

11-2010

Grand Juries and Expertise in the Administrative State

Kevin Washburn

University of New Mexico - School of Law, washburn@law.unm.eduFollow this and additional works at: https://digitalrepository.unm.edu/law_facbookdisplayPart of the [Law Commons](#)

Recommended Citation

Washburn, Kevin. "Grand Juries and Expertise in the Administrative State." *Grand jury 2.0: modern perspectives on the grand jury* (2010): 253-292. https://digitalrepository.unm.edu/law_facbookdisplay/68

This Book Chapter is brought to you for free and open access by the School of Law at UNM Digital Repository. It has been accepted for inclusion in Faculty Book Display Case by an authorized administrator of UNM Digital Repository. For more information, please contact amywinter@unm.edu.

Grand Jury 2.0

Grand Jury 2.0

Modern Perspectives on the Grand Jury

Edited by
Roger Anthony Fairfax, Jr.

CAROLINA ACADEMIC PRESS

Durham, North Carolina

Copyright © 2011
Roger Anthony Fairfax, Jr.
All Rights Reserved

Library of Congress Cataloging-in-Publication Data

Grand jury 2.0 : modern perspectives on the grand jury / edited by Roger Anthony Fairfax, Jr.

p. cm.

Includes bibliographical references and index.

ISBN 978-1-59460-702-8 (alk. paper)

1. Grand jury--United States. I. Fairfax, Roger Anthony, Jr. II. Title.

KF9642.G73 2010

345.73'072--dc22

2010030048

CAROLINA ACADEMIC PRESS
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

For Fatima Glovena, Regina Charlene-Elizabeth, and Nadia Alcynthia

Contents

Acknowledgments	xii
Introduction	xv
Chapter 1 • Enlisting and Deploying Federal Grand Juries in the War on Terrorism	3
<i>Sara Sun Beale and James E. Felman</i>	
Grand Jury Authority and Secrecy	5
The USA PATRIOT Act	7
The Attorney General's Disclosure Guidelines	9
The Intelligence Reform and Terrorism Prevention Act	12
Conclusion	13
Bibliography	16
Notes	18
Chapter 2 • Grand Jurors Speak	25
<i>Susan W. Brenner</i>	
Issues	26
Jurors Questioning Witnesses	27
Exculpatory and/or Additional Evidence	29
Whispers and Notes	30
Juror Access to Transcripts	31
Juror Access to the Law	32
Hearsay	33
Jury Nullification	34
Passivity?	35
Grand Jury Meeting to Discuss Responsibilities	38
Time Management	39
Foreperson Issues	40
Removing a Grand Juror	42
Secrecy Issues: From a Grand Juror	42
Secrecy Issues: From a Judge	43
Witness Contact with Grand Juror	44

Length of Grand Jury Service	46
A Court Reporter's Perspective	47
Taking the Fifth ... Responsibly	48
Taking the Fifth ... For Other Reasons	49
Conclusion	51
Bibliography	52
Notes	53
Chapter 3 • Does Grand Jury Discretion Have a Legitimate (and Useful) Role to Play in Criminal Justice?	57
<i>Roger A. Fairfax, Jr.</i>	
Contextualizing Grand Jury Discretion	59
Categorizing Grand Jury "Nullification"	60
Beyond the Normative Debate	61
The Compatibility of Grand Jury Discretion with Constitutional	
Design and the Rule of Law	62
Redefining Terms: Contours of the Rule of Law	63
The Structural Role of Grand Jury Discretion	66
Separation of Powers/Checks and Balances	66
Federalism	68
Optimizing the Exercise of Discretion in Criminal Justice	70
Inventorying Discretion in Criminal Justice	70
The Grand Jury as a Locus of Robust Discretion	71
Safety Valve	71
Enhanced Deliberation of the Grand Jury	72
Enhanced Access and Exposure to Information	73
Secrecy	74
Enhancing the Administration of Criminal Justice	76
Crime Control	77
Efficiency	79
The Grand Jury and Individual Rights	80
Conclusion	83
Bibliography	84
Notes	92
Chapter 4 • Honoring the Voice of the Citizen: Breathing Life into the Grand Jury Requirement	115
<i>Michael Daly Hawkins</i>	
Bibliography	120
Notes	121

Chapter 5 • Retelling Grand Jury History	125
<i>Niki Kuckes</i>	
The Modern Dogma: Grand Jury Procedure Replicates	
Historic Practice	128
The Prosecutorial Nature of Modern Grand Jury Procedure	129
The Premise that Modern Grand Jury Procedures	
Replicate History	130
A Fuller Grand Jury History Is Ambiguous, Contradictory,	
and Evolving	132
The Grand Jury's Origins in Ancient Medieval	
English "Procedure"	134
The American Constitutional Grand Jury in a State of Flux	135
Refuting the Historical Premise of Modern Grand Jury Procedure	136
Refuting the "No Rules" Premise: Historic Dominance of	
the Legal Evidence Rule	136
Undermining the "No Review" Premise: Historic Debates over	
the Proper Extent of Judicial Review of Grand Jury Evidence	139
Questioning the "Probable Cause" Premise: Historic Use of the	
<i>Prima Facie</i> Test for Grand Jury Indictment	142
Using Symbolic Grand Jury History to Mask Complex	
Conceptual Choices	147
Understanding the Court's "History" as a Conceptual Choice	148
Risks of Using Symbolic History in Place of a More Nuanced Test	150
How Historicism Retards Nuanced and Thoughtful Analysis	150
How the Court's "History" Freezes Grand Jury Rules in Place	152
Conclusion	153
Bibliography	155
Notes	157
Chapter 6 • Implementing the Neighborhood Grand Jury	171
<i>Adriaan Lanni</i>	
The Problem: Powerful Prosecutors and Political Pathologies	172
Reforming the Grand Jury	175
Selection	176
Individual Charging Decisions	178
General Charging Policies	184
Conclusion	186
Bibliography	186
Notes	188

Chapter 7 • Prosecutorial Charging Practices and Grand Jury Screening: Some Empirical Observations	195
<i>Andrew D. Leipold</i>	
Screening and Overcharging	196
The Grand Jury's Restraining Hand	196
Poor Screening and Overcharging: Do We Care?	199
Charging Practices Measured	200
Data and Results: Indictment Versus Outcome	201
Charge Disposition	202
Why Dismissals?	206
Things Change	206
Multiplicity	207
Strategic Charging Practices	207
What Type of Charges Fail?	208
Do Grand Juries Screen?	211
Conclusion	213
Bibliography	214
Notes	215
Chapter 8 • The True Goals of the Modern Grand Jury—and How to Achieve Them	223
<i>Ric Simmons</i>	
Grand Jury Power	224
Allowing Re-Presentation	224
Allowing Hearsay Testimony	225
A Defendant's Right to Testify	226
Judicial Review of Grand Jury Proceedings	227
The True Function of the Grand Jury	229
Victims	235
Defendants	237
Police Witnesses	239
Grand Jurors	239
Reforming the Grand Jury?	240
Conclusion	244
Bibliography	246
Notes	248
Chapter 9 • Restoring the Grand Jury	253
<i>Kevin K. Washburn</i>	
Establishing the Grand Jury: The Grand Jury in Context	256
Why Juries?	256

The Grand Jury in American Narrative	257
The Meaning of the Conventional Rhetoric and the Historical Narrative	258
Grand Juries Versus Trial Juries in Contemporary Policy	258
Plea Bargaining, Citizen Participation, and the Grand Jury	259
Trial Jury Nullification and Grand Jury Discretion	260
Scholarly Criticism of the Modern Grand Jury	261
Reconsidering the Role of the Grand Jury as a Check on Prosecutorial Power	262
The Grand Jury as Barometer of Legitimacy and a Theory of What Went Wrong	263
A Theory of What Went Wrong With the Grand Jury	264
The Failure of the Cross-Sectional Ideal	266
The Perniciousness of the Cross-Sectional Ideal in the Grand Jury Context	267
Restoring the Independence of the Grand Jury	268
The “Neighborhood Grand Jury” or the “Grand Jury by Zip Code”	269
The Advantages of Neighborhood Grand Juries for Local Offenses	271
Expanded and Improved Educative Benefits of Jury Service	271
Improved Community Representation and Legitimacy in Criminal Justice	272
Increased Power of Community Relative to the Prosecutor	273
A Colorblind Solution to Racial Problems in Criminal Justice	273
Potential Disadvantages of Neighborhood Grand Juries	274
The Neighborhood Grand Jury	276
Conclusion	277
Bibliography	277
Notes	282
Chapter 10 • Grand Juries and Expertise in the Administrative State	293
<i>Ronald F. Wright</i>	
A Brief History of Grand Juries as Administrative Bodies	294
Grand Jury Administrative Functions in a Frontier Democracy	295
Early Evaluations of the Grand Jury	296
Shrinking the Grand Jury’s Administrative Role	298
How Citizen Panels Became Unthinkable	301
Problems with Excluding Citizen Participation	303
Current Forms of Citizen Administration	305
Structuring an Administrative Grand Jury	307

Panel as Ombudsman	307
Veto over Policy Priorities	308
Leadership on Agency Information Policy	309
Transition from Criminal to Administrative Context	310
Antidotes for Grand Jury Passivity	310
Degree of Reliance on an Adversarial System	311
Conclusion	312
Bibliography	313
Notes	318
Chapter 11 • Remaking the Grand Jury	323
<i>Roger A. Fairfax, Jr.</i>	
Grand Jury 1.0	324
Classic Grand Jury Critiques	324
Costliness	325
Ineffectiveness (Over-Compliance)	325
Redundancy	326
Traditional Grand Jury Reform Proposals	327
The Case for Grand Jury Innovation	330
The Grand Jury's Susceptibility to Innovation	331
The Grand Jury as an Appropriate Vehicle for Criminal Justice Innovation	332
Grand Jury 2.0: The Grand Jury as a Tool to Facilitate Cutting-Edge Criminal Procedure	333
Plea Bargaining and Sentencing	333
Plea Bargaining	333
The Grand Jury as a Tool for Increased Popular Input into Criminal Sentencing	335
Diversion and ADR	336
Deferred Prosecution Agreements	336
Drug Courts and Problem-Solving Courts	337
Criminal Alternative Dispute Resolution: Victim-Offender Mediation	337
Guiding and Regulating Prosecutors	339
Guiding Prosecutorial Priorities	339
Regulating Prosecutorial Conduct	340
Conclusion	341
Bibliography	342
Notes	347
About the Authors	357
Index	363

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 Vemulapalli.

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.

Although the field boasts several excellent grand jury treatises—including *Grand Jury Law and Practice* (Sara Sun Beale, William C. Bryson, Michael J. Elston, James E. Felman), *Federal Grand Jury* (Susan Brenner), and *Federal Grand Jury Practice and Procedure* (Judge Paul Diamond)—there have been relatively few scholarly books on the grand jury since George Edwards published his classic *The Grand Jury* in 1906. In 1963, Richard D. Younger published *The People’s Panel: The Grand Jury in the United States, 1634–1941*, which provided an historical look at the American grand jury from the colonial era through the beginning of World War II. The 1970s brought two critical examinations of the grand jury’s role in American political life: *The Grand Jury: The Use and Abuse of Political Power* (1975) by Leroy D. Clark, and *The Grand Jury: An Institution on Trial* (1977) by Marvin E. Frankel and Gary P. Naftalis. A 1993 book on the grand jury, *The Not So Grand Jury: The Story of the Federal Grand Jury System*, by Blanche Davis Blank, provided an interesting critique of the grand jury based, in part, on the author’s personal experience as a grand juror.

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.