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Exploring the Criticisms of Grand Juries in the United States

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With the vast media coverage of the events in both Ferguson and New York, grand juries have been brought back to the forefront of the public eye. In Ferguson a young man by the name of Michael Brown was shot by a police officer, leading to a grand jury refusing to indict the police officer for criminal charges (McClam, 2014). In New York the police killed a man named Eric Garner and the grand jury there refused to indict that officer as well (Chandler, 2014). The debate has begun to gain momentum of whether grand juries are still performing the function that they were designed to do (Washburn, 2008). Criticisms from many claim that the grand juries are no longer doing their job, with some even calling for the complete abolishment of the system altogether (Doria, 1997). Originally these grand juries were created to protect the people from an oppressive government, creating what came to be known as the "shield" function, as well as being able to indict those who had committed crimes, which was thus named the "sword" function (Washburn, 2008). Many fear that grand juries have begun to depend too much on the prosecution, meaning they have lost their "shield" function by no longer protecting the public from unfounded criminal claims (Fouts, 2004). While some claim the system is beyond repair, it is the belief of others that grand juries can be reformed to do what they were created to do (Doria, 1997). This essay will explore the history behind grand juries, the criticisms against them, and reforms that have been suggested to fix the problematic grand jury system.

History of Grand Juries

Before it can be determined if grand juries have deviated from their original function, it must first be determined what that original function and purpose was.

Like many of the laws and customs that are followed in the United States today, grand juries came from England with the original east coast colonists (Washburn, 2008). Grand juries in England were seen as a great part of the judicial process because they would refuse to issue indictments, showing that they were independent from any governmental pressure (Washburn, 2008). This purpose was carried over to the colonies where grand juries were also used as investigative bodies, since the police force was vastly underdeveloped and underfunded (Washburn, 2008). Some states and nations did not have a sanctioned police force, while others had groups that were composed of volunteers who did the best they could with little means of ways to enforce the law (Washburn, 2008). Grand juries were able to fill the investigative gap that the police force at the time could not. This is how the "sword" function of grand juries was developed. Grand juries could take it upon themselves to investigate legal issues, which could lead to justice for those that were wronged (Washburn, 2008). Colonists saw these grand juries as a way to stand up to the Crown, as well as any other governmental oppression, leading to them being included in the justice system of the new United States and its Constitution in the Fifth Amendment as well (Washburn, 2008). This is also where the "shield" function of grand juries was developed. Citizens were protected from unwarranted prosecutions as grand juries refused to issue indictments based on political and governmental pressures (Washburn, 2008). In one case a grand jury refused to issue an indictment when it was asked for because the English Crown was not pleased with the man, showing that grand juries could serve as a "shield" to protect citizens from the government (Washburn, 2008). Based on their popularity, grand juries

were included in the Fifth Amendment of the Constitution, requiring a grand jury indictment before a person could be prosecuted for the felony (Washburn, 2008). From these original functions, many claim grand juries have changed drastically.

Today grand juries are charged with the duty of determining if there is probable cause that a person committed a specific felony (Fouts, 2004). If they find this to be true, then they are allowed to issue an indictment and charges can be filed against that person (Fouts, 2004). In order to determine this probable cause, grand juries listen to evidence and witnesses presented by the prosecutor (Fouts, 2004). While this is much like the function of a trial jury, grand juries do not determine guilt, hear any defense theories or theories of innocence, or publish what occurs within the hearings (Fouts, 2004). Grand juries do not need a unanimous vote in order to issue and indictment; in some cases they only need to have a small majority (Fouts, 2004). Grand juries are also given the option issuing a "no bill," or not issuing charges (Hoffmeister, 2008). Based on this "no bill," the individual will not be charged in the federal court system; if this occurs in the state court system a prosecutor may have other options in order to press charges instead (Hoffmeister, 2008).

Criticisms of Grand Juries

Prosecutorial Dependence

One of the most common criticisms of grand juries is that they have become too dependent on prosecutors (Beall, 1998). Instead of looking at the evidence presented to them, grand juries are simply issuing the indictment that the prosecutor asks them to (Beall, 1998). No longer are grand juries serving in their

"shield" function, but instead have become a tool of the prosecutor. Originally prosecutors were not always present at grand jury hearings, but by the twentieth century it was quite common (Fouts, 2004). Control of grand jury proceedings is constantly left to the prosecutor and their discretion. Only if the jurors themselves decide to take some control do prosecutors take a slightly less influential role. Prosecutors in theory should remain neutral and give correct and unbiased legal advice to the jurors, but this often is not the reality (Hoffmeister, 2008). The order in which evidence is presented, how witness are questioned, and what subpoenas are to be issued are all largely under the control of the prosecutor (Hoffmeister, 2008). Unless grand juries realize they have more power than they are often informed of, the prosecutor controls much of what the grand jury does. Grand juries that do realize and use their powers to the fullest extent are labeled as "runaway" and seen as not doing their job properly (Hoffmeister, 2008). Since the prosecutor is customarily the only actor in grand jury hearings with a legal background, jurors quite often listen to the advice that is given. Based on these facts a grand jury is more likely than not to issue an indictment, becoming a "rubber stamp" for the prosecution instead of serving as a separate body (Fouts, 2004).

What is largely unknown is the fact that grand juries do have the option to not issue an indictment, even if they believe probable cause is evident (Hoffmeister, 2008). In the creation of the grand jury system, one of the foundations was that a grand jury could protect a citizen from the government even if the government had evidence against them (Fouts, 2004). This was ultimately assured by a case in which the Supreme Court stated that "the grand jury is not bound to indict in every case

where a conviction can be obtained" (*Vasquez v. Hillery*, 1986, quoting *United States v. Ciambrone,* 1979, p. 14). This ultimately allows a grand jury to become a voice for the citizens and no longer a pawn of the prosecutor, if properly used today.

What was known as the "community voice" has also been lost as grand juries have strayed away from their original design and function (Fairfax, 2010). Grand juries are composed of members of the community, making them an avenue for public opinion to be heard (Beall, 1998). The grand juries of London in the 1600s stood up to the crown, showing that the community did not believe in certain potential charges, so they would refuse to issue indictments, creating a "shield" for the citizens from the government (Washburn, 2008). The jurors showed that if a community did not believe in certain government actions, that the community could stand up and say, through the voice of the grand jury, that they would not support the government in those particular actions. Since democratic governments depend on their power from the people, they often have to follow the will of those people in order to stay in power. Grand juries were designed as a way for the community to have input on criminal matters, as well as keeping the interests of the community as a whole in mind in making decisions of what indictments to issue (Washburn, 2008). By performing this function, prosecutors would be kept in check and communities would be more likely to support the criminal justice system since they were a more utilized part of it (Washburn, 2008). It can be argued that with a strong community voice, through the use of grand juries, governmental policies and actions could be impacted (Beall, 1998). Just as trial juries provide a community voice, grand juries can do the same, but often fail to in today's world.

The importance of grand jury independence from the prosecutor becomes even more necessary when a prosecutor refuses to follow the suggestions of the grand jury (Beall, 1998). In the case of one grand jury the issue was not about an indictment, but the fact that a prosecutor took a plea bargain over filing charges against a corporation. In 1989, a grand jury was called to investigate Rocky Flats Nuclear Weapons Plant for environmental crimes, including failure to properly dispose of nuclear waste (Beall, 1998). Over the course of two years the grand jury listened to testimony from witnesses and poured over countless boxes of evidence, eventually determining that there was enough to issue an indictment not only for employees of the plant, but also for members of the Department of Energy as well (Beall, 1998). Instead of filing these charges, the prosecutor agreed to a plea bargain before charging, causing outrage among members of the grand jury (Beall, 1998). These members felt that the public voice was being ignored and that the prosecution was not doing its duty. The grand jury had been used, and then ignored, when the prosecutor did not get the wanted results. These members felt they had been cheated (Beall, 1998).

Conflicting Roles

The debate of the judicial role of grand juries is also been brought to the front as many have argued that they depend on prosecutors but play a judicial role as well (Kuckes, 2006). Based on the Constitution and the separation of powers that is created within it, grand juries should not have both prosecutorial and judicial roles, as this would stop the separation of powers and weaken the checks and balances system (Kuckes, 2006). These two very different roles clash, causing a large conflict

on what role is best. Some see the role of indictment as prosecutorial, but others argue it is judicial. Grand juries are often describes as inquisitorial in nature, meaning they investigate both sides of the issue and determines a decision from that (Kuckes, 2006). This lends to a judicial function in which the grand jury is doing what is just and fair for both sides, yet the act of issuing an indictment is seen as prosecutorial (Kuckes, 2006). This is where a grand jury can also be twisted to favor the prosecution. Since the prosecution is the only side to present evidence to a grand jury, both sides are not heard meaning the matter may not be fully investigated (Kuckes, 2006). Thus the grand jury loses part of its judicial function and becomes more prosecutorial in nature.

Loss of Due Process Rights

In a trial court victims and the accused are all given certain due process rights protected by the Constitution and other legal decisions (Christofferson, 1998). This is done to protect these individuals from an unfamiliar and complicated legal process. In grand juries these rights are not given (Christofferson, 1998). One such trial protection is that a prosecutor must disclose any exculpatory evidence, meaning evidence that could prove innocence (Christofferson, 1998). This is not required in grand jury proceedings (Christofferson, 1998). The Supreme Court also stated this in the case of *United States v. Williams* (1992). While some states, such as California, have adopted policies for exculpatory evidence to be provided, federal grand juries are not governed by those policies (Christofferson, 1998). Policies, like those in California, do little to explain exactly what evidence qualifies as exculpatory, creating even greater confusion. (Christofferson, 1998). Based on this

issue, individuals could face an indictment for a crime that the prosecutor had evidence showing they did not commit.

Witnesses in grand jury proceedings also have little to no rights. They are not allowed to have legal counsel and are also forced to testify against their will (Decker, 2005). Miranda warnings are not required to be stated to witnesses (Decker, 2005). The right to not self-incriminate is not always told to witnesses, even if the witness could face criminal charges based on their statements (Decker, 2005). All of these legal policies have been upheld by the U.S. Supreme Court, based largely on the fact that grand jury hearings are not seen to be as coercive as police interrogations (Decker, 2005). Any person can be called as a witness to a grand jury through a subpoena, even if that person is not considered a target of the proceedings (Decker, 2005). When authorizing subpoenas, grand juries do not have to meet any standard of proof that a witness is involved or could be helpful, but must simply just file the subpoena to obtain an individual as a witness (Decker, 2005). Witnesses enter the grand jury system with little to no knowledge of what is happening, causing some to face legal consequences for their statements.

Grand juries also possess the power to issue subpoenas for any and all kinds of information, in addition to witness testimony. While they often follow the prosecutor's lead on what and whom to issue subpoenas for, they can also do this on their own. While police officers and other investigators must provide probable cause to be given a subpoena, grand juries do not have to meet this threshold (Decker, 2005). Instead grand juries can subpoena large amounts of evidence based on just a gut feeling (Decker, 2005). With basically no justification, a grand jury can

access private records, with little to no notice to the individual that they will be seizing those records (Taslitz & Henderson, 2014). Through this grand juries can often investigate matters that other criminal justice professionals cannot, but at the cost of the due process rights of the people (Taslitz & Henderson, 2014). Again it can be seen that individuals do not have the rights and protections that they normally have in other criminal justice proceedings, even though grand juries are considered to be a part of the process.

Changes from Original Function

As grand juries have developed and changed, they have also split into two different categories: those at the state level and those at the federal level because of a divide that was created at the start of the United States. When grand juries were officially created through the Constitution, they were only mandated for federal issues, even though they had been used by the state governments before the ratification of the Constitution (Washburn, 2008). Even after the passing of the 14th Amendment, the use of the selective incorporation doctrine failed to result in the incorporation of the requirement of a grand jury proceeding mandated in the Fifth Amendment, to the states (Decker, 2005). This was held by the court in the case of *Hurtado v. California* (1884) when it was decided that the grand jury process is only required at the federal level. This has ultimately created a wave of issues.

Some states that have grand juries, such as California, have created a rule stating that a prosecutor must provide exculpatory evidence to a grand jury, while other states have not (Christofferson, 1998). Confusion has arisen since each state has different rules from each other and from the federal grand jury system

(Christofferson, 1998). Some states have also elected to not have a grand jury system at all, meaning citizens of those states do not have the opportunity to have a community review before they are indicted (Christofferson, 1998). All of these differences between the federal and states grand jury systems have created a large amount of confusion.

Based on these major criticisms, reforms of the grand jury system have been suggested. Some feel the whole system should be done away with, but many feel it can be saved and made better than before if changes are made.

Reform Options

Independence from Prosecutors

One of the most supported reforms is that of making grand juries independent from prosecutors (Beall, 1998). By doing this the "shield" function would be restored to its former power and grand juries would be able to make their decisions without the influence of a prosecutor (Washburn, 2008). One such way of doing this is to give grand juries the power to issue an indictment without the permission of the prosecutor and have that indictment be carried out in court (Beall, 1998). Currently a grand jury can issue an indictment, but a prosecutor can refuse to sign it, meaning charges will never actually be brought (Beall, 1998). Through this the voice of the community is lost, and a grand jury can be rendered as useless (Washburn, 2008). Instead the grand jury should be allowed to hold the prosecutor accountable and be able to force charges to be brought (Beall, 1998).

Along with forcing a prosecutor to press charges, grand juries should also be always informed of their right to not authorize an indictment. Ultimately this is

known as jury nullification, but on many occasions prosecutors choose to not inform a grand jury of that option (Fouts, 2004). Instead, grand juries are often led by the prosecutor to believe that an indictment is the only option based on the evidence that is presented to them (Fouts, 2004). Without a strong nullification power grand juries lose their ability to protect the public from unnecessary prosecution. They eventually become just an extra and unneeded step in the criminal justice process. By reaffirming their nullification power, grand juries would be returned to their original high status of being protectors of the public.

Another way to gain independence from the prosecutor is that grand juries be provided with a Grand Jury Legal Advisor. While this is not a completely new concept, it is one that has not be used on a consistent basis (Hoffmeister, 2008). This counsel would provide a grand jury with unbiased legal advice (Hoffmeister, 2008). Also, this counsel could provide a grand jury with the information of exactly what they are allowed to do and what powers they can exercise (Fouts, 2004). Even just the presence of another legal actor could force the prosecutor to keep proceedings fair instead of just presenting arguments for their side of the case (Hoffmeister, 2008). By doing this, grand jury proceedings would become fair to both sides instead of being so one-sided in favor of the prosecution.

Additional Powers

Not only could grand juries gain independence from prosecutors, they could also be given additional powers as well. Plea bargaining has proven to be the most common form of solving criminal matters, with many individuals pleading guilty before a grand jury even decides if an indictment is allowable (Fairfax, 2010). These

individuals feel that the criminal justice system is too slow, so they would rather just admit to the crime than wait. It has been proposed that grand juries should be used to screen plea bargains before they can be accepted so that the plea bargains are fair to all the parties involved and that the judge is not taking advantage of the individual (Fairfax, 2010). The same could also be applied to sentencing. While this would limit a judge's power, it would increase the voice of the community and could prevent innocent individuals from pleading guilty and spending time incarcerated (Fairfax, 2010). Overall this would put an individual's fate in the hands of a jury at all points in the criminal process.

Special Grand Juries

Most grand juries are developed to review fairly straightforward criminal cases, but special grand juries can be created to investigate more complex issues, such as organized crime (Decker, 2005). These grand juries often are much more investigative in nature than their counterparts (Decker, 2005). In order to further increase the grand jury's power to check the government, it has been proposed that special grand juries be created to investigate public officials at both the federal and state levels (Buchwald, 2007). These special grand juries would be allowed to release their findings so the public would be aware of what their government was doing (Buchwald, 2007). Although some grand juries have been allowed to do this, if all were allowed to it would give them more power to keep governmental officials in line. An example of this could be found in the Watergate Scandal; the public wanted to know what happened and a special grand jury would be able to find that out (Buchwald, 2007). In California this reform has already taken place. Grand juries

serve as "watchdogs" and investigate the wrongdoing of public officials and local governments (Doria, 1997). This helps to ensure that elected officials are following the laws and doing what their constituents want them to do.

Another form of special grand juries that has been suggested at the state level is one that is even a more community based form. Grand juries would be in charge of smaller areas, making it more likely that the members would come from the same community (Washburn, 2008). This would in theory increase the chance that they would all have similar opinions on the same issue. This would increase their voice as a community and make it more unified (Washburn, 2008). Through this grand juries could further influence policies because of their members' unified voice.

Juror Training

A constant criticism of the grand jury system is that the jurors lack legal knowledge, so they cannot decide if there is enough evidence for an indictment. One counter argument to this is that trial or petit jurors do not receive any formal training either (Hoffmeister, 2008). Those jurors decide if a person will face penalties for their actions, which is much more impactful on an individual than the decision that they might have committed the crime but they may not have either. So it could be said that if any jurors should be provided with training, that it should be those of trial juries (Hoffmeister, 2008).

The other response to this argument, is to provide grand jurors with training to ensure they know all their options and what they are suppose to do. Jurors would not have the legal knowledge of those in the legal field, but they would be given

basic training on how to handle information and how to properly ask questions (Doria, 1997). Based on this training they would not have to depend so much on the prosecutor for information and could question witnesses themselves (Doria, 1997). This training would also inform jurors of all their options, such as they can refuse to issue an indictment if they feel the need (Fouts, 2004). All of this training could take several days but it would ensure that the grand jury process is fair to everyone involved.

Conclusion

Countless criticisms and reforms have been offered in regards to the current grand jury system. Some individuals claim the system is beyond repair, while others say there is hope if changes are made. It has been made clear that while the system may no longer be functioning how it use to, it is still a vital part to the criminal justice system. It is hoped that by reforming the system that grand juries will again serve as both the "sword" and the "shield" and do what they were designed to do.

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