

Clinton case violated grand jury traditions

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As the spectacle of U.S. President Bill Clinton's testimony about his sex life played out on millions of televisions this week, viewers were asking a basic question: What's a grand jury?

Canadians can be forgiven for wondering, says University of Alberta law professor Gerald Gall. There's nothing in the world quite like the U.S. grand jury system and "God forbid" we should adopt it here, says the constitutional law expert.

"We don't have any parallel to the U.S. grand jury system," says Gall.

Grand jurors hear criminal allegations in secret proceedings. Witnesses who appear before grand juries do not have a lawyer present. They are not subject to cross-examination. The juries are meant to gather information. After hearing from witnesses, jurors vote on whether to bring an indictment. At least, that's the way it's supposed to work.

In Canadian law, preliminary inquiries are held so that accused persons can see the evidence against them, says Edmonton civil rights lawyer Shirish Chotalia.

Preliminaries are subject to publication bans, but no one is interrogated in secret as a matter of course, says Gall.

"We cannot do that under Canadian law" because of safeguards in the Charter of Rights and Freedoms, Chotalia says.

The U.S. grand jury system was meant to be "a sword and a shield," says law professor Susan Brenner of the University of Dayton, author of a comprehensive book on U.S. grand juries.

As a "sword," it investigates serious crimes to produce indictments. As a "shield," it protects citizens who might have been wrongly accused. That's why grand jury testimony is traditionally heard in secret — to weigh whether the accusations warrant any further action.

What's said to a grand jury remains secret, unless it's repeated as part of a subsequent judicial proceeding.

It's done to protect the reputations of the innocent, says Brenner. Unless a grand jury votes to bring an indictment, the system protects the privacy of the person being investigated.

In fact, the U.S. Constitution, like the tradition found in English Common Law, sees grand juries as a citizen's protection against malicious prosecution and the arbitrary use of state power. The Fifth Amendment to the U.S. Constitution says: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury..."

The Clinton case is the exception, not the rule. The grand jury process has been "turned on its head," says Brenner. "In a standard criminal case, you just could not do this," she said, refer-

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ring to the constant leaks of grand jury testimony and the final voluminous release of all the material gathered by independent counsel Kenneth Starr. "Never, ever, ever, would you see this wholesale opening of the file."

Yet Brenner believes Starr may have gained the ability to do so from the three-judge panel that appointed him. On July 2, the relevant court handed down a sealed judgment on an application by Starr to publicize everything he had found.

"We don't know what's in the sealed judgment," said Brenner. But Starr may feel confident he has legal backing in releasing his findings.

Yet she finds the timing odd because this was before Clinton and paramour Monica Lewinsky testified. It's "very unusual" for prosecutors to seek permission to publish their findings even before key witnesses are questioned.

In law, she said, a court can order grand jury material released for use in "judicial proceedings."

Yet in the Clinton case, "impeachment is not a judicial process, it's a legislative one."

In effect, impeachment is a political decision. By releasing information for a possible impeachment rather than for a judicial proceeding, Starr gives the appearance that the grand jury system was used to "funnel things through" for a political purpose.

Grand juries were not meant to be used this way, Brenner said. "I think this whole thing reeks of unfairness."

The U.S. grand jury system arose from English common law traditions and there were grand juries in both Britain and Canada well into this century.

They were an intermediary step between a preliminary inquiry and an actual trial to ensure a trial was really necessary, said Gall. They were phased out in Britain in the 1930s and in all Canadian provinces after the Second World War.

Canadian grand juries were responsible for "gaol delivery," ensuring that prisoners were well-treated, said Gall. They were meant more to protect citizens than as an instrument of prosecution.

Brenner says American grand juries should serve the same function. In the Clinton case, Starr's conduct "opens up the idea of using grand juries for political purposes."