

No True Bill: A Grand Jury's Refusal to Indict

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Grand jury indictment is a constitutional [right](#) in federal felony cases. It is an [alternative means](#) of prosecution in many states. In either system, the grand jury is the people's panel. It stands as a group of randomly-selected members of the community, strategically placed "as a kind of [buffer](#) or referee between the Government and the people." It serves the "[twin](#) historical responsibilities [of] bringing to trial those who may be justly accused and shielding the innocent from unfounded accusation and prosecution." If the grand jury agrees that the evidence before it warrants indictment, it may indict and the accused may be brought to trial. If the grand jury does not agree and refuses to indict, an accused may not be brought to trial under indictment. Yet, the prosecutor's role before the grand jury can have a significant impact.

The [court](#) empanels and instructs the grand jury in the federal and most state systems. That is the last the grand jury will likely see of the judge. The prosecutor is another story. The prosecutor attends the grand jury in the [federal](#) and most [state](#) systems as a matter of right. He sees that witnesses are [subpoenaed](#) to appear before the grand jury. He [questions](#) them when they appear to testify or present evidence. He is under [no obligation](#) to present evidence favorable to the target of the investigation. He supplies the grand jury with [legal advice](#). He often drafts its indictments. In the [federal](#) system and many [state](#) systems, he may even elect not to bring to trial defendants whom the grand jury has indicted.

Yet, in virtually every system there are limits. Particularly in systems in which grand jury indictment is a matter of right, the prosecutor may not render the right meaningless. In the process of moving toward a possible trial, it is the grand jury's prerogative to determine whether to indict and for what, and it cannot be made to believe otherwise. Thus, the [courts](#) will undo the work of the grand jury where it is clear that an indictment is the product of prosecutorial overbearing. They will dismiss an indictment "if it is established that the [prosecutor's] violation substantially influenced the grand jury's decision to indict or if there is grave doubt that the decision to indict was free from the substantial influence of such violations."

The constitutional rights of a grand jury target or potential defendant aside, the courts afford prosecutors enormous discretion over the question of when and whether to prosecute. One state Supreme Court has [observed](#) that, "[i]n our criminal justice system, the decision whether to prosecute, and if so on what charges, is a matter ordinarily within the discretion of the duly elected prosecutor. The decision whether to bring charges is at the heart of the prosecutorial function. For this reason, it is a general rule that a prosecutor is not subject to judicial supervision in determining what charges to bring and how to draft accusatory pleadings, but is protected from judicial oversight by the doctrine of separation of powers." Or as a Missouri appellate court succinctly [stated](#) "[w]hen the State has probable cause to believe a crime has been committed, the decision whether or not to prosecute and what charge to file generally rests entirely within the prosecutor's discretion." Moreover in the grand jury context, the [American Bar Association](#) has opined that "a prosecutor should recommend that the grand jury not indict if he or she believes the evidence presented does not warrant an indictment under governing law."

On the other hand, the decision of one grand jury to refuse to indict by returning a prosecutor's draft indictment with the notation "no true bill," does [not necessarily bar](#) a prosecutor from presenting the matter a second time to the same or a subsequent grand jury. In addition, depending upon the misconduct involved, the refusal of a state grand jury to indict is [no bar](#) to federal prosecution. Nor does it preclude a [civil cause of action](#).