

Secret Justice:

Grand juries



The grand jury system will always be shrouded in secrecy, but in many cases, information from grand juries can be obtained by reporters — at least after the

investigation or subsequent trial is over. Yet reporters should also know that prosecutors and judges take leaks from grand juries —

like those in recent cases involving **Justin Barber** in Florida and Providence, R.I., mayor **Vincent “Buddy” Cianci** — very seriously, and will often go after reporters who reveal information obtained through those leaks.

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The Reporters Committee
For Freedom of the Press

Secret Justice: A continuing series

The American judicial system has, historically, been open to the public, and the U.S. Supreme Court has continually affirmed the presumption of openness. However, as technology expands and as the perceived threat of violence grows, individual courts attempt to keep control over proceedings by limiting the flow of information. Courts are reluctant to allow media access to certain cases or to certain proceedings, like jury selection. Courts routinely impose gag orders to limit public discussion about pending cases, presuming that there is no better way to ensure a fair trial. Many judges fear that having cameras in courtrooms will somehow interfere with the decorum and solemnity of judicial proceedings. Such steps, purportedly taken to ensure fairness, may actually harm the integrity of a trial because court secrecy and limits on information are contrary to the fundamental constitutional guarantee of a public trial.

The public should be the beneficiary of the judicial system. Criminal proceedings are instituted in the name of “the people” for the benefit of the public. Civil proceedings are available for members of the public to obtain justice, either individually or on behalf of a “class” of persons similarly situated. The public, therefore, should be informed — *well* informed — about trials of public interest. The media, as the public’s representative, needs to be aware of threats to openness in court proceedings, and must be prepared to fight to ensure continued access to trials.

In this series, the Reporters Committee takes a look at key aspects of court secrecy and how they affect the newsgathering process. We will examine trends toward court secrecy, and what can be done to challenge it.

The previous installments of this “Secret Justice” series concerned anonymous juries (Fall 2000), gag orders on trial participants (Spring 2001), access to alternative dispute resolution procedures (Fall 2001), access to terrorism proceedings (Winter 2002), secret dockets (Summer 2003), and judicial speech (Spring 2004).

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Access to grand jury information and material

They meet in “a virtual bunker,” *The Washington Post* recently reported. Special elevator keys and closed-to-the-public passageways help shuttle them swiftly and secretly to their meeting place, sealed off from the rest of the building.

A meeting of top presidential advisers?

No — a gathering of grand jurors in U.S. District Court in Alexandria, Va.

The super-secret proceedings, in a federal courthouse where several high-profile cases have been tried in the past year, illustrate to critics how excessive secrecy hinders journalists — and ultimately the public — from effectively monitoring courts.

While Alexandria might be a more extreme example, it is a sign of secrecy surrounding grand juries nationwide. California prosecutors, concerned about protecting grand jurors’ privacy in Michael Jackson’s case on alleged child molestation charges, moved jurors from the main courthouse to a secret location, sending the press scrambling across Santa Barbara County and giving “a whole new meaning to the term ‘runaway jury,’” quipped Boston media lawyer Jeffrey Pyle of Prince Lobel Glovsky & Tye.

Although the First Amendment allows grand jury witnesses — if one can reach them — to talk to the media about their testimony, recent court decisions restrict the scope of what they can disclose under state law. In September, a California appeals court upheld a warning to witnesses not to divulge anything they learn as a result of testifying before a grand jury. A federal appeals court validated a similar secrecy rule in Colorado last year.

Reporters are often stymied in their attempts to obtain grand jury records as well. Long after a grand jury has finished its work, courts may still keep transcripts of the proceedings under wraps because in the court’s view, the interest in secrecy outweighs the public’s right to know.

This report examines the law governing journalists’ access to grand jury transcripts, witnesses and ancillary proceedings. It also explores how much reporters can reveal about their *own* testimony before a grand jury.

What is a grand jury?

Grand juries are summoned to evaluate a prosecutor’s evidence and decide whether it supports indicting, or formally charging, someone accused of a crime. They are always used in federal criminal investigations, and in criminal prosecutions by many states, such as New York. A grand jury may have other functions as well; in California, for example, it often acts as a “watchdog” that secretly investigates and then publicly reports on local government affairs.

According to the American Bar Association, grand juries are so named because of the relatively large number of jurors impaneled — up to 23 — as opposed to a petit jury or trial jury, which usually has only six or 12 members. The U.S. Court of Appeals in Washington, D.C., in 1998 described a federal grand jury this way:

“Grand juries summon witnesses and documents with subpoenas. Witnesses, including custodians of documents, report on the scheduled date not to a courtroom, but to a hallway outside the room where the grand jury is sitting. The witness must enter the grand jury room alone, without his or her lawyer. No judge presides and none is present. . . . Inside the grand jury room are sixteen to twenty-three grand jurors, one or more prosecuting attorneys, and a court reporter. . . . The witness is sworn, and questioning commences, all to the end of determining whether ‘there is adequate basis for bringing a criminal charge.’” (Internal citations omitted.) (*In re Dow Jones & Co., Inc.*)

Grand jury proceedings have been held in secret since the 1600s. The secrecy rule, adopted from England, has become an integral — some say essential — part of the American criminal justice system. There is no First Amendment right of public access to grand jury proceedings. Participants, except witnesses, are forbidden from disclosing matters related to the grand jury, even after the grand jury’s activities have concluded.

The U.S. Supreme Court in 1979 identified several reasons for maintaining such secrecy. First, without the assurance of confidentiality, many prospective witnesses



AP PHOTOS

Reporters and news organizations have been met with contempt charges related to grand jury information in the investigation of Providence, R.I., mayor Vincent "Buddy" Cianci, left, and similar charges have been threatened in the case of Justin Barber, center, accused of killing his wife. The media unsuccessfully sought access to grand jury transcripts in the case of record producer Phil Spector, right.

would hesitate to come forward willingly, knowing that the people against whom they testify would find out about it; second, those who did come forward would be less likely to testify "fully and frankly" because they would be vulnerable to retribution and inducements; third, people about to be indicted might flee, or try to influence individual grand jurors to vote against indictment; and finally, it protects those who are accused, but not indicted, from public scorn. (*Douglas Oil v. Petrol Stops Northwest*)

Courts take apparent—and not-so-apparent—violations of the grand jury secrecy rule seriously. In Providence, R.I., WJAR television reporter James Taricani was being fined \$1,000 a day in October for refusing to reveal who leaked him an incriminating video surveillance tape used in the grand jury "Plunderdome" investigation of former Providence mayor Vincent "Buddy" Cianci's administration. The fine had swelled to more than \$75,000 as of late October, and prosecutors were asking the court to increase the daily amount. In California, the *San Francisco Chronicle* and the *San Jose Mercury News* were resisting efforts by federal investigators probing how the newspapers received transcripts of grand jury testimony in the BALCO steroids scandal.

And in Florida, a trial judge threatened a news organization with criminal penalties if it published information from grand jury transcripts in the case of Justin Barber, who is accused of killing his wife. First Coast News, a Gannett television network of ABC and NBC affiliates, obtained the transcripts from the state prosecutor's office, which had released them voluntarily as public

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records. As of late October, a Florida appeals court had yet to rule on a motion to quash the prior restraint order.

Requesting access

Before an indictment is issued, reporters may file a motion for access with the judge who is presiding over the grand jury, media attorney Jim Lake of Holland & Knight said. Post-indictment, the media may move to "intervene," or become a party to the case, to assert the public's interest in disclo-

sure of grand jury materials. In states like Florida, where courts are covered by the state open records law, journalists may request a copy of the transcripts if they were released to the defense during discovery, Lake said.

Alternatively, the press may simply ask to be heard without formally intervening. *Los Angeles Times* attorney Susan Seager of Davis Wright Tremaine recently tried to oppose the sealing of grand jury transcripts in the murder case against music producer Phil Spector, but was silenced by the judge who said she had no standing—a position Seager disputes.

"It's very clear under California law, and I would argue under the First Amendment in any court, that the press has standing to ask for grand jury [transcripts] to be unsealed once they become court records," Seager said.

Obtaining transcripts

Records of federal grand jury proceedings remain confidential "to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury," according to Rule 6(e)(6) of the Federal Rules of Criminal Procedure. It is left to the court to determine when to release such records.

Access to state grand jury transcripts

The news media tried to gain access to grand jury materials in the investigation into Marlene and Steve Aisenberg after the Justice Department admitted that prosecutors misled a federal judge.



varies. In California, transcripts of grand jury testimony become public record once an indictment is returned, unless a defendant can show a reasonable likelihood that release of part or all of the transcripts would prejudice his right to a fair trial.

Other states have no such law. A Massachusetts trial judge recently unsealed all court documents *except* the grand jury transcripts in *Commonwealth v. Pitsas*, a case involving a retired dentist charged with accidentally poisoning an infant.

When the media seeks disclosure of a grand jury transcript, a court balances the government's interest in secrecy against the public's interest in disclosure. The press should argue "that there is an important public interest in seeing what is in the grand jury transcripts," especially in cases involving botched prosecutions or government corruption, said Lake, who submitted a friend-of-the-court brief for the media in *United States v. Aisenberg*.

In *Aisenberg*, the parents of a missing infant sued the government after federal prosecutors misled the court about evidence that was used to indict the couple for allegedly lying to investigators. A trial court judge ordered the complete disclosure of all

the grand jury transcripts and the government appealed. The Court of Appeals in Atlanta (11th Cir.) reversed in February of this year, concluding that the trial court erred in deeming the government's interest in grand jury secrecy to be "minimal."

One argument often advanced in favor of disclosure is that the information contained in the grand jury materials is already public knowledge, so releasing it would cause no additional harm. In one of several cases involving the impeachment of President Bill Clinton, the White House accused the Office of Independent Counsel of violating grand jury secrecy. *The New York Times* reported that OIC prosecutors hoped to secure an indictment against Clinton for perjury from the grand jury that was then investigating him. The U.S. Court of Appeals in Washington, D.C., agreed it would ordinarily violate court rules to reveal that a grand jury was investigating someone, but in this case it was no secret the grand jury was investigating Clinton—he himself had said so on national television. (*In re Sealed Case No. 99-3091 (Office of Independent Counsel Contempt Proceeding)*)

But even if the media has revealed grand jury secrets, the information may still be

entitled to some protection from disclosure. Indeed, the argument that much has already been publicized about a subject may actually backfire on the party seeking disclosure. In *Aisenberg*, one of the reasons the court gave for keeping the grand jury transcript sealed was that evidence of the prosecution's misconduct in the case already had been aired publicly at great length. The lower court was wrong when it decided disclosure was necessary "so that the public can know about this misdirected prosecution," the appellate court concluded. "The public already knows."

It is not always the government that tries to keep grand jury materials hidden. In a criminal case, the defense often opposes their release while the prosecution favors it, or at least does not object to it. In the Spector case, for example, the district attorney's office argued the grand jury transcript was a public record that should be released.

Interviewing witnesses

Federal rules and the majority of states, either expressly or impliedly, allow grand jury witnesses to disclose what transpired when they testified.

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A housekeeper for Patsy and John Ramsey, pictured, was not allowed to discuss in a book questions asked of her before a grand jury looking into the death of JonBenet Ramsey.

AP PHOTO



What can reporters report about grand jury testimony?

At a time when reporters are being subpoenaed to appear before grand juries in at least five cases, including one grand jury investigating who leaked the name of CIA operative Valerie Plame to the press, it warrants examining what, if anything, journalists can report after they've testified.

"The issue right now is ripe, because we have . . . reporters [possibly] going to jail for refusing to testify before the grand jury," said media lawyer Gregg D. Thomas of Holland & Knight, who represented a reporter in the 1990 *Butterworth v. Smith* case.

In *Butterworth*, the U.S. Supreme Court ruled that journalists — like any other witnesses — have a First Amendment right to publish the details of their grand jury testimony once the investigation has ended.

Newspaper reporter Michael Smith was summoned to testify before a grand jury after he wrote articles about alleged wrongdoing by the prosecutor's office and sheriff's department of Charlotte County, Fla. Smith was warned that Florida law prohibited grand jury witnesses from ever disclosing their testimony in any way, and that a violation could result in criminal punishment.

Smith planned to write a story and perhaps a book about the investigation, including his own testimony and experiences before the grand jury. He sued in federal court to win a declaration that the state law prohibiting his disclosure unconstitutionally restricted his freedom of speech. He also sought an order preventing the state from prosecuting him.

The federal district court threw out

his case, ruling that a total and permanent ban on disclosure of witness testimony was necessary to ensure the proper functioning of the grand jury. The U.S. Court of Appeals in Atlanta (11th Cir.) reversed. The U.S. Supreme Court affirmed the appeals court, agreeing that the reasons for preserving grand jury secrecy did not warrant prohibiting witnesses from ever disclosing their testimony.

"[T]he interests advanced by the portion of the Florida statute [preventing witnesses from revealing their own testimony] . . . are not sufficient to overcome [Smith's] First Amendment right to make a truthful statement of information he acquired on his own," the Supreme Court concluded.

Although the high court specified that witnesses are free to talk once the grand jury has ended its investigation, Thomas said he believes it would have ruled the same way if the grand jury in his client's case had still been in session. He pointed out that the rule governing federal grand jury secrecy — Rule 6(e) — places no restriction on witnesses.

"Which means that if you're a witness before a federal grand jury, and you're not related to the government — you're just sort of a lay witness — you can immediately leave and discuss what happened before the grand jury," he said.

The Supreme Court also limited its holding to the disclosure of witness "testimony," declining to decide whether witnesses may talk about their "experience" before the grand jury. But Thomas said he thinks such speech would be protected.

"I absolutely think the First Amendment protects that — that is, what it felt like being before a grand jury, what the ques-

tions were that were asked by the grand jury. I think the First Amendment protects that sort of compelled interaction," he said. "You're not there on your own, you're not there as a volunteer, you're there because the government says you have to be there. And I really think you have the ability to talk about or discuss what your experience was before the grand jury."

At least one court, however, has narrowly interpreted *Butterworth* to permit grand jury witnesses to divulge only what they knew *before* they testified.

In 2003, the U.S. Court of Appeals in Denver (10th Cir.) ruled that a housekeeper for the parents of murdered child JonBenet Ramsey could not disclose anything she learned through testifying before the grand jury in a book she intended to write. In upholding a Colorado admonition to all grand jurors to keep their testimony secret "until and unless" an indictment issued, the court cited the importance of preserving the state's interest in grand jury secrecy. (*Hoffmann-Pugh v. Keenan*)

"[W]e are convinced a line should be drawn between information the witness possessed prior to becoming a witness and information the witness gained through her actual participation in the grand jury process," the court said. The U.S. Supreme Court in January declined to review the decision.

Thomas said the issue of reporters disclosing their grand jury testimony could arise in the current climate, noting that a few journalists actually have testified before the Plame grand jury.

"It would be interesting to see what some of those reporters had to say," he said.

60 Minutes ticks off prosecutor

It is not altogether uncommon for journalists to be subpoenaed to testify before grand juries as a result of something they publish or air.

Veteran *60 Minutes* reporter Mike Wallace, along with former executive producer Don Hewitt and producer Bob Anderson, were called as witnesses in the mid-1990s in connection with a story they aired about Tyson Foods honcho Don Tyson, according to media attorney Kevin T. Baine of Williams & Connolly.

A grand jury was investigating whether then-Secretary of Agriculture Mike Espy had received illegal gifts from Tyson. The prosecutor wanted to know whether Wallace had gathered any incriminating information on Tyson that was not broadcast, Baine said.

"In effect, all Wallace had to say was, 'I put together my piece. Anything that was interesting was on the air,'" Baine recalled. "In essence the answer was, 'I don't have any information that I withheld from the public that was of interest on the subject. What I got, I put on the air.'"

"It was a nonevent," he added. "It was interesting simply because Mike [Wallace] got to see how the grand jury worked."

Baine said Anderson created a fuss when he started taking notes during the proceedings so he could tell the lawyer what went on. Annoyed, the prosecutor went outside to talk to Baine, who saw nothing wrong with the practice.

"But he's a TV producer," the prosecutor complained.

"Maybe you should have thought about that before you called him into the grand jury," Baine replied. "And maybe you should let him go."

60 Minutes never reported on its involvement with the Espy grand jury, Baine said.

"I think really the government wanted to call Mike Wallace and Don Hewitt for the star quality of having them before the grand jury, to be honest with you," he said. "Because at the end of the day, I don't think their testimony was that critical. I don't think it was critical at all. I don't think the prosecutor regarded it as particularly helpful — which is why their grand jury appearances were pretty short."

"There are no restrictions on witnesses before the grand jury," said media attorney Kevin T. Baine of Williams & Connolly in Washington, D.C. "If anybody is called as a witness to the grand jury — whether as a witness to a crime, or a reporter, or someone suspected of a crime — that person is completely free to walk out of the grand jury room, stand in front of a TV camera and recite in detail everything that happened in that grand jury room."

In fact, President Clinton appeared on national television on the same day he testified before the grand jury and revealed his status as a witness. "I'm not saying it's inconceivable that a judge could ever gag a witness, but I'm not aware of it ever happening," Baine said.

But in September, the California Court of Appeal in Santa Clara County upheld a warning given to grand jury witnesses not to disclose their testimony, or anything they learned during their appearance before the grand jury, until the transcript is made public.

The case arose after a newspaper unsuccessfully tried to interview grand jury witnesses in connection with the criminal investigation of a local judge. The *San Jose Mercury News* complained that a witness declined to talk to one of its reporters after a prosecutor told the reporter, within earshot of the witness, that anyone who spoke publicly about his testimony could be thrown in jail. Another prospective witness refused to be interviewed without the district attorney's permission. The appeals court ruled that the admonition read to all witnesses was not an unconstitutional "prior restraint" on the press. (*San Jose Mercury News, Inc. v. Criminal Grand Jury of Santa Clara County*)

The ruling appears to conflict with a 1990 U.S. Supreme Court case, *Butterworth v. Smith* (see sidebar, page 5), which holds that all grand jury witnesses have a First Amendment right to disclose the contents of their testimony, at least once the grand jury has concluded its activities. But because the court in *San Jose Mercury News* limited its discussion to the single issue of prior restraint, it expressly declined to analyze the constitutionality of the warning under *Butterworth*.

One thing is certain: witnesses are completely free to discuss anything they knew prior to testifying before the grand jury. That doesn't mean they will be willing to do so, however — especially when a prosecutor may threaten to throw them in jail for talking, *San Jose Mercury News* lawyer James Chadwick noted.

Obtaining materials

The general rule of secrecy also applies

to materials used in the course of grand jury proceedings, and even ancillary proceedings. It applies to civil — or watchdog — grand juries as well as criminal ones.

As previously noted, Rule 6(e)(6) of the Federal Rules of Criminal Procedure provides that records, orders and subpoenas pertaining to grand jury proceedings are kept sealed from the public "to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury."

The U.S. Court of Appeals in Philadelphia (3rd Cir.) held in 1997 that there is no presumptive First Amendment or common law right of access to court documents involving materials presented before a grand jury. The court in that case determined that a sentencing memorandum that mentioned the names of grand jury witnesses, in apparent violation of the federal rules, and other pertinent documents were sufficiently related to the grand jury proceedings to justify sealing them. (*United States v. Smith*)

The same court later relied on *Smith* to deny a newspaper's request to unseal court documents related to an apparent contempt proceeding against federal prosecutors for leaking secret grand jury information to the media. (*In re Newark Morning Ledger Co.*)

Grand juries that act as government watchdogs often issue to a court reports of their findings and recommendations, which then become public records. In 1988, the Supreme Court of California concluded that a grand jury could not disclose as part of its report "raw evidentiary materials," including hearing transcripts and interviews conducted by the prosecutor, gathered during a watchdog investigation that failed to yield any indictments.

Numerous media organizations had challenged a lower court judge's refusal to file the report and his sealing of the evidentiary materials, arguing such actions violated the public's right to scrutinize public affairs. But the state high court, emphasizing the importance of grand jury secrecy, upheld the trial judge's actions. (*McClatchy Newspapers v. Superior Court*)

Ancillary proceedings

Under federal rules, not only are grand jury proceedings themselves closed to the public, but so are hearings on matters "affecting a grand jury proceeding." Such ancillary proceedings often involve matters such as motions to quash grand jury subpoenas, motions requesting immunity from prosecution and motions to compel testimony. Federal courts therefore first must determine whether a particular proceeding is related to or affects a grand jury proceeding. This is done on a fact-specific, case-by-case basis.



AP PHOTO
President Clinton is sworn in for his 1998 videotaped grand jury testimony in the Kenneth Starr probe. The federal court in Washington, D.C., ruled that some of the grand jury information could be released upon a finding that secrecy was no longer necessary to prevent disclosure of matters still before a grand jury.

Once determined to be ancillary to a grand jury proceeding, a matter is presumed secret. The press, in theory, can overcome the presumption by showing that the need for disclosure outweighs the need for secrecy. But case law indicates that such an argument has a slim chance of succeeding, especially if the grand jury's investigation is ongoing.

Federal courts have held that the media had no right of access to papers or proceedings involving: a claim by an anonymous grand jury witness that he was the victim of illegal electronic surveillance by the government (*In re Grand Jury Subpoena*); allegations of government misconduct in releasing a sentencing memorandum that allegedly violated the grand jury secrecy rule (*United States v. Smith*); and objections from Monica Lewinsky's lawyer to a grand jury subpoena and other ancillary matters during the investigation of President Clinton. (*In re Dow Jones & Co., Inc.*) At the state level, a California appeals court last year extended the rule of grand jury secrecy to motions to quash grand jury subpoenas served on an archdiocese in a priest sex abuse case. (*Los Angeles Times v. Superior Court*)

That is not to say the press can get no information at all about grand jury ancillary proceedings. In the *Dow Jones* case, the U.S. Court of Appeals in Washington, D.C., recognized that a local rule of criminal procedure allowed the trial court to open matters "upon a finding that continued secrecy is not necessary to prevent disclosure of matters occurring before the grand

jury." Pursuant to this "limited means for disclosing non-secret matters," the court suggested that cases before the grand jury could appear on the public docket under a nondescript caption such as "In re Grand Jury Proceedings," followed by a "miscellaneous" case number. It sent the case back to the trial court to consider this option.

The trial court subsequently refused to create a generic rule that would require public docketing of all grand jury ancillary proceedings. The case then went to the appeals court a second time. In upholding the lower court's decision, the appeals court noted that the media may seek a redacted public docket in a specific case. If the trial court denies the request, it must give a reason for doing so beyond the fact that it burdens administrators. The court also cannot deny the request based simply on the fear of leaks. The appeals court agreed with the media that the local rule "means what it says in providing a limited right to access with respect to grand jury ancillary proceedings." (*In re Sealed Case, No. 99-3024*)

So what does all this mean to journalists seeking access? There is no First Amendment right of access to grand jury proceedings. The longstanding rule of secrecy covers participants, documents, and other materials, as well as matters that are related to grand jury proceedings. It may even apply to witnesses to some extent.

Unless the law specifically permits disclosure, the presumption of secrecy most likely will trump the interest in openness. As one federal district judge noted, in a recent case questioning the government's

authority to hide investigations from the public: "[T]he government has at least some power to control information which is its 'own creation,' and to which there is otherwise 'no First Amendment right of access.'" (*Doe v. Ashcroft*)

Cases cited in this article:

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