

Reforming the Grand Jury Indictment Process:



Recent Efforts to Improve Public Confidence
in Cases Involving Police Use of Lethal Force



Center for Jury Studies

The NCSC Center for Jury Studies is dedicated to facilitating the ability of citizens to fulfill their role within the justice system and enhancing their confidence and satisfaction with jury service by helping judges and court staff improve jury system management.

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Table of Contents

Introduction	1
What Is a Grand Jury?	2
Special Duties	3
Size Requirements.....	4
Term of Service and Quorum Requirements	5
Reform Efforts.....	6
Task Forces.....	6
Improving Access.....	7
Removing Secrecy	8
Independent Prosecutors and Special Counsel.....	8
Grand Jury Reform Act of 2015	8
Eliminating the Grand Jury.....	9
Other Methods	9



Reforming the Grand Jury Indictment Process

Introduction

Widespread publicity about incidents involving police use of lethal force has led to increased public concern that police are not being held adequately accountable by the criminal justice system, beginning with the failure of grand juries to return indictments against police officers suspected of using excessive force.



Some cases garner national attention, such as those involving the deaths of Michael Brown (Ferguson, Missouri), Tamir Rice (Cleveland, Ohio), and Freddy Gray (Baltimore, Maryland). Official statistics on the frequency of police use of lethal force are not available, but an investigative reporting project by the *Washington Post* reported that police shot and killed 4,400 people since 2015, 6 percent of whom were unarmed.¹ The reasons why grand juries fail to indict police officers in cases involving unjustified homicides, especially with victims who are racial or ethnic minorities, is the subject of much speculation.

A commonly cited reason is the potential conflict of interest that prosecutors face when seeking indictments against police officers with whom they work closely.² Prosecutors wield great power in the indictment process. They choose the evidence to present and the legal arguments to make to the grand jury. Everything the grand jury hears is filtered through the prosecutor. It is possible that prosecutors are less aggressive in the indictment process when the target is a police officer.

Another possibility is the grand jury's access to pre-indictment publicity. Grand juries typically are not sequestered or monitored for their news or social-media access. There is ample evidence showing that the news media portrays people of color, specifically African-Americans, in racially biased ways. Viewing current events, and even the highly publicized cases in which they may be currently considering evidence, through the biased lens of the news can affect a grand jury's decision making about whether to issue an indictment.

The veil of secrecy that shields the grand jury has exacerbated public distrust, prompting increased interest in reforming the grand jury indictment process. This monograph provides an overview about grand jury practices and procedures in state courts. It then discusses recent legislative and regulatory reforms proposed in several states to strengthen public trust in the grand jury by increasing direct citizen access to the grand jury, by making grand jury proceedings more transparent to the public, and by using independent or special prosecutors.

¹ Joe Fox et al., *What We've Learned About Police Shootings Five Years After Ferguson*, WASH. POST, Aug. 9, 2019 (available at <https://www.washingtonpost.com/nation/2019/08/09/what-weve-learned-about-police-shootings-years-after-ferguson/?arc404=true>).

² Ric Simmons, *The Role of the Prosecutor and the Grand Jury in Police Use of Deadly Force Cases: Restoring the Grand Jury to Its Original Purpose*, 65 CLEV. ST. L. REV. 519 (2017).

WHAT IS A Grand Jury?

By The Numbers

- GRAND JURY
up to 23 members

- PETIT JURY
6 to 12 members



The grand jury is a legal tradition that predates the Magna Carta of 1215. Its name derives from the French word for “large” and refers to the size of its membership when compared to a petit (“small”) or trial jury.

The grand jury can range up to 23 members, but the petit jury consists of 6 to 12 members.

The role and decision-making criteria also differ for grand and petit juries. For example, petit juries are factfinders and render a verdict (final decision) after hearing evidence from parties on both sides of a case. In criminal cases, petit juries must find the defendant *guilty beyond a reasonable doubt* and must agree unanimously on the verdict. In contrast, a grand jury hears witness testimony and evidence presented by one side, the prosecuting attorney, and must only find *probable cause* that a crime was committed, and that it was committed by the defendant in order to issue a “true bill,” or indictment. When the grand jury fails to find sufficient evidence to issue an indictment, they return a “no bill,” also known as an *ignoramus*. The decision to issue an indictment does not have to be unanimous, but most states require a supermajority of grand jurors to

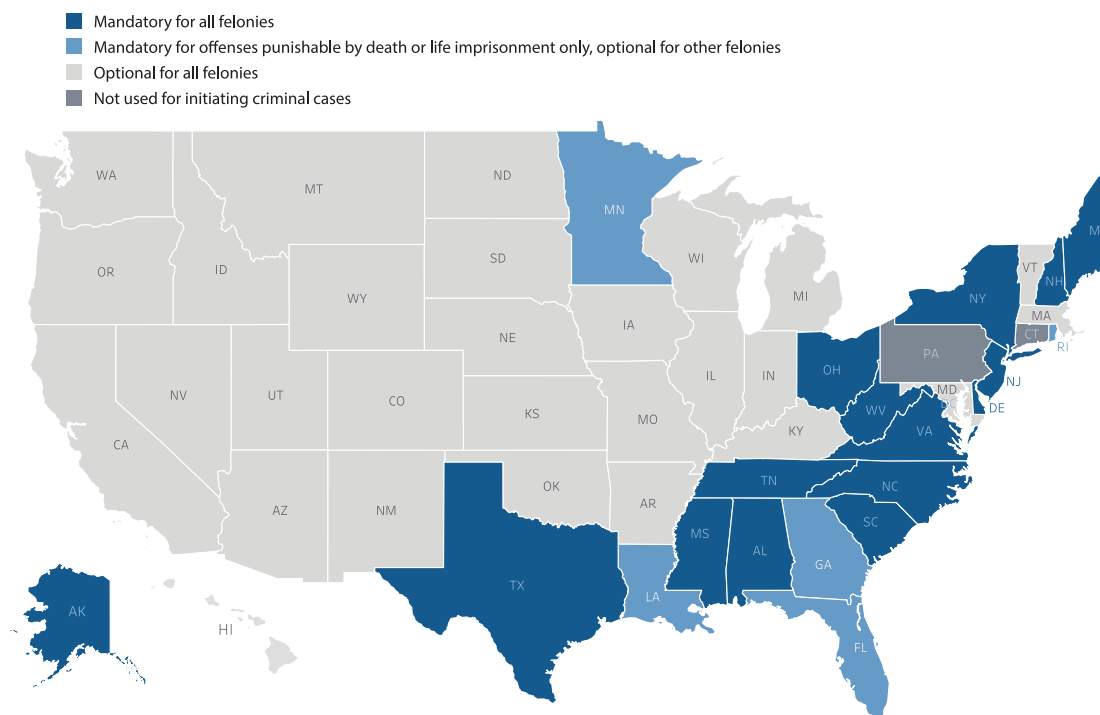
agree, typically two-thirds to three-quarters. Grand juries are lauded as examples of direct democracy but have also been known to serve as political cover for unpopular prosecutions or equally unpopular decisions not to prosecute.

Although the grand jury had its origins in England, it has since been abolished in that country and replaced with the practice called *information*. In this country, 23 states and the District of Columbia continue to require an indictment issued by a grand jury to pursue criminal prosecutions in serious cases. Interestingly, most of the states that require serious criminal cases to be submitted to a grand jury are located on the East Coast and in the South, perhaps reflecting historical practices that the original colonies and earliest U.S. territories adopted from England. Florida, Georgia, Louisiana, Minnesota, and Rhode Island require a grand jury indictment only in capital cases (cases in which the punishment is either death or life imprisonment). Only

Connecticut and Pennsylvania have abolished the indictment requirement, although both states still make use of the grand jury to conduct investigations into criminal activity. In the remaining states, prosecutors have the option of commencing criminal cases either through an indictment issued by a grand jury or by submitting evidence to courts in the form of an *information* or a criminal complaint. A preliminary hearing is then held to determine whether there is

enough evidence in the *information* or complaint to charge the defendant. The latter practice is usually more open than grand jury proceedings, which are held in secret, with the goal of protecting the reputation of potential defendants before they are formally charged. Even if a prosecutor fails to secure an indictment from a grand jury, they can still bring charges if a judge finds sufficient evidence at a preliminary hearing.

Is indictment required for all felonies?



Special Duties

Beyond investigation and accusation, state grand juries are often tasked with other duties. For example, grand juries can issue *presentments*, which are formal accusations resulting from a grand jury investigation into allegations of crime or corruption by public officials, helping to fulfill their role as a citizen check on government power. Here are some of the tasks given to grand juries:

- Inquire into alleged misconduct or incompetency of a public officer or office (13 states)
- Inquire into the condition of jail, prison, or juvenile detention facilities (13 states)
- Examine public buildings (3 states)
- Examine public records (3 states)
- Examine election fraud or rules violations (2 states)
- Investigate Medicaid vendor fraud (1 state)
- Review use of deadly force by peace officers (1 state)
- Inquire into the condition of the county treasury and the correctness of county officers' bonds (1 state)

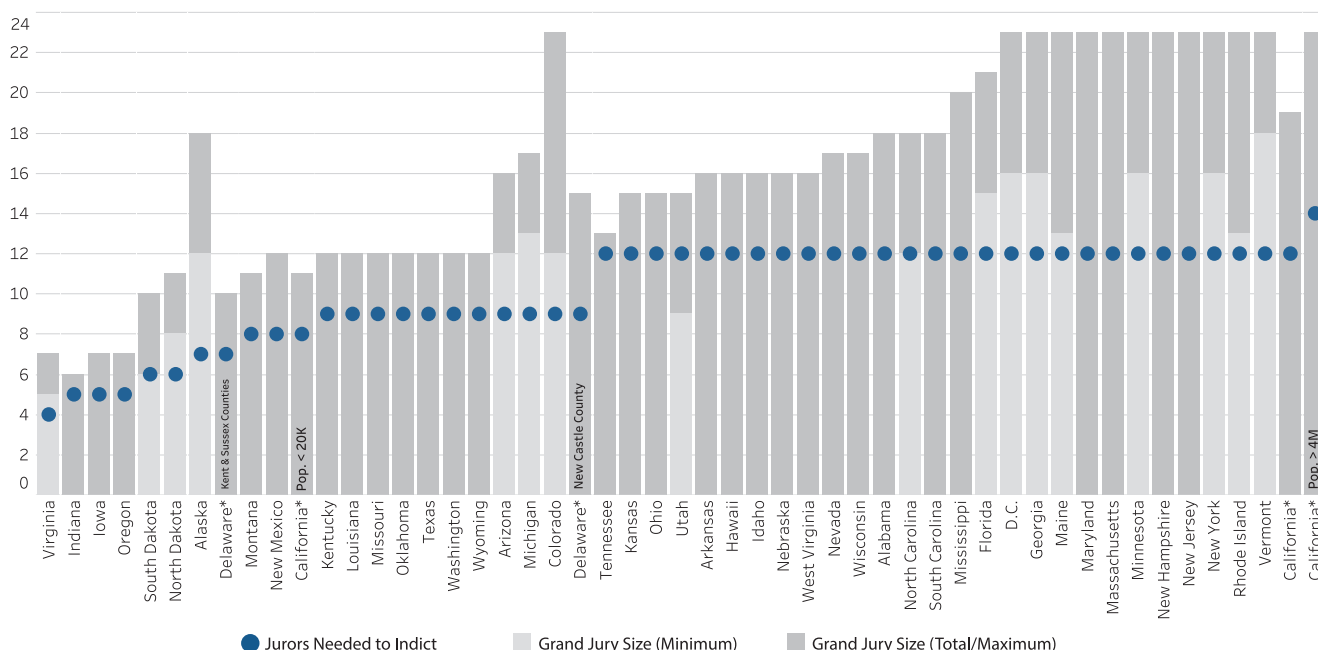
GRAND JURY Size and Unanimity Requirements

Grand juries vary in size based on state. In some states, the size of the grand jury depends on the size of the county. For example, in California, counties with a population above 4 million have a required grand jury size of 23 citizens, while counties with a population below 20,000 have a requirement of 11, and all other counties have a requirement of 19. The smallest grand jury is in Virginia, where grand juries can be as small as 5 jurors. The largest grand jury size is 23, which is possible in 13 states and the District of Columbia. Most of these states permit smaller grand juries, with a maximum size of 23. States that do not require a grand jury indictment tend to have

smaller-sized maximum grand juries than states that require indictments.⁵

Only one state, Tennessee, requires grand jurors to be unanimous to return an indictment. Other states have a minimum number of grand jurors who must agree to issue a true bill, and that number always reflects at least a majority of grand jurors. The most common number required is 12, which ironically is the most common size of petit juries in felony trials. The average proportion of grand jurors required to issue an indictment is 65 percent.

How many jurors are required to indict?



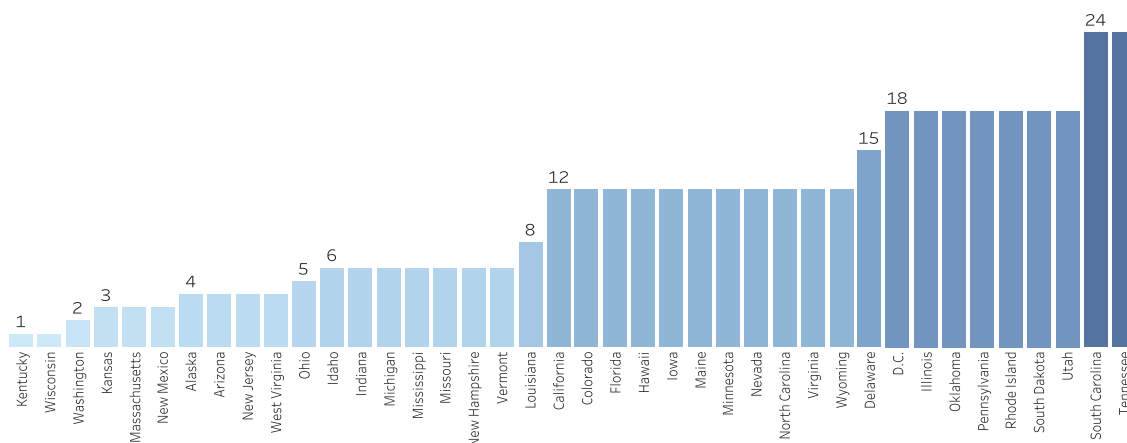
⁵ The maximum size requirements for states without required indictments is smaller ($M = 15.54$, $SD = 5.34$) than states with required indictments ($M = 18.54$, $SD = 4.81$); $t(50) = -2.12$, $p = 0.039$.

Term of Service and Quorum Requirements

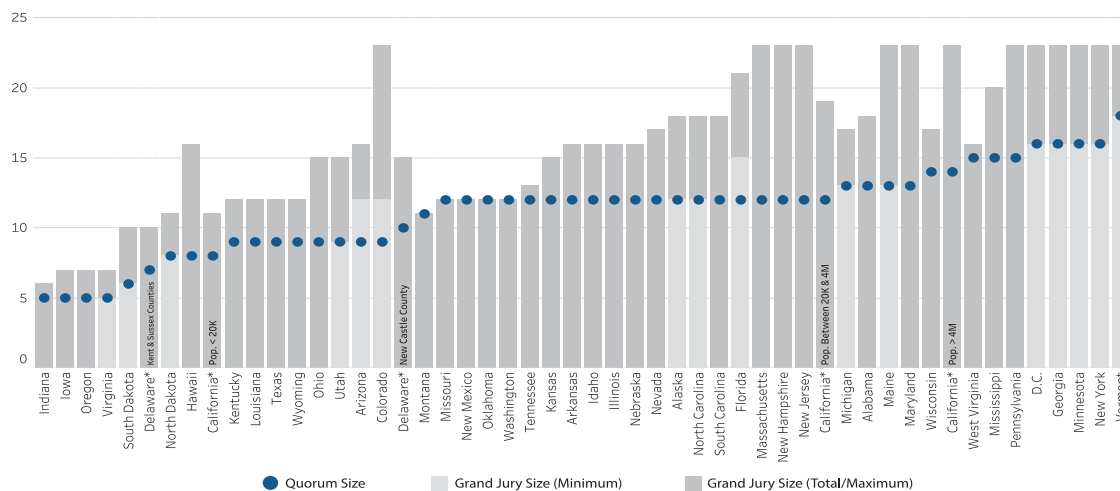
Grand jurors typically serve for longer periods of time than petit jurors, many of whom serve for as little as one day or one trial.⁶ Most states specify terms between 4 and 12 months, but at least 7 states authorize grand juries for up to 18 months, and Tennessee requires the grand jury foreman to serve up to 24 months. Few people are able to commit to such a lengthy term of service without an occasional absence. To accommodate those absences, most states have a quorum requirement that specifies the minimum

number of grand jurors that must be present to hear evidence, to deliberate, and to vote on indictments. The quorum ranges from 5 to 18, but because the size of the grand jury also varies by state, the proportion of grand jurors who must be present ranges from less than half (39 percent) in Colorado to 100 percent in Missouri, Montana, New Mexico, Oklahoma, and Washington. As a general matter, the smaller the size of the grand jury, the higher the quorum requirement.

What is each state's term of service by month?



Quorum Size and Grand Jury Size



⁶ GREGORY E. MIZE ET AL., STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: COMPENDIUM REPORT 23 (NCSC 2007).

Reform Efforts

TASK FORCES

Task forces to investigate public trust in grand juries is not a new phenomenon. Following a grand jury's failure to indict a police officer who shot and killed a black 17-year-old in Minneapolis, Minnesota, in 1990, Hennepin County created a task force to investigate grand jury procedures. The task force found that people of color were overrepresented as suspects before a grand jury but underrepresented as members of the grand jury itself.

Several states, including Ohio and Pennsylvania, have employed task forces to investigate how to improve private citizen confidence in the grand jury process following the surge of high-profile cases. In Ohio, a task force was appointed to examine potential improvements to the Ohio grand jury system and issued a report in July 2016.⁷ The task force reviewed grand jury systems used in other states, made recommendations for amendments to the Ohio Revised Code and Ohio Rules of Criminal Procedure, investigated whether there was a need for additional instruction and education for grand jurors, and addressed the public perception of the Ohio grand jury system. On the topic of police legal use-of-force cases, the task force recommended the exclusive use of special prosecutors through the Ohio Attorney General's Office, rather than county prosecutors who have relationships with the local law enforcement.

Pennsylvania is another state that is reviewing its grand jury procedures. In 1973, the Pennsylvania Constitution was amended to allow the courts of common pleas, with approval of the Pennsylvania Supreme Court, to initiate felony proceeding by information. The practice had been extended statewide by

1980, after which time grand juries were largely used as an investigatory body and were infrequently used to issue indictments. In 2012, the Pennsylvania Supreme Court amended the Pennsylvania Rules of Criminal Procedure to allow grand jury indictments in cases involving the risk of witness intimidation, including violent crimes. Ongoing concerns about the role of the investigatory grand jury prompted the Pennsylvania Supreme Court to appoint a task force in 2017 to study their use and issue recommendations for reform. A major focus of the task force deliberations was the scope of grand jury secrecy and its impact on the public reputation of witnesses and targets of investigation. The task force report was published in November 2019 with recommendations about grand jury secrecy, the utility and impact of grand jury reports, and the roles of key stakeholders in grand jury proceedings.⁸



HARRISBURG, PENNSYLVANIA: *The Supreme Court Chamber in the Pennsylvania State Capitol building in Harrisburg, Pennsylvania*

⁷ SUPREME COURT OF OHIO, REPORT AND RECOMMENDATIONS OF THE TASK FORCE TO EXAMINE IMPROVEMENTS IN THE OHIO GRAND JURY SYSTEM (July 2016) (*available at* <https://www.supremecourt.ohio.gov/Publications/grandJuryTF/report.pdf>).

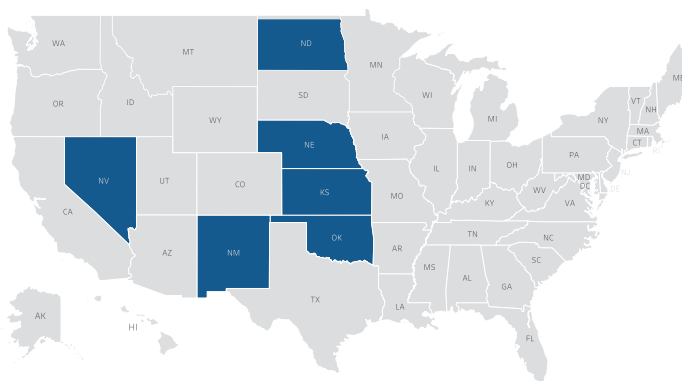
⁸ REPORT AND RECOMMENDATIONS OF THE [PENNSYLVANIA] INVESTIGATING GRAND JURY TASK FORCE (November 2019).

IMPROVING ACCESS

A common recommendation to improve public support of grand juries is to increase citizen access to the grand jury. Grand juries typically work in secret with almost complete prosecutorial control. Allowing private citizens to present evidence of a crime to the grand jury or even to petition to convene a grand jury in the first place can make the grand jury feel more accessible.

There are several methods of increasing private citizen access to the grand jury. First, six states offer the opportunity for private citizens to petition to convene a grand jury: Kansas, Nebraska, Nevada, New Mexico, North Dakota, and Oklahoma. In these states, if a private citizen collects the statutory minimum number of signatures, a judge must summon a grand jury to investigate the alleged crime. The number of signatures required varies by state but typically requires a certain percentage of the voters in the county, ranging from 2 percent of the registered voters (New Mexico) to 25 percent of the number of voters in the previous election (Nevada).

Six states offer the opportunity for private citizens to petition to convene a grand jury



Petitions to convene a grand jury are relatively infrequent. For example, there were two citizen-initiated grand juries in North Dakota between 2009 and 2018. Both grand juries investigated alleged bribery of the governor made by the oil industry in the form of campaign contributions. Following the second petition in 2013, the legislature raised the required number of signatures from 10 percent of the total number of voters in the previous election to 25 percent.

While the six states with citizen-initiated grand juries have had this mechanism for a long time, there is a bill in the Alaska legislature to create a similar option. Among other grand jury reforms, Senate Bill 15 would allow for citizen-initiated grand juries in Alaska. If a petitioner collects the signatures of 500 registered voters in the district within 45 days of submitting the petition to a judge for approval of the investigation's scope, a grand jury would be initiated.

In several instances, courts have rejected citizen-initiated petitions due to the strict statutory requirements. One example occurred in New Mexico in 2011, when a District Court judge rejected a citizen-initiated petition due to a lack of addresses listed alongside the signatures, which made it difficult to confirm that the signees were registered voters. The Court of Appeals reversed the decision, holding that names were sufficient as long as they matched names on the voter registration list.⁸ Similarly, an Oklahoma citizen-initiated petition with over 7,000 signatures was rejected by a judge due to the use of unauthorized forms when collecting signatures. In another example, separate petitions were filed in Kansas in 2016 and 2017 against Kansas Secretary of State Kris Kobach alleging election crimes.⁹ The Douglas County District Court initially rejected both petitions due to a lack of specific evidence that a crime occurred. The second

⁸ *Grand Jury Approved for Ecodiversity Case*, ALBUQUERQUE J., Nov. 16, 2011 (available at <https://www.abqjournal.com/69681/grand-jury-approved-for-ecoversity-case.html>).

⁹ *Court: Kobach Can Be Investigated by Citizen Grand Jury*, ASSOCIATED PRESS, June 8, 2018 (available at <https://www.apnews.com/d49b1dd3f39f4fdabb15fe871b184f84>).

ruling was eventually overturned by the Court of Appeals, which held only general allegations were required.

Strict compliance with statutory requirements walks a fine line between preventing government overreach and permitting frivolous claims. For example, a series of grand juries were called in Kansas in 2008 to investigate women's health-care clinics and specific doctors for violating abortion laws. The grand jury subpoenaed records for all women who had contacted the clinics about receiving an abortion in the previous five years but found insufficient evidence that a crime had been committed. In one case, before disbanding, the grand jury submitted a statement requesting that evidence required to allow a citizen petition to convene a grand jury be evaluated.

Another method to improve access is to allow private citizens to approach the grand jury with evidence of a crime.¹⁰ Almost a third of states have a method in place for citizens to access the grand jury, and the type of access differs greatly across states.¹¹ For example, in California, grand jurors must evaluate accusations submitted by private citizens, and grand juries also can host public sessions. In Maryland, victims of a crime who have exhausted all other possible remedies may present their case before the grand jury. The basis of access also differs across states. In some states, the legislature has created a statutory right to access, while in others case law has created the right. In other states, like Illinois and Maine, citizens can gain access to the grand jury through judicial discretion.

REMOVING SECRECY

Another method of improving public access to the indictment process is to remove the secrecy of the grand jury. In 2015 Colorado expanded disclosure requirements in police-shooting cases by requiring the district

attorney to release a report explaining their decision not to prosecute or, if directed to the grand jury, the intended scope of the investigation. If the grand jury fails to indict, the grand jury is given the opportunity to prepare a report of its findings to be released if in the public interest. Among other reasons, situations in which a police officer has abused his or her authority are considered to be in the public interest.

INDEPENDENT PROSECUTORS AND SPECIAL COUNSEL

One of the most popular reform efforts is to require the use of special counsel or independent prosecutors when the grand jury is tasked with investigating police use of lethal force. In 2015 bills were introduced in 15 states to require a special prosecutor when police use of force resulted in death. All of those bills failed. Examples include Georgia and New York.



FEDERAL GRAND JURY REFORM ACT OF 2015

In 2015 H.R. 429 was introduced in the U.S. Congress. If it had passed, the governor of any state receiving federal funding would have to randomly select a locally elected prosecutor from a different jurisdiction in the state to serve as a

¹⁰ National Crime Victim Institute, Fifty States and D.C. Survey of Laws that Authorize or Recognize Private Citizen-Initiated Investigation and/or Prosecution of Criminal Offenses (*available at* <https://law.lclark.edu/live/files/26911-50-states-victim-initiated-investigation>).

¹¹ This includes Alabama, California, Colorado, Georgia, Illinois, Louisiana, Maine, Maryland, Minnesota, Nebraska, New Mexico, North Carolina, Tennessee, Texas, and West Virginia. For more specific details on the approach of each state, *see id.*

special prosecutor in any case in which police use of force resulted in a death. Although the bill had 23 co-sponsors, Congress did not pass the bill.

ELIMINATING THE GRAND JURY

In 2016 California became the first state to specifically ban the use of grand juries for cases in which a police shooting or excessive use of force resulted in a fatality.¹² This change in the law means that prosecutors must independently decide whether to file charges against a police officer. It also removes the secrecy of a grand jury proceeding. The intention behind the change was to retain prosecutorial discretion but acknowledge the need for more transparency into that decision.

In Missouri, one representative filed a bill to eliminate the grand jury system entirely and instead use preliminary hearings.¹³

OTHER METHODS

Legislation is not the only way to amend the grand jury system. In New Jersey, the Acting Attorney General issued a statewide directive addressing the practices for use-of-force investigations. Investigations of police use of force require conflicts inquiries into the prosecuting attorney's office, a presumption of grand jury review when the use of force resulted in death or severe bodily injury, and a mechanism for administrative review if the investigation does not result in an indictment.

A Georgia House Resolution would have allowed police officers to make a statement before the grand jury, but no longer have the ability to be present throughout the entirety of the grand jury proceeding.¹⁴

Before 2015, Texas used a method of juror selection called the "pick-a-pal" system. In this system, the judge selects a commissioner, who then hand selects members to join the grand jury. The method allowed for more efficient grand juror selection, but it was criticized for biased selection, in which the commissioner has full control over who sits on the jury.

¹² Senate Bill 227.

¹³ Representative Brandon Ellington, House Resolution 17, 2016 Session.

¹⁴ House Resolution 429, which failed.



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