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Viewpoint: Time to Abolish the 'Inquisitorial' Grand Jury System

Rachel A. Van Cleave

Golden Gate University School of Law, rvanleave@ggu.edu

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Viewpoint: Time to Abolish the 'Inquisitorial' Grand Jury System

Rachel Van Cleave, The Recorder

December 31, 2014

The grand jury in Ferguson, Miss., refused to indict the officer who killed Michael Brown. A grand jury in New York refused to indict the officer who killed Eric Garner. In addition to prompting protests and calling into question many aspects of law enforcement tactics and training, these incidents have put a spotlight on criminal grand juries.

The U.S. criminal justice system is long overdue for reform and the best place to start is the institution of the criminal grand jury. This archaic aspect of our system was originally intended to protect individuals suspected of a crime by including people from the community as a check on those with the power of the state to enforce the law. The grand jury no longer serves this purpose and should be abolished.

Interestingly, exceedingly rare grand jury decisions not to prosecute have fueled this discussion. This is interesting because the legal community generally recognizes that a prosecutor can get a grand jury "to indict a ham sandwich," a phrase that underlies the particularly troublesome concern over unchecked prosecutorial power. This, in turn, undermines the general community's trust and confidence in our system.

A lonely inquisition

A comparative perspective can help enrich the discussion about grand juries and highlight why this institution is deeply problematic. Every facet of grand jury proceedings violates core democratic values and continuing to use it makes the U.S. an outlier compared with criminal systems in other countries. This is because grand juries have many elements associated with inquisitorial criminal systems that have been widely criticized throughout the twentieth century.

Since the end of World War II, many countries, especially in Europe, with historic ties to inquisitorial criminal justice systems have been reforming their systems to make them more democratic and fairer to those accused of a crime by eschewing secrecy, ensuring early and meaningful participation by defense attorneys, requiring proceedings to be oral and, most importantly, avoiding consolidating power in one individual, namely the investigative judge.

In inquisitorial systems the investigative judge controlled the investigation, the information and

evidence that ended up in the dossier and decided whether to bind the defendant over for trial. Defense attorneys were not permitted to review the entire written file, and they were limited in their ability to bring forward other evidence and were limited in how they might challenge evidence gathered by the investigative judge.

In grand jury proceedings, the prosecutor is equivalent to the inquisitorial investigative judges of old, and entrusted with a lot of power. For instance, the prosecutor decides what evidence to present to jurors, and the proceedings are secret, which means not even the defendant or the defense attorney may be present, much less present any evidence or challenge the prosecutor's evidence. While the jurors might continue to serve as a check on this power, nearly all scholars and commentators agree that without either a judge or defense counsel at these proceedings, jurors do not have enough knowledge or training to objectively assess the nature of the evidence presented; that is, the prosecutor is able to ensure jurors will reach the result the prosecutor seeks.

Many other countries have implemented reforms to separate and disperse the functions that had been consolidated in the investigative judge. These countries have also done away with secret and written proceedings to ensure that their criminal systems are more aligned with the values of a transparent and democratic system. Countries like Germany, Italy, Spain and France have focused on fragmenting these powers and creating mechanisms for review of both decisions to and decisions not to bind over for trial. Indeed, the procedures in these countries allow the crime victim to participate and to challenge a decision not to prosecute.

Investigative judges vs. the D.A.

The different training and mentality of investigative judges as compared with prosecutors in the U.S. makes the case for eliminating the grand jury even more compelling. Investigative judges are considered functionaries of the state and are not evaluated based on the number of convictions, but rather on the quality of their work. Their training consists of perfecting their ability to operate the machine of the system in a search for the substantive truth. Their mentality thus is not focused on a win/loss record, or on whether they will be reelected. Therefore, even though investigative judges have held a lot of power, the absence of incentives to win somewhat tempers this consolidation of powers.

By contrast, district attorneys are elected officials and the very nature of our adversary system creates incentives for prosecutors to be concerned about winning criminal cases and about reelection—certainly as compared with public prosecutors in other countries. Thus, U.S. prosecutors hold tremendous powers in grand jury proceedings and operate in a system in which they are not mere civil servants, but are subject to the scrutiny and whim of voters.

Prosecutor Bob McCulloch recently defended his decision to present to the grand jury any one who claimed to have seen the interaction between Officer Darren Wilson and Michael Brown by stating his purpose was to "find the truth," according to a New York Times article from Dec. 20.

Pointing to a few examples in which a grand jury did not issue indictments is not a testament to the ability of these proceedings to reach the truth. Rather, the fact that a number of cases involving police officer killings have not resulted in indictments speaks to the prosecutor's sweeping power over and potential to manipulate grand juries.

Time for abolition

The adversarial system in the U.S. is premised on the belief that the truth will emerge when two opposing advocates battle the issue out before a neutral decision-maker. The grand jury does not include an opposing advocate, and this is why this proceeding cannot result in truth as our system defines it, and why the concern that the prosecutor is able to control the grand jurors is powerfully real.

Other countries have made significant strides in shifting away from the inquisitorial model since WWII, incorporating many elements of the adversarial model. It is time for the U.S. to free our system of this relic and abolish an institution with strong inquisitorial elements associated with oppressive and undemocratic criminal systems and that no longer serves its original purpose.

What are the alternatives? Short of a constitutional amendment, federal prosecutors must continue to use the grand jury procedure. Therefore, the suggestion that U.S. attorneys investigate killings by police officers does not address the concerns raised about grand juries, since the U.S. Constitution mandates, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."

Many states use preliminary hearings instead of the grand jury. Preliminary hearings are public, and they include the presence of the defendant and the defense attorney. A judge decides whether to send the case to trial. A preliminary hearing is a proceeding that best comports with our democratic values and since this is used in most cases, it can be successfully used in all cases.

Thus, the reform of abolishing the grand jury is really not at all dramatic; even states that have this system have alternatives like the preliminary hearing and tend to rely more on these proceedings for the most part. However, the symbolism of doing away with the grand jury is more powerful because it demonstrates that in the U.S. we seek to have all of our systems and institutions adhere to democratic values.

The Recorder *welcomes submissions to Viewpoint*. Contact James Cronin at jcronin@alm.com.

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