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THE FRONT BURNER

Time for U.S. to junk grand juries?

In cases involving cops, special prosecutors needed

By KALYANI ROBBINS | Guest columnist

The recent cases in which grand juries have failed to indict police officers for killing unarmed citizens have raised questions regarding whether grand juries have any value at all. Might they simply be a tool for biased prosecutors to deflect the blame for refusing to charge high-profile perpetrators they don't actually want to prosecute? This abuse of the process appears quite likely, but it is not at all necessary to throw the baby out with the bathwater.

Grand juries can serve as a check on prosecutorial overreach, as the prosecutor must present sufficient evidence to demonstrate probable cause to bring the accused to trial. A criminal trial is not only a long, challenging, and public process one should not have to suffer needlessly, but the charges themselves can often result in keeping the accused in custody pending trial.

Some argue that because the vast majority of all cases brought before a grand jury result in indictment, the process fails to protect the innocent from rogue prosecutors. This is simply not true. In addition to the cases the grand jury declines to indict (about 9 percent in New York), there are the many cases the prosecutor declines to present to the grand jury (only one-third of all felony arrests in New York are presented to the grand jury). As a former Manhattan prosecutor, I would only go to the grand jury if I knew I had what I needed to present a solid case for indictment. The requirement that we present this evidence before a grand jury helps to weed out bad cases.

While grand juries can serve a valuable role in ordinary cases, it is questionable whether they should be utilized in high-profile and controversial cases. They are not sequestered and privy to media coverage of their cases, and thus may be tainted. Trial juries go through a far more rigorous process to eliminate bias than do grand juries. Nor does a secret process (intended, in ordinary cases, to protect the innocent from reputational harm that could result from public proceedings) play well in the media. Indeed, we lose the benefits of a grand jury in such cases, and may as well stick to a basic (and public) preliminary hearing before a judge.

Whether or not we utilize grand juries in such cases, the more important decision is who should be prosecuting the case, especially where the defendant is a player in the local criminal justice system. In such cases, it would be preferable to bring in a special prosecutor to investigate and, if appropriate, prosecute. State attorneys general can appoint special prosecutors to investigate cases involving alleged government misconduct. However, as the recent cases following the deaths of Michael Brown and Eric Garner demonstrate, the local district attorney typically handles police defendants.

Given the conflict of interest created by asking a prosecutor to bring charges against her partners in local law enforcement, states should have a special prosecutor for the investigation and prosecution of all cases against law enforcement officers. Some prosecutors have argued that they are not conflicted, and that it is their job to keep a critical eye on the police. However, conflict-of-interest recusal is traditionally broader than actual conflict, and applies when there may be the appearance of a conflict. In light of recent events, there remains little question that such an appearance exists in the context of local prosecutors bringing allegations of police brutality before grand juries.

Grand juries serve a valuable purpose of vetting cases and protecting the innocent both from criminal charges and (as a result of the secrecy) from disrepute. Rather than taking a hatchet to this system, we should use a scalpel to carve law enforcement defendants out of the dockets of local prosecutors. Further, in high-profile media-saturated cases, it may be wise (when constitutionally permissible) to carve them out of the grand jury process as well.

Kalyani Robbins is an associate professor of law at Florida International University College of Law.

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Today's moderator



DARRYL E. OWENS
Editorial Writer

There is one thing people know about grand juries: A porcine po'boy doesn't stand a chance of escaping a proceeding without being indicted if that's what the prosecutor wants.

Yet, in recent high-profile cases in Ferguson, Mo., and Staten Island, N.Y., grand juries did not return indictments for two police officers under scrutiny for killing unarmed men.

Outcomes that not only spawned outrage, but also cast a harsh spotlight on the usually secretive grand jury process.

Not that controversy over grand juries is new. Critics long have contended they're obsolete in today's justice system.

Indeed, Sol Wachtler, the former chief judge of New York state, who coined the "ham sandwich" idiom in 1985, at that time was pushing New York "to scrap the grand jury system of bringing criminal indictments," notes a recent Slate magazine article.

While all states provide for grand juries, nearly half don't bother with them, preferring preliminary hearings.

Critics would pierce the veil of secrecy and rein in prosecutorial power over grand juries. Indeed, one of today's columnists says such reforms might have made a difference in the recent controversies. However, he'd tweak, not junk the grand jury system.

Today's other columnist also supports the system; however, the former prosecutor favors appointing a special prosecutor to avoid conflicts of interest in cases where police officers are defendants.

By the numbers

- **5th:** Constitutional amendment that addresses grand juries.
- **16 to 23:** The number of people that can make up a grand jury in the federal system.
- **2/3 or 3/4:** The supermajority agreement grand juries need at minimum for an indictment, depending on the jurisdiction.

Evidence shows system needs mending, not ending

By ROGER A. FAIRFAX JR. | Guest columnist

Despite the outrage over recent high-profile grand jury decisions not to indict, most criticism of the American grand jury has focused on its perceived ineffectiveness as a filter for criminal charges. Grand juries rarely decline to indict; indeed, recent figures at the federal level show grand juries refusing to indict in fewer than one in every 15,000 cases.

However, these jarring statistics on grand jury refusals of indictments must be viewed in context. Many prosecutors will ask a grand jury to return an indictment only when they have more than enough evidence to establish probable cause. If there is any indication that the grand jurors are not satisfied with the evidence presented, the prosecutor may either obtain more evidence before the vote, or simply decide to pull the case. Therefore, many of the weaker cases actually may never go to a vote of the grand jurors.

Nevertheless, many observers parrot the old saw that a grand jury will indict a ham sandwich. Despite the grand jury's proud heritage as a check on the power of the prosecutor, the perception of the modern grand jury as a weak, impotent check on the prosecutor persists. The recent cases in Ferguson, Mo., and Staten Island, N.Y., would seem to

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run counter to that narrative — but they don't.

Yes, these grand juries declined to indict Darren Wilson and Daniel Pantaleo in the killing of unarmed individuals, but that misses the point. The most damning critique of the American grand jury is not that it indicts too often, but that it is too beholden to the whims of the prosecutor — the very criminal-justice actor the grand jury is meant to check.

Prosecutors wield tremendous influence over the grand jury, directing the investigation, deciding what evidence is presented, and determining which witnesses testify and how they are to be portrayed. Also, the prosecutor plays a dual role as both advocate and legal adviser to the grand jury, charged with instructing the grand jurors on the

applicable law.

Prosecutorial control of grand juries is the reason that almost all cases pursued result in indictments. Usually, a prosecutor brings a case before a grand jury because she wants the grand jury to indict the defendant. But prosecutors sometimes take potential charges to a grand jury with the preference that the grand jurors reject them. This may seem odd, given that prosecutors in many states, like Florida, have discretion whether to pursue or decline most criminal charges without first submitting them to a grand jury.

However, in cases where a particular prosecutorial decision not to prosecute a case may be unpopular, it might be expedient for a prosecutor to have the grand jury kill the case — and take the blame for having done so. Given prosecutors' influence over the grand jury, it should not be surprising that grand jurors will usually follow their lead. Indeed, this highlights the need not for abolition of the grand jury, but for independent special prosecutors in cases where there is reason to believe the prosecutor is unable to be impartial.

To be sure, the grand jury needs work, and a litany of reforms have been proposed over the years. Some of these proposed reforms target the power that prosecutors wield over the grand jury — for example, promoting greater transparency and accountability in the legal advice prosecutors give grand jurors, and ensuring that grand jurors are informed of their ability to help direct investigations. In fact, such reforms might have made a difference in Ferguson and Staten Island.

The grand jury initially was conceived as the voice and conscience of the community, and it still has the potential to serve that role. Of course, it can be difficult when making sense of the grand jury decisions in Ferguson and Staten Island to appreciate the grand jury's continued usefulness and legitimacy. However, the anger and disappointment spawned by the outcome of these cases should serve not as the rationale to abolish the grand jury but, rather, as the catalyst for its reform.

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The Needle

Revealed: Hackers Can Monitor Any Mobile Call; To be safe, don't use a cellphone, and definitely don't use a cellphone to call Sony." — **Ironic Times**

The Russian economy is tanking. It's gotten so bad that today Vladimir Putin had to pawn his stolen Super Bowl ring. And Putin will finance his next invasion on Kickstarter." — **David Letterman**

NPR realizes its mic volume has been low all this time" — **The Dandy Goat**



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