Historically, the grand-jury system began in England in the 12th century to guard against unfair prosecution during the reign of English kings, concurrent with the decline of the “divine right of kings” as feudal lords and barons gained power. Grand juries, composed of 25 freemen—mostly barons and later property owners—operated as self-regulating, autonomous bodies charged with investigating alleged wrongdoing and, if found, charging and delivering the accused to the courts for adjudication.

Today, the Fifth Amendment to the U.S. Constitution states, “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.” Rule 7 of the Federal Rules of Criminal Procedure extends the protections afforded to criminal defendants by requiring the use of a grand jury in the charging process for any federal crime that is punishable “by imprisonment for more than one year.” As a practical matter, that means grand juries are required in the charging process of all federal felony cases.

However, there is no requirement under the U.S. Constitution or federal law that mandates states to use grand juries in their felony-charging process. Although a number of state constitutions and statutes require a grand-jury indictment to dispose of a felony charge, by trial or by a guilty plea, these states may allow a defendant to waive the right to have his or her case presented to a grand jury. Such waivers are relatively rare. Additionally, waivers of this nature are almost exclusively done pursuant to a plea agreement, often when the proposed plea is to a crime that was not charged in a pending indictment.

In addition to states requiring an indictment for all felony cases, four states require a grand jury indictment in specific situations. In Louisiana and Rhode Island, a defendant has the right to require a grand jury indictment in capital cases or cases with a possible life sentence. In Florida, this right extends only to capital cases, and in Minnesota, which does not have a death penalty, the right exists for cases with a possible life sentence.

**Pros and Cons of Grand Juries in Criminal Cases**

Critics of the modern grand-jury process aver that grand juries now have almost no true independence. They argue that over the past two centuries the executive and legislative branches, often feeling the brunt of grand jury investigations and indictments themselves, narrowed the jury’s independence through laws, statutes and legal convention. They further note that grand juries are almost completely dependent to make decisions based on the evidence that is presented by the prosecuting attorney. The prosecutor, therefore, has the ability to sculpt the decision of the grand jury by manipulating the evidence that is presented to them. This can be done by presenting exculpatory evidence in specific cases, such as cases in which a law enforcement officer was involved in killing or seriously injuring a citizen.

Supporters of the modern grand jury system note that although this may be a practical reality in many circumstances, grand jurors have a number of powers to counteract the impact of the prosecutor. First, they can question witnesses and they can compel those witnesses to produce documents or other evidence for their review. Second, they can subpoena witnesses without the consent of the prosecution. Those witnesses can be compelled to provide testimony subject to the Fifth Amendment’s right to remain silent, and witnesses can be incarcerated for contempt of court if they fail to do so. When exercised appropriately, these tools afford grand jury members the ability to investigate facts and theories of crimes that may go beyond anything that was contemplated in the presentation of the prosecutor.
Grand jury proceedings are secret, and testimony before a grand jury can only lawfully be released under very specific situations. In a limited number of cases, the secret nature of the proceeding may encourage noncooperative witnesses to be candid. The secrecy also protects some defendants by keeping the facts of their cases from appearing in the media—facts that may be inadmissible at trial—which reduces exposure of these facts to prospective jurors. However, the secrecy makes it impossible for members of the public to be sure that the prosecutor zealously presented any given case to the grand jury, which is their ethical obligation. Public uncertainty was undoubtedly a significant part of the sensation that justice had not been served by the grand jury in Ferguson, Mo., when the jury declined to indict police officer Darren Wilson in connection with his shooting of Michael Brown.

Many state systems do not use a grand jury to bring charges in felony cases. In those states, the prosecution merely files the charging document with the court and defendants are tried on that document. On the one hand, a prosecutor who wants to avoid bringing a defendant to trial, whether that is justifiable or not, has the ability in these systems to merely refuse to file the charges with the court. Although the prosecutor conceivably could be disciplined for failing to zealously prosecute the case, or could be removed from office, there is no practical way to navigate around the prosecutorial monopoly for a given case.

The grand jury process in many states eliminates the prosecutorial monopoly over the charging process. A number of states authorize “citizen presentments” to the grand jury. Citizen presentments allow a member of the public to gain access to the grand jury to present evidence of a felony and seek an indictment. This is a useful tool for a member of the public that feels the prosecutor is neglecting or abusing his or her position through inaction on a case. For example, a prosecutor’s office that has a policy of presenting all incidents involving a police officer shooting a citizen, whether or not there is any reason to believe the officer’s actions were criminal in nature. This policy certainly would relieve the prosecution of its burden to decide whether to charge a law enforcement officer. It also would eliminate hostility between the prosecution and law enforcement, regardless of the determination of the grand jury. This policy might even be in the best interest of justice, but only if the public could be sure that the prosecution zealously presented the best case against the officer. However, due to the secrecy related to grand jury proceedings, the public has no way to know that.

Another possible benefit of the grand jury system is the didactic value for members of the grand jury. As members of grand juries are typically selected from randomized lists of the public, most members will have very little knowledge of the criminal activity occurring in their jurisdiction, other than high-profile crimes reported by the media. Through their grand jury experience, they quickly become aware of the magnitude and volume of criminal activity that impacts the courts, law enforcement, social services, etc. Although grand jury proceedings are secret and grand jurors are instructed not to discuss them, they are not precluded from discussing the nature of criminal activity locally in a general sense.

**Proposed Grand Jury Reforms for Police Shooting Cases**

So, what is the solution? Do the benefits of the grand jury outweigh some of the problematic features? While it is difficult to answer these questions, U.S. Rep. Hank Johnson of Georgia has filed House Resolution 429, or the “Grand Jury Reform Act.”

In a press release dated Jan. 21, 2015, he noted:

> The bill requires the appointment of a special prosecutor to conduct an investigation and present the results to a judge in a probable cause hearing, open to the public, whenever a police officer kills an individual while acting in the line of duty. Passage of this bill would help restore trust in our justice system, while ensuring a fair process for all parties.

To achieve compliance, the bill, if enacted, would use as leverage federal funds the states receive under subpart 1 of part E of 21 title I of the Omnibus Crime Control and Safe Streets Act 22 of 1968 (42 U.S.C. 3750 et seq.). A noncompliant state would be
GRAND JURIES

GRAND JURIES

The Council of State Governments

243

ineligible to receive funding under this provision in the future.

New York Gov. Andrew Cuomo announced a similar initiative for his state. Under his plan, an independent monitor would be appointed to review cases in which a grand jury has declined to indict a police officer that killed an unarmed citizen. The Cuomo plan also would make the grand jury process less secretive. The plan would require district attorneys submit a public report in these cases, which would identify the facts of the case and summarize the testimony provided by each witness to the grand jury.

Both the reform efforts advocated by Johnson and Gov. Cuomo apply to a small portion of all the cases handled by grand juries nationally. Additionally, these concepts have one thing in common: if enacted they both would effectively create a two-tiered grand jury system. One system would apply to police officers involved in killing a citizen and the other for everyone else. Although these suggested plans are clearly being proposed to improve the public’s view of the grand jury as a fair and equitable process, if enacted, they may have the opposite impact.

Conclusion

The grand jury process historically has been a component of the criminal justice system at the federal level and in a number of states. At the federal level, the U.S. Constitution mandates its use for the most serious of crimes. It is also mandated by many state constitutions. The grand jury is also interwoven into both the legal culture and the criminal procedure in jurisdictions that mandate its use for felony cases. As such, it is unlikely that the grand jury process will cease to exist.

However, reinvigorating grand jury systems to have the vitality and independence they historically had certainly should be a goal. One easy way to accomplish this is to ensure that individual grand jurors fully understand their rights and powers as grand jurors, for example, by explaining to them that they have the right to question witnesses, to subpoena witnesses, and to demand production of documents and other evidence. Jurors also should be allowed to exercise these rights without interference from the prosecution.

If grand jurors regularly exercise these rights, this would help the institution once again be a partner in the justice system rather than being an archaic relic. It also, over time, would improve the public’s trust in grand jury systems.

Notes

*The National Center for State Courts does not take a position on whether using grand juries in the felony-charging process is beneficial to the criminal justice system, needs reform or should be eliminated.

1 Article 61 in the Magna Carta, signed by King John in 1215, called for 25 barons to sit as a body to oversee the actions and acts of the king to ensure they did not violate the “liberties of the people.”


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