



LEGISLATOR'S GUIDE TO THE ISSUES 2021-2022

Grand Jury Reform

The Issue

It is often said that a prosecutor could get a grand jury to indict a ham sandwich. This is largely because a grand jury receives the facts of the case solely from the perspective of the state. While this is mostly hyperbole, the process seems to have strayed from its original purpose of protecting citizens from an overzealous and despotic government, which was an early concern for those responsible for crafting America's new constitution in the 1780s.

The state now wields a tremendous amount of unfettered power in how the facts and evidence are presented to a grand jury, and examples of grand juries being used as a means to legitimize prosecutions motivated by other objectives than searching for justice are too frequent to ignore. The Lone Star State is certainly not immune, as the case of Alfred Brown exemplifies how the shortcomings of the Texas grand jury system today can have severe consequences.

Brown was convicted in 2005 for killing a Houston police officer. Brown stated he was at his girlfriend's house all day, and actually made a phone call from the house to his girlfriend's work at a time when prosecutors put Brown at a different apartment complex with other suspects of the crime. Brown was recently released from death row after his conviction was overturned due to exculpatory evidence of that phone call being placed from his girlfriend's house found in a homicide detective's garage 7 years after Brown was convicted.

During his grand jury proceedings, his girlfriend testified that Brown was asleep on the couch at her house when prosecutors believed he was casing venues to rob. She also testified that she received the call from Brown at her work.

However, the prosecutor and the grand jury (whose foreman was a police officer) did not believe her, repeatedly threatening that if she was lying, she could lose her children and be sent to prison for 10 years for committing perjury. Facing continued pressure, she began to change her story, as she put it, based upon the intimidation of the prosecutor and grand jury. She was subsequently charged with three counts of aggravated perjury and spent 120 days in jail. In order to be released from prison, she agreed to testify against Brown at his trial. She was given 2 years community supervision. It would appear she would have benefited considerably from being able to consult counsel during her lengthy testimony. Nothing statutorily denies a witness from obtaining counsel, but nothing statutorily grants a witness the right to consult counsel during the proceedings or allows an attorney within the grand jury room.

In Texas, counsel for witnesses are not statutorily granted any representation during the proceeding, prosecutors can bring grand

jury after grand jury if the previous one does not return an indictment, exculpatory evidence is not required to be presented, and the whole proceedings are not required to be transcribed. In 2015, the controversial "pick-a-pal" system that allowed judge-appointed jury commissioners to choose the individuals that would sit on the grand jury was eliminated. These juries have been shown to skew toward being populated with individuals tied to law enforcement and thus potentially biased in their views of the case (Alfred Brown had his grand jury intentionally led by a police officer).

Even with this reform, very few safeguards are implemented to protect the accused or witnesses who could be subject to prosecution based upon their testimony. Texas should implement several common-sense reforms in order to bring more balance to grand jury proceedings and ensure only appropriate allegations are advanced to trial.

The Facts

- Grand juries were initially an integral due process barrier from overzealous prosecution.
- Throughout the years, grand juries have tilted heavily in favor of the prosecution, providing little protection to accused individuals.

Recommendations

- Require the entire grand jury proceeding to be either recorded or transcribed. This would aid in future recall of the proceedings by defendants and facilitate defense counsel's ability to advise clients of their options based on actual testimony, not memories.
- Allow all accused individuals and other witnesses the right to have counsel present in the grand jury chambers and to play a passive role within the proceeding.
- Require exculpatory evidence to be presented.
- Preclude any subsequent grand jury from being empaneled absent new material evidence.
- Create a "loser pays" mechanism that allows the accused to have their legal fees paid by the state when frivolously prosecuted.

Resources

Balancing the Scales of Due Process: The Conservative Case for Grand Jury Reform in Texas by Greg Glod, Texas Public Policy Foundation (Nov. 2016).