



Balancing the Scales of Due Process:

The Conservative Case for Grand Jury Reform in Texas

by Greg Glod
Policy Analyst

Key Points

- Grand juries were initially an integral due process barrier from overzealous prosecution.
- Throughout the years, however, grand juries have been heavily tilted in favor of the prosecution, providing little protection to accused individuals.
- Right-sizing the grand jury system includes better access to counsel for accused individuals and greater transparency and checks on the state.

Introduction

“Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will” ([Wood v. Georgia, 390](#)).

This quote, from the 1962 Supreme Court case *Wood v. Georgia*, eloquently summarizes the historic role of the American grand jury: a shield for the people against an overzealous and despotic government; a civic check on the criminal justice system prior to trial. Unfortunately, as this case illustrates, the grand jury has not always been utilized in this manner.

In the case, the judge of the Superior Court in Bibb County, Georgia, after requesting media present, issued a charge to a grand jury to conduct an investigation on the “inane and inexplicable pattern of Negro bloc voting” and “rumors and accusations” of payoffs to black leaders by certain candidates (*Wood v. Georgia, 376*).

Sensing that this investigation was intended to intimidate local black leaders who voted “incorrectly,” the Bibb County sheriff (who was up for reelection) criticized the move in a written statement to the press, calling it “one of the most deplorable examples of race agitation to come out of Middle Georgia in recent years” (379).

The sheriff was then cited on two counts of contempt of court for obstructing the grand jury and a third count, alleging that his comments constituted a “clear, present, and imminent danger” to the administration of justice. Even though no witnesses were called, and no evidence presented, the sheriff was convicted on all three counts* (380).

Although the assertion that a grand jury would indict a ham sandwich if the prosecutor asked it is likely a step too far, the process seems to have strayed from its original purpose of protecting citizens from overzealous prosecutors. The state now wields a tremendous amount of unfettered power in how the facts and evidence are presented. 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. Counsel for witnesses are not statutorily granted any semblance of 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. Until recently, Texas employed the “pick-a-pal” juror system, a nationally rare selection method where judge-appointed jury commissioners chose the individuals that would sit on the grand jury ([Ward](#)). These juries have been shown to skew towards being populated with individuals tied to law enforcement and thus potentially biased in their views of the case ([Karson](#)).

The process was often criticized for empaneling a disproportionate number of jurors that would likely dole out favorable decisions to prosecutors. The case of Alfred Brown exemplifies the problem. Brown, a former death row inmate whose conviction was recently thrown out, had his grand jury intentionally led by a cop. ([Rogers](#)). Since “pick-a-pal” was removed in 2015, the only option available is similar to a *voir dire* that one would see at the trial stage of

* The Supreme Court overturned the conviction stating this was, amongst other things, a violation of the sheriff’s First Amendment rights.

a criminal case, providing a greater chance at a fairer body of jurors.

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.

This paper discusses the history of the American grand jury system, Texas' grand jury system, areas within the status quo where procedural safeguards do not properly protect the liberties of Texans, and what other states have done to bolster their grand jury systems. It also makes several recommendations: 1) a full transcript of the grand jury proceedings should be recorded and provided to defense counsel; 2) a subsequent grand jury cannot be brought if the first grand jury did not return an indictment, unless there is new material evidence; 3) the prosecutor must provide the grand jury exculpatory evidence; 4) provide witnesses reasonable time before they are called to testify in order to retain counsel and review the case; 5) provide defense counsel reasonable access inside the grand jury room while their client is testifying; and 6) provide statutory language that requires the reimbursement of legal fees to an individual who was the subject of a grand jury investigation if it turns out the claim was not brought in good faith.

History of the Grand Jury

12th Century

Not surprisingly, the American grand jury system comes from English common law tradition. However, in its infancy, the English grand jury was used not as pushback on an overbearing monarchy, but rather as a tool by the king to prosecute and punish those thought to be enemies of the Crown (Kadish, 5-6). The Crown would also be the beneficiary of any fines or forfeited property of individuals convicted of a crime (6).

In the 12th century, King Henry II established a system of local "informers," who would meet with the king's sheriff twice a year to provide the king with a list of individuals suspected of murder, larceny, and harboring criminals. Forgery and arson were added later. If the informers failed to report any suspect, they could be fined themselves (6).

The persons accused would generally have to stand "trial," which was more akin to the Hunger Games than any court proceeding. Trials by ordeal, such as taking a rock out of a boiling pot of water without getting burned, would be required to prove innocence (Kadish, 7; Schwartz).

Through the centuries, while the English criminal justice system began to resemble our modern-day criminal justice system, it was only affording due process to the accused in appearance, as "jurors" were often fined or imprisoned for not rendering guilty verdicts. It wasn't until the 17th century that the grand jury emerged as a safeguard to government oppression (Wallach, 131).

In a famous 1681 case, Lord Shaftesbury was accused by the Crown of making treasonous statements. Even with great pressure from the government, the grand jury refused to indict. This marked a defining moment representing the power the grand jury has as protection against malicious and meritless prosecutions (Decker, 350).

Grand Juries in Colonial America

As they did in the English system, grand juries in America rose from a lineage of unchecked British power. "Assistants" appointed by the Crown in the American colonies could make laws, accuse individuals of crimes, and also act as jurors. This unfettered power grew abusive. With no colonial governments established, grand juries rose as the people's protection from corrupt British rule. Grand juries criticizing British authority were commonplace, with some grand juries even bringing charges against the assistants themselves (Kadish, 10-11).

For example, in 1733, British authorities accused John Peter Zenger, newspaper publisher, of printing libelous statements about the Crown. Despite the British-controlled government of New York presenting the case two times, the grand jury refused to indict him. However, authorities were able to move forward with an indictment through a process called an "information," which circumvented the grand jury process. Despite only having to prove that Zenger wrote the articles (which he admitted), the jury acquitted him (Historical Society of New York Courts). Additionally, a grand jury in 1765 refused to indict patriots that had caused a riot against the Stamp Act (Younger, 28).

Grand juries also served much more of a community-oriented role: levying taxes, appointing local officials, presenting town officials that neglected their jobs, etc. The people were in power, while prosecutors served more of an investigatory role. (Kadish, 10-11).

Grand Juries and the Constitution

In 1791, the Fifth Amendment was ratified by the states and adopted into the Bill of Rights of the U.S. Constitution.

It guaranteed that “no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury...” ([Cornell University Law School](#)). Because of their importance as a protection against British rule before and during the Revolution, ratification of grand juries in the Bill of Rights was rather uncontroversial.

States began following suit and guaranteeing the right to a grand jury in their constitutions. However, as more states were admitted into the Union, the right to a grand jury was no longer seen as always necessary and therefore did not always find its way into later state admissions. In fact, in the 1800s, some states began to remove it from their constitutions (Beale §§1:4, 1-5, 1-21).

Unlike many other provisions in the Bill of Rights, the Supreme Court has not incorporated the Fifth Amendment’s guarantee of a grand jury to the states, meaning states are under no obligation to require a grand jury proceeding. Today, about half of all states do not require an indictment by a grand jury for felony charges. Generally those states have a preliminary hearing before a judge to determine whether charges are appropriate ([Task Force to Examine Improvements to the Ohio Grand Jury System](#), 2).

Grand Jury System in Texas

Pursuant to Article 1 § 10 of the Texas Constitution, all Texans enjoy the right to a grand jury proceeding if accused of a felony. Articles 19 and 20 of the Texas Code of Criminal Procedure lay out how the grand jury is chosen, the rights of the accused, and the responsibilities of the grand jury.

Selection

Grand juries are selected to serve for terms that can last months. In Harris County for example, grand juries generally meet for six months, with some meeting for less time ([Harris County District Courts](#)).

Prior to 2015, there were two ways grand juries were selected. First, the “pick-a-pal” or “key-man” system allowed a judge to pick three to five jury commissioners to recruit individuals to serve on the jury. Although commissioners were supposed to select jurors from a broad cross-section of the community, the process was often criticized for empaneling juries not representative of the community and that would produce favorable indictment decisions for the state ([2013 Texas Code of Criminal Procedure 19.01-19.06](#); Ward).

A 2006 study done by the University of Houston-Downtown’s Department of Criminal Justice looked into the occupations of jury commissioners and individuals chosen as jurors to determine whether the racial make-up of the juries was representative of the community. The study found that over half the commissioners were associated with the criminal justice system, potentially resulting in grand juries more inclined to indict (Karson).

In the 84th Legislature in 2015, Texas did away with the “pick-a-pal” system, leaving California as the only state to still have the method available ([HB 2150](#)).

The method now exclusively used in Texas works similarly to picking a jury in a criminal trial. The district judge directs 20 to 125 prospective grand jurors to be summoned for potential duty. The judge then determines whether they are qualified, pursuant to Articles 19.08 and 19.23 of the Code of Criminal Procedure. Pursuant to Article 19.26, the panel should have 16 qualified jurors from the juror pool, “randomly selected from a fair cross section of the population of the area served by the court.” Of the 16 jurors, 12 serve on the jury, with four used as alternates.

Procedure

Pursuant to Article 20.011, Code of Criminal Procedure, only the following people may be present in the grand jury room:

1. Grand jurors;
2. Bailiffs;
3. Attorney representing the state;
4. Witnesses while being examined or when necessary to assist the attorney representing the state in examining other witnesses or presenting evidence to the grand jury;
5. Interpreters;
6. Video operators, stenographers, or persons operating an electronic recording device (if necessary).

No attorney for the witnesses or the suspect/accused are allowed to be in the grand jury room, nor is there anything in Texas statute that allows an accused individual/witness to consult with their counsel outside the grand jury room when being questioned. This is a potential issue as testimony given during a grand jury proceeding can be used against an accused individual/witness in a criminal proceeding. To compound this issue, only the accused is given a reasonable opportunity to retain counsel or apply for an

appointed attorney (Texas Code of Criminal Procedure Article 20.17). There is no reasonable notice requirement for witnesses.

As for the accused, statutes and case law are unclear to what extent counsel can participate in the proceedings. Counsel cannot be in the room, but could the accused, if required to testify, stop the proceedings to consult with counsel? Does this happen in some jurisdictions and not others? What is clear is that statute is silent on the issue.

Pursuant to Article 20.02 of the Texas Code of Criminal Procedure, proceedings of the grand jury are to remain secret. Very seldom are transcripts entered into the public record. The defendant may petition a court to order disclosure of grand jury information in connection with a judicial proceeding if the court has a finding of a particular need for the disclosure. However, only the testimony of the accused is required to be recorded (Texas Code of Criminal Procedure Article 20.012). This could cause issues in a trial or an appeal if certain inconsistencies of testimony are alleged but with no record to base them on. Recording the entire proceeding is the preferred method by the Texas District and County Attorneys Association ([Brewer](#)).

A grand jury operates differently than a typical criminal trial. It is not considered adversarial in nature as there is no defense counsel present and the accused is only allowed to be in the grand jury room if he or she is testifying. Because of this, prosecutors are intended to serve as the representative of the state as well as of the defendant. The model is that the prosecutor will simply lay the facts out to the grand jury, whose members may ask questions of the prosecutor and any witness or the accused (Texas Code of Criminal Procedure Art. 20.05-20.06).

The rules of evidence (except for those rules dealing with privilege) do not apply to grand jury proceedings. This means that evidence that would be excluded in a criminal trial, such as hearsay, is allowed to be presented ([Texas Rules of Evidence, Article 1 Rule 101](#)). Unlike criminal trials, exculpatory information is not explicitly required to be presented to the grand jury, or provided to the defense. In other words, prosecutors are able to paint a picture of the facts of the case as they see fit, with few to no restrictions.

After all the testimony and evidence are presented to the grand jury, jurors vote on whether there is enough evidence to indict. If nine grand jurors vote in the affirmative, an indictment is prepared.

Alfred Brown

The case of Alfred Brown exemplifies how the shortcomings of the Texas grand jury system today can have severe consequence. Brown was convicted in 2005 for killing a Houston police officer. Brown stated he was at his girlfriend's (Ericka Dockery) house all day, and actually made a phone call from the house, on a landline, to his girlfriend's work at a time when prosecutors put Brown at a different apartment complex with the other suspects. Brown was recently released from death row after his conviction was overturned due to exculpatory evidence (phone record showing the made call) found in a homicide detective's garage seven years after Brown was convicted ([Falkenberg 2014; Rogers](#)).

During the grand jury, Dockery 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. They repeatedly threatened that if she was lying, she could lose her children and be sent to prison for ten years for committing perjury (Falkenberg 2014).

As she continued to be pressured, Dockery began to change her story, as she put it, based upon the intimidation of the prosecutor and grand jury. Dockery was subsequently charged with three counts of aggravated perjury and spent 120 days in jail. In order to be released from prison, Dockery agreed to testify against Brown at his trial. She was given two years community supervision. It would appear Dockery 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 ([Falkenberg 2014a](#)).

Reforms in Other States and Their Results

Several issues with the current grand jury system in Texas should be addressed to ensure the rights of the accused are protected and to bring more balance to this critical step in the criminal justice system that was originally intended as a check on an overzealous government.

Some states have acknowledged the threat of state abuse with the status quo and have made several reforms to prevent such abuse.

Below we highlight some of the reforms that two states, Colorado and New York, have undertaken to address problems with the modern grand jury process. The National Association of Criminal Defense Lawyers (NACDL) recently surveyed and interviewed prosecutors, judges, and defense counsel from these two states about their experiences with these reforms. In general, prosecutors, defense counsel, and judges returned positive reviews of these initiatives and say that they benefit the administration of justice ([Crites, Gould, Shepard](#)).

Right to Counsel

At least 24 states have granted some sort of statutory right to counsel. In Texas, the accused are granted a statutory right to counsel but the counsel cannot be present in the grand jury room (Decker, 369). New York requires the appointment of counsel to the accused and witnesses in a grand jury proceeding (Crites, Gould, Shepard 16). Targets of a grand jury may bring their counsel into the grand jury room if they sign a waiver of immunity. For all other witnesses, their attorney may be outside to advise at the witness' request. If counsel is in the grand jury room, their role is not akin to their general participation in subsequent proceedings. They cannot address the grand jury and can only whisper to their client (16-18).

In Colorado, all witnesses have the right to counsel in the grand jury room and will be provided such counsel if they cannot afford it. Attorneys are restricted in a similar manner within the grand jury room as in New York. (20).

Of those defense attorneys surveyed, 80 percent in New York and 75 percent in Colorado believed their presence in the grand jury room led to fairer questioning. Seventy-six percent of New York defense attorneys and 69 percent of Colorado defense attorneys also believed that the knowledge gained by being present helped them prepare for trial or plea bargaining.

A majority of prosecutors who were interviewed in both states believed that the practice benefits the administration of justice with one prosecutor stating it "lends an air of legitimacy." Prosecutors interviewed also stated that defense attorneys rarely interrupt the work of the state and are generally silent observers. They were also "unified" that defense attorneys don't slow their work (21-24).

Right to Grand Jury Transcript

In New York, an indicted defendant has a right to the transcript. In Colorado, all witnesses have a right to the tran-

script if they are to be called to trial. Moreover, Colorado requires the prosecution to supply the defense with copies of the transcript and any evidence presented at trial within 30 days of the indictment.

Ninety-two percent of defense attorneys in both states found that the transcripts are helpful in preparing for trial or plea bargaining. The interviews showed that several attorneys agreed the transcripts were beneficial to urge clients who wanted to go to trial, but were then reminded of the finer details of the facts of the case based upon the transcripts. Ninety-one percent of defense attorneys in New York and 81 percent in Colorado agreed that transcripts improved the accuracy of future testimony (25-26).

Notice to Testify

In Texas, there are no strict requirements of how long the notice must be given to a witness after a subpoena is issued from the time required to testify. "Reasonable" time of notice must be given to the accused. In Colorado, witnesses must be given a 48-hour notice from the time the subpoena is issued. This prevented a practice performed by a prosecutor in southern Colorado that required immediate appearance, causing obvious professional and personal hardships for witnesses. It also prevented individuals from having enough time to obtain proper counsel. New York does not have a similar provision.

In both states, a majority (61 percent in Colorado and slightly over 50 percent in New York) said witnesses were more likely to appear with advance notice. No attorneys stated their clients failed to appear after being given advanced notice. Additionally, those interviewed stated prior notice assisted their clients in testifying accurately and being able to evaluate plea deals. Several attorneys did express concern that 48 hours was not enough time (27-30).

Disclosing Exculpatory Evidence

Texas does not explicitly require prosecutors to disclose exculpatory evidence during grand jury proceedings. At least 10 states currently have provisions requiring some level of exculpatory evidence to be provided to the grand jury. In New York, prosecutors must disclose exculpatory evidence that is so "substantial" or "important" that it could reasonably affect the jury's decision to indict. New York also permits the accused to testify and request the grand jury call other witnesses on their behalf, another requirement Texas lacks. Colorado doesn't have a similar provision; however, counsel can request certain evidence be presented.

Even with a statutory requirement, a vast majority (77 percent) of New York defense attorneys surveyed said that prosecutors rarely or never disclose exculpatory evidence in grand jury proceedings. This may be due to the fact that the definition is so vague, that there may be quite a differing interpretation of what “substantial” or “important” means. If Texas were to adopt similar provisions, a tighter definition of what exculpatory information required to be presented will be necessary. Additionally, a vast majority of New York (76 percent) and Colorado (59 percent) defense attorneys believed that disclosing exculpatory evidence to the grand jury made it less likely for the targeted individual to be indicted (31-33).

Recommendations

Texas should implement several common-sense reforms in order to bring more balance to grand jury proceedings and expedite the criminal justice system in general.

Entire Transcript or Record of Grand Jury Proceeding

Texas should require the entire grand jury proceeding to be either transcribed or recorded. The record, as is the case now, should only be able to be publicly disclosed by the defendant. Further, defense counsel should also be able to receive a copy of the entire transcript upon request, with consent of their client. However, it should only be able to be disclosed if it is intended to be used in connection to a subsequent judicial proceeding and a particularized need is shown. This should be done for a variety of reasons.

First, with defense counsel not allowed to be present in the grand jury room, the lack of a complete transcript puts the accused and defense counsel at a disadvantage. For example, it’s essentially impossible to impeach a witness with prior statements during a grand jury hearing given the lack of a full transcript. A statutory provision allowing defense counsel to use grand jury testimony for impeachment purposes may also be required, as the rules of evidence are not clear whether such types of statements are hearsay.

Second, as the NACDL report shows, the production of transcripts actually improves the overall administration of justice for both sides, as defendants are able to fully recall the proceedings, making it easier for defense counsel to convince guilty defendants to take plea deals based upon the actual account of the proceedings, not their memories.

Presence of Counsel

Similar to Colorado and New York, Texas should provide,

for all accused and other witnesses (at least without immunity), the right to have counsel in the grand jury room and to play a passive role within the proceeding, advising their clients by whispering and not being allowed to speak directly to the grand jury.

Witnesses should receive at least a 72-hour notice prior to testimony to receive ample time to prepare with their attorney. This will enable them to provide more accurate testimony and to be more fully advised of their rights and the consequences of the proceeding, which can include perjury charges if they are untruthful.

Require Exculpatory Evidence to Be Presented

Article 2.01 of the Texas Code of Criminal Procedure in part already states “they [prosecuting attorneys] shall not suppress facts or secrete witnesses capable of establishing the innocence of the accused.” Further, pursuant to SB 1611 of the 83rd Texas Legislature’s regular session (also known as the Michael Morton Act), the prosecuting attorney must “disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.” To ensure that citizens get these protections at such a critical point in the criminal justice process, a provision could be included under the Code of Criminal Procedure that specifies that these provisions relate to grand jury proceedings and because there is no defense that can be put forth by the accused, it is the prosecutor’s obligation to do present this evidence at this stage.

Another solution could be to require a “Michael Morton” like disclosure to defense counsel prior to the grand jury in order for defense counsel to request exculpatory evidence from the judge or prosecutor.

Preclude a Subsequent Grand Jury Without New Material Evidence

In Texas, a subsequent grand jury proceeding can be brought against an individual even if the initial grand jury refused to indict (what is called a “no bill”) without obtaining any new evidence. This is because legal jeopardy does not attach at this portion of the criminal justice process since an indictment has not been brought yet.

In some instances, prosecutors continually bring grand juries against individuals until they get the results they want (Tom DeLay for example). At this early stage, it makes sense to allow for a subsequent grand jury if new evidence is

found, because the idea behind the grand jury proceeding is investigatory, and not accusatory.

In order to protect individuals from undue embarrassment, harassment, and costs, while saving judicial resources, Texas should only allow subsequent grand jury proceedings if new material evidence is presented. The provision should require the prosecutor to state, in writing, what the new evidence is and good cause why it was not presented at the initial grand jury. The accused should be given time to object and allow for a hearing before a judge to rule if the evidence is material and if good cause exists why it was not presented initially.

It should be reminded that the point of a grand jury is to give all the evidence to a group of citizens to decide whether

the evidence shows there is probable cause to indict the individual. It undermines the idea of a grand jury if prosecutors leave out certain evidence known to them at the time as a means of strategy to obtain an indictment. Therefore, demonstrating good cause why this evidence wasn't presented initially should be required.

Loser Pays Provision

In order to prevent overzealous prosecutors from pursuing charges that have no good faith basis, a mechanism could be created that allows the accused to have their legal fees paid by the state defending the frivolous prosecution. These would be in very rare circumstances and only in cases where no good faith basis for pursuing an indictment can be found. ★

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About the Author



Greg Glod is a policy analyst for the Center for Effective Justice and also for Right on Crime at the Texas Public Policy Foundation.

Glod began his legal career as a law clerk for the Honorable Judge Laura S. Kiessling on the Circuit Court for Anne Arundel County, Maryland. He subsequently practiced at a litigation firm in Annapolis, Maryland before joining Right on Crime and the Texas Public Policy Foundation.

He graduated from The Pennsylvania State University with B.A. degrees in crime, law, and justice, and in political science. Glod received his J.D. from the University of Maryland School of Law.

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