I
n the year since protestors in Staten Island and Missouri set off a national discussion on race, policing and grand jury practices, New York and other states have adopted or proposed a wide range of reforms to their grand jury systems. With the deaths of Eric Garner and Michael Brown—and the subsequent decisions by grand juries not to indict the police officers who were involved in those fatalities—grand juries were thrust into the public consciousness. Commentators and politicians have proposed a number of far-reaching and varied proposals to alter, and in some cases eliminate, the grand jury.

On one end of the spectrum, some states have or are considering eliminating the grand jury in whole or in part. Other states, including New York, have provided for a special prosecutor in the event that an officer is involved in a fatality. Several states have also sought a committee review process, to carefully examine the status of the grand jury and propose reforms. A number of other states have enacted or are considering a myriad of proposals, including increased transparency, evidentiary inferences and other procedural reforms to address perceived shortcomings of the grand jury system. Although the debate has been robust nationwide, most states, however, have not yet enacted reform legislation.

This column surveys the current status of state and federal efforts to reform the grand jury system (as of August 2015), and seeks to provide an overview of the various reform efforts and where the consensus is heading. Unsurprisingly, many states have bills or proposals that fall into one or more of the general categories described herein, but an effort was made to select the most prominent current initiatives for each state. To that end, this column is organized into the following broad categories based on the type of legislative reform predominant in each state: (1) special prosecutor; (2) committee review; (3) partial or total elimination of the grand jury; (4) other reforms and (5) no action.

New York has been at the forefront of grand jury reform efforts. This is due in large part to the state’s historic role as an active legal rule-maker, combined with the public interest and political response to the Eric Garner chokehold death and non-indictment of police officer Daniel Pantaleo.

New York (Special Prosecutor)

During the past year, New York has been at the forefront of grand jury reform efforts. This is due in large part to the state’s historic role as an active legal rule-maker, combined with the public interest and political response to the Eric Garner chokehold death and non-indictment of police officer Daniel Pantaleo. Although the debate statewide concerning grand jury reform remains fluid, New York has now embedded a special prosecutor in the grand jury process.

In July 2015, New York Gov. Andrew Cuomo signed Executive Order No. 147, authorizing the state Attorney General to investigate, and if warranted, prosecute cases in which a law enforcement officer kills an “unarmed” civilian or in which “there is a significant question as to whether the civilian was armed and dangerous at the time of his or her death.”

Executive Order No. 147 is born from the public perception that district attorneys have a conflict of interest in cases involving police officers. The most frequent criticism of the grand jury as it relates to police-involved deaths is that local prosecuting attorneys avoid having grand juries indict police officers because of their symbiotic professional relationship. In these situations, so the argument goes, a prosecutor is prevented (consciously or not) from impartially guiding a grand jury on the law and facts of a case against a member of local law enforcement. A conflict exists because the policing and prosecuting authorities depend upon each other and work closely together.

Right, wrong, or somewhere in between, this argument has gained broad support in the debate about grand juries. The perception of bias is such that many citizens would question the prosecutors’ grand jury presentation regardless of what they do, especially if no indictment is returned. The appearance of a perceived conflict of interest is certainly a reasonable conclusion, and reform efforts have sought to alleviate the
issue with the appointment of a special prosecutor. Proposals generally mandate that in the event of an officer-involved death, a special prosecutor unrelated to the criminal justice system in the local jurisdiction should be used to conduct an investigation and pursue an indictment by grand jury. Despite Cuomo’s attempts to persuade the state legislature to create an independent monitor to review cases in which unarmed civilians are killed by police officers, the legislature declined to act. As a result, Cuomo appointed the Attorney General through executive action as the New York “special prosecutor.” The special prosecutor’s jurisdiction when there are police-involved deaths can “displace and supersede the jurisdiction of the county district attorney where the incident occurred.” Similar to the traditional roles of a local prosecutor, the special prosecutor is tasked with “gathering and analyzing evidence,” “conducting witness interviews,” and “reviewing investigative reports.” The special prosecutor is also required to “appear in person before any grand jury ... for the purpose of conducting any and all proceedings, examinations, and inquiries” as well as to “bring any and all criminal actions and proceedings which may be had or taken before said grand jury” relating to the alleged crime.

In the event that the special prosecutor declines to present evidence to a grand jury or a grand jury does not return an indictment, the special prosecutor is required to explain her or its reasons and recommend any “systemic reform[s] arising from the investigation.” Presently, the order is set for a one-year term and does not apply retroactively. Governor Cuomo has stated that he hopes that a more permanent law will be enacted in its place; whether he plans on renewing the order if the state legislature does not enact a permanent measure remains uncertain.

In August 2015, less than a month after Executive Order 147 was enacted, Attorney General Eric Schneiderman formally took on the first special prosecutor investigation. The investigation involves the death of Raynette Turner, a mother of eight, who died in a Mount Vernon Police Department holding cell while awaiting arraignment on a shoplifting charge.

### Special Prosecutors

In addition to New York, Connecticut, Georgia, Iowa, and Maryland all have proposed legislation to appoint a special prosecutor in varying circumstances. In June 2015, South Carolina was the first state to enact a law involving the appointment of a special prosecutor. Special prosecutor legislation differs among the states, but typically mandates a special prosecutor when civilian deaths result from acts or omissions of police officers.

Federal legislation has also been introduced calling for special prosecutors. The Federal Grand Jury Reform Act of 2015 creates a Byzantine process resulting in special prosecutor “recommendations” and conditions eligibility for certain federal funding on the state’s compliance with this Act.

Acknowledging the “symbiotic relationship” between local prosecutors and law enforcement, which “creates public suspicion” of preferential treatment from grand juries, the bill would require local police agencies and prosecutors to report any police-involved death to the governor. The governor would then be required to appoint a special prosecutor within three days, at random, from a pool of all elected prosecutors throughout the state—excluding the prosecutor in the jurisdiction where the incident occurred. Additionally, the governor would be required to order the state law enforcement agency to investigate the incident, rather than the local agency.

A special prosecutor appointed in this way would have to hold a public hearing within 90 days of appointment before a judge, who would determine if probable cause exists to bring criminal charges against the involved police officer. The judge would then submit a determination with respect to probable cause to the elected prosecutor for the jurisdiction where the death occurred. The special prosecutor would also make a recommendation to the elected prosecutor as to whether criminal charges should be brought against the officer. Neither the determination of the judge nor the recommendation of the special prosecutor would have any binding effect on the elected prosecutor who alone would then decide whether to bring criminal charges.

### Grand Jury Reviews

Several states have proposed legislation that would commit the states to a formal review process of their grand jury system. Such legislation forms the current predominant initiative in Illinois, Massachusetts, and Virginia. Generally, these (and other) states proposing legislation to review their grand juries, provide wide latitude to the authorities they empower to investigate all aspects of the grand jury institution. The “task forces” or “commissions” designated by such legislation are typically comprised of a diverse range of participants, including from academia, the bar, the judiciary, law enforcement, politicians and the public. The time for reporting back to the various state legislatures on recommendations about the future of the grand jury range from one to two years.

### Grand Jury Elimination

One of the most significant reform possibilities includes the elimination of a state’s grand jury process in whole, or in part for cases involving law enforcement. Two states where such proposals are the predominant initiatives are Missouri and Indiana. California and Wisconsin have already enacted such legislation.

Missouri, the state where Michael Brown was shot and killed, is offering one of the most novel solutions to the grand jury system. Missouri House Joint Resolution No. 17 provides the first step in eliminating the grand jury, scheduling a referendum to take place at the state’s next general election in November 2016, or sooner, if the Governor elects to hold a special election. The referendum would allow voters to decide whether to accept an amendment to the Missouri Constitution, eliminating the right to a grand jury.

Indiana’s proposed Senate Bill 377 also seeks to abolish the grand jury; however, unlike Missouri, the Indiana legislature and the governor can abolish the grand jury on their own because there is no right to a grand jury embodied in the state constitution.

In August 2015, California barred the use of grand juries in cases where police use exces-
sive or deadly force. The California law leaves the decision about whether to prosecute to the discretion of local district attorneys. The state senator who sponsored the legislation explained her view that grand jury secrecy fosters a lack of trust in the system, and that the new law—written in response to the Ferguson and Staten Island fatalities—would help make proceedings more transparent and district attorneys more accountable.

Even before the Garner and Brown fatalities, but after a vigorous political debate foreshadowing many of the same arguments raised in the past year, Wisconsin enacted legislation in 2013 that replicates the transparency and accountability goals behind the new California law. Wisconsin abolished the grand jury in officer-involved fatalities, and created a board to review officer-involved deaths. The board and state investigators work together to prepare an investigative report reviewing all aspects of police-involved deaths. The board then submits recommendations to the responsible district attorney, who is charged with deciding to prosecute by complaint-information, or not. This law and the accountability of the local district attorney for not prosecuting the involved police officer were most recently at issue in the well-publicized shooting earlier this year of an unarmed African-American teenager in Madison.

Other Reforms

A number of other states, most notably Colorado, Oregon, Nevada, New Hampshire, Texas and Utah, have enacted or proposed other reforms addressing perceived weaknesses in the grand jury process.

In May 2015, Colorado enacted a provision designed to "provide additional transparency to peace officer-involved shootings." The law provides that "[i]f no true bill is returned, the grand jury may issue a report" when the grand jury proceeding is deemed to be in the public interest, which presumably would be the cost for most, if not all, police-involved shootings.

Legislation introduced in Oregon would unveil the secret nature of grand jury proceedings by recording the entire proceeding and, in certain instances, releasing information to the public pursuant to a court order.

Effective October 2015, Nevada will permit the admission of certain hearsay testimony in grand jury hearings. New Hampshire introduced a bill that would require police officers to wear a camera during all interactions with the public. If the police officer were to fail to record the entire contact or interrupt the recording without "legal or other sufficient justification," then a grand jury "shall draw reasonable negative evidentiary inferences against the officer." For decades and despite criticism from the U.S. Supreme Court, Texas has used controversial district judge-appointed commissioners to empanel grand juries from a pre-selected group of citizens. This "pick-a-pal" system intuitively leads to conflicts of interest and other concerns about fairness. Effective September 2015, Texas ended this archaic system and replaced it with a more typical selection process for each county.

Utah has proposed legislation attempting to create an additional mechanism (beyond the prosecutor) for empanelling grand juries—a special panel of five judges in cases involving deadly force by law enforcement officers.

No Reform

Notwithstanding the discussion above, most states have not yet introduced legislation or executive orders addressing grand jury reform. The absence of legislation does not mean, however, that no discussion about the grand jury's future is taking place in those states.

Conclusion

While it is apparent that the states vary in their approach to grand jury reform, there is a nationwide effort to bring meaningful change to our grand jury system. Although there are extreme positions being advocated in debates about the role of the grand jury, there is also a commonality of concerns expressed across most of the spectrum of opinion. An appearance of conflict between prosecutors and police, particularly in cases involving police killings, is well accepted. Similarly, a push for more transparency and accountability in the grand jury decision-making process is a goal shared by most commentators. However, it is also generally accepted that reforms need to be balanced against the historic need for some grand jury secrecy, especially to protect witness identity. Reform and flexibility in providing grand jury information to the public is plainly warranted, especially when indictments are not issued in police shooting cases. The attributes of a special prosecutor or investigator model in combination with ultimate local district attorney decision-making would also appear to address many conflict, transparency and accountability issues. In the final analysis, a robust national debate and state efforts at grand jury reform should contribute to restoring confidence in the fairness and efficacy of our grand jury system.

References

1. See Steven M. Witzel, "Grand Jury Practice, Protests and Reform," N.Y.L.J. Jan. 15, 2015, available at http://www.newyorklawjournal.com/corporate-update/id/129271517302/Grand-Jury-Practice-Protests-and-Reform"mcode=138056201338&curindex=1. 2. In addition to New York, Connecticut, Georgia, Iowa, Maryland and South Carolina now require or are considering requiring the appointment of special prosecutors for grand jury proceedings investigating police-involved shootings. 3. States proposing a review process include Illinois, Massachusetts and Virginia. 4. These states include Colorado, Oregon and Nevada (increasing grand jury transparency); New Hampshire (imposing adverse evidentiary inferences when a police officer does not video record his contact with citizens); Texas (altering the way grand juries are empaneled); and Utah (creating an additional procedure to empanel grand juries). 5. These 30 states are: Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia and Wyoming. Notwithstanding the lack of formal legislation to reform the grand jury process, there has been a robust public and political debate in almost all of these states. The District of Columbia, which would be included in this category, passed a resolution decrying "the failure of grand juries to indict" the police officers responsible for the deaths of Michael Brown and Eric Garner. http://lisms.dclibrary.us/Download/53119/PR39-1195-Introduction.pdf. 6. This article is current as of August 2015; more recent reform efforts, legislation, or other relevant developments are not included in this column.
dent-monitor. The records of the grand jury must be released to the Attorney General from a state grand jury investigation "shall be held in public, however the presiding judge must conduct a hearing on the claim and issue an appropriate order for the investigation." To disqualify the Attorney General, the judge must find an "actual conflict of interest resulting in actual prejudice" to the grand jury, and the county attorney must file a written statement elaborating on how such a conflict is found. The Attorney General would then enliven the appointment of a "special prosecutor" to investigate and prosecute the case.


22. Id.

23. Res. 175, 99th Gen. Assemb., Reg. Sess. (I.B. 2015). Senate Resolution 175 resolves to create a Grand Jury Task Force to "review the current grand jury process and suggest reforms to make the system more effective in investigating cases of alleged police misconduct." The bill was introduced to study the current grand jury system. The proposed study "might achieve the same goals as a grand jury.

24. H.B. 623, 2015-16 Leg., Reg. Sess. (Cal. 2015). Section 1 of the bill, entitled "effective analysis, and specific recommendations" would be issued within 24 months of the appointment of all Commission members.

25. House Joint Resolution No. 541, 2015 Sess. (Jan. 14, 2015). Resolution No. 541 directs the Virginia State Crime Commission to study the current grand jury system. The proposed study would be aimed at "the need for special prosecutors or a system of special prosecutors to investigate and prosecute the occurrence of an incident involving a public officer that is charged with a felony or act of family violence." The resolution specifies that if the proposed study finds the need for special prosecutors or a system of special prosecutors to investigate and prosecute the occurrence of an incident involving a public officer that is charged with a felony or act of family violence, the Virginia State Crime Commission shall terminate its study and report its findings to the General Assembly. The General Assembly shall then consider the report and make any necessary legislative changes.

26. H.R. 17, 98th Gen. Assemb., 1st Reg. Sess. (Mo. 2015). The bill requires a preliminary examination, including grand jury proceedings, to be held before a defendant can be convicted of a crime.

27. Id. The voters could rescind Article I, §16, mandating the use of a grand jury: "[T]he power of grand juries to inquire into the willful misconduct in office of public officers, and to fix the penalties applicable to such misconduct..." The bill was introduced to study the current grand jury system.

28. Id. The voters could rescind Article I, §16, mandating the use of a grand jury: "[T]he power of grand juries to inquire into the willful misconduct in office of public officers, and to fix the penalties applicable to such misconduct..." The bill was introduced to study the current grand jury system.

29. In fact, the only direct reference to grand juries at all exists in Article VII, §17, which provides that "[t]he General Assembly may modify, or abolish, the grand jury system." IND. CONST. art. VII, §17. The voters could rescind Article I, §16, mandating the use of a grand jury: "[T]he power of grand juries to inquire into the willful misconduct in office of public officers, and to fix the penalties applicable to such misconduct..." The bill was introduced to study the current grand jury system.

30. S.B. 227, 2015-16 Leg., Reg. Sess. (Mo. 2015). Section 1 states that the grand jury shall not inquire into an offense that involves a shooting or use of excessive force by a peace officer.

31. Id.


33. Id.

34. Id. at §4; see WI Stat. §175.47(5)(b). If the district attorney fails to act within 60 days of the request, the defendant may request a judge to conduct a hearing and determine whether the district attorney should be relieved of the duty to conduct a preliminary examination, including grand jury proceedings, to be held before a defendant can be convicted of a crime.


36. S.B. 518, 2015-16 Gen. Assemb., 121st Sess. (S.C. 2015). The state's grand jury statutes were revised to expand provisions relating to the recusal of the Attorney General and to disqualify him or her designee from an investigation, and the subse-quent appointment of a special prosecutor. In South Carolina, the Attorney General serves as the grand jury's legal advisor, and the recusal of the Attorney General from any case involving a peace officer, the Attorney General from a state grand jury investigation "shall be held in public, however the presiding judge must conduct a hearing on the claim and issue an appropriate order for the investigation." To disqualify the Attorney General, the judge must find an "actual conflict of interest resulting in actual prejudice" to the grand jury, and the county attorney must file a written statement elaborating on how such a conflict is found. The Attorney General would then enliven the appointment of a "special prosecutor" to investigate and prosecute the case.

37. Id. at §4; see WI Stat. §175.47(5)(b). If the district attorney fails to act within 60 days of the request, the defendant may request a judge to conduct a hearing and determine whether the district attorney should be relieved of the duty to conduct a preliminary examination, including grand jury proceedings, to be held before a defendant can be convicted of a crime.


44. See supra note 5.

45. For example, in Pennsylvania, a state that uses the grand jury solely as an investigative body, see supra note 5, there is a robust discussion about grand jury reforms. The NAACP recently held a panel discussion in Philadelphia to debate the role of prosecutors in criminal justice reform. See “Media Advisories for NAACP 100th National Convention” (States News Service, July 10, 2015). Chief among the panel’s discussion was the role of the grand jury in the administration of justice and the potential for reforming that body “to make sure the criminal justice system operates fairly and free from any bias. These views are echoed by a former President of the Pennsylvania Association of Criminal Defense Lawyers who believes grand juries are inherently biased. See “Suggested Changes for Federal, State Criminal Procedure in 2015,” Legal Monitor Worldwide, Jan. 17, 2015. In addition, to move reform forward, the Dean of the Duquesne University School of Law has called on the state’s bar association and the state’s grand jury committee to evaluate the future of Pennsylvania’s grand jury system. This committee would consist of both prosecutors and defense attorneys to ensure an equitable evaluation. Id.