11-2010

Grand Juries and Expertise in the Administrative State

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Grand Jury 2.0
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Modern Perspectives on the Grand Jury

Edited by
Roger Anthony Fairfax, Jr.

Carolina Academic Press
Durham, North Carolina
For Fatima Glovena, Regina Charlene-Elizabeth, and Nadia Alcynthia
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#### Chapter 11 • Remaking the Grand Jury

*Roger A. Fairfax, Jr.*

**Grand Jury 1.0**

- Classic Grand Jury Critiques
  - Costliness
  - Ineffectiveness (Over-Compliance)
  - Redundancy
- Traditional Grand Jury Reform Proposals

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  - The Grand Jury as a Tool for Increased Popular Input into Criminal Sentencing
- Diversion and ADR
  - Deferred Prosecution Agreements
  - Drug Courts and Problem-Solving Courts
  - Criminal Alternative Dispute Resolution: Victim-Offender Mediation
- Guiding and Regulating Prosecutors
  - Guiding Prosecutorial Priorities
  - Regulating Prosecutorial Conduct

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Acknowledgments

This project was inspired by the “Legal Scholarship Roundtable on the Grand Jury” I organized at the George Washington University Law School in March of 2008. I was truly fortunate to be able to bring together many of the scholars, practitioners, and jurists whose work I most admire. Roundtable participants included: Professor Sara Sun Beale, Professor Susan Brenner, Carol Elder Bruce, Esq., Professor Angela Jordan Davis, Honorable Paul S. Diamond (U.S. District Court, E.D.Pa.), Honorable Michael Daly Hawkins (U.S. Court of Appeals, Ninth Circuit), Honorable Thomas F. Hogan (Chief Judge, U.S. District Court, District of Columbia), Roscoe Howard, Esq., Honorable Rufus G. King, III (Chief Judge, Superior Court of the District of Columbia), Professor Niki Kuckes, Professor Andrew D. Leipold, Professor Julie Rose O’Sullivan, Honorable Rod Rosenstein, Esq., Professor Stephen Saltzburg, Earl J. Silbert, Esq., Professor Ric Simmons, Dean Kevin Washburn, and Daniel Zelenko, Esq. I thank all of the distinguished Roundtable presenters and participants, some of whom authored chapters of this book, for their insight and intellectual energy.

I planned and organized the grand jury roundtable with the tremendous support of my colleagues at the George Washington University Law School, including Paul Butler, Naomi Cahn, Selena Davis, Claire Duggan, Natalie Fields, David Fontana, Phyllis Goldfarb, Glynnis Hammond, Susan Karamanian, Fred Lawrence, Cynthia Lee, Steve Saltzburg, Wanda Wilder, James Wilson, and student assistants (now attorneys) Marie-Claude Jean-Baptiste, Russell Gold, Emily Crandall Harlan, Adrienne Lawrence, Turia Meah, and Rakhee Vemulpalli.

My friend, Joan Heminway, a fellow Carolina Academic Press author, was a generous and indispensable guide through the process of proposing, organizing, and producing an edited volume, and I remain in her debt. I also thank my GW colleagues, Paul Butler, Chris Bracey, Naomi Cahn, Spencer Overton, and Stephen Saltzburg, who provided advice and encouragement as I navigated the book proposal process. Gratitude is also due to the wonderful folks at Carolina Academic Press, including Linda Lacy, Kelly Miller, Zoë Oakes, and Keith Sipe who were supportive, responsive, and patient throughout the production and publication process.
I thank all of the authors whose work is featured in the book. Signing on to a joint project such as this can be a leap of faith, and I appreciate the confidence they placed in me. It is my hope that the finished project does justice to their generosity of time and spirit. The scholarship featured in this book was supported in a number of ways, including research funding from the authors’ home institutions. For my part, I would like to thank Dean Fred Lawrence and George Washington University Law School for generous support of my own writing and the overall book project. Special thanks are due to the law journals which generously allowed previously published work to be adapted for publication in this volume: Administrative Law Review, Boston University Law Review, Cornell Law Review, Fordham Law Review, Harvard Civil Rights-Civil Liberties Law Review, and the William & Mary Bill of Rights Journal.

Additionally, my magnificent and indispensable research assistant, Rebecca Rodgers, was brilliant in assisting with the surprisingly labor-intensive process of editing and organizing such rich and thoughtful legal scholarship. Her ability to juggle her law studies, journal responsibilities, and devote countless hours to this project serves as a harbinger of a successful career in the law. Another talented research assistant, Samuel Gilbert, provided reliable and cheerful assistance with the final stages of editing and production.

Finally, I would like to take the prerogative of recognizing my family who have been so supportive of me in this and every worthwhile endeavor I have pursued. I have had the pleasure recently of working on a family history project with my father, Roger Sr. This genealogical research has provided me the opportunity to reflect upon how the privilege of serving as a member of the legal academy and profession that I enjoy rests upon the sacrifices and accomplishments of so many—from my 18th century relatives who struggled forward toward their “American dream” in the face of unimaginable challenges and obstacles, to my late maternal and paternal grandparents (Alcynthia and Charles Butler, and Glovena and John Fairfax), all four of whom, despite severely circumscribed life opportunities, lived successful and prosperous lives marked by integrity, faith, fortitude, humility, and abundant love. From the foundation laid by my forbears is derived the unwavering support of my talented and lovely mother, Charlene Fairfax, my devoted siblings and extended family, my loyal friends, my brilliant and encouraging wife, Lisa, and my wonderful and loving daughters, Fatima, Regina, and Nadia. Thank you for everything.

Roger Anthony Fairfax, Jr.
Washington, DC
September 2010
Introduction

Many believe the grand jury—one of the oldest protections known to the American constitutional order—has strayed from its moorings and has eroded beyond recognition. A common criticism is that the grand jury’s central purpose has morphed from the protection of individual rights to the facilitation of governmental investigative power. Others echo Jeremy Bentham’s 19th century critique that the grand jury is unnecessary and redundant in a modernized criminal justice system. Although commentators differ as to the degree of the grand jury’s atrophy, most scholars, lawyers, and judges paint a fairly bleak portrait of the grand jury’s present utility as the bulwark of liberty it was designed to be. This book challenges the American legal culture to re-imagine the grand jury, both by restoring its proud heritage and adapting it to modern realities.


This volume, thus, seizes the opportunity to update the discussion and offer modern perspectives on the grand jury—all of which lead to a coherent vision for reforming and remaking the grand jury. Each of the chapters represents a fresh contribution to the grand jury literature by leading criminal law
and procedure scholars and commentators. The book’s synthesis of constitutional theory and history and concrete policy proposal make it required reading for any scholar, student, jurist or lawyer interested in the past, present, or future of the American grand jury.

In Chapter 1, “Enlisting and Deploying Federal Grand Juries in the War on Terrorism,” Sara Sun Beale and James E. Felman explore the role the grand jury—an ancient law enforcement investigative tool—plays in the modern counterterrorism efforts.

In Chapter 2, “Grand Jurors Speak,” Susan Brenner takes us inside the “black box” of grand juror deliberations. As a result of operating an informational website devoted to the grand jury, Professor Brenner has received numerous unsolicited communications for sitting and former grand jurors. Their queries and statements give is a rare peek into how grand juries operate and how grand jurors think.

In Chapter 3, “Does Grand Jury Discretion Have a Legitimate (and Useful) Role to Play in Criminal Justice?” Roger Fairfax illuminates grand jury discretion and places it in its constitutional and historical context, arguing that the grand jury can assist prosecutors in the exercise of their discretion in a way that enhances crime control, criminal justice efficiency, and the protection of individual rights.

In Chapter 4, “Honoring the Voice of the Citizen: Breathing Life into the Grand Jury Requirement,” Judge Michael Daly Hawkins, the author of an influential Ninth Circuit opinion explaining the grand jury’s historical role and function, makes a compelling case for revitalizing the modern grand jury.

In Chapter 5, “Retelling Grand Jury History,” Niki Kuckes challenges the conventional wisdom that modern grand jury law and practice are firmly rooted in historical practice.

In Chapter 6, “Implementing the Neighborhood Grand Jury,” Adriaan Lanni proposes a reengineering of the grand jury as an organ of local democratic influence on prosecutorial charging practices.

In Chapter 7, “Prosecutorial Charging Practices and Grand Jury Screening: Some Empirical Observations,” Andrew Leipold mines empirical data to attempt to shed light on the question whether the grand jury is an effective screen for criminal charges in a system driven by guilty pleas.

In Chapter 8, “The True Goals of the Modern Grand Jury—and How to Achieve Them,” Ric Simmons sets forth a blueprint for helping the grand jury to fulfill its true potential in the modern criminal justice system.

In Chapter 9, “Restoring the Grand Jury,” Kevin Washburn advances a community-based conception for restoring the grand jury’s original purpose.
In Chapter 10, “Grand Juries and Expertise in the Administrative State,” Ronald Wright proposes the grand jury as a model for greater utilization of lay citizens in the oversight and administration of government.

Finally, in Chapter 11, “Remaking the Grand Jury,” Roger Fairfax sketches a blueprint for the grand jury’s functional makeover designed to make it relevant and responsive to the needs of modern criminal justice.