

INVESTIGATORY GRAND JURY _____

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Connecticut has created an unusual grand jury system, often called the “one man grand jury,” to investigate certain kinds of crimes. The investigatory grand jury system was widely used until the mid-1980s. At that time, the state legislature responded to complaints of numerous abuses in the grand jury system by imposing strict standards for its use. The reforms have cured some of the asserted abuses, but have also limited the effectiveness of the grand jury as an investigative tool.

As its name suggests, an investigatory grand jury’s task is to investigate complicated crimes, take testimony from witnesses, and then file a report stating whether it finds that there is probable cause to believe that somebody has committed a crime. It usually consists of only one person, who must be a superior court judge or a judge trial referee (retired judge). By law, the investigatory grand jury can only investigate certain kinds of crimes: corruption in state or local government, Medicaid fraud, corrupt organizations and racketeering activities, election law violations, and any felonies that are punishable by imprisonment of more than five years.

Under the previous system, any state’s attorney in any judicial district could apply to the presiding judge in his district to appoint a one-man grand jury to investigate virtually anything. The presiding judge could then appoint any judge sitting in the district, including him or herself, without any further review.

Under the amended statutes, Conn. Gen. Stat. §§ 54-47a (and following), a three-judge panel appointed by the chief justice of the Connecticut Supreme Court hears all applications for the appointment of an investigatory grand jury. Any state’s attorney or any judge can make an application, under oath, that describes the facts and circumstances that lead him or her to believe that the investigatory grand jury will find “probable cause” to believe that a crime has been committed. The applicant must also disclose whether other applications have been made to investigate the same criminal activity or the same suspected offender. If the applicant is—as it usually is—a state’s attorney, he or she must also provide: a statement as to the status of the investigation and evidence collected to date; a statement indicating what other normal investigative procedures (including, for instance, court-

authorized wiretapping), if any, have been tried and why they failed; a statement indicating what other normal investigative procedures, if any, have *not* been tried, including the reasons why they are not likely to succeed or are too dangerous to try; and a statement of the applicant's belief as to why an investigatory grand jury will lead to a finding of probable cause that a crime has been committed.

The panel may approve the application and order an investigation if three requirements are met: (1) the administration of justice requires an investigation; (2) other normal investigative procedures have been tried and have failed or appear to be unlikely to succeed or too dangerous to try; and (3) the investigation will likely succeed in determining whether or not there is probable cause to believe a crime has been committed. These findings are incorporated into the order.

If the three-judge panel approves the application, it issues an order that defines the scope of the investigation, the approximate time it should take, and recommends a particular court as the court where motions to quash can be heard, contempt proceedings will be conducted, and the final grand jury report will be filed. The chief court administrator then appoints a judge (who was *not* a member of the three-judge panel) to serve as the grand juror. The initial term of the investigation may not exceed six months, but the grand juror can apply for up to two extensions of six months each to complete his or her work.

The grand juror can appoint a state's attorney or any other attorney to assist in the investigation. The grand juror has the authority to compel witnesses to attend the proceeding. A witness who refuses to appear, to produce documents, or to answer questions, can be prosecuted for contempt of court. If a witness claims a Fifth Amendment right not to incriminate him or herself, the state's attorney can apply to the court for an order compelling the witness to comply. However, if the court grants the request and compels the witness to testify before the grand juror, the witness is effectively granted immunity for the testimony taken in that proceeding, and the testimony can't be used against him or her in a subsequent prosecution.

A witness called to testify before an investigatory grand jury has limited rights. The witness has the right to have an attorney present during questioning, and to consult with the attorney before answering questions. The witness's attorney is not allowed to object to questions, however, as he or

she would during a trial. A witness has a right to be told whether he or she is a target of the investigation, and a target witness must be informed of his or her right not to answer questions that might incriminate him or her (at least without a grant of immunity as described above).

A court reporter makes a transcript of the testimony of all grand jury witnesses. The transcripts are subsequently filed with the court. The state's attorney can obtain access to all grand jury transcripts without a court order, and may introduce testimony given by a defendant in an investigatory grand jury proceeding against him or her in the prosecution's case in chief. A witness can sometimes obtain a copy of the transcript of his or her own testimony, but not of the testimony of anyone else. The grand jury's target has an unqualified right to a transcript of his or her own testimony after the state charges him or her with a crime that was the subject of the grand jury investigation, while other witnesses may be denied transcripts of their own testimony if a judge so orders.

When its investigation is complete, the investigatory grand jury issues a report that must include a finding as to whether or not there is probable cause to believe that a crime has been committed. Unless a state's attorney makes a motion in court to prevent the disclosure of the report, such a report is made public seven days after it is filed. If there is a motion for nondisclosure, a public hearing is held.

Controversy frequently attends the issuance of the grand jury report. Nothing prevents the grand jury from naming names of persons whom the grand jury suspects of criminal activity. However, the grand jury has no power to indict anyone; a state's attorney must evaluate the evidence and the grand jury findings and determine whether there is a sufficient basis to proceed with a prosecution. As a result, individuals may be named in grand jury reports—and their reputations may be irreparably damaged—before a state's attorney concludes that there is too little evidence to warrant a prosecution.

No effective controls keep the grand jury within the scope of its investigatory assignment. For instance, a recent grand jury in Hartford, appointed to investigate police corruption, issued a massive report that purported to discover links between drug dealing and welfare. Its investigation was thorough but unscientific, necessarily based largely upon inherently unreliable sources (drug dealers), and reached sweeping conclusions about the

“drug and welfare” culture that were widely publicized. It also, almost incidentally, named police officers it believed to be involved in illegal activities. Yet nearly a year later few of those officers had been arrested.

The amendments to the investigatory grand jury system in the mid-1980s by no means addressed all of the issues that had previously caused controversy. For instance, critics had complained that witnesses subpoenaed to testify before grand juries have virtually no rights—no right, for instance, to know the subject matter of the investigation, the authority under which it is conducted, the scope of the investigation, and no right to present exculpatory information. These problems were not addressed by the reforms—although the revised law does require the state’s attorney to present any exculpatory information that is in his or her possession. Similarly, the reforms did not give witnesses the ability to control their time of appearance, or to prevent the grand juror from causing them to be subpoenaed repeatedly, or to object to particular questions asked by the grand jury or the state’s attorney who assists in the investigation.

Although many flaws remain in the grand jury system, some state’s attorneys complained that the reforms went too far by imposing a requirement that they exhaust normal investigative methods before seeking appointment of a grand jury. State’s attorneys have also complained that their own investigatory powers are too limited, and that they should have the power to issue investigative subpoenas without requesting a grand jury. The General Assembly has considered bills that would grant the state’s attorneys such powers as well as balanced bills to reform the grand jury system to provide the powers together with protections for the rights of witnesses and targets. One bill would authorize individual members of the state’s attorney’s office to conduct, in essence, their own “grand jury investigations” with very few controls on their use of such power; another modifies the federal grand jury system with greater powers and greater controls.

Whatever flaws in the grand jury system, it is surely preferable to a system in which individual prosecutors could circumvent the restraints of the Fourth and Fifth Amendments by subpoenaing witnesses whom they suspected of criminal activity, ordering them to produce documents and tangible evidence on the pain of a prosecution for contempt of court if they refused to comply, and then compelling them to answer whatever questions the prosecutor chose to frame. In any event, the next chapter of the grand

jury system is being written, as the current cumbersome and often criticized process wanes.

