires him to bring certain evidence with him. Federal law (continued...)

meaningfully a party in a grand jury proceeding."[52] Nevertheless, there seems little question that subpoenas may be issued and served at the request of the panel itself,[53] although the attorney for the government usually "fills in the blanks" on a grand jury subpoena and arranges the case to be presented to the grand jury.[54] Unjustified failure to comply with a grand jury subpoena may result

with regard to subpoenas in criminal cases is governed in large measure by Rule 17 of the Federal Rules of Criminal Procedure:

> A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command the witness to attend and testify at the time and place the subpoena specifies. The clerk must issue a blank subpoena—signed and sealed—to the party requesting it, and that party must fill in the blanks before the subpoena is served.
>
> * * *
>
> The court (other than a magistrate judge) may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by a federal court in that district. A magistrate judge may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by that magistrate judge as provided in 28 U.S.C. § 636(e). FED. R. CRIM. P. 17(a), (g).

[52] *In re* Snoonian, 502 F.2d 110, 112 (1st Cir. 1974).

[53] United States v. Calandra, 414 U.S. 338, 343 (1974) ("The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate ... "); *cf.* United States v. Williams, 504 U.S. 36, 48–49 (1992).

[54] United States v. Thomas, 736 F.3d 54, 61 n.10 (1st Cir. 2013); Lopez v. DOJ, 393 F.3d 1345, 1349 (D.C. Cir. 2005) ("[T]he term 'grand jury subpoena' is in some respects a misnomer, because the grand jury itself does not decide whether to issue the subpoena; the prosecuting attorney does."); Coronado v. Bank Atlantic Bancorp, Inc., 222 F.3d 1315, 1320 (11th Cir. 2000); *In re* Grand Jury Proceeding, 752 F. Supp. 2d 173, 177 (D. P.R. 2010) ("Although grand jury subpoenas are issued in the name of the district court, they are issued in blank ... [and] are in fact almost universally instrumentalities of the United States Attorney's office" (alterations in original) (quoting *In re* Grand Jury Matters, 751 F.2d 13, 16 (1st Cir. 1984))). Subpoenas duces tecum will in fact frequently permit alternative means of compliance under which the witness is given the option of presenting the documents to the attorney for government who is assisting the grand jury, see e.g., the appendices in *In re* Grand Jury Proceedings, 887 F. Supp. 288, 291 (M.D. Ga. 1995); United States v. Int'l Paper Co., 457 F. Supp. 571, 577 (S.D. Tex. 1978). *But see Wadlington*, 233 F.3d at 1075 ("The Government rests on its authority to subpoena witnesses in advance of their presentation to the grand jury in order to allow for the efficient presentation of evidence and to save time for grand jurors. *See* United States v. Universal Mfg. Co., 525 F.2d 808, 811–12 (8th Cir. 1975) (holding that the Government may have advance access to documents and other evidentiary matter subpoenaed by or presented to a federal grand jury); *see also In re* Possible Violations of 18 U.S.C. §§ 201, 371, 491 F. Supp. 211, 213 (D. D.C. 1980) (holding that the Government may call a grand jury witness to its offices pursuant to subpoena on the day of grand jury proceedings for a consensual interview so that government attorneys may identify the nature of the proposed testimony).... Rule 17(a) of the Federal Rules of Criminal Procedure states that a subpoena 'shall command each person to whom it is directed to attend and give testimony at the time and place specified therein.' This language has been interpreted to mean that witnesses may be subpoenaed to give testimony at formal proceedings, such as grand jury proceedings, preliminary hearings, and trials. It does not authorize the Government to use grand jury subpoenas to compel prospective grand jury witnesses to attend private interviews with government agents"); *Lopez*, 393 F.3d at 1349 ("The prosecutor may issue the subpoena without the knowledge of the grand jury, but his authority to do so is grounded in the grand jury investigation, not the prosecutor's own inquiry. Federal prosecutors have no authority to issue grand jury subpoenas independent of the grand jury.").

in a witness being held in civil contempt,[55] convicted for criminal contempt,[56] or both.[57] A witness who lies to a grand jury may be prosecuted for perjury,[58] or for making false declarations before the grand jury.[59]

Conversely, others with information they wish to provide to the grand jury are prohibited from doing so except through the court or the attorney for the government.[60] Consequently, neither a

[55] 28 U.S.C. § 1826(a). ("Whenever a witness in any proceeding before ... any ... grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information ... the court ... may summarily order his confinement at a suitable place until such time as the witness is willing to given such testimony or provide such information.... ") *See, e.g., In re* Grand Jury Subpoena, 597 F.3d 189 (4th Cir. 2010).

"[C]ivil contempt ... is remedial, and for the benefit of the complainant. [C]riminal contempt ... is punitive to vindicate the authority of the court.... [T]he relief ... is remedial if the defendant stands committed unless and until he performs the affirmative act required by the court's order.... " Hicks v. Feiock, 485 U.S. 624, 631–32 (1988). Civil contempt is imposed "for the obvious purpose of compelling the witnesses to obey the orders to testify.... However, the justification for coercive imprisonment as applied to civil contempt depends upon the ability of the contemnor to comply with the court's order. Where the grand jury has been finally discharged a contumacious witness can no longer be confined since he then has no further opportunity to purge himself of contempt." Shillitani v. United States, 384 U.S. 364, 368, 371 (1966).

In the case of civil contempt under § 1826, the recalcitrant witness must be released after eighteen months even if the grand jury has not been discharged, *In re* Grand Jury Proceedings of the Special April 2002 Grand Jury, 347 F.3d 197, 206 (7th Cir. 2003).

While fear is not just cause for failure to obey a grand jury subpoena, the witness's fear is a factor to be considered in determining whether civil contempt is likely to induce compliance. *In re* Grand Jury Proceeding (Doe), 13 F.3d 459, 461 (1st Cir. 1994); *In re* Grand Jury Proceedings, 914 F.2d 1372, 1374–75 (9th Cir. 1990); *In re* Grand Jury Proceedings of Dec., 1989, 903 F.2d 1167, 1169 (7th Cir. 1990); *In re* Grand Jury Proceedings, 862 F.2d 430, 432 (2d Cir. 1988).

[56] 18 U.S.C. § 401 ("A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as ... (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."); *e.g.*, *In re* Grand Jury, 971 F.3d 40, 52 (2d Cir. 2020).

[57] *E.g.*, United States v. Thompson, 925 F.3d 292, 294–95 (6th Cir. 2019); United States v. Marquardo, 149 F.3d 36, 39–41 (1st Cir. 1998); *In re* Grand Jury Proceedings (Goodman), 33 F.3d 1060, 1061 (9th Cir. 1994); *In re* Grand Jury Witness, 835 F.2d 437, 440 (2d Cir. 1987); United States v. Ryan, 810 F.2d 650, 653 (7th Cir. 1987); United States v. Alvarez, 489 F. Supp. 2d 714, 719–20 (W.D. Tex. 2007); *cf.*, United States v. Ashqar, 582 F.3d 819, 821–22 (7th Cir. 2009).

[58] 18 U.S.C. § 1621 ("Whoever ... having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify ... truly, ... willfully and contrary to such oath states ... any material matter which he does not believe to be true ... is guilty of perjury and shall ... be fined under this title or imprisoned not more than five years, or both ... ").

[59] 18 U.S.C. § 1623 ("(a) Whoever under oath ... in any proceeding before ... any ... grand jury of the United States knowingly makes any false material declaration ... shall be fined under this title or imprisoned not more than five years, ... or both ... (c) ... In any prosecution under this section, the falsity of a declaration ... shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before ... any ... grand jury. It shall be a defense ... that the defendant at the time he made each declaration believed the declaration was true. (d) Where, in the same continuous ... grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest hat such falsity has been or will be exposed ... "). United States v. Butterworth, 511 F.3d 71, 74 (1st Cir. 2007).

[60] Sibley v. Obama, 866 F. Supp. 2d 17, 22 (D.D.C. 2012)), *aff'd*, No. 5198, 2022 WL 6603088 (D.C. Cir. Dec. 6, 2012); *In re* Application of Wood, 833 F.2d 113, 116 (8th Cir. 1987); *In re* New Haven Grand Jury, 604 F. Supp. 453, 455–56 (D. Conn. 1985). Section 1504 of title 18 of the *U.S. Code* provides, "[w]hoever attempts to influence the action or decision of any grand ... juror of any court of the United States upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his duties, by writing or sending to him any written communication, in relation to issue or matter, shall be fined under this title or imprisoned not more than six months, or both. Nothing in this section shall be construed to prohibit the communication of a request to appear before the grand jury."

potential defendant nor a grand jury target nor any of their counsel has any right to appear before the grand jury unless invited or subpoenaed.[61] Nor does a potential defendant nor a grand jury target nor their counsel have any right to present exculpatory evidence to the grand jury nor to present a substantive objection.[62]

Grand jury appearances, however, are more likely to be fought than sought. Resistance is futile most often. Absent self-incrimination or some other privilege, the law expects citizens to cooperate with efforts to investigate crime.[63] In the name of this expectation, a witness may be arrested, held for bail, and under some circumstances incarcerated.[64] 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 may be compelled to appear before the grand jury and claim the privilege with respect to any questions to which it applies.[65]

Witnesses also enjoy the benefit of fewer checks on the grand jury's exercise of investigative power than might be the case if the inquisitor were a government official rather than a group of randomly selected members of the community.[66] Thus as a rule, the grand jury is entitled to every individual's evidence even though testimony may prove burdensome, embarrassing, or socially or economically injurious for the witness.[67]

A grand jury subpoena may even "trump" a pre-existing protective court order under some circumstances.[68] This is not to say that the grand jury's authority is without limit, or that

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[61] United States v. Williams, 504 U.S. 36, 52 (1992); United States v. Mandujano, 425 U.S. 564, 581 (1976); United States v. Fritz, 852 F.2d 1175, 1178 (9th Cir. 1988); United States v. Pabian, 704 F.2d 1533, 1538-539 (11th Cir.1983); United States v. Dynkowski, 720 F. Supp. 2d 475, 479 (D. Del. 2010); United States v. Ernst, 857 F. Supp. 2d 1098, 1105 (D. Or. 2012), *aff'd*, 623 F. App'x 333 (9th Cir. 2015); *but see In re Application of Wood*, 833 F.2d at 116 (court may permit a matter to be presented to the grand jury by a private individual, if the prosecutor declines to do so; the decision to prosecute, however, rests with the attorney for the government, should the grand jury vote to indict).

It has been suggested that targets be afforded the opportunity to appear before the grand jury as a matter of right, Peter Arnella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 569 (1980).

[62] *Williams*, 504 U.S. at 51–54; United States v. Darden, 688 F.3d 382, 387 (8th Cir. 2012); United States v. Class, 38 F. Supp. 3d 19, 29 (D.D.C. 2014); United States v. Kubini, 19 F. Supp. 3d 579, 621 (W.D. Pa. 2014).

[63] Blair v. United States, 250 U.S. 273, 280–81 (1919); Barry v. United States *ex rel*. Cunningham, 279 U.S. 597, 617 (1929); Stein v. New York, 346 U.S. 156, 184 (1953).

[64] 18 U.S.C. §§ 3144, 3142. The procedure applies to witnesses "in a criminal proceeding," a class which includes material grand jury witnesses, United States v. Awadallah, 349 F.3d 42, 49–51 (2d Cir. 2003); Bacon v. United States, 449 F.2d 933, 936–41 (9th Cir. 1971). *See generally*, CRS Report R41903, *Federal Material Witness Statute: A Legal Overview of 18 U.S.C. § 3144*, by Charles Doyle; Robert Boyle, *The Material Witness Statute Post September 11: Why It Should Not Include Grand Jury Witnesses*, 48 N.Y.L. SCH. L. REV. 12 (2003).

[65] *Mandujano*, 425 U.S. at 572.

[66] *E.g.*, *In re* Sealed Case (Lewinsky), 162 F.3d 670, 674 n.4 (D.C. Cir. 1998) ("No grand jury witness may refuse to answer questions on the ground that the questions are based on illegally obtained evidence.").

[67] United States v. Calandra, 414 U.S. 338, 345 (1974) ("In *Branzburg v. Hayes*, [408 U.S. 665,] 682 and 688, the Court noted that '[c]itizens generally are not constitutionally immune from grand jury subpoenas ... ' and that 'the longstanding principle that "the public ... has a right to every man's evidence" ... is particularly applicable to grand jury proceedings.' The duty to testify may on occasion be burdensome and even embarrassing. It may cause injury to a witness' social and economic status. Yet the duty to testify has been regarded as 'so necessary to the administration of justice' that the witness' personal interest in privacy must yield to the public's overriding interest in full disclosure." (alterations in original) (quoting *Blair*, 250 U.S. at 281)).

[68] The question of whether a protective order arising out of federal civil litigation takes precedence over a grand jury subpoena for material covered by the order has divided the federal courts of appeal. One approach requires the demonstration of a compelling need or of extraordinary circumstances before the secrecy of a protective order can be (continued...)

excessive prosecutorial zeal before the grand jury is unknown, or that there is never any just cause for a witness's refusal to answer a question or provide a document, but simply that the restraints on the grand jury's authority have been narrowly drawn and applied.

Common Law Privileges

Federal grand jury subpoenas are subject to the maxim that, "the grand jury ... may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law."[69] In the context of grand jury subpoenas, as in most others, federal evidentiary privileges are governed by the Federal Rules of Evidence.[70]

The Rules do not articulate specific privileges. Instead, they declare that federal law concerning privileges is "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[71]

Although the standard is clearly evolutionary, present federal law seems to reflect three levels of privilege recognition. Some privileges like doctor-patient have been refused recognition at least for the time being, 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 clergy-communicant have been recognized as evidentiary privileges for grand jury purposes.[72]

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breached, while others take the position that grand jury subpoenas trump protective orders. *In re* Grand Jury Subpoena (Roach), 138 F.3d 442 (1st Cir. 1998) describes the split among the circuits over precisely when a pre-existing protective order should take precedence over a grand jury subpoena. The Fourth, Ninth, and Eleventh Circuits have adopted a per se rule under which "the existence of an otherwise valid protective order [is] not sufficient grounds to quash the subpoena duces tecum issued by the ... grand jury," 138 F.3d at 444 (alterations in original) (quoting *In re* Grand Jury Subpoena, 836 F.2d 1468, 1478 (4th Cir. 1988); *In re* Grand Jury Subpoena, 62 F.3d 1222, 1224 (9th Cir. 1995); and *In re* Grand Jury Proceedings, 995 F.2d 1013, 1020 (11th Cir. 1993)); *see also In re* Grand Jury Subpoenas, 627 F.3d 1143, 1144 (9th Cir. 2010). The Second Circuit has espoused a balancing test thought to prefer the protective order over the grand jury subpoena, *In re Grand Jury Subpoena*, 138 F.3d at 444–45 (citing, Martindell v. International Tel. & Tel. Corp., 594 F.2d 291, 295 (2d Cir. 1979); *see also In re* Grand Jury Subpoena Duces Tecum, 945 F.2d 1221, 1223–24 (2d Cir. 1991). The First Circuit has endorsed a modified per se rule under which "[a] grand jury's subpoena trumps a Rule 26(c) protective order unless the person seeking to avoid the subpoena can demonstrate the existence of exceptional circumstances that clearly favor subordinating the subpoena to the protective order," *In re Grand Jury Subpoena*, 138 F.3d at 445. The Third Circuit agrees with the First, *In re* Grand Jury, 286 F.3d 153, 157–58 (3d Cir. 2002). *See generally*, Brian Baggott, *Return to Certainty: Why Grand Jury Subpoenas Should Supersede Civil Protective Orders*, 10 SUFFOLK JOURNAL OF TRIAL AND APPELLATE ADVOCACY 43 (2005).

[69] *Calandra*, 414 U.S. at 346; United States v. Nixon, 418 U.S. 683, 709 (1974); *In re* Grand Jury Subpoenas 04-124-03 and 04-124-05, 454 F.3d 511, 520 (6th Cir. 2006); *In re* Grand Jury, 475 F.3d 1299, 1304 (D.C. Cir. 2007); *In re* Grand Jury Proceedings, 616 F.3d 1172, 1181 (10th Cir. 2010); *In re* Grand Jury Investigation, 966 F.3d 991, 996 (9th Cir. 2020).

[70] FED. R EVID. 1101(c), (d)(2), 501; *In re* Grand Jury Investigation, 399 F.3d 527, 530 (2d Cir. 2005); *In re* Grand Jury Proceeding, 241 F.3d 308, 313 (3d Cir. 2001).

[71] Act of Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1926, 1933 (codified as amended at 28 U.S.C. app.) ("Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rule prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."); *see also* FED. R. EVID. 501.

[72] *In re* Grand Jury Investigation, 918 F.2d 374, 384-85 (3d Cir. 1990).

Thus, the federal courts have said that for purposes of federal law no evidentiary privilege exists in cases of:

- physician-patient;[73]
- accountant-client;[74]
- researcher-source;[75]
- parent-child;[76]
- employer-stenographer;[77]
- banker-depositor;[78]
- draft counselor-client;[79]
- police observation post location;[80]
- probation officer-probationer;[81]
- insurance company-client;[82]
- academic peer review;[83]
- medical peer review;[84]

[73] Merrill v. Waffle House, Inc., 227 F.R.D. 467, 471 (N.D. Tex. 2005) (quoting, Whalen v. Roe, 429 U.S. 589, 602 n.28 (1977) ("physician-patient privilege is unknown to the common law") (quoting, Whalen v. Roe, 429 U.S. 589, 602 n.28 (1977)); United States v. Bek, 493 F.3d 790, 801–02 (7th Cir. 2007); Swan v. Miss Beau Monde, Inc., 566 F. Supp. 3d 1048, 1068 (D. Or. 2021); Langenfeld v. Armstrong World Industries, Inc., 299 F.R.D. 547, 551 (S.D. Ohio 2014); Awalt v. Marketti, 287 F.R.D. 409, 423 (N.D. Ill. 2012); Heilman *ex rel.* Heilman v. Waldron, 287 F.R.D. 467, 472 (D. Minn. 2012). Federal courts do, however, recognize a psychotherapist-patient privilege, Jaffee v. Redmond, 518 U.S. 1, 15 (1996).

[74] United States v. Arthur Young & Co., 465 U.S. 805, 817 (1984); Valero Energy Corp. v. United States, 569 F.3d 626, 630 (7th Cir. 2009); United States v. Bisanti, 414 F.3d 168, 170 (1st Cir. 2005); FDA Inspector Gen. v. Glenn, 122 F.3d 1007, 1012 (11th Cir. 1997); Forsythe v. Brown, 281 F.R.D. 577, 587 (D. Nev. 2012), *report and recommendation adopted*, No. 10-CV-00716, 2012 WL 1833393 (D. Nev. May 18, 2012); Perez v. Wallis, 77 F. Supp. 3d 730, 748 (N.D. Ill. 2014) (citing *In re* Grand Jury Proceedings, 220 F.3d 568, 571 (7th Cir. 2000)).

[75] *In re* Grand Jury Proceedings, 5 F.3d 397, 403 (9th Cir. 1993); United States v. Doe, 460 F.2d 328, 333–34 (1st Cir. 1972); United States v. Trs. of Bos. Coll., 831 F. Supp. 2d 435 (D. Mass. 2011), *aff'd in part, rev'd in part sub nom.*, *In re* Request from the U.K., 718 F.3d 13 (1st Cir. 2013), *and aff'd in part sub nom.*, *In re* Request from the United Kingdom, 685 F.3d 1 (1st Cir. 2012), *and aff'd in part, rev'd in part sub nom.*, *In re* Request from the United Kingdom, 718 F.3d 13 (1st Cir. 2013); *but see* Cusumano v. Microsoft Corp., 162 F.3d 708, 714–15 (1st Cir. 1998) (recognizing qualified journalist-like privilege).

[76] Under Seal v. United States, 755 F.3d 213, 215 (4th Cir. 2014); United States v. Dunford, 148 F.3d 385, 390–91 (4th Cir. 1998); *In re Grand Jury Proceedings*, 103 F.3d 1140, 1146 (3d Cir. 1997); United States v. Duran, 884 F. Supp. 537, 541 (D. D.C. 1995); *contra In re* Grand Jury Proceedings, 949 F. Supp. 1487, 1497 (E.D. Wash. 1996).

[77] United States v. Schoenheinz, 548 F.2d 1389, 1390 (9th Cir. 1977).

[78] Am. Elec. Power Co., Inc. v. United States, 191 F.R.D. 132, 141 (S.D. Ohio 1999); Delozier v. First Nat 'l Bank, 109 F.R.D. 161, 163–64 (E.D. Tenn. 1986); Harris v. United States, 413 F.2d 316, 319–20 (9th Cir. 1969).

[79] *In re* Grand Jury Subpoena, 329 F. Supp. 433, 436–37 (C.D. Cal. 1971).

[80] United States v. Foster, 986 F.2d 541, 542–44 (D.C. Cir. 1993).

[81] United States v. Simmons, 964 F.2d 763, 768–79 (8th Cir. 1992).

[82] Linde Thompson Langworthy Kohn & Van Dyke v. RTC, 5 F.3d 1508, 1514 (D.C. Cir. 1993); Petersen v. Douglas County Bank & Trust Co., 967 F.2d 1186, 1188 (8th Cir. 1992).

[83] Univ. of Pa. v. EEOC, 493 U.S. 182, 189 (1990); Leon v. County of San Diego, 202 F.R.D. 631, 637 (S.D. Cal. 2001).

[84] Hamdan v. Ind. U. Health N. Hosp., Inc., 880 F.3d 416, 421 (7th Cir. 2018); Adkins v. Christie, 488 F.3d 1324, 1330 (11th Cir. 2007); Agster v. Maricopa County., 422 F.3d 836, 839 (9th Cir. 2005); Virmani v. Novant Health Inc., 259 (continued...)

- mediation;[85]
- union officials-union members;[86]
- Secret Service protective function;[87]and
- private investigator-client.[88]

A second group consists of recognized or emerging qualified privileges, whose effectiveness against a grand jury subpoena may be uncertain at best. Members of the group include privileges for:

- critical self-evaluation;[89]
- journalists (not generally recognized for grand jury purposes);[90]
- presidential communications;[91]
- state legislators;[92]

F.3d 284, 286–93 (4th Cir. 2001); Roberts v. Legacy Meridian Park Hosp., Inc., 299 F.R.D. 669, 672–73 (D. Or. 2014); Gargiulo v. Baystate Health, Inc., 826 F. Supp. 2d 323, 327 (D. Mass. 2011); Mattice v. Mem'l Hosp., 203 F.R.D. 381, 384–86 (N.D. Ind. 2001) (collecting cases).

[85] *In re* Grand Jury Subpoena Dated Dec. 17, 1996, 148 F.3d 487, 492–93 (5th Cir. 1998); other than in cases of grand jury subpoenas, two lower federal courts have recognized a qualified mediation privilege, Sheldone v. Pa. Tpk Comm'n, 104 F. Supp. 2d 511, 512–18 (W.D. Pa. 2000); Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1170–81 (C.D. Cal. 1998), *aff'd*, 216 F.3d 1082 (9th Cir. 2000); *see also In re* Wendy's Co. S' holder Derivative Action, 44 F.4th 527, 537 (6th Cir. 2022) (citing Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 980 (6th Cir. 2003)) ("[F]ederal law recognize[s] a privilege protecting communications made during mediation proceedings.... ").

[86] *In re* Grand Jury Subpoenas Dated Jan. 20, 1998, 995 F. Supp. 332, 334–37 (E.D. N.Y. 1998).

[87] *In re* Sealed Case, 148 F.3d 1073, 1079 (D.C. Cir. 1998).

[88] U.S. Dep't of Educ. v. NCAA, 481 F.3d 936, 938 (7th Cir. 2007); Ubiquiti Networks, Inc. v. Kozumi USA Corp., 295 F.R.D. 517, 525 (N.D. Fla. 2013).

[89] *In re* Block Island Fishing, Inc., 323 F. Supp. 3d 158, 161 (D. Mass. 2018) ("The *O'Connor* court identified four 'potential guideposts' for the application of the self-critical analysis privilege: (1) materials protected have generally been those prepared for mandatory governmental reports; (2) only subjective, evaluative materials have been protected; (3) objective data in those same reports have not been protected; and (4) in sensitivity to plaintiffs' need for such materials, court have denied discovery only where the policy favoring exclusion has clearly outweighed plaintiffs' need.") (quoting O'Connor v. Chrysler Corp., 86 F.R.D. 211, 217 (D. Mass. 1980)); Freiermuth v. PPG Indus., Inc., 218 F.R.D. 694, 697 (N.D. Ala. 2003) (citing the circuits that have refused to recognize the privilege); *In re* Kaiser Aluminum & Chem. Co., 214 F.3d 586, 593 (5th Cir. 2000) (declining to recognize privilege when asserted against the government); Bredice v. Doctor's Hosp., Inc., 50 F.R.D. 249, 251 (D. D.C.1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973) (privilege recognized); Reichhold Chems., Inc. v. Textron, Inc., 157 F.R.D. 522, 524–25 (N.D. Fla. 1994); *In re* Grand Jury Proceedings (File Sealed), 861 F. Supp. 386, 389–91 (D. Md. 1994) (privilege not applicable to grand jury matters).

[90] Branzburg v. Hayes, 408 U.S. 665, 667 (1972); *In re* Grand Jury Subpoena, 397 F.3d 964, 968–73 (D.C. Cir. 2005) (holding that no First Amendment privilege existed in a grand jury context, but noting disagreement within the panel over whether a qualified common law journalist privilege (unavailable under the facts before court) might exist), *superseded*, *In re* Grand Jury Subpoena, 438 F.3d 1141 (D.C. Cir. 2006); Horne v. WTVR, LLC, 893 F.3d 201, 212 (4th Cir. 2018) (recognizing a qualified journalist privilege); United States v. Treacy, 639 F.3d 32, 42 (2d Cir. 2011) (recognizing qualified privilege); Chen v. FBI, 687 F. Supp. 3d 115, 126 (D. D.C. 2023), *dismissed*, No. 23-5198, 2023 WL 6284257 (D.C. Cir. Sept. 25, 2023) (per curiam) (same).

[91] *In re* Sealed Case, 121 F.3d 729, 742–57 (D.C. Cir. 1997) (per curiam) (recognizing qualified privilege may be available to quash grand jury subpoena); Cheney v. U.S. Dist. Ct., 542 U.S. 367, 382–90 (2004); Trump v. Thompson, 20 F.4th 10, 26–27 (D.C. Cir. 2021); Amnesty Int'l USA v. CIA, 728 F. Supp. 2d 479, 522–23 (S.D. N.Y. 2010), *subsequent determination*, No. 07 Civ. 5435, 2010 WL 5421928 (S.D. N.Y. Dec. 21, 2010).

[92] Pernell v. Fla. Bd. of Governors of the State Univ., 84 F.4th 1339, 1344 (11th Cir. 2023); La Union del Pueblo Entero v. Abbott, 68 F.4th 228, 235 (5th Cir. 2023); Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Par., 849 F.3d 615, 624 (5th Cir. 2017); Orange v. City of Suffolk, 855 F. Supp. 620, 622–24 (E.D. N.Y. 1994).

- state secret/national security;[93]
- bank examiners;[94]
- state recognized privileges;[95]
- state tax returns;[96] and
- intra-agency, government deliberative process.[97]

The handful of privileges that provide the grounds for quashing a grand jury subpoena include

- attorney-client;[98]
- attorney work product;[99]
- clergyman-communicant;[100]
- informer identity;[101]
- spousal immunity;[102]

[93] Gen. Dynamics Corp. v. United States, 563 U.S. 478, 484 (2011) (recognizing privilege); United States v. Reynolds, 345 U.S.1, 6–7 (1953); United States v. Zubaydah, 595 U.S. 195, 204 (2022); United States v. Alahmedalabdaloklah, 94 F.4th 782, 811 (9th Cir. 2024), *cert. denied*, No. 24-125, 2024 WL 5011718, at *1 (U.S. Dec. 9, 2024) (mem.); United States v. Abu-Jihaad, 630 F.3d 102, 140–41 (2d Cir. 2010); Al-Haramain Islamic Found. v. Bush, 507 F.3d 1190, 1196 (9th Cir. 2007); El-Masri v. United States, 479 F.3d 296, 303 (4th Cir. 2007); *cf.* Tenet v. Doe, 544 U.S. 1, 9 (2005) (holding that the "well-established" state secrets privilege has not replaced the *Totten* rule); FBI v. Fazaga, 595 U.S. 344, 355 (2022) (holding the Foreign Intelligence Surveillance Act (FISA) does not the state secrets privilege).

[94] Schneiber v. Society for Savings Bancorp, Inc., 11 F.3d 217, 220 (D.C. Cir. 1993) (recognizing privilege); S.E. Pa. Trans. Auth. v. Orrstown Fin. Servs., 367 F. Supp. 3d 267, 276 (M.D. Pa. 2019); Principe v. Crossland Sav., FSB, 149 F.R.D. 444, 447 (E.D.N.Y. 1993).

[95] Hamilton v. Radnor Twp., 662 F. Supp. 3d 536, 542 (E.D. Pa. 2023) (diversity case); Sierra Club v. Woodville Pellets, LLC, 553 F. Supp. 3d 378, 383 (E.D. Tex. 2021) (environmental self-audit); United States v. Mass. Gen. Hosp., Inc., 498 F. Supp. 3d 186, 190 (D. Mass. 2020) (medical peer review); *In re* Production of Records to Grand Jury, 618 F. Supp. 440 (D. Mass. 1985) (social worker communications).

[96] *In re* Grand Jury Subpoena Dated April 18, 2007, 485 F. Supp. 2d 709, 710-11 (E.D. Va. 2007); *In re* Grand Jury Subpoena, 144 F. Supp. 2d 540, 541-42 (W.D. Va. 2001).

[97] Dept. of Interior v. Klamath Water Users Protective Assn., 532 U.S. 1, 7–9 (2001); Waterman v. IRS, 61 F.4th 152, 156 (D.C. Cir. 2023); Transgender L. Ctr. v. Immigr. & Customs Enf't, 46 F.4th 771, 782–83 (9th Cir. 2022); *In re* United States, 441 F.3d 44, 63 (1st Cir. 2006); Marriott Int'l Resorts, L.P. v. United States, 437 F.3d 1302, 1306–307 (Fed. Cir. 2006).

[98] *In re* Pac. Pictures Corp., 679 F.3d 1121, 1130 (9th Cir. 2012); *In re* Grand Jury Proceedings, 609 F.3d 909, 912 (8th Cir. 2010); *In re* Grand Jury Subpoena, 419 F.3d 329, 338–39 (5th Cir. 2005); *In re* Grand Jury Subpoena Under Seal, 415 F.3d 333, 338 (4th Cir. 2005); *In re* Grand Jury Subpoena, 274 F.3d 563, 571 (1st Cir. 2001); *In re* Subpoenaed Grand Jury Witness, 171 F.3d 511, 513 (7th Cir. 1999); *cf.* Swidler & Berlin v. United States, 524 U.S. 399, 410–11 (1998) (holding that the attorney-client privilege survives the death of the client where the privilege had been asserted in the face of a grand jury subpoena).

[99] *In re* Grand Jury Subpoena Dated July 6, 2005, 510 F.3d 180, 184 (2d Cir. 2007); *In re* Green Grand Jury, 492 F.3d 976, 979 (8th Cir. 2007); *In re Grand Jury Subpoena*, 419 F.3d at 339; United Kingdom v. United States, 238 F.3d 1312, 1321 (11th Cir. 2001); *cf. In re* Grand Jury Proceedings, 616 F.3d 1172, 1184–85 (10th Cir. 2010); *In re* Grand Jury Subpoenas, 561 F.3d 408, 411–12 (5th Cir. 2009); *In re* Grand Jury Proceedings, 350 F.3d 299, 301–04 (2d Cir. 2003) (holding the work product privilege had not been waived or forfeited).

[100] *In re* Grand Jury Investigation, 918 F.2d 374, 384–85 (3d Cir. 1990); Duffy v. Kent County Levy Court, 800 F. Supp. 2d 624, 628 (D. Del. 2011).

[101] *In re* Perez, 749 F.3d 849, 855–59 (9th Cir. 2014); United States v. Alaniz, 726 F.3d 586, 609–10 (5th Cir. 2013); *In re* Grand Jury Investigation, 922 F.2d 1266, 1270–72 (6th Cir. 1991); Puerto Rico v. United States, 490 F.3d 50, 62–64 (1st Cir. 2007) (recognizing a more broadly stated law enforcement privilege); *cf.* Wolfson v. United States, 672 F. Supp. 2d 20, 27–28 (D.D.C. 2009).

[102] Trammel v. United States, 445 U.S. 40, 53 (1980); United States v. Pineda-Mateo, 905 F.3d 13, 15 (1st Cir. 2018); (continued...)

- spousal communications;[103] and
- psychotherapist-patient.[104]

Perhaps the two most commonly cited privileges in motions to quash grand jury subpoenas are the attorney-client privilege and the closely related attorney work product privilege. The attorney-client privilege covers "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance."[105] The privilege does not foreclose grand jury inquiry into attorney-client communications which are themselves criminal or are in furtherance of some future criminal activity.[106] Nor, as a general rule, does the privilege cover the identity of the client nor details concerning payment of the attorney's fee,[107] and thus the privilege will usually not constitute grounds to quash a grand jury subpoena directed to secure that information.[108]

This last general rule may be subject to any of three exceptions. The privilege may extend to information concerning the identity of the client or the particulars of the fee arrangement when (1) "disclosure would implicate the client in the very criminal activity for which legal advice was sought; ... [(2)] disclosure of the client's identity by his attorney would have supplied the last link in an existing chain of incriminating evidence likely to lead to the client's indictment; ... [or (3)]

United States v. Fomichev, 899 F.3d 766, 771 (9th Cir. 2018), *opinion amended on denial of reh'g*, 909 F.3d 1078 (9th Cir. 2018); United States v. Underwood, 859 F.3d 386, 390 (6th Cir. 2017); United States v. Brock, 724 F.3d 817, 822–23 (7th Cir. 2013); United States v. Miller, 588 F.3d 897, 904 (5th Cir. 2009); United States v. Jarvison, 409 F.3d 1221, 1231 (10th Cir. 2005); United States v. Bad Wound, 203 F.3d 1072, 1075 (8th Cir. 2000); United States v. Morris, 988 F.2d 1335, 1338–41 (4th Cir. 1993).

[103] Blau v. United States, 340 U.S. 332 (1951); *Fomichey*, 899 F.3d at 771; *Underwood*, 859 F.3d at 390; United States v. Breton, 740 F.3d 1, 10–11; *Brock*, 724 F.3d at 820–22; United States v. Banks, 556 F.3d 967, 974 (9th Cir. 2009); *Jarvison*, 409 F.3d at 1231.

[104] Jaffee v. Redmond, 518 U.S. 1 (1996) (recognizing a generally applicable federal privilege in another context and leaving development of the dimensions of the privilege for another day); United States v. Fackrell, 991 F.3d 589, 605 (5th Cir. 2021); United States v. Lara, 850 F.3d 686, 690 (4th Cir. 2017); United States v. Ghane, 673 F.3d 771, 782-85 (8th Cir. 2012); United States v. Chase, 340 F.3d 978, 985 (9th Cir. 2003) (refusing to recognize a dangerous patient exception to the federal privilege and noting a circuit split on the issue); *In re* Grand Jury Investigation, 114 F. Supp. 2d 1054, 1055 (D. Or. 2000) (holding that a grand jury target had waived his psychotherapist-patient privilege).

[105] Fisher v. United States, 425 U.S. 391, 403 (1976); United States v. Snyder, 71 F.4th 555, 566 (7th Cir. 2023), *rev'd and remanded*, 603 U.S. 1 (2024); *In re* Grand Jury, 23 F.4th 1088, 1091 (9th Cir. 2021); *In re* Grand Jury Subpoena, 2 F.4th 1339, 1345 (11th Cir. 2021); *In re* Grand Jury Subpoena, 745 F.3d 681, 687 (3d Cir. 2014).

[106] *In re* Grand Jury Proceedings, 609 F.3d 909, 912 (8th Cir. 2010) ("Under the crime-fraud exception, attorney-client privilege 'does not extend to communications made for the purpose of getting advice for the commission of a fraud or a crime'") (quoting *In re* Green Grand Jury Proceedings, 492 F.3d 976 (8th Cir. 2007)); *see also In re* Abbott Lab's, 96 F.4th 371, 377 n.4 (3d Cir. 2024); United States v. Carr, 83 F.4th 267, 276 (5th Cir. 2023); *In re* Grand Jury Subpoena, 745 F.3d at 687 (The government "must make a prima facie showing that (1) the client was committing or intending to commit a fraud or crime, and (2) the attorney-client communications were in furtherance of that alleged crime or fraud"); *In re* Grand Jury Proceedings, 417 F.3d 18, 22 (1st Cir. 2005); *In re* Grand Jury Subpoenas, 144 F.3d 653, 659–62 (10th Cir. 1998).

[107] Taylor Lohmeyer Law Firm P.L.L.C., 957 F.3d 505, 510 (5th Cir. 2020) (citing *In re* Grand Jury Subpoena, 926 F.2d 1423, 1431 (5th Cir. 1991)); Gerald B. Lefcourt, P.C. v. United States, 125 F.3d 79, 86–88 (2d Cir. 1997); United States v. Ellis, 90 F.3d 447, 450–51 (11th Cir. 1996); *but see* Amador v. United States, 98 F.4th 28, 37 (1st Cir. 2024) ("Trial courts are under a duty to inquire when confronted with a potential conflict of interest that could impact a defendant's Sixth Amendment right to representation free from conflict" but trial court exceeded its discretion when it subjected defendant's attorney to examination under oath by prosecutor concerning the source of attorneys' fees).

[108] Ralls v. United States, 52 F.3d 223, 225–26 (9th Cir. 1995); *In re* Grand Jury Proceedings, 42 F.3d 876, 878–79 (4th Cir. 1994); Vingelli v. United States (DEA), 992 F.2d 449, 451–54 (2d Cir. 1993). The motion to quash is no more likely to be granted because the prosecutor failed to comply with the guidelines of the United States Attorneys' Manual concerning the issuance of grand jury subpoenas seeking client information, *In re Grand Jury Proceedings*, 42 F.3d at 880.

the payment of the fee itself is unlawful ... [or] the fee contract contain[s] any confidential communication."[109]

The attorney "work product privilege protects any material obtained or prepared by a lawyer in the course of his legal duties, provided that the work was done with an eye toward litigation."[110] Like the attorney-client privilege, it is subject to a crime/fraud exception.[111] Unlike that privilege, however, "the work product privilege belongs to both the client and the attorney, either one of whom may claim it.[112] An innocent attorney may claim the privilege even if a prima facie case of fraud or criminal activity exists as to the client."[113]

Constitutional Privileges

The cases which give rise to attorney-client and attorney work product claims not infrequently include Sixth Amendment invocations as well.[114] At first blush, the Sixth Amendment right to the assistance of counsel might be thought to afford but scant ground upon which to base a motion to quash a grand jury subpoena since the right does not ordinarily attach until an individual has been accused of a crime, e.g., after indictment.[115] This is in fact a very real limitation, but one which admits to exception where either the client has already been indicted or arrested or where the vitality of the right requires pre-attachment recognition.[116]

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[109] *In re* Grand Jury Subpoenas, 906 F.2d 1485, 1488, 1489, 1492 (10th Cir. 1990); *In re* Grand Jury Proceedings, 33 F.3d 1060, 1063–64 (9th Cir. 1994); *Ralls*, 52 F.3d at 225–26; *In re* Subpoenaed Grand Jury Witness, 171 F.3d 511, 514 (7th Cir. 1999); Guo Wengui v. Clark Hill, PLC, 338 F.R.D. 7, 15 (D.D.C. 2021); Taylor Lohmeyer Law Firm PLLC v. United States, 385 F. Supp. 3d 548, 555 (W.D. Tex. 2019), *aff'd*, 957 F.3d 505 (5th Cir. 2020).

[110] *In re* Sealed Case, 29 F.3d 715, 718 (D.C .Cir. 1994); *In re* Sealed Case, 146 F.3d 881, 884–87 (D.C. Cir. 1998); *In re Subpoenaed Grand Jury Witness*, 171 F.3d at 514; *In re* Grand Jury Subpoena, 274 F.3d 563, 574 (1st Cir. 2001); *In re* Grand Jury Proceedings, 401 F.3d 247, 250 (4th Cir. 2005); *In re* Grand Jury Subpoena Dated July 6, 2005, 510 F.3d 180, 183–84 (2d Cir. 2007); *In re* Grand Jury Proceedings, 616 F.3d 1172, 1184 (10th Cir. 2010); *In re* Grand Jury Subpoena, 745 F.3d 681, 693 (3d Cir. 2014); see also *In re* Grand Jury 2021 Subpoenas, 87 F.4th 229, 252 (4th Cir. 2023); Am. Oversight v. DOJ, 45 F.4th 579, 590 (2d Cir. 2022); *In re* Grand Jury, 23 F.4th 1088, 1093 (9th Cir. 2022).

[111] United States v. Carr, 83 F.4th 267, 276 (5th Cir. 2023); In re Sealed Search Warrant, 11 F.4th 1235, 1249 (11th Cir. 2021) (per curiam); *In re* Grand Jury Subpoena, 745 F.3d at 694; *In re* Grand Jury Proceedings, 609 F3d 909, 912 (8th Cir. 2010); *In re* Grand Jury Subpoenas, 561 F.3d 408, 411 (5th Cir. 2009); *In re* Green Grand Jury Proceedings, 492 F.3d 976, 979–80 (8th Cir. 2007); *In re* Grand Jury Subpoena, 419 F.3d 329, 335 (5th Cir. 2005); *In re Grand Jury Proceedings*, 401 F.3d at 251; *In re* Sealed Case, 223 F.3d 775, 778–79 (D.C. Cir. 2000); *In re* Richard Roe, Inc., 168 F.3d 69, 70–72 (2d Cir. 1999).

[112] *In re* Search Warrant Issued June 13, 2019, 942 F.3d 159, 174 (4th Cir. 2019).

[113] *In re* Grand Jury Subpoena, 220 F.3d 406, 408 (5th Cir. 2000); *In re* Grand Jury Proceedings, 609 F.3d 909, 912 (8th Cir. 2010); *In re* Grand Jury Subpoenas, 561 F.3d at 411; *In re* Grand Jury Proceedings Thursday Special Grand Jury, 33 F.3d 342, 349 (4th Cir. 1994).

[114] U.S. CONST. amend.VI ("In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.").

[115] "[U]ntil such time as the 'government has committed itself to prosecute, and ... the adverse positions of the government and defendant have solidified' the Sixth Amendment right to counsel does not attach." Moran v. Burbine, 475 U.S. 412, 432 (1986) (quoting, United States v. Gouveia, 467 U.S. 180, 189 (1984) and Kirby v. Illinois, 406 U.S. 682, 689 (1972)); *see also* United States v. Warrington, 78 F.4th 1158, 1164 (10th Cir. 2023); United States v. Snyder, 71 F.4th 555, 566 (7th Cir. 2023); United States v. Medley, 34 F.4th 326, 333 (4th Cir. 2022); McFarland v. Lumpkin, 26 F.4th 314, 322 (5th Cir. 2022); United States v. Kourani, 6 F.4th 345, 353 (2d Cir. 2021); United States v. Olson, 988 F.3d 1158, 1160 (9th Cir. 2021); United States v. Kubini, 19 F. Supp. 3d 579, 618 (W.D. Pa. 2014) (citing, United States v. Williams, 504 U.S. 36, 49 (1992)) ("The Supreme Court has likewise recognized that the Sixth Amendment right to counsel does not attach prior to the grand jury's return of an indictment.").

[116] United States v. Van Engel, 15 F.3d 623, 630 (7th Cir. 1993), abrogated on other grounds by United States v. Canoy, 38 F.4th 873 (7th Cir. 1994) ("The preindictment investigation of Kravit could violate the Sixth Amendment therefore, only if it affected his representation of Van Engel at the later stages of the case, in particular the trial."), *abrogated on*

(continued...)

As a general rule, a grand jury subpoena will only be quashed on the basis of Sixth Amendment considerations on those rare instances where it is shown to have been motivated solely by an intent to harass,[117] where compliance would unnecessarily result in an actual conflict of interest between the attorney and his or her client, or where compliance would unnecessarily tend to undermine the attorney-client relationship.[118] The Sixth Amendment, however, does not assure a grand jury witness of the right to have an attorney present when the witness testifies before the grand jury.[119]

A successful refusal to appear or testify before the grand jury, based upon the First Amendment guarantees of the freedoms of the press, association, or expression,[120] is even more rare. Under

other grounds by, United States v. Canoy, 38 F.4th 873 (7th Cir. 1994); *In re* Grand Jury Subpoena, 913 F.2d 1118, 1128 (5th Cir. 1990) ("[T]he district court's exercise of its discretion to quash the subpoena because it created a serious interference with Reyes-Requena's relationship with his attorney is justified for several reasons. Reyes-Requena's Sixth Amendment rights had attached. The prosecution against him was moving swiftly—an indictment issued within three weeks of Reyes-Requena's detention hearing. DeGeurin's representation of Reyes-Requena was effectively stalled during the two-to-three-week interval that he contested the subpoena. The government made no effort to explain, even rhetorically, why it was necessary to subpoena DeGeurin during that critical juncture in his representation of the defendant. The government made not a single argument in the district court or before this court to suggest that a brief delay in the process, until a lull in the Reyes-Requena prosecution or until after his conviction would have been imprudent.").

[117] *Cf.* Trump v. Vance, 591 U.S. 786, 805 (2020) ("[G]rand juries are prohibited from engaging in 'arbitrary fishing expeditions' and initiating investigations 'out of malice or an intent to harass.'") (quoting United States v. R. Enters., Inc., 498 U.S. 292, 299 (1991)); United States v. Trump, 91 F.4th 1173, 1197 (D.C. Cir. 2024), *vacated and remanded*, 603 U.S. 593 (2024).

[118] United States v. Bergeson, 425 F.3d 1221, 1224–27 (9th Cir. 2005); *In re* Grand Jury Proceedings, 33 F.3d 1060, 1062–63 (9th Cir. 1994); *In re* Grand Jury Matter, 926 F.2d 348, 351 (4th Cir. 1991).

[119] Conn v. Gabbert, 526 U.S. 286, 292 (1999); United States v. Mandujano, 425 U.S. 564, 581 (1976); United States v. McKenna, 327 F.3d 830, 838 (9th Cir. 2003). Although the lower federal courts have generally recognized the right of a grand jury witness to suspend his or her testimony in order to consult with an attorney immediately outside the grand jury room, *In re* Grand Jury Subpoena, 97 F.3d 1090, 1092–93 (8th Cir. 1996); Gabbert v. Conn, 131 F.3d 793, 801 (9th Cir. 1997), *rev'd on other grounds*, 526 U.S. 526 (1999), as the Supreme Court observed in *Conn*, the Court itself has never held that such an accommodation is constitutionally required, *Conn v. Gabbert*, 526 U.S. at 292; *In re* Grand Jury Investigation, 182 F.3d 668, 671 n.3 (9th Cir. 1999).

Subject to various limitations, a number of states permit state grand jury witnesses to have an attorney present when they testify, *e.g.*, ARIZ. REV. STAT. § 21-412 (2025) (only targets of investigation); COLO. REV. STAT. § 16-5-204(4)(d) (2025); CONN. GEN. STAT. § 54-47f (2025); FLA. STAT. § 905.17 (2025); 725 ILL. COMP. STAT. 5/112-4.1 (2025); IND. CODE ANN. § 35-34-2-5.5 (2025) (only targets); KAN. STAT. ANN. § 22-3009 (2025); LA. CODE CRIM. PROC. ANN. art. 433 (2024) (only targets of an investigation); MASS. GEN. LAWS ch.277, § 14A (2024); MICH. COMP. LAWS § 767.3 (2025); Minn. R. Crim. P. 18.03 (only witnesses who have waived or been granted immunity); NEB .REV. STAT. § 29-1411 (2025); NEV. REV. STAT. § 172.239 (2025) (target of grand jury); N.M. STAT. § 31-6-4 (2025) (attorney for targets); N.Y. CODE CRIM. PROC. § 190.52 (only witnesses who have waived immunity); OKLA. STAT. ANN. tit. 22, § 340 (2025); 42 PA. CONS. STAT. § 4549 (West 2025); S.D. CODIFIED LAWS § 23A-5-11 (2025); UTAH CODE ANN. § 77-10a-13 (West 2025); VA. CODE ANN. § 19.2-209 (2024) (special grand jury); WIS. STAT. § 968.45 (2025).

[120] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

extreme circumstances, it will provide the grounds to avoid a contempt citation or to quash a federal grand jury subpoena.[121] Generally it will not.[122]

The Fourth Amendment prohibits unreasonable governmental searches and seizures.[123] What might be unreasonable under other circumstances, may well be considered reasonable in a grand jury environment. For example, grand jury subpoenas are not considered per se unreasonable simply because they require neither probable cause nor the filter of an approving neutral magistrate. [124]

The opportunity to be heard on a motion to quash before complying makes the grand jury subpoena in many respects less intrusive than the warrant.[125]

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[121] Branzburg v. Hayes, 408 U.S. 665, 707–78 (1972) ("[N]ews gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment.... " (footnote omitted)); *In re* Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461, 706 F. Supp. 2d 11, 18–19 (D.D.C. 2009) ("[D]espite its admonition in *Branzburg*, the Supreme Court has yet to define the appropriate standard for reviewing grand jury subpoenas that implicate First Amendment concerns. However, several courts of appeal, in addition to this Court, have adopted a two-part test to determine whether to enforce a subpoena that may infringe on First Amendment rights. *See In re Grand Jury Subpoenas Duces Tecum*, 78 F.3d 1307, 1312 (8th Cir. 1996); *In re Grand Jury Proceedings*, 776 F.2d 1099, 1102–03 (2d Cir. 1985). In order to survive a First Amendment challenge the government must show that they have a compelling interest in obtaining the sought-after material and that there is a sufficient nexus between the subject matter of the investigation and the information they seek.").

[122] *Branzburg*, 408 U.S. at 667 (freedom of the press); Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991) ("Neither does the First Amendment relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source."); *In re* Grand Jury Subpoena, 438 F.3d 1141, 1145–50 (D.C. Cir. 2006) (declining to recognize either a First Amendment or common law privilege under the facts before it); *In re* Grand Jury Subpoena, 947 F. Supp. 1314, 1318–21 (E.D. Ark. 1996); *In re* Grand Jury 87-3 Subpoena Duces Tecum, 955 F.2d 229, 231–34 (4th Cir. 1992) (freedom of expression); Nat 'l Commodity & Barter Ass'n v. United States, 951 F.2d 1172, 1174–75 (10th Cir. 1991) ("[W]hen a party makes a prima facie showing of First Amendment infringement, the government must show a compelling need to obtain the documents identifying petitioner's members. Further, the government must show that the records sought bear a substantial relationship to this compelling interests.... 'A good-faith criminal investigation into possible evasion of reporting requirements through the use of a private banking system that keeps no records is a compelling interest'" (quoting First Nat'l Bank v. DOJ, 865 F.2d 217, 220 (10th Cir. 1989)); *In re* the Grand Jury, 171 F.3d 826, 835 (3d Cir. 1999) (freedom of religion). The Department of Justice has issued guidelines relating to subpoenas issued to media and its representatives, 28 C.F.R. § 50.10 (2024), but they do not create enforceable legal rights, *In re Grand Jury Subpoena*, 438 F.3d at 1152–53.

Reporters, academics and others have periodically suggested adjustments in the law in this area, *e.g.*, Christina Koningisor, *The De Facto Reporter's Privilege*, 127 YALE L.J. 1176 (2018); Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515 (2007); Monica Langley & Lee Levine, *Branzburg Revisited: Confidential Sources and First Amendment Values*, 57 GEO. WASH. L. REV. 13 (1988); Leslye DeRoos Rood & Ann K. Grossman, *The Case for a Federal Journalist's Testimonial Shield Statute*, 18 HASTINGS CONST. L. Q. 779 (1981), an effort which may not be without its own pitfalls, see, *Are Oliver Stone and Tom Clancy Journalists: Determining Who Has Standing to Claim the Journalist's Privilege*, 69 WASH. L. REV. 739 (1994); *Using the Shield as a Sword: an Analysis of How the Current Congressional Proposals for a Reporter's Shield Law Wound the Fifth Amendment*, 20 ST. JOHN'S J. LEGAL COMMENT. 339 (2006).

[123] U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

[124] Zurcher v. Stanford Daily, 436 U.S. 547, 562–63 (1978).

[125] Id. at 575–76 (Stewart, J. dissenting). The government might respond to a motion to quash by seeking a search warrant for the same material, if it has sufficient evidence to establish probable cause.

Even "forthwith" subpoenas, where the opportunity to quash may be minimized,[126] have generally been thought to pass constitutional muster, either because the party to whom they were address complied, i.e., consented,[127] or because the circumstances presented exigencies similar to those to which Fourth Amendment demands have traditionally yielded.[128]

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:

> A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive.

However, a "'grand jury proceeding is accorded a presumption of regularity, which generally may be dispelled only upon particularized proof of irregularities in the grand jury process.' Consequently, a grand jury subpoena issued through normal channels is presumed to be reasonable."[129]

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.[130]

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[126] In some instances, a forthwith subpoena may command performance "forthwith" and not later than some short period thereafter, e.g., *In re* Grand Jury Subpoenas, 597 F.3d 189, 202 (4th Cir. 2010) ("production [of subpoenaed documents] must proceed forthwith and must be complete as [soon as] counsel can make it no later than May 12, 2006 [(7 days later)]"). In other instances, a forthwith subpoena may command immediately performance, thereby reducing the possibility of filing a timely motion to quash or to seek the assistance of counsel, and raising questions as to when a forthwith subpoena is really an arrest or search warrant available without the necessities of the Fourth Amendment.

[127] United States v. Susskind, 4 F.3d 1400, 1401 (6th Cir. 1993), adopting Part IV of its previously vacated opinion reported at United States v. Susskind, 965 F.2d 80, 85–87 (6th Cir. 1992); United States v. Allison, 619 F.2d 1254, 1257 (8th Cir. 1980).

[128] United States v. Lartey, 716 F.2d 955, 962 (2d Cir. 1983) (evidence suggested that delay might well have resulted in the destruction or alteration of the subpoenaed records); United States v. Wilson, 614 F.2d 1224, 1228 (9th Cir. 1980) (evidence indicated that delay might have afforded an opportunity to forge documents); United States v. Triumph Capital Grp., Inc, 211 F.R.D. 31, 55–56 (D .Conn. 2002) (exigent circumstances—the threat that evidence sought would be destroyed—justified use a forthwith grand jury subpoena).

[129] United States v. R. Enters., Inc., 498 U.S. 292, 301 (1991) (quoting United States v. Mechanik, 475 U.S. 66, 75 (1986) (O'Connor, J., concurring in the judgment)); *see also In re Grand Jury Proceedings*, 744 F.3d 211, 220 (1st Cir. 2014); *In re* Grand Jury Proceedings, 115 F.3d 1240, 1244 (5th Cir. 1997); *In re* Grand Jury Proceedings, 607 F. Supp. 2d 803, 806 (W.D. Tex. 2009); *In re* Grand Jury Subpoenas, 438 F. Supp. 2d 1111, 1120–21 (N.D. Cal. 2006).

[130] *R. Enters., Inc.*, 498 U.S. at 299–301 (1992); *In re* Grand Jury, 478 F.3d 581, 585 (4th Cir. 2007) ("In the absence of such a privilege, a subpoena may still be unreasonable or oppressive under Rule 17(c) if it is irrelevant, abusive or harassing, overly vague, or excessively broad. Additionally, some courts have recognized that Rule 17(c) enables district courts to quash a subpoena that intrudes gravely on significant interests outside of the scope of a recognized privilege, if compliance is likely to 'entail consequences more serious than even severe inconveniences occasioned by irrelevant or overbroad request for records'") (citations omitted) (quoting *In re* Grand Jury Matters, 751 F.2d 13, 18 (1st Cir.1984); *In re* Grand Jury Subpoenas, 906 F.2d 1485, 1496 (10th Cir. 1990); *In re* Grand Jury Subpoena Duces Tecum Dated November 15, 1993, 846 F. Supp. 11, 12–14 (S.D.N.Y. 1994) (quashing as overbroad a grand jury subpoena for all computer hard disk drives and floppy diskettes without any particular reference to their content). In *R. Enterprises*, the Court held that the party seeking to quash bears the burden of establishing that a particular subpoena is unreasonable because it is unduly burdensome or because of its want of specificity or relevancy and that a motion to quash on grounds of relevancy "must be denied unless there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." 498 U.S. at 301); *In re* Grand Jury Proceedings, 616 F.3d 1186, 1201 (10th Cir. 2010); *In re* Grand Jury Subpoena, 175 F.3d 332, 339 (4th Cir. 1999); *In re* Sealed Case, 121 F.3d 729, 759 (D.C. Cir. 1997). Moreover, burdensomeness is a matter (continued...)

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,[131] a handwriting exemplar,[132] to sign a consent form authorizing the disclosure of bank records,[133] or for juveniles to produce a DNA sample and a complete set of fingerprints.[134] Consequently, the courts will not quash an otherwise valid subpoena issued for any those purposes.[135]

Although the Fifth Amendment privilege against self-incrimination[136] precludes requiring a witness to testify at his or her criminal trial,[137] it does not "confer an absolute right to decline to respond in a grand jury inquiry."[138] Once before the grand jury, a witness may decline to present self-incriminating testimony.[139] The right does not include the option to protect pre-existing, voluntarily prepared personal papers on the ground that they are self-incriminatory,[140] but a witness may refuse to produce that documents where the act of production (rather than the mere

of context, *In re* Grand Jury Proceedings, 744 F.3d at 221 (1st Cir. 2014) ("NITHPO ultimately does little more than enumerate the categories of requested documents and generally protest 'the sheer amount of time and resources that would be required to comply' with the subpoena duces tecum. But all subpoenas demand some amount of time and resources from their recipients, and absent a more specific explanation of how the burden in this case is unreasonable, we decline to disturb the district court's judgment."). Here again, failure to comply with guidelines in the United States Attorneys' Manual or other internal directives will not per se render a grand jury subpoena subject to being quashed, *In re* Grand Jury Proceedings, 42 F.3d 876, 880 (4th Cir. 1994).

[131] United States v. Dionisio, 410 U.S. 1 (1973).

[132] United States v. Mara, 410 U.S. 19 (1973).

[133] Doe v. United States, 487 U.S. 201 (1988).

[134] *In re* Green Grand Jury Proceedings, 371 F. Supp. 2d 1055, 1056–58 (D. Minn. 2005); *In re* Shabazz, 200 F. Supp. 2d 578, 581–85 (D.S.C. 2002) (applying Fourth Amendment analysis to a motion to quash a grand jury subpoena duces tecum for a saliva sample sought for DNA testing purposes).

[135] United States v. Meregildo, 876 F. Supp. 2d 445, 450 (S.D. N.Y. 2012) ("Among other limitations, a 'grand jury is ... without power to invade a legitimate privacy interest protected by the Fourth Amendment.' ... While a grand jury subpoena may constitute a search, '[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.' Thus, grand jury subpoenas compelling voice exemplars, handwriting samples, and hair samples fall outside the ambit of the Fourth Amendment protection. By contrast, grand jury subpoenas involving intrusions into the body, such as blood testing implicate the Fourth Amendment's prohibition of unreasonable searches.") (first and third alterations in original) (citations omitted) (first quoting United States v. Calandra, 414 U.S. 338, 346 (1974); and then quoting Katz v. United States, 389 U.S. 347, 351 (1967)).

[136] U.S. Const. amend. V ("[N]or shall any person ... be compelled in any criminal case to be a witness against himself.... ").

[137] *Cf.* Griffin v. California, 380 U.S. 609, 613–14 (1965) (prosecutors are constitutionally barred from making uninvited comments on the defendants' failure to testify to the jury); United States v. Carswell, 996 F.3d 785, 797 (7th Cir. 2021); United States v. Ayewoh, 627 F.3d 914, 922–23 (1st Cir. 2010).

[138] United States v. Mandujano, 425 U.S. 564, 572 (1976). Nor is a witness entitled to Miranda warnings even if he or she is a target of the grand jury's investigation. *Id.* at 579; United States v. Williston, 862 F.3d 1023, 1032 (10th Cir. 2017); United States v. Byram, 145 F.3d 405, 409 (1st Cir. 1998); United States v. Gomez, 237 F.3d 238, 241–42 (3d Cir. 2000); United States v. Quam, 367 F.3d 1006, 1008 (8th Cir. 2004); United States v. Trinh, 638 F. Supp. 2d 143, 147 (D. Mass. 2009).

[139] *Gomez*, 237 F.3d at 240. The Fifth Amendment, however, ordinarily does not permit a grand jury witness to refuse to answer on grounds his testimony will expose him to prosecution under foreign law, *In re* Grand Jury Proceedings of the Special April 2002 Grand Jury, 347 F.3d 197, 208 (7th Cir. 2003) (citing, United States v. Balsys, 524 U.S. 666, 673–700 (1998)); *In re* Grand Jury Investigation, 542 F. Supp. 2d 467, 469 (E.D. Va. 2008); United States v. Alvarez, 489 F. Supp. 2d 714, 721–23 (W.D. Tex. 2007).

[140] United States v. Hubbell, 530 U.S. 27, 35–36 (2000) (citing, Fisher v. United States, 425 U.S. 391, 409 (1976) and United States v. Doe, 465 U.S. 605, 612 (1984)); *In re* Grand Jury Subpoena, Dated April 18, 2003, 383 F.3d 905, 909 (9th Cir. 2004).

content of the documents) would itself be incriminating.[141] The privilege, nevertheless, is a personal one, and as a result provides no basis to quash a grand jury subpoena duces tecum for the records of corporate or other legal entities rather than of individuals.[142]

The Fifth Amendment Due Process Clause,[143] with and like the "unreasonable or oppressive" standard of Rule 17 of Federal Rules of Criminal Procedure, supplements other grounds for a motion to quash grand jury subpoenas when confronted with potential abuse of the grand jury process or practices that are fundamentally unfair.

Thus, a grand jury subpoena is subject to a motion to quash if issued for the sole or dominant purpose of preparing the government's case against a previously indicted target, but not if there is a possible valid purpose for the subpoena.[144] Nor may the grand jury subpoena be used solely as a discovery device for civil cases in which the government has an interest.[145]

[141] *Hubbell*, 530 U.S. at 40–43; *In re* Grand Jury Proceeding, 971 F.3d 40, 55 (2d Cir. 2020); *In re* Twelve Grand Jury Subpoenas, 908 F.3d 525, 528 (9th Cir. 2018) (per curiam); *In re* Grand Jury Witnesses, 92 F.3d 710, 712–13 (8th Cir. 1996); *In re* Grand Jury Subpoena Dated April 18, 2003, 383 F.3d 905, 909–10 (9th Cir. 2004); *In re* Grand Jury Subpoena, 991 F. Supp. 2d 968, 972–76 (E.D. Mich. 2014).

[142] Braswell v. United States, 487 U.S. 99 (1988); *In re Twelve Grand Jury Subpoenas*, 908 F.3d at 528; *In re* Grand Jury Subpoena Issued June 18, 2009, 593 F.3d 155, 158–59 (2d Cir. 2010); *In re* Grand Jury Subpoena, 584 F.3d 175, 184 (4th Cir. 2009); *In re Grand Jury Subpoena*, 991 F. Supp. 2d at 972–76; *cf.* Bellis v. United States, 417 U.S. 85 (1974) (upholding the contempt citation of an attorney for failure to comply with a grand jury subpoena for his law firm's business records).

[143] U.S. CONST. amend. V ("[N]or shall any person ... be deprived of life, liberty, or property, without due process of law.... ").

[144] *In re* Grand Jury 2021 Subpoenas, 87 F.4th 229, 251–52 (4th Cir. 2023); United States v. Punn, 737 F.3d 1, 6 (2d Cir. 2013) ("The law is settled in this circuit and elsewhere that it is improper to utilize a Grand Jury for the sole or dominating purpose of preparing an already pending indictment for trial"); United States v. US Infrastructure, Inc., 576 F.3d 1195, 1214 (11th Cir. 2009) ("A defendant claiming grand jury abuse 'has the burden of showing that the Government's use of the grand jury was improperly motivated.' While the grand jury cannot be used 'solely or even primarily' to gather evidence against an indicted defendant, it can be used to investigate whether a defendant committed crimes not covered in the indictment. '[T]he law presumes, absent a strong showing to the contrary, that a grand jury acts within the legitimate scope of its authority'" (alteration in original) (footnotes omitted) (first quoting United States v. Leung, 40 F.3d 577, 581 (2d Cir.1994), then quoting United States v. Bros. Const. Co., 219 F.3d 300, 314 (4th Cir. 2000), and then quoting United States v. R. Enters., Inc., 498 U.S. 292, 300 (1991)); *In re* Green Grand Jury Proceedings, 492 F.3d 976, 986 (8th Cir. 2007) ("The government may not use the grand jury's investigative powers for the sole or dominant purpose of a preparing a pending indictment for trial. If the grand jury proceedings are directed toward other charges or persons, 'its scope cannot be narrowly circumscribed and any collateral fruits from bona fide inquires may be utilized by the government.'" (first quoting United States v. Puckett, 147 F.3d 765, 770 (8th Cir.1998), and then quoting United States v. Wadlington, 233 F.3d 1067, 1074 (8th Cir. 2000)); United States v. Apperson, 441 F.3d 1162, 1189 (10th Cir. 2006); United States v. Flemmi, 245 F.3d 24, 28 (1st Cir. 2001) ("if a grand jury's continuing indagation results in the indictment of parties not previously charged, the presumption of regularity generally persists. So too when the grand jury's investigation leads to the filing of additional charges against previously indicted defendants" (citation omitted)); United States v. Bros. Constr. Co., 219 F.3d 300, 314 (4th Cir. 2000).

[145] *In re* Grand Jury Subpoenas, 175 F.3d 332, 339–40 (4th Cir. 1999); *cf.*, United States v. Sells Eng'g, Inc., 463 U.S. 418, 432 (1983) ("If prosecutors in a given case knew that their colleagues would be free to use the materials generated by the grand jury for a civil case, they might be tempted to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in the civil suit, or even to start or continue a grand jury inquiry where no criminal prosecution seemed likely. Any such use of grand jury proceedings to elicit evidence for use in a civil case is improper per se"). The attorney for the government, however, need not seek court approval to use in a related civil matter the knowledge he gained by assisting a grand jury, United States v. John Doe, Inc., 481 U.S. 102, 111 (1987).

Finally, the Constitution provides that "for any speech or debate in either House, they [the members of Congress] shall not be questioned in any other place."[146] The privilege precludes questioning before the grand jury of a Member's legislative acts.[147]

Statutory and Other Limitations of Grand Jury Subpoena Authority

Federal law prohibits the use of evidence tainted by illegal wiretapping.[148] The prohibition permits a grand jury witness to refuse to answer inquiries derived from illegal wiretapping.[149] Similarly, a grand jury subpoena directed towards earlier testimony secured under a promise of immunity from prosecution may be quashed if sought solely for the purpose of indicting the witness.[150]

The courts are divided over the question of whether a statute that classifies information as confidential thereby takes the information beyond the reach of a federal grand jury subpoena, or otherwise confines the grand jury's prerogatives.[151]

The vitality of regulatory limitations upon the grand jury subpoena power are equally unclear. The courts have consistently held that the government's failure to comply with the guidelines in the United States Attorneys' Manual concerning grand jury subpoenas does not constitute valid

[146] U.S. Const. art. I, § 6, cl. 2.

[147] *In re* Grand Jury Subpoenas, 571 F.3d 1200, 1202–03 (D.C. Cir. 2009); United States v. Rostenkowski, 59 F.3d 1291, 1300 (D.C. Cir. 1995); United States v. Swindall, 971 F.2d 1531, 1543 (11th Cir. 1992); *cf. In re* Sealed Case, 80 F.4th 355, 365 (D.C. Cir. 2023). Federal law also affords members of state and local legislative bodies a similar privilege. La Union del Pueblo Entero v. Abbott, 93 F.4th 310, 318 (5th Cir. 2024); Pernell v. Fla. Bd. Governors. of the State Univ., 84 F.4th 1339, 1343 (11th Cir. 2023) *In re* North Dakota Legis. Assembly, 70 F.4th 460, 463 (8th Cir. 2023), *vacated sub nom*., Turtle Mountain Band of Chippewa Indians v. N.D. Legislative Assembly, 144 S. Ct. 2709 (2024) (mem.).

[148] 18 U.S.C. § 2515 ("Whenever any wire or oral communications has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence ... before ... any grand jury ... if the disclosure of that information would be in violation of this chapter [18 U.S.C. §§ 2510–2522]." No such rule governs admissibility of evidence before the grand jury with respect to interceptions under the Foreign Intelligence Surveillance Act. *See*, 50 U.S.C. § 1806 (use of information); *In re* Grand Jury Subpoena, 597 F.3d 189, 201 (4th Cir. 2010).

[149] Gelbard v. United States, 408 U.S. 41, 43–44 (1972) (citing 18 U.S.C. § 2515); *In re* Grand Jury Proceedings, 988 F.2d 211, 213 (1st Cir. 1992); *In re* Grand Jury, 111 F.3d 1066, 1077–79 (3d Cir. 1997); *In re* Grand Jury Investigation, 437 F.3d 855, 857 (9th Cir. 2006); *cf.* United States v. Muhtorov, 20 F.4th 558, 627 (10th Cir. 2021).

[150] *In re* Grand Jury Proceedings, 45 F.3d 343, 347–48 (9th Cir. 1995) (interpreting 18 U.S.C. § 6002).

[151] For instance, one court has suggested that a grand jury subpoena does not constitute a "court order" sufficient to trigger the exception to the confidentiality requirements of the Privacy Act, 5 U.S.C. § 552a, with respect to records maintained by the federal government, Doe v. DiGenova, 779 F.2d 74, 85 (D.C. Cir. 1985), while another court has reached a contrary conclusion, *In re* Grand Jury Subpoena Issued to the United States Postal Service, 535 F. Supp. 31, 32–33 (E.D. Tenn. 1981). The D.C. Circuit has noted a similar divergence of views on the question of whether a grand jury subpoena constituted a court order sufficient to trigger an exception in the Fair Credit Reporting Act (15 U.S.C. § 1681), *Doe*, 779 F.2d at 81 n.16 (citing, *In re* Grand Jury Subpoena Duces Tecum Concerning Credit Bureau, Inc., 498 F. Supp. 1174 (N.D. Ga. 1980) and *In re* Application of Credit Information Corp. of New York to Quash Grand Jury Subpoena, 526 F. Supp. 1253 (D. Md. 1981)), in contrast to, *In re* Grand Jury Proceedings, 503 F. Supp. 9 (D.N.J. 1980) and *In re* Subpoena Duces Tecum, 460 F. Supp. 1007 (E.D. Mich. 1978)); compare also, United States v. 218 Third St., 805 F.2d 256, 60–62 (7th Cir. 1986), with *In re* Castiglione, 587 F. Supp. 1210 (E.D. Cal. 1984), with respect to exceptions to the confidentiality requirements of the Right to Financial Privacy Act (12 U.S.C. § 3420)). *In re* August, 1993 Regular Grand Jury, 854 F. Supp. 1380, 1382–85 (S.D. Ind. 1994) recognizes the authority to quash a grand jury subpoena to preserve the confidentiality of hospital records concerning drug abuse treatment patients under 42 U.S.C. § 290dd-2. *See also In re Grand Jury Proceedings*, 607 F. Supp. 2d 803, 806–07 (W.D. Tex. 2009) ("[C]ourts in other circuits have rejected claims from state officials that compliance with a federal-grand-jury subpoena would mean that they would violate state confidentiality laws or that a separate court order is necessary for enforcement of a subpoena").

ground upon which to quash or modify a grand jury subpoena,[152] but implications of ethical rules purporting to proscribe the manner in which government attorneys may act with respect grand jury subpoenas and other matters arising out of their duties are less clear.[153]

Secrecy

Federal grand juries conduct their business in secret, primarily[154] at the direction of Rule 6 of the Federal Rules of Criminal Procedure that limits who may attend,[155] and the circumstances under which matters involving the conduct of their business may be disclosed.[156] Grand jury secrecy predates the arrival of the grand jury in this country and the Supreme Court has said that "the proper functioning of our grand jury system depends upon" it.[157] On the other hand, it has always been freely acknowledged that there are circumstances when, in balancing the interests of justice, the interests to be served by disclosure will outweigh the interests in secrecy.

The cloak surrounding the grand jury's business serves several interests:

> (1) to prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witness who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect [the] innocent accused who is exonerated from disclosure of the fact that he has been under

[152] *In re* Grand Jury Proceedings No. 92-4, 42 F.3d 876, 880 (4th Cir. 1994); *In re* Grand Jury Proceedings, 13 F.3d 1293, 1296 (9th Cir. 1994).

[153] Compare, Whitehouse v. U.S. Dist. Ct., 53 F.3d 1349 (1st Cir. 1995) (upholding a rule that required judicial approval before serving a grand jury subpoena for client information on an attorney), *with*, Stern v. United States District Court, 214 F.3d 4 (1st Cir. 2000) (holding invalid a rule, comparable but subject to a comment suggesting grounds for judicial disapproval).

[154] The federal circuits disagree over the extent to which federal courts may disclose grand jury matters, apart from Rule 6, based on their inherent supervisory powers. *In re* Petition for Order Directing Release of Records, 27 F.4th 84, 90 (1st Cir. 2022) ("The Second and Seventh Circuits have held that 'Rule 6(e)(3)(E) is permissive not exclusive'.... On the other side of the split, four circuits have concluded 'that Rule 6(e) is exhaustive, and that district courts do not possess inherent, supervisory power to authorize the disclosure of grand jury records outside of Rule 6(e)(3)'s enumerated exceptions.'") (first quoting Carlson v. United States, 837 F.3d 753, 766–67 (7th Cir. 2016); and then quoting Pitch v. United States, 953 F.3d 1226, 1229 (11th Cir. 2020) (en banc) (first citing *In re* Petition of Craig, 131 F.3d 99, 101–03 (2d Cir. 1997); then citing McKeever v. Barr, 920 F.3d 842, 850 (D.C. Cir. 2019); then citing United States v. McDougal, 559 F.3d 837, 840 (8th Cir. 2009); and then citing *In re* Grand Jury, 932 F.2d 481, 488 (6th Cir. 1991)).

[155] FED. R. CRIM. P. 6(d) ("The following persons may be present while the grand jury is in session: attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device.... No person other than the jurors, and any interpreter needed to assist a hearing-impaired or speech-impaired juror, may be present while the grand jury is deliberating or voting.").

[156] FED. R. CRIM. P. 6(e)(2), (7) ("(A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B). (B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury: (i) a grand juror; (ii) an interpreter; (iii) a court reporter; (iv) an operator of a recording device; (v) a person who transcribes recorded testimony; (vi) an attorney for the government; or (vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii) ... (7) Contempt. A knowing violation of Rule 6, or of guidelines jointly issued by the Attorney General and the Director of National Intelligence pursuant to Rule 6, may be punished as a contempt of court."); *see generally*, CRS Report R45456, *Federal Grand Jury Secrecy: Legal Principles and Implications for Congressional Oversight*, by Michael A. Foster.

[157] Rehberg v. Paulk, 566 U.S. 356, 374 (2012); United States v. Sells Eng'g, Inc., 463 U.S. 418, 424 (1983) (quoting Douglas Oil Co. v. Petrol Stops Nw., 441 U.S. 211, 218 (1979)).

> investigation and from the expense of standing trial where there was no probability of guilt.[158]

Conversely, circumstances may exist under which evidence of what occurred before the grand jury could prevent a miscarriage of justice or serve some other public interest. These conditions may develop in any environment in which evidence unearthed by the grand jury might be relevant. They can arise in the federal criminal trials which often follow from a grand jury investigation, in state criminal investigations and proceedings, in civil litigation, and in administrative and legislative proceedings.

The boundaries of grand jury secrecy have been defined by balancing the public interest in the confidentiality of grand jury proceedings against the public interest in disclosure in a particular context.[159] In some cases such as disclosure to a second grand jury, the rule permits disclosure without court approval;[160] in other cases such as disclosure to a civil litigant, the rule requires court approval after balancing the conflicting interests represented in a particular request for disclosure.[161]

Those Who Need Not Keep the Grand Jury's Secrets

Rule 6 expressly declares that "[n]o obligation of secrecy may be imposed on any person except in accordance with" its provisions,[162] and only proscribes disclosures by members of the grand jury, its court reporters and interpreters, the attorney for the government, and any personnel to whom grand jury matters are disclosed so that they may assist the attorney for the government.

This implies that a grand jury witness may usually disclose his or her grand jury testimony,[163] and those not listed in Rule 6 generally need not keep the grand jury's secrets even if they learned of

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[158] United States v. John Doe, Inc., 481 U.S. 102, 109 n.5 (1987) (quoting United States v. Rose, 215 F.2d 617, 628–29 (3d Cir. 1954) and United States v. Procter & Gamble Co., 356 U.S. 677, 681–82 n.6. (1958)); Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 219 n.10 (1979).

Douglas Oil Co. offered an alternative formulation, "First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule," *Douglas Oil Co.*, 441 U.S. at 219. The two are obviously similar and subsequent lower court decisions seem to show no real preference, *Pitch*, 953 F.3d at 1232 (citing *Douglas* Oil, 441 U.S. at 218); O'Keefe v. Chisholm, 769 F.3d 936, 943 (7th Cir. 2014) (same); *In re* Grand Jury Subpoena, 493 F.3d 152, 154 (D.C. Cir. 2007) (per curiam) (same); United States v. Aisenberg, 358 F.3d 1327, 1346 (11th Cir. 2004) (citing *Douglas Oil*, 441 U.S. at 218); *In re* Newark Morning Ledger Co., 260 F.3d 217, 221 (3d Cir. 2001) (same); Camiolo v. State Farm Fire & Cas. Co., 334 F.3d 345, 355 (3d Cir. 2003) (citing *Rose*, 215 F.2d at 628–29); *In re* Petition of Craig, 131 F.3d 99, 102 (2d Cir. 1997) (same); Anilao v. Spota, 918 F. Supp. 2d 157, 172 (E.D. N.Y. 2013) (same).

[159] *Douglas Oil Co.*, 441 U.S. at 218–19 ("disclosure is appropriate only in those cases where the need for it outweighs the public interest in secrecy"); *see also* Forbes Media LLC v. United States, 61 F.4th 1072, 1079–80 (9th Cir. 2023); SEC v. Rajaratnam, 622 F.3d 159, 183 (2d Cir. 2010); United Kingdom v. United States, 238 F.3d 1312, 1320 (11th Cir. 2001); United States v. Borda, 905 F. Supp. 2d 201, 204 (D.D.C. 2012).

[160] FED. R. CRIM. P. 6(e)(3)(C).

[161] FED. R. CRIM. P. 6(e)(3)(E)(ii).

[162] FED. R. CRIM. P. 6(e)(2).

[163] United States v. Sells Eng'g, Inc., 463 U.S. 418, 425 (1983) ("Witnesses are not under the prohibition unless they also happen to fit into one of the enumerated classes." [*e.g.*, grand juror, interpreter, court reporter, attorney for the government, etc.]; *In re* Subpoena, 947 F.3d 148, 152 (3d Cir. 2020); Butterworth v. Smith, 494 U.S. 624 (1990) (holding unconstitutional, as a violation of the First Amendment, a Florida statute that prohibited a witness from ever disclosing his or her grand jury testimony); Oracle Corp. v. SAP AG, 566 F. Supp. 2d 1010, 1011 (N.D. Cal. 2008); *cf.*
(continued...)

the matter from someone bound by the rule of secrecy.[164] Nevertheless, at least one court appears to believe that the Stored Communications Act operates as a sub silentio exception, permitting the imposition of nondisclosure orders upon communications service providers with respect to grand jury subpoenas they receive for customer communications content and records.[165] Moreover, there is some suggestion that witness nondisclosure orders are "routinely issued" to federal grand jury witnesses.[166]

Matters

Grand jury secrecy shrouds "matter[s] occurring before the grand jury."[167] In most instances, it does not bar disclosure of information because the information might be presented to the grand jury at some time in the future.[168] The rule protects the workings of the grand jury not the grist for

In re Sealed Motion, 880 F.2d 1367, 1373 (D.C. Cir. 1989) (holding that "a grand jury witness has a general right to a transcript of [his or her own] testimony absent the government demonstrating countervailing interests which outweigh the right to release of a transcript"); *contra*, *In re* Grand Jury Subpoena, 72 F.3d 271, 275–76 (2d Cir. 1995) (holding that grand jury witnesses do not have a presumptive right to a copy of their grand jury testimony on demand); *In re* Grand Jury Proceedings, 417 F.3d 18, 25–28 (1st Cir. 2005) (holding that under narrow circumstances the inherent power of the court to impose secrecy orders incidental to the matters occurring before them includes the power to impose such orders upon grand jury witnesses); *In re* Grand Jury, 566 F.3d 12, 17–23 (1st Cir. 2009) (holding a witness must show a particularized need for disclosure of his testimony, but not a strong showing of particularized need); *In re* N.Y. Times Co., 657 F. Supp. 3d 136, 147 (D.D.C. 2023) ("The rule does not impose any obligation of secrecy on witnesses. [Nevertheless,] [t]he existing practice on this point varies among districts." (quoting Fed. R. Civ. P. 6(e) advisory committee's note to 1944 adoption.), *vacated sub nom*. *In re* Cheney, No. 23-5071, 2024 WL 1739096 (D.C. Cir. Apr. 23, 2024)); *see generally*, *Statutory Silence: Reconsidering Orders of Grand Jury Witness Non-Disclosure and Judicial Discretion*, 50 AM. J. CRIM. L. 101.

[164] Fund for Constitutional Gov't v. Nat 'l Archives, 656 F.2d 856, 870 n.33 (D.C. Cir. 1981); United States v. Forman, 71 F.3d 1214, 1217–20 (6th Cir. 1995); *In re* Polypropylene Carpet Antitrust Litigation, 181 F.R.D. 680, 692–94 (N.D. Ga. 1998); SARA SUN BEALE ET AL., *supra* note 36, § 5.4. Under some circumstances, however, such disclosures may constitute violations of 18 U.S.C. § 641 (theft of federal property) or § 1503 (obstruction of justice), see United States v. Jeter, 775 F.2d 670 (6th Cir. 1985) (upholding convictions under both sections of a defendant who had sold information, obtained from carbon paper used to type transcripts of grand jury proceedings, to the targets of the grand jury investigations).

[165] *In re* Application of the United States for an Order of Nondisclosure Pursuant to 18 U.S.C. § 2705(b) for Grand Jury Subpoena, 45 F. Supp. 3d 1, 8 (D.D.C. 2014).

[166] Samantha S. Soter, *Statutory Silence: Reconsidering Orders of Grand Jury Witness Non-Disclosure and Judicial Discretion*, 50 AM. J. CRIM. L. 101, 101 n.1 (2024).

[167] FED. R. CRIM. P. 6(e)(2)(B); *see generally*, SARA SUN BEALE ET AL., *supra* note 30, § 5.6.

[168] United States v. E. Air Lines, Inc., 923 F.2d 241, 244 (2d Cir. 1991); but see, *In re* Motions of Dow Jones & Co., 142 F.3d 496, 500 (D.C. Cir. 1998) ("The phrase—'matters occurring before the grand jury'—includes not only what has occurred and what is occurring, but also what is like to occur"); *In re* Cudahy, 294 F.3d 947, 951(7th Cir. 2002)) ("the purpose of Rule 6(e) is to protect the confidentiality of the grand jury's hearings and deliberations, and the term matters occurring before the grand jury is interpreted accordingly. See Martin v. Consultants & Adm's, Inc., 966 F.2d 1078, 1097 (7th Cir. 1992) ('the general rule is that Rule 6(e)'s nondisclosure requirement applies to anything that may reveal what occurred before the grand jury'); *In re* Sealed Case, 192 F.3d 995, 1001 (D.C. Cir. 1999) (the phrase '"matters occurring before the grand jury' encompasses 'not only what has occurred and what is occurring, but also what is likely to occur,' including 'the identities of witnesses or jurors, the substance of testimony as well as actual transcripts, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like."' (quoting *In re Motions of Dow Jones & Co.*, 142 F.3d at 500)); United States v. Phillips, 843 F.2d 438, 441 (11th Cir. 1988) ("The 'term matters occurring before a grand jury' has been defined to include anything that will reveal what transpired during the grand jury proceedings,"); Standley v. DOJ, 835 F.2d 216, 218 (9th Cir. 1987)) ("'anything which may reveal what occurred before the grand jury' or 'information which would reveal "the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of the jurors, and the like"'" (first quoting *In re* Grand Jury Matter, 682 F.2d 61, 63 (3d Cir.1982; and then quoting *Fund for Const. Gov't.*, 656 F.2d at 869)); Concepcion v. FBI, 606 F. Supp. 2d 14, 33 (D.D.C. 2009) (the term covers disclosures that "'could reveal the inner workings of the [grand jury]'" on a particular case. (alteration in original) (quoting Declaration of David H. Hardy ¶ 28, *Concepcion*, 606 F. Supp. 2d 14 (No. 07–1766), Dkt. No. 23-1)).

its mill. The fact of disclosure to the grand jury, rather than the information disclosed, is the object of protection, but the two are not always easily separated. Clearly, grand jury secrecy does not bar disclosure of information previously presented to a grand jury but sought for an unrelated purpose by a requester unaware of its earlier presentation. On the other hand, it does cover instances where information is sought because it has been presented to the grand jury. In between, the distinctions become more difficult and the cases do not reflect a single approach.[169] For instance, there is some dispute over whether "ministerial" records relating to the grand jury are beyond the cloak of secrecy.[170]

Rule 6(e) also shields ancillary proceedings and records to avoid frustration of its purpose during the course of litigation concerning the proper scope of the rule.[171]

[169] *See, e.g.*, United States v. Dynavac, Inc., 6 F.3d 1407, 1411–12 (9th Cir. 1993), which first notes that "Rule 6(e) 'is intended only to protect against disclosure of what is said or takes place in the grand jury room ... it is not the purpose of the Rule to foreclose from all future revelations to proper authorities the same information or documents which were presented to the grand jury.' Thus, if a document is sought for its own sake rather than to learn what took place before the grand jury, and if its disclosure will not compromise the integrity of the grand jury process, Rule 6(e) does not prohibit its release." (quoting United States v. Interstate Dress Carriers, Inc. 280 F.2d 52, 54 (2d Cir. 1960). The *Dynavac* court then goes on to discuss the several, various different tests used by other circuits to determine when business records subpoena by the grand jury should be considered covered by Rule 6(e); see also, *In re* Grand Jury Investigation, 55 F.3d 350, 353–54 (8th Cir. 1995); Kersting v. United States, 206 F.3d 817, 821 (9th Cir. 2000) ("The law, however, is clear that business records sought for intrinsic value are admissible, even if the same documents were also presented to the grand jury. The only exception ... is if the material reveals a secret aspect of the grand jury's workings"); *In re* Cudahy, 294 F.3d 947, 952 (7th Cir. 2002) ("[T]hese formulations do not suggest that the mere fact of the existence of a grand jury is automatically to be deemed a matter occurring before it ... unless revelation of its existence would disclose the identities of the targets or subjects of the grand jury's investigation"); Stolt-Nielsen Transp. Grp. Ltd. v. United States, 534 F.3d 728, 733 (D.C. Cir. 2008) ("[T]he government may not bring information into the protection of Rule 6(e) and thereby into the protection afforded by Exemption 3 [of the Freedom of Information Act], simply by submitting it as a grand jury exhibit"); Dassault Systemes, SA v. Childress, 663 F.3d 832, 845 (6th Cir. 2011) ("Thus, even documents that were originally prepared in the ordinary course of business are presumptively matters occurring before the grand jury when they have been requested pursuant to a grand jury investigation. Mere contact with a grand jury, however, does not change every document into a matter occurring before a grand jury within the meaning of Rule 6. Rather, a party can rebut the presumption that the sought-after materials should be so classified by demonstrating that the information is public or was not obtained through coercive means or that disclosure would be otherwise available by civil discovery and would not reveal the nature, scope, or direction the grand jury inquiry"); *In re* Pac. Pictures Corp., 679 F.3d 1121, 1130 n.5 (9th Cir. 2012) ("As these preexisting documents were sought for [their] own sake rather than to learn what took place before the grand jury and as their disclosure will not compromise the integrity of the grand jury process,' Petitioners' argument that the disclosure was protected by Federal Rule of Criminal Procedure 6(e)(2)(B) is similarly without merit." (alteration in original) (quoting *Dynavac, Inc.*, 6 F.3d at 1411–12).

[170] Laws. Comm. for 9/11 Inquiry, Inc. v. Garland, 43 F.4th 276, 286 (2d Cir. 2022) ("The Ninth Circuit has adopted a more relaxed disclosure rule for what it termed 'ministerial' grand jury materials, including orders authorizing the extension of a grand jury, roll sheets reflecting composition and attendance of a grand jury, and the manner in which a grand jury was empaneled. This court has not recognized such a ministerial-record exception to the rules surrounding disclosure of grand jury materials.") (citing *In re* Special Grand Jury, 674 F.2d 778, 781–82 (9th Cir. 1982)).

[171] FED. R. CRIM. P. 6(e)(5), (6). ("(5) Closed Hearing. Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury. "(6) Sealed Records. Records, orders, and subpoenas relating to grand jury proceedings must be kept under seal to the extent and as long as necessary to prevent disclosure of a matter occurring before a grand jury.") These provisions have withstood First Amendment challenges in at least four circuits, United States v. Index Newspapers LLC, 766 F.3d 1072, 1083–84 (9th Cir. 2014); *In re* Newark Morning Ledger Co., 260 F.3d 217, 221–23 (3d Cir. 2001); *In re* Motions of Dow Jones & Co., 142 F.3d 496, 500 (D.C. Cir. 1998); *In re* Grand Jury Subpoena, 103 F.3d 234, 237 (2d Cir. 1996).

Disclosure

Rule 6 expressly authorizes disclosure of matters occurring before the grand jury under a number of circumstances. Some require court approval; others do not. The areas beyond the cloak of grand jury secrecy may include instances where: (1) the individual with the information is not among those listed in the Rule as bound to maintain the grand jury's secrets;[172] (2) disclosure does not constitute disclosure of "matters occurring before the grand jury";[173] (3) subsequent use of the information presented to the grand jury is not "disclosure";[174] or (4) the disclosure is one of the explicit exceptions listed in Rule 6(e)(3).[175]

Government Attorneys and Employees

Explicit exceptions aside, government attorneys and other employees may benefit from access to matters occurring before the grand jury in a number of instances. For example, grand jury secrecy does not prevent a government attorney (who acquired information and prepared documents while assisting a grand jury) from reviewing and using the information and documents, without disclosing them to anyone else, in preparation for civil litigation.[176]

Moreover, disclosure to government attorneys and employees assisting the grand jury is likewise possible without court approval under Rule 6(e)(3)(A).[177] The Supreme Court has made it clear that such disclosures are limited to attorneys and employees assisting in the criminal process which is the focus of the grand jury's inquiry.[178] Grand jury material may be disclosed without

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[172] FED. R. CRIM. P. 6(e)(2) ("(A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B) [listing those bound not to disclose matters occurring before the grand jury]."

[173] *Id.*

[174] *Dynavac, Inc.*, 6 F.3d at 1411–14; *In re* Grand Jury Investigation, 55 F.3d 350, 353–54 (8th Cir. 1995); Kersting v. United States, 206 F.3d 817, 821 (9th Cir. 2000); *In re* Cudahy, 294 F.3d 947, 952 (7th Cir. 2002); *Dassault Systems, SA*, 663 F.3d at 846; *In re* Comm. on the Judiciary, 332 F.R.D. 412, 415 (D. D.C. 2019) ("Rule 6(e) does not bar 'the disclosure of information 'coincidentally before the grand jury [which can] be revealed in such a manner that the revelation would not elucidate the inner workings of the grand jury." (alteration in original)) (quoting *In re* Sealed Case, 192 F.3d 995, 1002) (D.C. Cir. 1999)).

[175] As discussed below, Rule 6(e)(3) contains an extensive list of exceptions covering disclosures to government attorneys and employees under a wide variety of circumstances, as well as disclosures in relation to judicial proceedings.

[176] United States v. John Doe, Inc. I, 481 U.S. 102, 108–09 (1987). But individual use may not include disclosure to the court before whom the civil litigation is pending without prior judicial approval, *In re* Sealed Case, 250 F.3d 764, 768 (D.C. Cir. 2001) ("The Government ... takes the untenable and disturbingly cavalier position a sealed, ex parte, conveyance of grand jury information to a federal judge who is acting in his judicial capacity is not a disclosure within the meaning to the grand jury secrecy rule.").

[177] FED. R. CRIM. P. 6(e)(3)(A), (B) ("(A) Disclosure of a grand-jury matter—other than the grand jury's deliberations or any grand juror's vote—may be made to: (i) an attorney for the government for use in performing that attorney's duty; (ii) any government personnel—including those of a state, state subdivision, Indian tribe, or foreign government—that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law; or (iii) a person authorized by 18 U.S.C. § 3322 [relating to the disclosure of grand jury matters to government attorneys in civil forfeiture cases and with court approval to bank regulatory agencies in certain cases]; (B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule."); Pitch v. United States, 953 F.3d 1226, 1234 (11th Cir. 2020); United States v. Walters, 910 F.3d 11, 19 n.4 (2d Cir. 2018).

[178] United States v. Sells Eng'g, Inc., 463 U.S. 418, 427 (1983) ("The Government contends that all attorneys in the Justice Department qualify for automatic disclosure of grand jury materials under (A)(i), regardless of the nature of the (continued...)

court approval under Rule 6(e)(3)(A) to enable state police officers to assist a federal grand jury investigation, but apparently not private contractors.[179]

The rule, however, permits disclosure of grand jury evidence of certain foreign and terrorist criminal activities to various law enforcement officials without prior judicial approval. More specifically, Rule 6(e)(3)(D) authorizes disclosure of grand jury information concerning foreign nations, their agents and activities to federal, state, local, tribal and foreign officials without court approval, although the court must be notified after the fact.[180]

Judicial Proceedings

Rule 6(e)(3)(E)(i) permits court approved disclosure of grand jury matters "preliminarily to or in connection with a judicial proceeding."[181] Historically, the courts concluded, with some dissent, that the exception applied not only to the trial which followed the grand jury's investigation but to a variety of proceedings range from state bar and police disciplinary investigations,[182] to parole hearings,[183] state criminal investigations,[184] congressional inquiries,[185] federal administrative proceedings,[186] civil litigation,[187] and other grand jury investigations.[188] In *United States v. Baggot*, however, the Supreme Court provided guidance as to when disclosure might be considered "preliminarily to or in connection with" an appropriate proceeding and some indication of what kinds of proceedings might be considered "judicial":

> [T]he term "in connection with," in (C)(i) [now (E)(i)] ... refer[s] to a judicial proceeding already pending, while "preliminary to" refers to one not yet initiated.... The "judicial proceeding" language ... reflects a judgment that not every beneficial purpose, or even

litigation in which they intend to use the materials. We hold that (A)(i) disclosure is limited to use by those attorneys who conduct the criminal matters to which the materials pertain"); SEC v. Rajaratnam, 622 F.3d 159, 183 (2d Cir. 2010) ("[G]overnment civil attorneys may only receive grand jury materials from prosecutors for the purposes of pursuing a civil suit upon making a showing of particularized need.'" (quoting *Sells*, 463 at 420.)).

[179] *In re* Capitol Breach Grand Jury, 339 F.R.D. 1, 9 (D.D.C. 2021); *In re* November 1992 Special Grand Jury for the Northern District of Indiana, 836 F. Supp. 615, 616–17 (N.D. Ind. 1993); *In re* Grand Jury Matter, 607 F. Supp. 2d 273, 275–76 (D. Mass. 2009); *but see* United States v. Pimental, 380 F.3d 575, 591–96 (1st Cir. 2004) (holding that investigators of a "hybrid private/public" insurance association should be considered government personnel for grand jury disclosure purposes).

[180] FED. R. CRIM. P. 6(e)(3)(D). *See generally*, Lori E. Shaw, *The USA PATRIOT Act of 2001, the Intelligence Reform and Terrorism Prevention Act of 2004, and the False Dichotomy Between Protecting National Security and Preserving Grand Jury Secrecy*, 35 SETON HALL L. REV. 495 (2005); Jennifer M. Collins, *And the Walls Came Tumbling Down: Sharing Grand Jury Information with the Intelligence Community Under the USA PATRIOT Act*, 39 AM. CRIM. L. REV. 1261 (2002).

[181] FED. R. CRIM. P. 6(e)(3)(E)(i) ("(E) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand jury matter: (i) preliminary to or in connection with a judicial proceeding"); United States v. Wilkerson, 656 F. Supp. 2d 22, 34 (D.D.C. 2009) (The rule "allows district courts to authorize disclosure of grand jury matters in connection with a judicial proceeding if the party requesting disclosure demonstrates a particularized need or compelling necessity for the testimony." (quoting Smith v. United States, 423 U.S. 1303, 1304 (1975)), *aff'd*, 966 F.3d 828 (D.C. Cir. 2020).

[182] Doe v. Rosenberry, 255 F.2d 118 (2d Cir. 1958); *In re* Special February 1977 Grand Jury, 490 F.2d 894 (7th Cir. 1973).

[183] United States v. Shillitani, 345 F.2d 290 (2d Cir. 1965), *vacated on other grounds*, 384 U.S. 364 (1966).

[184] Gibson v. United States, 403 F.2d 166 (D.C. Cir. 1968).

[185] Haldeman v. Sirica, 501 F.2d 714 (D.C. Cir. 1974) (impeachment inquiry); *In re* Grand Jury Investigation of Ven-Fuel, 441 F. Supp. 1299 (M.D. Fla. 1977) (legislative investigation).

[186] *In re* Grand Jury Proceedings, 613 F. Supp. 672 (D. Or. 1985) (Customs Service proceedings).

[187] *In re* Grand Jury Investigation, 414 F. Supp. 74 (S.D.N.Y. 1976).

[188] *In re* 1979 Grand Jury Proceedings, 479 F. Supp. 93 (E.D.N.Y. 1979).

> every valid governmental purpose, is an appropriate reason for breaching grand jury secrecy. Rather, the rule contemplates only uses related fairly directly to some identifiable litigation, pending or anticipated. Thus, it is not enough to show that some litigation may emerge form the matter in which the material is to be used, or even that litigation is factually likely to emerge. The focus is on the *actual* use to be made of the material. If the primary purpose of disclosure is not to assist in preparation or conduct of a judicial proceeding, disclosure under (C)(i) [now (E)(i)] is not permitted.[189]

Using this criterion, *Baggot* concluded that disclosure of grand jury matter to the government for purposes of a tax audit, after which any tax liability could be enforced nonjudicially, could not be considered "preliminary to or in connection with a judicial proceeding" and thus could not be permitted under (C)(i) [now (E)(i)].[190]

Baggot found it unnecessary to address "the knotty question of what, if any, sorts of proceedings other than the garden-variety civil actions or criminal prosecutions might qualify as judicial proceedings under (C)(i)."[191] The case's description of disclosures in an administrative context, however, hardly supports the notion that "judicial proceedings" include those before administrative tribunals.[192]

Particularized Need

Court-approved disclosures generally require "a strong showing of particularized need."[193] Petitioners seeking disclosure "must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed."[194]

Since any examination begins with a preference for preservation of the grand jury's secrets, the particularized need requirement cannot be satisfied simply by demonstrating that the information sought would be relevant or useful or that acquiring it from the grand jury rather than from some other available source would be more convenient.[195]

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[189] United States v. Baggot, 463 U.S. 476, 479–80 (1983) (emphasis of the Court).

[190] Presumably, Rule 6(e)(3)(C)(i)(now (E)(i)) might have permitted disclosure in *Baggot* if the tax payer, rather than the IRS, had sought disclosure in anticipation of a judicial challenge of the results of the audit: "Of course, the matter may end up in court if Baggot chooses to take it there, but that possibility does not negate the fact that the primary use to which the IRS purposes to put the materials it seeks is an extrajudicial one—the assessment of a tax deficiency by the IRS," 463 at 481.

[191] 463 U.S. at 479 n.2; the D.C. Circuit subsequently found the exception extended to the proceedings conducted to determine the extent to which final reports of Independent Counsels should be made public, *In re* North, 16 F.3d 1234, 1244–45 (D.C. Cir. 1994) (per curiam); *In re* Espy, 259 F.3d 725, 728 (D.C. Cir. 2001), and to subsequent grand jury proceedings, *In re* Grand Jury, 490 F.3d 978, 986 (D.C. Cir. 2007) (citing various circuit court views on whether a grand jury witness should be permitted to examine or copy his testimony).

[192] *Baggot*, 463 U.S. at 480–81 n.5. Rule 6(e)(3)(E)(ii) permits disclosure at the request of a defendant who "shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury"; *see, e.g.*, United States v. Shows Urquidi, 71 F.4th 357, 366 (5th Cir. 2023).

[193] *Sells Eng'g, Inc.*, 463 U.S. at 443.

[194] Douglas Oil Co. v. Nw. Petrol Stops, 441 U.S. 211, 222 (1979); *Shows Urquidi*, 71 F.4th at 366; United States v. Tingle, 880 F.3d 850, 855 (7th Cir. 2018); United States v. McDougal, 559 F.3d 837, 841 (8th Cir. 2009); United States v. Moussaoui, 483 F.3d 220, 235 (4th Cir. 2007); United States v. Aisenberg, 358 F.3d 1327, 1348 (11th Cir. 2004); McAninch v. Wintermute, 491 F.3d 759, 767 (8th Cir. 2007); *In re* Special Grand Jury, 143 F.3d 565, 569–70 (10th Cir. 1998); United States v. Miramontex, 995 F.2d 56, 59 (5th Cir. 1993).

[195] *In re* Grand Jury, 118 F.3d 1433, 1437 (10th Cir. 1997); *In re* Grand Jury Investigation, 55 F.3d 350, 354–55 (8th Cir. (continued...)

While the test remains the same whether the government or a private party seeks disclosure,[196] "the concerns that underlie the policy of grand jury secrecy are implicated to a much lesser extent when the disclosure merely involves government attorneys."[197]

In the balance to be struck in the process of determining whether "the need for disclosure is greater than the need for continued secrecy,"[198] the district court enjoys discretion to judge each case on its own facts,[199] but some general trends seem to have developed. "[A]s the considerations justifying [grand jury] secrecy become less relevant, a party asserting a need for grand jury [material] will have a lesser burden in showing justification."[200]

The need to shield the grand jury's activities from public display is less compelling once it has completed its inquiries and been discharged,[201] especially if the resulting criminal proceedings have also been concluded.[202] Of course, there must still be a counterbalancing demonstration of need,[203] a requirement that becomes more difficult if the grand jury witnesses whose testimony is be disclosed still run the risk of retaliation.[204]

Because they necessarily reveal less of matters occurring before the grand jury, federal courts regularly distinguish documents generated independent of the grand jury from grand jury witness statements.[205]

Moreover, the courts seem responsive to requests to disclose matters occurring before the grand jury in order to resolve some specific inconsistency in the testimony of a witness or to refresh a witness's collection during the course of a trial.[206] In the same vein, they are more disposed to the interests supporting disclosure if the petitioner's opponent already enjoys the benefit of the information sought.[207]

1995*);* Hernly v. United States, 832 F.2d 980, 883–85 (7th Cir. 1987); *In re* Grand Jury Proceedings, 800 F.2d 1293, 1302 (4th Cir. 1986); *In re* Air Cargo Shipping Services Antitrust Litigation, 931 F. Supp. 2d 458, 468–69 (E.D.N.Y. 2013).

[196] United States v. John Doe, Inc. I, 481 U.S. 102, 112 (1987) (citing, United States v. Sells Eng'g, Inc., 463 U.S. 418, 443-44 (1983); and Illinois v. Abbott & Assocs., Inc., 460 U.S. 557 (1983)).

[197] *John Doe, Inc. I*, 481 U.S. at 112; *cf. In re Grand Jury Investigation*, 55 F.3d at 353–54.

[198] *Douglas Oil Co*, 441 U.S. at 222; United States v. Nix, 21 F.3d 347, 351 (9th Cir. 1994).

[199] *In re* Grand Jury Proceedings, 62 F.3d 1175, 1180 (9th Cir. 1995); United States v. Aisenberg, 358 F.3d 1327, 1349 (11th Cir. 2004).

[200] Douglas Oil Co., 441 U.S. at 223; *In re* Capitol Breach Grand Jury Investigations Within D.C., 339 F.R.D. 1, 24 (D.D.C. 2021).

[201] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234 (1940); *In re Grand Jury Investigation*, 55 F.3d at 354; *In re* Grand Jury Proceeding Relative to Perl, 838 F.2d 304, 307 (8th Cir. 1988).

[202] *In re* Grand Jury Proceedings, 800 F.2d at 1301 (4th Cir. 1986); United States v. Blackwell, 954 F. Supp. 944, 966 (D.N.J. 1997); *In re* Shopping Cart Antitrust Litigation, 95 F.R.D. 309, 312–13 (S.D.N.Y. 1982).

[203] *Aisenberg*, 358 F.3d at 1348; Hernly v. United States, 832 F.2d 980, 985 (7th Cir. 1987); *In re* Grand Jury Testimony, 832 F.2d 60, 64 (5th Cir. 1987).

[204] *In re Grand Jury Investigation*, 55 F.3d at 355.

[205] *In re Grand Jury Proceeding Relative to Perl*, 838 F.2d at 306–07; *In re Grand Jury Investigation*, 55 F.3d at 354; *In re* Sealed Case, 801 F.2d 1379, 1381 (D.C. Cir. 1986); *In re Grand Jury Investigation*, 630 F.2d 996, 1000 (3d Cir. 1980).

[206] *Douglas Oil Co.*, 441 U.S. at 222 n.12; United States *ex rel*. Stone v. Rockwell Int'l Corp., 173 F.3d 757, 759 (10th Cir. 1999) (per curiam); *In re Grand Jury Testimony*, 832 F.2d at 63; Lucas v. Turner, 725 F.2d 1095, 1105 (7th Cir. 1984); United States v. Fischbach & Moore, Inc., 776 F.2d 839, 845 (9th Cir. 1985). Under much the same logic, a court may afford a grand jury witness access to his or her earlier testimony prior to a subsequent appearance. *In re* Grand Jury, 490 F.3d 978, 986–90 (D.C. Cir. 2007); *In re* Grand Jury, 566 F.3d 12, 17–21 (1st Cir. 2009).

[207] *Douglas Oil Co.*, 441 U.S. at 222 n.13; *In re* Grand Jury Proceedings, 800 F.2d at 1302–03; *Fischbach and Moore, Inc.*, 776 F.2d at 844.

Defendant's Motion to Dismiss[208]

Rule 6(e)(3)(E)(ii) permits court approved disclosure upon a defendant's request "showing grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury," and upon a showing of particularized need.[209]

Second Grand Jury[210]

Grand jury matters may be disclosed to another federal grand jury without court approval under Rule 6(e)(3)(C). Prior to enactment of this part of the Rule, disclosure to another federal grand jury was possible upon a showing of particularized need "preliminary to or in connection with a judicial proceeding" under (E)(i). Neither particularized need nor court approval are apparently any longer required and disclosure is permitted whether the two panels are sitting within the same district or not.[211]

State, Military, or Foreign Law Enforcement[212]

Where the grand jury matters may show evidence of a violation of state law, the attorney for the government may petition the court for disclosure to state, military, or foreign law enforcement authorities under Rule 6(e)(3)(E)(iii), (iv), (v).[213]

Express Authority Under Statute or Other Rule

A criminal defendant is entitled to inspect and copy that portion of the transcript of his or her own testimony before a grand jury which relates to a crime with which he or she has been charged.[214]

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[208] FED. R. CRIM. P. 6(e)(3)(E)(ii) ("(E) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand jury matter: ... (ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury.").

[209] United States v. Shows Urquidi, 71 F.4th 357, 366 (5th Cir. 2023) (The party seeking disclosure "must demonstrate that '(1) the material he seeks is needed to avoid a possible injustice ... , (2) the need for disclosure is greater than the need for continued secrecy, and (3) his request is structured to cover only material so needed.'") (quoting Pitt. Plate Glass Co. v. United States. 360 U.S. 395, 400 (1959); United States v. Wilkinson, 124 F.3d 971, 977 (8th Cir. 1997); United States v. Puglia, 8 F.3d 478, 480 (7th Cir. 1993); United States v. Rankin, 651 F. Supp. 3d 523, 572 (D. Conn. 2023), *aff'd sub nom.* United States v. Sullivan, 118 F.4th 170 (2d Cir. 2024); United States v. Scott, 624 F. Supp. 2d 279, 291 (S.D. N.Y. 2008) ("Mere [s]peculation and surmise as to what occurred before the grand jury are not sufficient to overcome the presumption of regularity'" of proceedings before the grand jury (quoting United States v. Jailall, No. 00 CR 069, 200 WL 1368055, at *2 (S.D. N.Y. Sept. 20, 2000)).

[210] FED. R. CRIM. P. 6(e)(3)(C) ("(C) An attorney for the government may disclose any grand jury matter to another federal grand jury.").

[211] *In re* Grand Jury Subpoenas Duces Tecum, 658 F. Supp. 474, 478–80 (D. Md. 1987).

[212] FED. R. CRIM. P. 6(e)(3)(E)(iii), (iv),(v). ("(E) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand jury matter: ... (iii) at the request of the government, when sought by a foreign court or prosecutor for use in an official criminal investigation; (iv) at the request of the government if it shows that the matter may disclose a violation of state, Indian tribal, or foreign criminal law, as long as the disclosure is to an appropriate state, state-subdivision, Indian trial, or foreign government official for the purpose of enforcing that law; (v) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.").

[213] United States v. McVeigh, 157 F.3d 809, 814–15 (10th Cir. 1998).

[214] FED. R. CRIM. P. 16(a)(1)(A).

Under the Jencks Act, after a witness has testified against a defendant at trial, the defendant is entitled to request and receive a copy of the witness' relevant grand jury testimony.[215]

Congress has expressly authorized the disclosure of grand jury matters in connection with enforcement of some of the banking laws.[216] In the case of civil penalties for bank fraud, false statements and embezzlement and civil forfeiture for money laundering, the attorney for the government may receive information concerning grand jury matters from the attorney who assisted the grand jury or any of his or her assistants.[217] Bank regulatory agency personnel may receive grand jury information concerning such misconduct upon a motion by the government showing substantial need.[218]

But Congress's intent to breach the general rule of secrecy must be clear. Thus, the disclosure of grand jury matters is not authorized by those provisions of the Clayton Act which in certain antitrust instances compel the U.S. Attorney General to provide state Attorneys General with "any investigative files or other materials which are or may be relevant or material" to a cause action under the act.[219]

Consistence with the Historical Dimensions of Grand Jury Secrecy

Several courts, conscious of a responsibility over the grand jury subpoenas and indictments and of the common law origins of Rule 6(e), have permitted or asserted that under the proper circumstances they would permit disclosure without reference to any particular express exception within Rule 6(e) or elsewhere.[220] Others consider Rule 6(e) the exclusive source of disclosure authority.[221] Still others have noted that under the appropriate circumstances, a court might

[215] 18 U.S.C. § 3500; *see also* FED. R. CRIM. P. 26.2(a), 26.2(f)(3).

[216] 18 U.S.C. § 3322.

[217] FED. R. CRIM. P. 6(e)(3)(C); 18 U.S.C. § 3322.

[218] FED. R. CRIM. P. 6(e)(3)(C); 18 U.S.C. § 3322.

[219] Illinois v. Abbott & Assocs., Inc., 460 U.S. 557 (1983); see also, *In re* North, 16 F.3d 1234, 1243 (D.C. Cir. 1994) (holding that the statutory obligation of Independent Counsel to submit a final report of their investigations and prosecutions, 28 U.S.C. § 585(b), did not relieve them of the secrecy obligations of government attorneys under Rule 6(e)).

[220] McHan v. Commissioner, 558 F.3d 326, 334 (4th Cir. 2009) ("It is a common sense proposition that secrecy is no longer necessary when the contents of the grand jury matters have become public"); *In re* Grand Jury Subpoena, 438 F.3d 1138, 1140 (D.C. Cir. 2006) (same); *In re* Grand Jury Investigation (John Doe), 59 F.3d 17, 19–20 (2d Cir. 1995) (permitting access to documents held by the grand jury when sought in response to the legitimate needs of the entity that created the documents); *In re* Petition Kutler, 800 F. Supp. 2d 42, 44–48 (D. D.C. 2011) (permitting disclosure of certain Watergate grand jury testimony); *In re* Report & Recommendation of June 5, 1972 Grand Jury, 370 F. Supp. 1219, 1227–30 (D.D.C. 1974) (permitting disclosure of grand jury material relevant to an impeachment inquiry to the House Judiciary Committee); *In re* Grand Jury Investigation of Ven-Fuel, 441 F. Supp. 1299, 1302–04 (M.D .Fla. 1977) (permitting disclosure of grand jury material a House legislative subcommittee).

The Second Circuit offered a "non-exclusive list of factors that a trial court might want to consider when confronted with these highly discretionary and fact-sensitive special circumstance motions [for disclosure of grand jury information on grounds other than those specified in Rule 6(e)(3)]: "(i) the identity of the party seeking disclosure; (ii) whether the defendant to the grand jury proceeding or the government opposes the disclosure; (iii) why disclosure is being sought in the particular case; (iv) what specific information is being sought for disclosure; (v) how long ago the grand jury proceeding took place; (vii) the current status of the principals of the grand jury proceedings and that of their families; (vii) the extent to which the desired material—either permissibly or impermissibly—has been previously made public; (viii) whether witnesses to the grand jury proceedings who might be affected by disclosure are still alive; and (ix) the additional need for maintaining secrecy in the particular case in question," *In re* Petition of Craig, 131 F.3d 99, 106 (2d Cir. 1997).

[221] *In re* Petition for Order Directing Release of Records, 27 F.4th 84, 90 (1st Cir. 2022) ("[T]his is a matter on which our sister circuits are divided. On one side of the split, the Second and Seventh Circuits have held 'that Rule 6(e)(3)(E) (continued...)

restrict disclosure of grand jury matters even in instances where Rule 6(e) would ordinarily permit disclosure.[222]

Enforcement of Grand Jury Secrecy

"A knowing violation of Rule 6 ... may be punished as a contempt of court."[223] Since the Rule speaks of punishment, it might be fair to assume that it contemplates criminal contempt. While it does, the courts have also held that violations of grand jury secrecy may subject offenders to civil contempt and to the injunctive power of the court.[224] Government employees and members of the bar who improperly disclose the grand jury's secrets may be subject to disciplinary proceedings.[225] Under some circumstances, improper disclosure of grand jury matters may also violate the obstruction of justice provisions of 18 U.S.C. § 1503 (corruptly impeding or endeavoring to impede the administration of justice in connection with a judicial proceeding).[226]

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is permissive, not exclusive, and ... does not eliminate the district court's long-standing inherent supervisory authority to ... ensure the proper functioning of a grand jury' including by 'unseal[ing] grand jury materials in circumstances not addressed by Rule 6(e)(3)(E).'" (alterations in original) (quoting Carlson v. United States, 837 F.3d 7523, 766–67 (7th Cir. 2016) (citing *In re* Petition of Craig, 131 F.3d 99, 101–03 (2d Cir. 1997)). On the other side of the split, four circuits have concluded "that Rule 6(e) is exhaustive, and that district courts do not possess inherent, supervisory power to authorize the disclosure of grand jury records outside of Rule 6(e)(3)'s enumerated exceptions.'" (Pitch v. United States, 953 F.3d 1226, 1229 (11th Cir. 2020) (en banc); McKeever v. Barr, 920 F.3d 842, 850 (D.C. Cir. 2019); United States v. McDougal, 559 F.3d 837, 840 (8th Cir. 2009); and *In re* Grand Jury 89-4-72, 932 F.2d 481, 488 (6th Cir. 1991)) (declining to take a position).

[222] *In re* Subpoena, 947 F.3d 148, 152 (3d Cir. 2020); *In re* Grand Jury Proceedings, 417 F.3d 18, 26 (1st Cir. 2005); *In re* Grand Jury Subpoena, 103 F.3d 234, 240 n.8 (2d Cir. 1996); *In re* Charlotte Observer, 921 F.2d 47, 50 (4th Cir. 1990) (citing *In re* Special March 1981 Grand Jury, 753 F.2d 575, 577 (7th Cir. 1985)); *In re* Grand Jury Subpoena, 864 F.2d 1559, 1563–64 (11th Cir. 1989)); *see also In re* Special Grand Jury, 450 F.3d 1159, 1177–78 (10th Cir. 2006) (noting the authority in other circuits but postponing consideration of the question).

[223] FED. R. CRIM. P. 6(e)(7) ("A knowing violation of Rule 6, or of the guidelines jointly issued by the Attorney General and the Director of National Intelligence under Rule 6, may be punished as a contempt of court"); Bank of N.S. v. United States, 487 U.S. 250, 263 (1988); United States v. Thomas, 736 F.3d 54, 66 (1st Cir. 2013); United States v. Holloway, 991 F.2d 370 (7th Cir. 1993). Under some circumstances, the court may appoint a special prosecutor for criminal contempt proceedings, *In re* Blue Grand Jury, 536 F. Supp. 3d 435, 436 (D. Minn. 2021) (citing FED. R. CRIM. P. 42(a)(2); and then citing Young v. United States *ex rel*. Vuitton et Fils S.A. 481 U.S. 787, 793 (1987)).

[224] Barry v. United States, 865 F.2d 1317, 1321 (D.C. Cir. 1989); Blalock v. United States, 844 F.2d 1546, 1551 (11th Cir. 1988); *In re* Grand Jury Investigation, 610 F.2d 202, 213 (5th Cir. 1980*); In re* Capitol Breach Grand Jury Within D.C., 339 F.R.D. 1, 9 n.7 (D. D.C. 2021) ("[V]iolating Rule 6(e)(2)'s general rule of grand jury secrecy carries potential penalties, including being held in 'contempt of court.'" (quoting Fed. R. Crim. P.6(e)(7)); *see also In re* Sealed Case, 151 F.3d 1059, 1067–70 (D.C. Cir. 1998) (recognizing a private right of action to initiate civil contempt proceedings to enforce Rule 6(e)(2)."); Corsi v. Mueller, 422 F. Supp. 3d 51, 69 (D. D.C. 2019); *contra In re* Grand Jury Investigation, 748 F. Supp. 1188, 1202 (E.D. Mich. 1990). *See generally*, Janice S. Peterson, Note, *Federal Rule of Criminal Procedure 6(e): Criminal or Civil Contempt for Violations of Grand Jury Secrecy*, 12 W. NEW ENG. L. REV. 245 (1990).

[225] *Bank of N.S.*, 487 U.S. at 263 ("[A] knowing violation of Rule 6 may be punished as a contempt of court.... In addition, the court may direct a prosecutor to show cause why he should not be disciplined and request the bar or the Department of Justice to initiate disciplinary proceedings against him." (citation omitted)). The civil relief available against the government for violations of grand jury secrecy does not include the right to monetary damages or attorneys' fees, *In re Sealed Case*, 151 F.3d at 1070; McQueen v. United States, 5 F. Supp. 2d 473, 482–83 (S.D. Tex. 1998); see also, *Thomas*, 736 F.3d at 66 ("[O]utside of severe cases, the authorized remedy for a secrecy violation is contempt, and not suppression of evidence").

[226] United States v. Jeter, 775 F.2d 670, 675–79 (6th Cir. 1985); United States v. Howard, 569 F.2d 1331, 1336 (5th Cir. 1978); United States v. Peasley, 741 F. Supp. 18, 20 (D. Me. 1990); *In re* Grand Jury Proceedings, 813 F. Supp. 1451, 1465 n.10 (D. Colo. 1992).

Final Grand Jury Action

There are four possible outcomes of convening a grand jury—(1) indictment,[227] (2) a vote not to indict, to find "no bill" or "no true bill," or to endorse the indictment "ignoramus,"[228] (3) discharge or expiration without any action,[229] (4) submission of a report to the court.[230]

Indictment

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"[231] and bears the signature of the attorney for the government, and of the grand jury foreperson.[232] The "constitutional requirements for an indictment [are], first, that it contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and second, [that it] enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense."[233]

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.[234] It is a right, however, which the defendant may waive in noncapital cases and be charged under an information filed by the prosecutor without grand jury involvement.[235] Misdemeanors may, but need not, be tried by indictment.[236]

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[227] FED. R. CRIM. P. 6(f).

[228] 1 FEDERAL GRAND JURY PRACTICE MANUAL, *supra* note 32, at 14.

[229] FED. R. CRIM. P. 6(g).

[230] SARA SUN BEALE ET AL., *supra* note 30, §§ 2.1–2.8.

[231] FED. R. CRIM. P. 7(c); United States v. Sweet, 107 F.4th 944, 957 (10th Cir. 2024); United States v. Benjamin, 95 F.4th 60, 66 (2d Cir. 2024), *cert. denied*, No. 24-142, 2024 WL 5112284 (Dec. 16, 2024) (mem.).

[232] FED. R. CRIM. P. 6(c); United States v. Stewart, 744 F.3d 17, 21 (1st Cir. 2014); United States v. Elonis, 730 F.3d 321, 332 (3d Cir. 2013); United States v. Stringer, 730 F.3d 120, 123–24 (2d Cir. 2013), *rev'd and remanded*, 575 U.S. 723 (2015); United States v. Kelley, 404 F. Supp. 3d 447, 451 (D. Mass. 2019) *aff'd sub nom.,* Bank of N.S. v. United States, 487 U.S. 250 (1988). The foreperson's failure to endorse the indictment is not fatal unless it reflects the absence of a concurrence of twelve grand jurors in the indictment, Hobby v. United States, 468 U.S. 339, 345 (1984) (citing, Frisbie v. United States, 157 U.S. 160, 163–65 (1895)); Curtis v. United States, 630 F. Supp. 2d 77, 80 (D.D.C. 2009).

The absence of a signature of an attorney for the United States is likewise not fatal, unless it reflects the determination not to go forward with the prosecution, United States v. Chess, 610 F.3d 965, 968 (7th Cir. 2010); United States v. Cox, 342 F.2d 167, 171–72 (5th Cir. 1965); *cf.* Kelley v. United States, 989, F.3d 67, 69 (1st Cir. 2021).

[233] United States v. Resendiz-Ponce, 549 U.S. 102, 108 (2007); Untied States v. Abou-Khatwa, 40 F.4th 666, 675 (D.C. Cir. 2022); *Stewart*, 744 F.3d at 21; *Stringer*, 730 F.3d at 124; United States v. Wayerski, 624 F.3d 1342, 1349 (11th Cir. 2010). As a constitutional matter, a former President enjoys "some immunity from criminal prosecution for official acts during his tenure in office." Trump v. United States, 603 U.S. 606 (2024).

[234] U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentiment or indictment of a Grand Jury.... "); Stirone v. United States, 361 U.S. 212, 215–19 (1960); United States v. Bastian, 770 F.3d 212, 217–18 (2d Cir. 2014); United States v. Davis, 53 F.4th 833, 846 (5th Cir. 2022), *cert. denied*, 144 S. Ct. 72 (2023) (mem.); United States v. Ramos-Baez, 86 F.4th 28, 69 (1st Cir. 2023).

[235] FED. R. CRIM. P. 7(b); Ornelas v. United States, 840 F.2d 890, 892 n.3 (11th Cir. 1988); United States v. Moore, 37 F.3d 169, 173 (5th Cir. 1994); *cf.* United States v. Littlefield, 105 F.3d 527, 528 (9th Cir. 1997); Goode v. United States, 305 F.3d 378, 386 (6th Cir. 2002); *Bastian*, 770 F.3d at 217–18; United States v. Smith, 945 F.3d 860, 864 (5th Cir. 2019); United State v. B.G.G., 53 F.4th 1333, 1367 (11th Cir. 2022). A defendant's waiver, however, does not preclude grand jury investigation or indictment. United States v. Cessa, 856 F.3d 370, 374 n.4 (5th Cir. 2017).

[236] FED. R. CRIM. P. 7(a), 58(b)(1); United States v. Ayala-Bello, 995 F.3d 710, 713 (9th Cir. 2021); United States v. Brewer, 681 F.2d 973, 974 (5th Cir. 1982), *cert. denied*, No. 23-1365, 2024 WL 4743079 (U.S. Nov. 12, 2024) (mem.); (continued...)

The grand jury may indict only upon the vote of twelve of its members,[237] and upon its conclusion that there is probable cause to believe that the accused committed the crime charged.[238]

Refusal to Indict

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.[239] 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.[240] Moreover, the defendant will not be heard to complain that the panel was not informed of its prerogative to decline to indict even if presented with probable cause.[241]

Reports[242]

The law regarding the last alternative available to the grand jury, the authority to send forward "reports" or "presentments," is somewhat obscure. At common law "indictments" were returned by the grand jury based upon evidence presented to the grand jury, while "presentments" were "the notice taken by the grand jury of any offense from their own knowledge or observation,

United States v. Cocoman, 903 F.2d 127, 129–30 (2d Cir. 1990); United States v. Pitt-Des Moines, Inc., 168 F.3d 976, 986 (7th Cir. 1999).

[237] FED. R. CRIM. P. 6(f); United States v. Byron, 994 F.2d 747, 748 (10th Cir. 1993), but some courts have held that the requirement is not jurisdictional and may be waived or, if harmless, provides inadequate grounds to vacate a conviction, United States v. Enigwe, 17 F. Supp. 2d 390, 392 (E.D. Pa. 1998), *aff'd*, 248 F.3d 1131 (3d Cir. 2000); United States v. Gooch, 23 F. Supp. 3d 32, 40–41 (D.D.C. 2014), *aff'd*, 842 F.3d 1274 (D.C. Cir. 2016).

[238] United States v. Calandra, 414 U.S. 338, 343 (1974) (citing, Branzburg v. Hayes, 408 U.S. 665, 686-87 (1972)).

[239] Vasquez v. Hillery, 474 U.S. 254, 263 (1986); United States v. Ciambrone, 601 F.2d 616, 629 (2d Cir. 1979)) (Friendly, J., dissenting) ("By refusing to indict, the grand jury has the unchallengeable power to defend the innocent from government oppression by unjust prosecution. And it has the equally unchallengeable power to shield the guilty, should the whims of the jurors or their conscious or subconscious response to community pressures induce twelve or more jurors to give sanctuary to the guilty." (quoting United States v. Cox, 342 F.2d 167, 189–90 (5th Cir. 1965) (Wisdom, J. concurring)); *see also* Kaley v. United States, 571 U.S. 320, 328 (2014) ("The grand jury gets to say—without any review, oversight, or second-guessing—whether probable cause exists to think that a person committed a crime"); United States v. Doe Corp., 59 F.4th 301, 305 (7th Cir. 2023) ("[T]he grand jury 'is not bound to indict in every case where a conviction can be obtained.' And even where the grand jury decides to indict, it may choose whether 'to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense.'") (quoting *Vasquez*, 474 U.S. at 263); United States v. Scantlebury, 921 F.3d 241, 250 (D.C. Cir. 2019). Prosecutors, however, must secure the approval of a U.S. Attorney, before resubmitting a draft indictment to the same or a subsequent grand jury following an initial refusal to indict, U.S. Dep't of Just., Just. Manual § 9-11.120(A) (2025).

[240] FED. R. CRIM. P. 6(e)(3)(C); United States v. Williams, 504 U.S. 36, 49 (1992); United States v. Thompson, 251 U.S. 407, 413-14 (1920); *In re* United States, 441 F.3d 44, 63 (1st Cir. 2006); United States v. Pabian, 704 F.2d 1533, 1537 (11th Cir. 1983); *In re* Grand Jury Proceedings, 658 F.2d 782, 783 (10th Cir. 1981); United States v. Gakoumis, 624 F. Supp. 655, 656 (E.D. Pa. 1985).

[241] United States v. Marcucci, 299 F.3d 1156, 1159 (9th Cir. 2002); *cf.* United States v. Wahib, 578 F. Supp. 3d 951, 957 (N.D. Ohio 2022).

[242] *See generally,* SARA SUN BEALE ET AL., *supra* note 30, §§ 2.1–2.8; 1 SUSAN W. BRENNER & LORI E. SHAW, FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE § 3.4 (2d ed. 2006 & 2014 Supp.); Barry Jeffrey Stern, *Revealing Misconduct by Public Officials Through Grand Jury Reports*, 136 U. PA. L. REV. 73 (1987); *Reviving Federal Grand Jury Presentments*, 103 YALE L. J. 1333 (1994); *The Grand Jury Report as an Infringement on Private Rights*, 23 HASTINGS L. J. 561 (1972).

without any bill of indictment laid before them at the suit of the king."[243] It is clear that in the limited case of the special grand juries convened under 18 U.S.C. §§ 3331-3334, the grand jury has statutory authority to present a report on organized crime to the court.[244] Most federal grand jury panels, however, have no express authority to present reports.

They nevertheless appear to have common law authority to prepare reports, at least under some circumstances.[245] The district court which empanels 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";[246] and whether the report intrudes upon the prerogatives of state and local governments.[247]

Discharge

The court has the power to discharge a grand jury panel at any time within its term for any reason it sees fit.[248] The court's authority to discharge a panel, quash its subpoenas, seal or expunge its reports or dismiss its indictments affords a check on "runaway" grand jury panels.[249]

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[243] 4 BLACKSTONE, *supra* note 5, at 275. Reports, on the other hand, involved statements of the grand jury on the conduct of the King's officials and the conditions of the public jails and highways. Over time, however, grand jury reports came to include those "presentments" upon which the grand jury had voted to indict but which could not be considered indictments because the attorney for the government would not sign them, *In re* Grand Jury, 315 F. Supp. 662, 676 (D. Md. 1970).

[244] *In re* Grand Jury Proceedings, 813 F. Supp. 1451, 1459–60 (D. Colo. 1992) ("The Court's discretion in releasing special grand jury reports is governed by (1) 18 U.S.C.A. § 3333 and (2) common law principles in conjunction with Fed. R. Crim. P. 6."). Some state grand juries have more extensive reporting authority, see e.g., *Adding Bite to the Watchdog's Bark: Reforming the California Civil Grand Jury System*, 28 PAC. L. J. 1115 (1997).

[245] United States v. Christian, 660 F.2d 892, 902 (3d Cir. 1981); United States v. Briggs, 514 F.2d 794, 801–02 (5th Cir. 1975); Application of Johnson, 484 F.2d 791, 796–97 (7th Cir. 1973); United States v. Cox, 342 F.2d 167, 188–89 (5th Cir. 1965) (Wisdom, J. concurring); *In re* Grand Jury, 734 F. Supp. 875, 876 (N.D. Iowa 1990); Application of Jordan, 439 F. Supp. 199, 204–05 (S.D. W.Va. 1977); *In re* Report and Recommendation of June 5, 1972 Grand Jury, 370 F. Supp. 1219, 1222-226 (D.D.C. 1974); *In re* Grand Jury January 1969, 315 F. Supp. 662, 675–79 (D. Md. 1970); *In re* Petition for Disclosure of Evidence Before the October 1959 Grand Jury, 184 F. Supp. 38, 39–40 (E.D. Va. 1960); *contra*, Application of United Electrical, Radio & Machine Workers, 111 F. Supp. 858, 864–69 (S.D.N.Y. 1953). At least one commentator has recommended that this authority to report on civic affairs be more regularly exercised, see Roger A. Fairfax, Jr., *Grand Jury Innovation: Toward a Functional Makeover of the Ancient Bulwark of Liberty*, 19 WM. & MARY BILL RTS. J. 339, 368 (2010) ("The grand jury, as a cross-section of the community, represents a potentially vital and energetic vehicle for feedback from the citizenry on a wide variety of issues. Under this more robust view of its functional value, the grand jury, for example, could give legislators and government officials community input on contemplated measures and policies, increase transparency surrounding large public expenditures, or serve in a designated watchdog role, guarding against waste, fraud, and abuse.").

[246] In re Grand Jury, 734 F. Supp. at 876 (quoting *In re* Report of the Grand Jury Proceedings Filed on June 15, 1972, 479 F.2d 458, 460 n.2 (5th Cir. 1973)) (collecting cases).

[247] *In re* Petition for Disclosure of Evidence Before the October 1959 Grand Jury, 184 F. Supp. 38, 40 (E.D. Va. 1960).

[248] FED. R. CRIM. P. 6(g) ("A grand jury must serve until the court discharges it ... "); United States v. Navarro-Vargas, 408 F.3d 1184, 1199 (9th Cir. 2005); Korman v. United States, 486 F.2d 926, 933 (7th Cir. 1973); Petition of A & H Transportation Inc., 319 F.2d 69, 71 (4th Cir. 1963); *In re* Investigation of World Arrangements, etc., 107 F. Supp. 628, 629 (D.D.C. 1952). An indictment issued after discharge or the expiration of the panel's term is "null from the beginning." United States v. Slape, 44 F.4th 356, 361 (5th Cir. 2022).

[249] *What Do You Do With a Runaway Grand Jury? A Discussion of the Problems and Possibilities Opened Up by the Rocky Flats Grand Jury Investigation*, 71 S. CAL. L. REV. 617 (1998); Roger Roots, *If It's Not a Runaway, It's Not a Real Grand Jury*, 33 CREIGHTON L. REV. 821 (2000).

Indictments Dismissed

Defendants have urged dismissal of their indictments based upon a wide array of alleged grand jury irregularities. They are rarely successful, if the indictment is valid on its face. The courts will dismiss an indictment which fails to charge a federal crime, as for instance, when it fails to include an essential element of the crime it purports to charge.[250] Otherwise, 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.[251] 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;[252] which are tainted by violations of the Speech or Debate privilege in the case of a Member of Congress,[253] or of the right of the accused to counsel of his choice;[254] which are based *solely* on evidence secured in violation of the Fourth Amendment;[255] which the government knowingly secured through the presentation of false or perjured testimony;[256] or which are returned after a witness is called

[250] United States v. Ngige, 780 F.3d 497, 502 (1st Cir. 2015); United States v. Brewbaker, 87 F.4th 563, 572 (4th Cir. 2023) ("A criminal indictment ... should be dismissed for failing to state an offense."); United States v. Qazi, 975 F.3d 989, 991 (9th Cir. 2020) ("[A]n indictment missing an essential element that is properly challenged before trial *must* be dismissed."); United States v. Theis, 853 F.3d 1178, 1181 (10th Cir. 2017); United States v. Gonzalez, 686 F.3d 122, 127 (2d Cir. 2012); *cf.* United States v. Sholley-Gonzalez, 996 F.3d 887, 893 (8th Cir. 2021) ("An indictment survives a motion to dismiss for failure to state an offense if 'the indictment contains a facially sufficient allegation.'" (citations omitted)).

[251] *Cf.* Bank of N.S. v. United States, 487 U.S. 250, 257 (1988); Vasquez v. Hillary, 474 U.S. 254, 260–64 (1986); United States v. Graham, 80 F.4th 1314, 1318 (11th Cir. 2023) (citing *Bank of N.S.*, 487 U.S. at 257).

[252] United States v. Allen, 864 F.3d 63, 98 (2d Cir. 2017); United States v. Mayer, 503 F.3d 740, 747 (9th Cir. 2007); *In re* Sealed Case (No. 98-3054), 144 F.3d 74, 75 (D.C. Cir. 1998); Grand Jury Subpoena Dated Dec. 7 and 8, 40 F.3d 1096, 1103 (10th Cir. 1994); *In re* Grand Jury Proceedings (Kinamon), 45 F.3d 343, 347–48 (9th Cir. 1995); *but see*, United States v. Schmidgall, 25 F.3d 1533, 1538–39 (11th Cir. 1994) (disclosure of immunized testimony to an indicting grand jury does not require dismissal if the disclosure is shown to have been harmless).

[253] United States v. Renzi, 651 F.3d 1012, 1028–29 (9th Cir. 2011); United States v. Swindall, 971 F.2d 1531, 1543 (11th Cir. 1992); United States v. Helstoski, 635 F.2d 200, 204–06 (3d Cir. 1980); *cf.* United States v. Rostenkowski, 59 F.3d 1291, 1298–99 (D.C. Cir. 1995) (noting that at some point presentation of speech or debate material to a grand jury will contaminate the resulting indictment but declining to identify that point).

The Speech or Debate "privilege is strictly confined to things done in the course of parliamentary proceedings, and does not cover things done beyond the place and limits of duty." Hutchison v. Proxmire, 443 U.S. 111, 126 (1979) (quoting 3 STORY, *supra* note 7, § 863, at 329).

[254] United States v. Stein, 495 F. Supp. 2d 390, 421–25 (S.D.N.Y. 2007), *aff'd*, 541 F.3d 130, 146 (2d Cir. 2008).

[255] United States v. MacDonald, 435 U.S. 850, 860 n.7 (1978); United States v. Mayer, 503 F.3d 740, 747 (9th Cir. 2007); *but see* United States v. Snyder, 71 F.4th 555, 565 (7th Cir. 2023), *abrogated on other grounds by* 603 U.S. 1 (2024) ("The remedy for such Fourth Amendment violations in a criminal proceeding is suppression of the evidence, not dismissal of the indictment.... ").

[256] United States v. Jackson, 58 F.4th 541, 553 (1st Cir. 2023); United States v. Muhammad, 14 F.4th 353, 363 (5th Cir. 2021) ("Even if grand jury testimony is false, the indictment should dismissed only if (1) the Government knowingly sponsored the false testimony and (2) the false testimony was material.... "); United States v. Burke, 425 F.3d 400, 412–13 (7th Cir. 2005); United States v. Spillone, 879 F.2d 514, 524 (9th Cir. 1989); United States v. Levine, 700 F.2d 1176, 1180 (8th Cir. 1983); but not where there is no evidence that the government was aware the testimony was false, United States v. Strouse, 286 F.3d 767, 772 (5th Cir. 2002).

before the grand jury for the sole purpose of building perjury prosecution against the witness;[257] or which charge violation of a statute that is unconstitutional on its face.[258]

Courts will also dismiss a grand jury indictment in the name of due process for government misconduct unrelated to grand jury irregularities, for instance, where the prosecution sought indictment selectively for constitutionally impermissible reasons;[259] for reasons of vindictive retaliation;[260] where the prosecution has secured the indictment through outrageous conduct which shocks the conscience of the court;[261] or where the prosecution has unjustifiably delayed seeking an indictment to the detriment of the defendant.[262]

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.[263] The Supreme Court in *Bank of Nova Scotia v. United States* held that "a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants."[264] Thus, a district court may not exercise its supervisory powers over the grand jury to dismiss an indictment, absent misconduct before the grand jury amounting to a clear transgression of statute or Supreme Court precedent.[265]

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[257] United States v. Chen, 933 F.2d 793, 796–97 (11th Cir. 1991) ("[a] perjury trap is created when the government calls a witness before the grand jury for the primary reason of obtaining testimony from him in order to prosecute him later for perjury"); United States v. Brown, 49 F.3d 1162, 1168 (6th Cir. 1995); *but see* United States v. Reid, 477 F. Supp. 3d 1174, 1184 (W.D. Wash 2020) (noting that the Ninth Circuit has never recognized the perjury trap doctrine).

[258] United States v. Mayer, 503 F.3d 740, 747 (9th Cir. 2007).

[259] A claim of impermissible selective prosecution requires a showing of discriminatory effect for a discriminatory purpose, United States v. Armstrong, 517 U.S. 456, 465 (1996) ("To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted."); Frederick Douglass Foundation, Inc. v. District of Columbia, 82 F.4th 1122, 1136 (D.C. Cir. 2023); Conley v. United States, 5 F.4th 781, 789 (7th Cir. 2021); United States v. Cannon, 987 F.3d 924, 937 (11th Cir. 2021).

[260] United States v. Meyer, 810 F.2d 1242, 1249 (D.C. Cir. 1987), *vacated*, 816 F. 2d 695, *reinstated*, 824 F.2d 1240; *cf.* United States v. Cyprian, 23 F.3d 1189, 1196 (7th Cir. 1994) ("prosecution is vindictive, in violation of the Fifth Amendment Due Process Clause, if it is undertaken in retaliation for the exercise of a legally protected statutory or constitutional right"); United States v. Baldwin, 68 F.4th 1070, 1073 (7th Cir. 2023); United States v. Villa, 70 F.4th 704, 710 (4th Cir. 2023).

[261] *Mayer*, 503 F.3d at 747 (citing United States v. Russell, 411 U.S. 423, 432 (1973)); United States v. Montoya, 45 F.3d 1286, 1300 (9th Cir. 1995); United States v. Sneed, 34 F.3d 1570, 1576-578 (10th Cir. 1994) *cf.* United States v. Peeples, 962 F.3d 677, 687 n.33 (2d Cir. 2020).

[262] United States v. Marion, 404 U.S. 307, 324 (1971); United States v. Meléndez-González, 892 F.3d 9, 15 (1st Cir. 2018); United States v. Villa, 70 F.4th 704, 715–16 (4th Cir. 2023); United States v. Garcia, 74 F.4th 1073, 1099 (10th Cir. 2023).

[263] Goodrich v. Hall, 448 F.3d 45, 50 (1st Cir. 2006) ("[A]n indictment returned by a legally constituted and unbiased grand jury ... if valid on its face, is enough to call for trial of the charge on the merits." (second alteration in original) (quoting Costello v. United States, 350 U.S. 359, 363 (1956))); United States v. Rafoi Bleuler, 60 F.4th 982, 994 (5th Cir. 2023) ("[A]n indictment returned by a legally constituted and unbiased grand jury, if valid on its face, is enough to call for trial of the charge on the merits.'" (quoting United States v. Mann, 517 F.2d 259, 267 (5th Cir. 1975))); United States v. Aiyer, 33 F.4th 97, 116 (2d Cir. 2022); United States v. Hardaway, 999 F.3d 1127, 1130 (8th Cir. 2021).

[264] *Bank of N.S.*, 487 U.S. at 254; *see also* United States v. Graham, 80 F.4th 1314, 1317 (11th Cir. 2023); *Jackson*, 58 F.4th at 554; United States v. Gussie, 51 F.4th 535, 541 (3d Cir. 2022); United States v. Walters, 910 F.3d 11, 23 (1st Cir. 2018); United States v. Darden, 688 F.3d 382, 387-88 (8th Cir. 2012); *Jackson*, 22 F. Supp. 3d at 642 (quoting, inter alia, United States v. Hillman, 642 F.3d 929, 934 (10th 2011)) ("[E]ven upon a showing of the most egregious prosecutorial misconduct, the indictment may only dismissed upon proof of actual prejudices, when prosecutorial misconduct amounts to overbearing the will of the grand jury so that the indictment is, in effect, that of the prosecutor rather than the grand jury. 'But even with this standard a common theme of the cases is that prosecutorial misconduct alone [or at least rarely] is not a valid reason to dismiss an indictment.").

[265] United States v. Strouse, 286 F.3d 767, 772–73 (5th Cir. 2002); *see also* United States v. Williams, 504 U.S. 36, 46 (continued...)

Bank of Nova Scotia also makes it clear, nevertheless, that such supervisory authority to dismiss an indictment 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."[266] 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 most of its force.

n.6 (1992) ("Rule 6 of the Federal Rules of Criminal Procedure contains a number of such rules, providing, for example, that 'no person other than the jurors may be present while the grand jury is deliberating or voting,' Rule 6(d), and placing strict controls on disclosure of 'matters occurring before the grand jury,' Rule 6(e). Additional standards of behavior for prosecutors (and others) are set forth in the United States Code. (See 18 U.S.C. §§ 6002, 6003 (setting forth procedures for granting a witness immunity from prosecution; § 1623 (criminalizing false declarations before the grand jury); § 2515 (prohibiting grand jury use of unlawfully intercepted wire or oral communications); § 1622 (criminalization of perjury).... ").

[266] Bank of N.S. v. United States, 487 U.S. 250, 256 (1988) (quoting United States v. Mechanik, 475 U.S. 66, 78 (1986) (O'Connor, J., concurring)); *Goodrich*, 448 F.3d at 50 ("The circumstances justifying dismissal of the indictment after conviction must be so severe, the prosecutorial misconduct so 'blatant,' as to 'call[] into doubt the fundamental fairness of the judicial process'" (quoting United States v. Ortiz de Jesus, 230 F.3d 1, 4 (1st Cir. 2000)); United States v. Jackson, 58 F.4th 541, 554 (1st Cir. 2023) ("[T]he violation substantially influenced the grand jury's decision to indict, or [that] there is grave doubt that the decision to indict was free from the substantial influence of such violations" (citations omitted) (quoting *Bank of N.S.*, 487 U.S. at 256); United States v. Harris, 7 F.4th 1276, 1295 (11th Cir. 2021); United States v. Jackson, 22 F. Supp. 3d 636, 641 (E.D. La. 2014) ("[A]n indictment may be dismissed for prosecutorial misconduct which is so flagrant to the point that there is some significant infringement on the grand jury's ability to exercise independent judgment").

Finally, the supervisory power to dismiss an indictment beyond those areas where it is reinforced by the Constitution, statute, or rule is exceptionally limited.[267] As a consequence of these limitations, the courts have refused to dismiss indictments in the face of a wide range of objections.[268]

[267] *Cf. Williams*, 504 U.S. at 46–47 ("We did not hold in *Bank of Nova Scotia*, however, that the courts' supervisory power could be used, not merely as a means of enforcing or vindicating legally compelled standards of prosecutorial conduct before the grand jury, but as a means of prescribing those standards of professional conduct in the first instance ... Because the grand jury is an institution separate from the courts, over whose functioning the courts do not preside, we think it clear that, as a general matter at least, no such 'supervisory' judicial authority exists ... ") (emphasis of the Court); *but see*, United States v. Bundy, 968 F.3d 1019, 1030 (9th Cir. 2020) ("A district court may dismiss an indictment under its inherent supervisory powers '(1) to implement a remedy for the violation of a recognized statutory or constitutional right; (2) to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; and (3) to deter future illegal conduct.'" (quoting United States v. Green, 962 F.2d 938, 942 (9th Cir. 1992)).

[268] For example:

- the prosecutor failed to present evidence favorable to the defendant (*Williams*, 504 U.S. at 45; United States v. Casas, 425 F.3d 23, 37–38 (1st Cir. 2005); United States v. Waldon, 363 F.3d 1103, 1109 (11th Cir. 2004); United States v. Angel, 355 F.3d 462, 475 (6th Cir. 2004); United States v. Haynes, 216 F.3d 789, 798 (9th Cir. 2000), *cert. denied*, 144 S. Ct. 485 (2023) (mem.));

- the prosecutor failed to properly instruct the panel on applicable law (United States v. Warren, 16 F.3d 247, 252–53 (8th Cir. 1994); United States v. Buchanan, 787 F.2d 477, 487 (10th Cir. 1986));

- the prosecutor failed to advise a grand jury witness that he was a target of the investigation (United States v. Hughson, 488 F. Supp. 2d 835, 845 (D. Minn. 2007));

- prosecutor knowingly presented false testimony to the grand jury absent prejudice to the defendant (United States v. Jackson, 58 F.4th 541, 553–54 (1st Cir. 2023));

- a witness was called to testify before the grand jury when the prosecutor knew the witness would invoke his privilege against self-incrimination (United States v. Stein, 429 F. Supp. 2d 633, 639–40 (S.D. N.Y. 2006) (citing Bank of N.S. v. United States, 487 U.S. 250, 258–59 (1988));

- the prosecutor presented the grand jury with a signed indictment for its consideration and approval or rejection (United States v. Singer, 660 F.2d 1295, 1302 (8th Cir. 1981); United States v. Levine, 457 F.2d 1186, 1189 (10th Cir. 1972); United States v. Conley, 826 F. Supp. 1533, 1534 (W.D. Pa. 1993));

- inflammatory press coverage proximate to the grand jury's inquiry (United States v. York, 428 F.3d 1325, 1331–32 (11th Cir. 2005));

- plain language in the underlying statute provided constitutionally adequate notice of potential for prosecution (United States v. Dion, 37 F.4th 31, 43–44 (1st Cir. 2022));

- breach of grand jury secrecy (absent prejudice to the defendant) (United States v. Walters, 910 F.3d 11, 22–23 (2d Cir. 2018); *Vincent*, 416 F.3d at, 600; United States v. Kilpatrick, 821 F.2d 1456, 1468–69 (10th Cir. 1987), *aff'd on other grounds sub nom*., Bank of N.S. v. United States, 487 U.S. 250 (1987); United States v. Malatesta, 583 F.2d 748, 753–54 (5th Cir. 1978));

- "multiple mistrials following hung juries" on the charges in the indictment (United States v. Wright, 913 F.3d 364, 375 (3d Cir. 2019));

- pre-indictment delays did not warrant dismissal under speedy trial factors (United States v. Oliva, 909 F.3d 1292, 1306 (11th Cir. 2018) (per curiam));

- indictment challenged on the grounds of extraterritoriality (United States v. Fonseca, 49 F.4th 1, 11 (1st Cir. 2022); United States v. Vasquez, 899 F.3d 363, 371 (5th Cir. 2018));

- reindictment by an untainted grand jury panel following dismissal of an indictment by a panel tainted by the presence of a victim of the offense (*Gussie*, 51 F.4th at 539);

- insufficient evidence to support the indictment (United States v. Sholley-Gonzalez, 996 F.3d 887, 893 (8th Cir. 2021); United States v. Wedd, 993 F.3d 104, 121 (2d Cir. 2021));

- presence of unauthorized individuals while the grand jury conducted its business (United States v. Mechanik, 475 U.S. 66 (1986); United States v. Fowlie, 24 F.3d 1059, 1065–66 (9th Cir. 1994); United States v. Busch, 795 F. Supp. 866, 868 (N.D. Ill. 1992); *but see* United States v. Hart, 779 F. Supp. 883, 890 (E.D. Mich. 1991));

(continued...)

In addition to dismissal of the indictment at the request of the accused, the government may move for dismissal of the indictment under Rule 48(a) of the Federal Rules of Criminal Procedure.[269] 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."[270] In most instances, dismissal at the government's behest is without prejudice, and the prosecutor may seek to reindict for the same offense as long as neither speedy trial, the double jeopardy clause, or due process pose a bar.[271]

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- presentation of hearsay evidence (Costello v. United States, 350 U.S. 359, 363–64 (1956); United States v. Bowie, 618 F.3d 802, 817–18 (8th Cir. 2010); *Waldon*, 363 F.3d at 1109; Wilkerson v. Whitley, 28 F.3d 498, 503 (5th Cir. 1994); Virgin Islands *ex rel.* A.M., 34 F.3d 153, 161 (3d Cir. 1994));

- presentation of illegal obtained evidence (United States v. Greve, 490 F.3d 566, 570–71 (7th Cir. 2007));

- presentation of evidence secured in violation of the Fourth Amendment (United States v. Calandra, 414 U.S. 338, 349–52 (1974); United States v. Salazar, 323 F.3d 852, 856 (10th Cir. 2003); *Wilkerson*, 28 F.3d at 503; Williams v. Poulous, 11 F.3d 271, 290 (1st Cir. 1993); Baylson v. Disciplinary Bd., 975 F.2d 102, 110 n.3 (3d Cir. 1992));

- presentation of evidence secured by intrusion into the attorney-client relationship (United States v. Esformes, 60 F.4th 621, 633 (11th Cir. 2023) ("'A]bsent demonstrable prejudice, dismissal [is] plainly inappropriate as a remedy' for the violation of attorney-client privilege") (quoting United States v. Ofshe, 817 F.2d 1508, 1515 (11th Cir. 1987)); *Haynes*, 216 F.3d at 797–98 ("Haynes and Denton also argue that the district court should have exercised its supervisory power to dismiss the indictment on the ground that the government engaged in various acts of misconduct before the grand jury. To the extent that their argument is based on privileged testimony improperly elicited from Fairbanks [defense counsel's investigator], the challenge fails because a grand jury is permitted to consider evidence obtained in violation of a privilege, whether the privilege is established by the Constitution, statute, or the common law. *See* United States v. Calandra, 414 U.S. 338, 346 (1974).")));

- presentation of evidence secured in violation of the Constitution's Speech or Debate Clause (United States v. Jefferson, 546 F.3d 300, 312 (4th Cir. 2008); United States v. Williams, 644 F.2d 950, 952 (2d Cir. 1981) (where the violations were not "wholesale"); United States v. Helstoski, 635 F.2d 200, 205–06 (3d Cir. 1980));

- erroneous charge to the grand jury (United States v. Navarro, 608 F.3d 529, 536–38 (9th Cir. 2010));

- no twelve grand jurors heard all the evidence upon which the indictment was based (United States v. Overmyer, 899 F.2d 457, 465 (6th Cir. 1990); United States v. Leverage Funding Systems Inc., 637 F.2d 645, 649 (9th Cir. 1980).

[269] *See generally*, 3B WRIGHT & MILLER'S FEDERAL PRACTICE AND PROCEDURE § 801 (4th ed. 2013).

[270] Rinaldi v. United States, 434 U.S. 22, 30 (1977) (quoting United States v. Cowan, 524 F.2d 504, 513 (5th Cir. 1975); United States v. B.G.G., 53 F.4th 1353, 1361 (11th Cir. 2022); United States v. Romero, 360 F.3d 1248, 1251 (10th Cir. 2004); United States v. Gonzalez, 58 F.3d 459, 461 (9th Cir. 1995); United States v. Smith, 55 F.3d 157, 159 (4th Cir. 1995); United States v. Norita, 708 F. Supp. 2d 1043, 1049–51 (D.N.M.I. 2010); United States v. Sullivan, 652 F. Supp. 2d 136, 139–40 (D. Mass. 2009); *but see* United States v. Olmos-Gonzales, 993 F. Supp. 2d 1234, 1235 (S.D. Cal. 2014) ("To enable courts to carry out this limited review, the government must provide its reasons and factual basis justifying dismissal.").

[271] United States v. Oliver, 950 F.3d 556, 562 (8th Cir. 2020); United States v. Jones, 664 F.3d 966, 973–74 (5th Cir. 2011); United States v. Hector, 577 F.3d 1099, 1102–03 (9th Cir. 2009); United States v. Soriano-Jarquin, 492 F.3d 495, 503 (4th Cir. 2007); United States v. Colombo, 852 F.2d 19, 24–26 (1st Cir. 1988); United States v. Dyal, 868 F.2d 424, 429 (11th Cir. 1989); United States v. Reardon, 787 F.2d 512, 518 (10th Cir. 1986).

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