

The Modern Grand Jury (Part II)

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This article is the second of a two-part series (the first one “pro,” this one “con”) describing the role of modern grand juries in the felony-charging process. The purpose of these articles is to identify the issues, rather than suggesting one side of the argument has more merit than the other. The National Center for State Courts does not take a position as to whether using grand juries in the felony-charging process is beneficial to the criminal justice system, needs reform, or should be eliminated.

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.^[1] 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 to be adjudicated.

Today, 800 years later, that purpose is still championed as a basic reason grand juries remain part of the American justice system. Yet in present-day practice, it is hard to picture grand juries as true bastions of independence charged with protecting individual rights against the arbitrary use of government power. In many ways, they have become a government tool.

Over the 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 conventions. Grand juries do not do things on their own anymore, and have not for centuries. Today, they are primarily empanelled to review serious felonies, and occasionally may conduct special investigations under the auspices of a prosecuting agency. In both instances, evidence is solely brought to them by a prosecutor, who is the only one permitted to present information behind the closed doors of the jury. Rarely do grand jurors, in practice, exercise independent judgment in reviewing matters.

Although data at the state level are sketchy, it is generally agreed by most justice system experts that it is rare for prosecutors to fail to win an indictment before a grand jury.^[2] Most observers concur with University of Illinois Law professor Andrew D. Leipold, a critic of grand juries, that “if the prosecutor wants an indictment and doesn’t get one, something has gone terribly wrong.” It also works in the converse, where a state’s attorney may want to avoid an indictment in a politically sensitive case. The recent highly publicized deaths of African-American crime suspects by police officers in Ferguson, Missouri (Brown case) and Staten Island, New York (Garner case) are examples.

The jurors, ordinary citizens, are schooled in the law, presented evidence, and instructed about the case or issue before them by the prosecutor acting alone. Even those serving on grand juries have begun to question their neutrality. A letter from a former grand juror to a Phoenix newspaper editor captures those concerns.

The problem with the grand jury system is the jury. The prosecutor has complete control over what is presented to the grand jury and expects the grand jurors to just rubber stamp every case brought before it. Unfortunately, most grand jurors are only too obliged to act as a rubber stamp instead of as a jury to decide if there is enough probable cause to take a case to trial. The purpose of a grand jury is to prevent the government from taking people to trial without some probable cause to believe they committed a crime.

I served on the Maricopa County Grand Jury and remember one juror becoming upset with me because I asked questions of the witnesses and didn't just rubber stamp, resulting in her making the statement that "If they weren't guilty, they wouldn't have their cases here." We had cases where when I questioned the detective they had no more information than the report they read to the grand jury, and sometimes because they did no investigation at all and only had a complaint. Clearly, the police and the prosecutor expect the grand jury to just blindly indict anyone brought before them.

If I'm ever accused of a crime, I only hope that my case is brought before a qualified judge to determine probable cause to go to trial—and not a grand jury.

Interestingly, grand juries are unknown outside the United States. In the 1800s there was a move to abolish or limit their use by judicial reformers on the basis that court and judicial processes provided better, more-public (transparent) ways to determine culpability and simultaneously protect the rights of the accused. As a result, grand juries in England were eliminated in 1933 and in Canada in 1984.

Those hoping to eliminate prosecution by grand jury favor presenting all criminal cases by information (formal accusation) filed in open court, the only process available in roughly half the states. They argue grand juries are too easily subject to abuse and misuse since they are conducted with few rules of evidence and without the presence of a judge, defendant, defense attorney, the press, or the public. The most troublesome operating principle for many is that the proceedings must be conducted in secret. Participants, except witnesses, are forbidden from disclosing matters related to the grand jury, even after the grand jury proceedings have concluded. The bottom line for these abolitionists: the interests of justice are better served through a more balanced playing field between prosecution and defense and outweigh keeping grand-jury proceedings secret.

Preliminary hearings are the answer. They are conducted in open court by a neutral judge, who decides whether the government has produced adequate evidence (probable cause) that an accused committed the crimes charged. A defense attorney is present and permitted to cross-examine the government witnesses, as well as disclose any exculpatory evidence favorable to the accused. The result is an impartial, evenhanded review of the government's claims and, ultimately many say, a more just outcome.

Another contention by justice system reformers in pushing for the demise or limited use of grand juries is their overall cost and inefficiency given the preliminary hearing as a more streamlined alternative. Grand jurors often sit for extended periods of time ranging from a

month to multiples of months. This drains public juror funding, and the collective expense, inconvenience, and productivity loss to jurors and businesses is sizable.

Recently, National Center for State Courts (NCSC) consultants conducting caseflow analysis in various trial courts linked needless court delay and public expense to overuse of grand-jury indictment by some prosecutors. In one urban court, NCSC studied virtually all felony cases were prosecuted through grand juries. The average elapsed time from arrest to indictment was four months, resulting in serious jail-overcrowding problems and unnecessary case-processing delays. Multiple grand juries were required to handle the volume. It was impossible for the court to meet model American Bar Association time standards calling for the disposition of 75 percent of all felony cases within 90 days. NCSC recommended more felony cases be processed through information.

Controversy over grand-jury justice likely will not subside any time soon. In the meantime, many states and prosecutors have moved away from it in favor of prosecution by information for all or most felony matters. More likely more will do so as transparency, justice, cost, and delay issues further question the grand jury's effectiveness in modern-day society.

[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."

[2] According to the Bureau of Justice Statistics, U.S. District Attorneys prosecuted 162,000 federal cases in 2010, the most recent year for which data is available. Grand juries declined to return an indictment in 11 cases (.006%)

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