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# The Investigative Grand Jury in Alaska

February 1987

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alaska judicial council





# alaska judicial council

1031 W. Fourth Avenue, Suite 301, Anchorage, Alaska 99501 (907) 279-2526

EXECUTIVE DIRECTOR  
Francis L. Bremson

U.S. Department of Justice  
National Institute of Justice

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ATTORNEY MEMBERS  
William T. Council  
James D. Gilmore  
Barbara L. Schuhmann

CHAIRMAN, EX OFFICIO  
Jay A. Rabinowitz  
Chief Justice  
Supreme Court

## THE INVESTIGATIVE GRAND JURY IN ALASKA

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ACQUISITIONS

PROJECT STAFF

Francis L. Bremson, Director  
Mary A. Kancewick, Special Counsel  
and Principal Author  
Teresa W. Carns, Research Associate  
Marla N. Greenstein, Research Attorney  
Sheila R. Vonesh, Secretary  
Josefa M. Zywna, Secretary

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Alaska Judicial Council

CHAIRMAN

Jay A. Rabinowitz  
Chief Justice

ATTORNEY MEMBERS

William T. Council  
James D. Gilmore  
Barbara L. Schuhmann

NON-ATTORNEY MEMBERS

Mary Jane Fate  
Hilbert J. Henrickson, M.D.  
Renee Murray

COUNCIL STAFF

Francis L. Bremson, Executive Director  
Teresa W. Carns, Senior Staff Associate  
Marla N. Greenstein, Staff Attorney  
Josefa M. Zywna, Executive Secretary

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THE INVESTIGATIVE GRAND JURY IN ALASKA

EXECUTIVE SUMMARY AND RECOMMENDATIONS

## EXECUTIVE SUMMARY

### THE INVESTIGATIVE GRAND JURY IN ALASKA

On August 5, 1985, following the conclusion of its deliberations into the matter of issuing articles of impeachment against Governor William J. Sheffield, as had been recommended by a Juneau grand jury, the Alaska Senate adopted S. Res. 5 am calling upon the Alaska Judicial Council to "study use of the power of the grand jury to investigate and make recommendations..." and "...to consider a possible amendment to the State Constitution." In response to that request the Judicial Council identified the weaknesses of the existing system. The Council looked to alternatives adopted by other jurisdictions and recommendations of national organizations.

Although the Council initially considered addressing the full scope of grand jury activities, the focus of the study was ultimately limited to the grand jury's investigative function and its power to issue investigative reports. The Council's recommendations for improving the existing system (in the form of a proposed Criminal Rule re: Grand Jury Reports) were based on the belief that the grand jury's broad grant of investigative authority in the Alaska Constitution should be preserved. However, this provision should be read together with the due process and privacy provisions of the Constitution.

Art. I, § 8 of the Alaska Constitution states:

"The power of grand juries to investigate and make recommendations concerning the public welfare or safety shall never be suspended."

"Public welfare or safety" has been interpreted very broadly and includes concerns with public order, health, or morals. Black's Law Dictionary defines general welfare as "the government's concern for the health, peace, morals, and safety of its citizens." "Suspend" is defined in case law and by Black's as "to cause to cease for a time; to postpone; to stay, delay or hinder." In other words, the Alaska Constitution gives grand juries the power to investigate into and make recommendations addressing virtually anything of public concern. This broad general power can never be hindered or delayed.

Just as grand juries in Alaska are constitutionally empowered to investigate any matter of public concern, so are they free to report on their findings. Indeed, there is no law in Alaska preventing grand jury reports from naming names, recommending referral to government or private agencies or alleging indictable conduct. As a result, individuals named or referred to in reports may be deprived of basic constitutional rights and protections. While a constitutional amendment restricting the grand jury's investigative powers could reduce these problems, an amendment would substantially alter the role of the grand jury envisioned by the delegates of the Alaska Constitutional convention.

While safeguards are needed, the grand jury, as a citizens' body, serves a valuable function in its investigative role. A proper balance between the grand jury's reporting power and other constitutionally-protected rights of individuals can be achieved through the development of procedures that provide: (a) due process protections for individuals named or referred to in reports; (b) judicial review; and (c) guidelines for the publication and dissemination of reports.

A. Due Process: Protection of Individuals Named or Referred to in Reports.

Basic fairness and constitutional due process require that persons identified in grand jury reports be provided with certain protections not currently specified by Alaska law. Unindicted individuals named in at least three Alaska grand jury investigative reports lacked a forum or mechanism through which to respond to those criticisms.

**THE JUDICIAL COUNCIL RECOMMENDS THE FOLLOWING:**

If the report reflects adversely on a person who is named in the report or whose identity can be determined in the report: (1) that the report be supported by substantial evidence, (2) that it be related to the public welfare or safety and (3) that it not infringe upon any protected rights or liberties of that person.

## B. Judicial Review

No guidelines, statutes or case law presently exist in Alaska to provide standards for judicial review of grand jury reports. Other than the constitutional requirement that the report address some aspect of "the public welfare or safety", judges have no additional guidance in reviewing the subject matter of reports or the circumstances under which a report should be issued.

### THE JUDICIAL COUNCIL RECOMMENDS THE FOLLOWING PROCEDURES FOR JUDICIAL REVIEW OF GRAND JURY REPORTS:

(1) If the judge determines that part of the report is not supported by substantial evidence, the judge may refer the report back to the grand jury with instructions.

(2) The judge may also return the report to the grand jury if any part of the report is not reasonably related to the public welfare or safety, unlawfully infringes on any protected rights or liberties, or otherwise violates any law.

(3) In addition, a person identified in a report may move for a hearing. At the close of the hearing the judge determines whether the report is supported by clear and convincing evidence.

(4) Any action taken by the reviewing judge is also subject to review under the rules of appellate procedure and any aggrieved person, the state or the grand jury may seek review.

## C. Publication and Dissemination of Reports

THE JUDICIAL COUNCIL RECOMMENDS that after a report has been approved for release it be made public. A report shall not be made public by any person except the presiding judge. In addition, the judge may direct that additional materials be attached to the report as an appendix.

The above recommendations could be implemented either by legislation or court rule. The material which follows is a draft criminal rule and commentary which the supreme court may wish to consider for adoption.

PROPOSED CRIMINAL RULE 6.1  
GRAND JURY REPORTS

6.1 Grand Jury Reports

(a) Authority of the grand jury to make reports.

- (1) The grand jury shall have the power to investigate and make reports and recommendations concerning the public welfare or safety.
- (2) Grand jury reports may include allegations of criminal conduct.
- (3) A report shall be made only upon the concurrence of a majority of the total number of grand jurors and shall be signed by the foreman.
- (4) An indictment is not a "report" under these rules.

(b) Examination by presiding judge; reference back.

The grand jury shall present its proposed report to the presiding judge. At the earliest possible time before the grand jury is discharged, the judge shall examine the report and the record of the grand jury. The judge may order production of audio copies or transcripts of the grand jury proceedings and may request the prosecuting attorney to submit a summary of the evidence before the grand jury. The judge shall make specific findings on the record as required by each subsection below.

- (1) The judge shall first determine whether the report is within the grand jury's authority. If it is not, the judge shall proceed under subsection (3).
- (2) The judge shall then determine if the publication of the report would i) unlawfully infringe upon any protected rights or liberties of any persons, including but not limited to unlawful interference with a person's right of privacy or right to a fair trial in a pending criminal proceeding or ii) otherwise violate any law.
- (3) If the judge determines that the report is not within the grand jury's authority under subsection (1) or that publication of the report would be unlawful under subsection (2), the judge shall return the report to the grand jury. The judge shall advise the grand jury of the reasons for returning the report. The grand jury may then conduct further proceedings, may revise the report, or may seek review of the decision not to release the report, as provided in section (e).

Proposed Cr. R. 6.1

(c) Proceedings when report reflects adversely on identifiable person.

Notwithstanding a determination that the requirements of section (b) are satisfied, the judge shall determine whether any part of the report may reflect adversely on any person who is named or is otherwise identified in the report. "Person" includes a natural person, organization or agency. The judge shall then determine from a further review of the record if the part of the report under review is supported by substantial evidence. If the judge determines the report to be unsupported by substantial evidence, he shall return the report to the grand jury suggesting specific changes which would permit publication of the report.

If the judge finds that the part of the report under review is supported by substantial evidence, the judge shall proceed as follows:

- (1) The judge shall order that a copy of the report be served on each such person. Such persons shall be advised of the rights provided in this section.
- (2) Each such person may, within ten days of service of a copy of the report, move for a hearing. For calendaring purposes, the hearing shall have priority over all other non-criminal matters. The hearing shall be in camera and shall be recorded.
- (3) Each person requesting a hearing shall be given a reasonable period of time prior to the hearing to examine the grand jury report and the record of the grand jury proceedings.
- (4) At the hearing, the person may be represented by counsel, may call and examine witnesses who testified before the grand jury, and may present additional evidence that may explain or contradict the evidence presented to the grand jury. The prosecuting attorney may be present at the hearing and may examine witnesses called.
- (5) At the close of the hearing, the judge shall determine whether that part of the report reflecting adversely upon a person named in the report is supported by clear and convincing evidence. If the judge finds that it is not, he shall return the report to the grand jury and shall advise the grand jury of the reasons for returning the report. The grand jury may then conduct further proceedings, may revise the report, or may seek review of the decision not to release the report, as provided in section (e).

(d) Release of the report; secrecy.

- (1) No person may disclose the contents of the report or any matters revealed in an in camera hearing except as permitted by the judge, who shall withhold publication of the report until the

Proposed Cr. R. 6.1

expiration of the time for the making of a motion for a hearing by a person under subsection (c). If such motion is made, publication shall be withheld pending determination of the motion. Publication shall also be withheld pending any review under section (e).

- (2) The judge may order the report released only after complying with the procedures of sections (b) and (c). The judge, in his discretion, may order that additional materials be attached to the report as an appendix as requested by the person or persons entitled to a hearing under section (c). The report and appendices, if any, shall then be filed with the clerk of the court and be available for public inspection. The judge may further direct that copies of the report be sent to those public agencies or officials who may be concerned with the subject matter of the report as well as any other persons as may reasonably be requested by the grand jury.

(e) Review.

- (1) Any judicial determination under this rule is subject to review by the supreme court under the rules of appellate procedure.
- (2) Any aggrieved person, the state or the reporting grand jury by majority vote may seek review.
- (3) The grand jury shall be permitted access to the record of the in camera hearing to assist it in determining whether to pursue appellate review. The grand jury shall at all times maintain the confidentiality of the record. The grand jury may request that it be represented by the attorney general in pursuing review under this subsection.

COMMENTARY TO PROPOSED CRIMINAL RULE 6.1  
GRAND JURY REPORTS

6.1 Grand Jury Reports.

The purpose of Criminal Rule 6.1 is to set out procedures relating to the grand jury's investigative reporting powers, including the instance where a report reflects adversely upon an individual. It does not address proceedings before the grand jury itself, which are covered in Rule 6. The rule establishes the superior court as the forum for a person to object to the publication of a report if it reflects adversely upon him. In this respect, its purpose is generally analogous to the protections afforded to an indicted defendant.

(a) Authority of the grand jury to make reports.

Subsection (1) is based upon Article 1, Sec. 8 of the Alaska Constitution. The only significant difference between the language in the constitutional provision and that in the rule is that the rule refers to "reports," while the constitutional provision does not. The drafters of the rule believed that the power to report is included in the power to make recommendations concerning the public welfare or safety.

The grand jury is not prohibited by law from issuing reports in lieu of indictments [(a)(2)]. It remains unclear whether reports may accompany indictments. This rule is structured to allow a report to be issued where there may be evidence that a crime has been committed as long as the report does not interfere with an individual's right to a fair trial (see subsection (b)(2) below).

Subsection (4) does not permit minority reports since the constitution contemplates action by the grand jury as a body.

(b) Examination by presiding judge; reference back.

This rule requires an explicit finding by the presiding judge that a report is within the grand jury's authority. Publication is not automatically precluded where

there is evidence that a crime may have been committed [(b)(1)], but publication may be withheld if publication could interfere with the right of an individual to a fair trial in a pending criminal proceeding [(b)(2)(i)]. "Pending" includes both proceedings following the filing of criminal charges in any court and grand jury proceedings in which return of an indictment against identified persons is under active consideration.

The judge may also withhold publication if the report unlawfully infringes on any person's constitutionally protected right of privacy [(b)(2)(i)]. A judge may also prevent publication of a report containing information which would be unlawful to publish. For example, release of a report that reveals government secrets protected by law or contains obscene materials [(b)(2)(ii)] could be prevented.

When the judge makes a finding that any part of the report is unacceptable for publication, the judge returns the entire report to the grand jury with reasons for returning the report [(b)(3)]. The grand jury may, at that time, conduct further proceedings, revise the report, or seek appellate review of the judge's decision. These procedures allow the judge to review the report's legal sufficiency while the grand jury retains final authority over the report's content. Judicial determinations under this section can be made at any time prior to publication of the report; the judge need not delay conducting an evidentiary hearing under section (c) pending the completion of any other determination under this section.

(c) Proceedings when report reflects adversely on identifiable person.

Where the report reflects adversely upon a named or otherwise identifiable person, the judge must make a determination under this provision, even if he has concluded that publication of the report would not unlawfully infringe upon any protected rights or liberties of any person. The purpose behind this section is twofold: first, to prevent publication of a report that is not supported by substantial evidence; and second, to afford a person upon whom the report reflects adversely an opportunity to object to the release of the report on the grounds set out in the rule.

Whenever a report reflects adversely on an identifiable person, that person is entitled to review the report and request a hearing before the judge [(c)(1-2)].

The hearing would be held in camera to protect both the secrecy of the grand jury proceedings and the privacy of the adversely affected individual [(c)(2)]. The adversely affected person may have an attorney at the hearing, may call witnesses who appeared before the grand jury and may present additional evidence, both written and oral, but only to explain or contradict the evidence presented to the grand jury [(c)(4)]. Although the prosecuting attorney may also be present at the hearing, his role is limited to examining the witnesses called. The purpose of the hearing is to assess the sufficiency of the evidence upon which the grand jury's conclusions were based, not to determine liability in the matter under consideration.

The goal of the hearing is to provide a mechanism for identifiable individuals to respond to reports. The person identified in the report often has not had the chance to participate in the grand jury proceedings and has not had the opportunity to present his or her story. The hearing is conducted for a limited purpose: to create a forum for response and rebuttal.

Although the allegations in the report may be found to be supported by substantial evidence, evidence of allegations adverse to identified individuals must be found at this hearing to be clear and convincing [(c)(5)]. The "clear and convincing" test reflects the Council's position that the standard for publication should be relatively high where individuals may be adversely affected.

(d) Release of the report; secrecy.

A report may not be released except upon order of the court. The report is to be treated as a single document and may not be released in parts [(d)(1)]. The rule does not permit release of a report by fewer than a majority of the grand jury since the constitution contemplates action by the grand jury as a body. The rule does allow the judge, in his discretion, to attach additional materials to the report if requested by a person who has the right to a hearing under the rule [(d)(2)].

(e) Review.

Any of the judge's decisions under the recommended procedures are subject to review by the supreme court. The provision for review by the supreme court reflects the need for appellate jurisdiction over both the civil and criminal aspects of the

proceedings. The grand jury, the state, or any person who might be adversely affected by the judge's ruling has the right to seek review. Most often, the adversely affected individuals will be those individuals who were entitled to a hearing under section c. The grand jury was given the right to seek review to avoid potential abuse of judicial discretion. Whether and how such appeals should be expedited should be considered by the Supreme Court's Criminal Rules and Appellate Rules Committees.

This rule does not give standing to an individual grand juror or any number fewer than a majority to seek review of the superior court's action since the constitution contemplates action by the grand jury as a body. The grand jury should be represented by counsel in any appeal. Counsel may be provided by the attorney general or the grand jury may choose to be represented by other counsel. Any representation by the Department of Law would be subject to the discretion of the attorney general.

CHAPTER 1

INTRODUCTION

## CHAPTER 1

### INTRODUCTION

#### 1.1 Background

The Alaska Senate, on August 5, 1985, unanimously adopted Senate Resolution 5 am requesting the Alaska Judicial Council to "study use of the powers of the grand jury to investigate and make recommendations", and to "make recommendations to the supreme court and legislature to assure effective and proper use of that power with effective safeguards to prevent abuse and assure basic fairness."<sup>1</sup> The resolution was the final product of a special legislative session called in response to a Juneau grand jury's recommendation that the state Senate consider impeachment proceedings against the Governor. Although the Senate voted against impeachment proceedings, the grand jury's report set the stage for examination of the powers and functions of the grand jury.

The grand jury's request to the Senate followed a lengthy investigation of the executive branch's involvement in the lease of space for state offices in Fairbanks. Initiated by the Criminal Division of the Department of Law, the investigation focused on alleged attempts by the Governor's Chief of Staff and the Governor to avoid normal bidding procedures. The state's chief prosecutor eventually employed a Washington D.C. attorney who had served as an Assistant U.S. Attorney during the Watergate investigation, to serve as outside counsel for the grand jury.

The grand jury, acting on the range of choices presented to them by the prosecutors, did not issue indictments. Instead, it prepared a report criticizing the Governor's job performance. The report contained verbatim testimony of the Governor's Chief of Staff, and quoted extensively from the Governor's testimony to establish his alleged "lack of candor." The grand jury concluded its report with several recommendations, chiefly, the request for consideration of impeachment.

This report was submitted to the court with the request that it be made public. Prosecutors submitted a brief to support that request, but no other parties

were present at the hearing. The court ultimately released the report to the public.

The Senate's consideration of the grand jury's report led it to ask for further study of investigative grand juries by the Alaska Judicial Council. Because the Alaska Constitution states: "The power of grand juries to investigate and make recommendations concerning the public welfare or safety shall never be suspended,"<sup>2</sup> the Senate also asked the Judicial Council "to consider a possible amendment to the State Constitution...concerning the need to strengthen the grand jury system consistent with due process and standards" such as those being developed nationally.<sup>3</sup>

### 1.2 Scope and Methodology.

The Council identified several potential problems within the investigative grand jury process. Following a preliminary review of the literature, the Council decided to focus its attention on two general areas--the power to investigate and the power to make recommendations (reports). Issues unrelated to the reporting function were generally treated as falling outside the scope of analysis. To the extent such issues were defined and analyzed, however, they are presented in Appendix B, which is intended to serve primarily as a resource for future research efforts.

The following key issues were addressed during the course of the study:

1. What subjects may be investigated by grand juries?
2. How are investigations initiated?
3. Can grand juries issue reports?
  - A. Under what circumstances?
  - B. What can be included or precluded?

- C. What protections are or can be provided for persons or institutions named in reports?
- D. Are reports public?
- E. What guidelines are needed for judicial review of grand jury reports, and for publication of reports?

The Council then:

1. Documented law and practice in Alaska; and
2. Identified potential problems and abuses through:
  - A. Interviews with judges, attorneys and former grand jurors;
  - B. Analysis of grand jury investigative reports, transcripts and case law; and
  - C. Review of grand jury reform literature;
3. Reviewed approaches to such problems developed in other jurisdictions or recommended by national grand jury reform organizations, to identify appropriate solutions.

These findings are presented as follows:

- Ch. 2 History of the Grand Jury and the grand jury reform movement;
- Ch. 3 The Investigative Powers and the Reporting Powers in Alaska, in the federal courts, and in other states; and

Ch. 4 The Reporting Power: Procedural Limitations, which describes the due process, judicial review and publication and dissemination aspects of the recommendation (reporting) power in Alaska, at the federal level, and in other states.

Additional issues that are not exclusively part of the investigative and reporting functions are treated in Appendix B.

CHAPTER 2

HISTORY OF THE GRAND JURY AND ITS  
INVESTIGATIVE AND REPORTING POWERS

## CHAPTER 2

### HISTORY OF THE GRAND JURY AND ITS INVESTIGATIVE AND REPORTING POWERS

#### 2.1 History of Investigative Grand Jury

##### 2.1.1 Pre-Revolution

The word "jury" comes from the Old French "jurer" which meant "to swear".<sup>4</sup> The word now means a body of persons sworn to give a verdict on some matter submitted to them.<sup>5</sup> In the context of the courts it has come to mean a group of people legally selected and sworn to inquire into matters of fact and to give their verdict according to the evidence. The word "grand" comes from the Middle French and means having more importance than others, being foremost.<sup>6</sup> In the context of the courts, the grand jury is the jury which makes the crucial initial determination whether or not to indict a person accused of a serious crime based on evidence and charges presented to it by a public prosecutor.

The grand jury developed from the Grand Assize of twelfth century England;<sup>7</sup> "assize" or "assise" being French for foundation or basis.<sup>8</sup> The Grand Assize was established by King Henry II and consisted of a body of noblemen drawn from the countryside to report on, or lay the foundation for charges of, crimes in their neighborhoods. The Grand Assize was the "sword" of the royal government.

The character of the grand jury changed over the centuries. In the days of the Grand Assize, accusation by that body was followed by trial by the ordeal chosen by the accuser. The Lateran Council abolished trial by ordeal in 1215, in favor of having the accused tried by the indicting jury. It was, at the same time, the practice of royal judges to fine and imprison jurors who found a defendant not guilty.<sup>9</sup> By the middle of the fourteenth century the accused was allowed to strike from the trial jury any member of the indicting grand jury. About this time the idea of grand jury secrecy was born, and the grand jury began to hear testimony in private to resist pressure from the crown. Not until the next century however, did judges discontinue the practice of cross-examining grand jurors about their findings.<sup>10</sup>

King Charles II and his royal prosecutors sought to have a 1681 grand jury indict for treason two outspoken protestant opponents of the King's attempt to re-establish the Catholic Church in England.<sup>11</sup> The King demanded that grand jury proceedings in this case be held in public. The Grand Assize resisted, asserting under pressure the power to question witnesses in private, which meant most especially without the presence of the royal prosecutors.<sup>12</sup> After hearing the evidence, the Grand Assize refused to indict. This instance has been credited as the initial exercise of the grand jury's power to shield accused persons against prosecution.<sup>13</sup> The King in that case simply resubmitted the charge to another assize in a different town, and the second assize obliged him by returning a true bill.<sup>14</sup>

The practice of grand juries commenting on their findings outside an indictment or no-true-bill also has early roots. In 1683 an English grand jury, without returning a formal indictment charged certain Whigs including the Earl of Macclesfield with disloyal and seditious conduct. The Earl sued the members of the grand jury for libel. The defense urged that it was the "constant universal practice" of grand juries to present to the court any matters concerning the business of the county, and that this was commonly done in "every assizes and sessions." The plaintiff argued "that 'the law never did empower a jury or any other, to blast any man's reputation without possibility to clear it,' and that grand juries may lodge only specific charges of crime...The court without opinion unanimously found for the defendants".<sup>15</sup> Legal historians have documented numerous reports issued in England in the 17th and 18th centuries, criticizing abusive market practices, reporting on horse racing and cockfighting, on the supervision by the justices of houses of correction, on the use by innkeepers and vendors of false drink measures, and on the improper care of bridges, highways and other county property.<sup>16</sup>

The newly-established English colonies in America transplanted the grand jury powers during the mid and late 17th century. Initially the bodies were simply extensions of the English Grand Assize. For example, a 1642 royal decree ordered Virginia church wardens to aid in local law enforcement by delivering "presentments of the misdemeanors of swearing and violating the Sabbath that to their knowledge had been committed during the preceding year."<sup>17</sup> All of the American colonies had some type of grand jury system in place by 1683.<sup>18</sup>

Grand juries became less responsive in the 1700s to the wishes of the loyalists and more sympathetic to those resisting British rule. The first clear assertion of the shield function was said to have occurred in 1743, in the case of a newspaper publisher who had criticized the colony's governor. The governor sought to have the newspaper publisher indicted for libel. Two grand juries refused to indict. In 1765 a Boston grand jury refused to indict the leaders of riots against the Stamp Act. It was during this time that the grand jury gained its reputation as a shield against unwarranted prosecution and governmental oppression.

The grand juries of the colonies, in addition to screening prosecutions, exercised their powers to investigate criminal activity and "as spokesmen for the people, sounding boards for their leaders, and vehicles for complaints against officialdom."<sup>19</sup> A different product than the straightforward disposition of charges commonly resulted from these wide-ranging investigations, a product which became known as the grand jury report:

Grand jurors in the colonies inspected and reported on the conditions of public roads, the performance of public officials, and the expenditure of public funds. In New York, the grand jury successfully petitioned the Duke of York to grant the colony an elected assembly. Subsequently, the crown abolished this newly created assembly and the grand jury expanded its power accordingly. Colonial New York grand juries engaged in such legislative functions as ordering dispensers of alcoholic beverages to provide lodging for their patrons.

In Boston, grand juries mobilized public opinion behind movements for improved public administration. When a grand jury threatened to indict the city of Boston for not keeping the streets in safe condition, the Town Meeting reacted by repairing the streets rather than hiring a lawyer to defend it in criminal prosecution. In Annapolis, grand jury protests against corruption and incompetence forced the city council to meet regularly and to be more responsive to the people's needs.

...In Philadelphia, a grand jury initiated a program of resistance to British rule; it denounced the use of the tea tax to pay the salaries of British officials, promoted a boycott of British goods, and called for collective action with the other colonies for redress of grievances.<sup>20</sup>

### 2.1.2 Federal Grand Juries

The fifth amendment to the U.S. Constitution provides as part of due process: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...."<sup>21</sup>

#### Federal Investigative Power

Federal statutory law mandates grand jury indictments when the penalty for a crime may exceed one year imprisonment.<sup>22</sup> Under the Federal Criminal Code and Rules of Criminal Procedure the grand jury has been granted the power to compel the testimony of witnesses by issuing subpoenas<sup>23</sup> and, where necessary and appropriate granting immunity.<sup>24</sup> It has the power to compel the production of physical or documentary evidence under looser evidentiary and exclusionary standards than those that apply at trial.<sup>25</sup>

#### Federal Reporting Power

A grand jury has only two explicit products under the Federal Rules of Criminal Procedure--an indictment or a no-true-bill.<sup>26</sup> For many years, federal grand juries were not viewed as having the power to issue investigative reports when an indictment would not be appropriate.<sup>27</sup> The authority of federal grand juries to issue reports is neither expressly granted nor denied in the Constitution, Federal Code or Rules of Criminal Procedure (before 1970).<sup>28</sup>

In a 1953 case a federal district court judge ordered a report expunged from the records of the court saying that "the great weight of authority is that such reports exceed the powers of the Grand Jury and may be expunged."<sup>29</sup> Reports have been issued nevertheless, and acknowledged as traditional.<sup>30</sup> The law and practice with respect to the legality and appropriateness of grand jury reports has remained confused.<sup>31</sup>

The 1970 Organized Crime Control Act provided that special organized-crime grand juries would have the specified power to publish reports at the completion of their terms. Reports could describe certain kinds of noncriminal conduct by appointed public officials or employees.<sup>32</sup> Numerous safeguards were built into

this legislation.<sup>33</sup> A number of federal court judges in recent years have ruled that grand jury reports are permissible under certain circumstances.<sup>34</sup> In 1974, Judge John J. Sirica upheld the power of the Watergate grand jury to issue a report as well as a recommendation that it be forwarded to the House Judiciary Committee for use in the impeachment inquiry.<sup>35</sup>

### 2.1.3 State Grand Juries

The Fifth Amendment to the U.S. Constitution giving an accused the right to indictment by grand jury has been held not applicable to the individual states. In 1884 the U.S. Supreme Court ruled that for the states the filing of an information by a prosecutor was a constitutionally permissible alternative to prosecution by indictment.<sup>36</sup> The authority of states to choose whether or not to use the grand jury has been upheld.<sup>37</sup>

A number of state constitutions require a grand jury indictment for certain categories of crime. Other state constitutions allow the legislature to specify the rules governing the initiation of prosecution. The legislatures generally give prosecutors the discretionary power to choose between the use of grand jury indictment or the filing of an information, the latter usually in conjunction with some sort of probable cause hearing. Today grand jury indictment is required for all crimes in four states;<sup>38</sup> for all felonies in fourteen states, including Alaska;<sup>39</sup> and for only capital crimes in six states.<sup>40</sup> Grand jury indictment is optional in twenty-six states.<sup>41</sup>

### State Grand Jury Investigatory Powers

State grand juries have often exercised investigative powers to battle political corruption. At times, they have acted on their own initiative in the face of opposition from a district attorney:

In New York City, in 1872, an extensive grand jury probe toppled the notorious Boss Tweed and his cronies. Since the district attorney was closely associated with Tweed, the panel acted independently of him, conducting its own investigation and interviewing witnesses without the prosecutor's help.

In Minneapolis, in 1902, a grand jury hired its own private detectives and amassed evidence sufficient to indict the mayor

and cause the chief of police to resign. After removing these officials, the grand jury acted as a committee of public safety and effectively governed the city. Five years later, in San Francisco, a grand jury indicted the mayor and named a new reform mayor to run the city.<sup>42</sup>

State grand juries also have investigated noncriminal matters concerning general welfare or safety. Recently some states have passed legislation attempting to define the areas grand juries may investigate other than specific criminal activity.<sup>43</sup>

### State Grand Jury Reporting Powers

State practices vary with respect to grand jury reports. The law governing the reporting practice on both federal and state levels is far less developed than that governing the indicting process because the major role of grand juries has been the screening and investigation of specific allegations of criminal violations. The number of grand juries that have issued reports is very small when compared to the number of grand juries that have met to consider criminal cases and have issued indictments or no-true-bills.

Some states prohibit grand jury reports where there are not sufficient grounds for indictment.<sup>44</sup> States that permit them usually limit their scope. For example, there is an apparently universal prohibition against commenting on purely private activity.<sup>45</sup> Reports criticizing elected officials tend to be allowed only where there is statutory authority.<sup>46</sup> However, a statute requiring the grand jury to inquire into misconduct in public office does not necessarily imply a power to report the result of the inquiry where no crime is charged.<sup>47</sup> In the absence of enabling statutes, a grand jury, generally, has no right to file a report reflecting on the character or conduct of public officers or citizens, unless the report is accompanied or followed by an indictment.<sup>48</sup> The power to report on general conditions in the community is broader and includes the power to name public officials absent an indictment.<sup>49</sup> Regardless of their subject matter, states subject grand jury reports to a variety of restrictions.<sup>50</sup>

## 2.2 History of Grand Jury Reform

The grand jury has been the subject of intense controversy and the object of reform efforts at the federal level and throughout the states for more than sixty years. Reformers have questioned the continuance of the grand jury's charging function.<sup>51</sup> About half the states have eliminated or strictly limited this function.<sup>52</sup> The Alaska Judicial Council examined the charging function of the grand jury in Alaska ten years ago, and recommended that individuals be given the right to waive grand jury proceedings in favor of a preliminary hearing.<sup>53</sup>

The recent call for grand jury reform first focused on federal procedures. Perceptions of abuse arose from the grand jury investigations initiated by the Justice Department's Internal Security Division in the 1960s and 1970s into the activities of public dissidents. During the same years, the federal grand jury was used more frequently to investigate complex white collar crime, organized crime, and public corruption. Charges of abuse were made by business leaders and civil attorneys whose clients were investigated for tax fraud and violations of antitrust laws.

The recent focus on the investigative function of grand juries resulted in the establishment, in 1974, of a Grand Jury Committee by the American Bar Association's Section of Criminal Justice. After seven years' work the committee proposed thirty legislative principles for grand jury reform.<sup>54</sup> Many of these have been incorporated into Department of Justice policy statements and the U.S. Attorney's Manual; both are practical guides without the force of law.

Grand jury reform in the states does not seem to have been prompted by claims of major abuses at the state level similar to those alleged at the federal level. Some state grand jury reform proposals appear to have been adopted as part of larger reform movements. For instance, some states have included sections governing the grand jury in a revision of their entire criminal code.<sup>55</sup> One recent commentator has noted: "For the most part the changes which have been proposed are designed to reform the grand jury by implementing a number of due process protections with respect to the operations of the grand jury and have principally been directed at its investigatory role."<sup>56</sup>

CHAPTER 3

THE INVESTIGATIVE POWERS AND THE REPORTING POWERS

## CHAPTER 3

### THE INVESTIGATIVE POWERS & THE REPORTING POWERS

Alaska's grand jury serves two distinct functions. First, it acts as the charging body for crimes committed within its jurisdiction. The grand jury considers evidence presented to it by the state's district attorney who has investigated the crime or crimes in each case. The grand jury decides whether the district attorney's evidence is sufficient to call for the individual or individuals facing the charge to stand trial. If the majority of grand jurors finds the evidence sufficient, the foreperson of the grand jury signs the indictment prepared by the district attorney and marks it a true bill. If the majority of grand jurors do not find the evidence sufficient, the foreperson marks the indictment not a true bill, and signs what is then referred to as a no-true-bill. This function is the grand jury's charging function.

Although infrequent, the grand jury can also sit as an investigative body.<sup>57</sup> In response to instructions from the court or the district attorney, or in response to petitions or requests from the public, or on the initiative of a majority of the members of the grand jury, the grand jury may investigate concerns affecting the public welfare or safety. These public welfare or safety concerns may arise from criminal or potentially criminal activity, or they may involve noncriminal public welfare or safety matters. After completing its investigation, if the grand jury has found sufficient evidence to charge an individual or individuals with a crime, the grand jury may ask the district attorney to prepare an indictment or indictments. The foreperson of the grand jury then signs the indictment designating it a true bill.

The law is unclear as to whether or under what circumstances the grand jury may also file a report. When the grand jury, acting in its investigative role, does not find evidence to warrant indictment, the practice of grand juries has been to issue reports to the court summarizing the findings and conclusions of the investigation. Grand jurors are authorized by law to make recommendations<sup>58</sup> although the nature and scope of these recommendations are not defined.

The grand juries of England and of the colonies, in addition to filing charges, conducted investigations of criminal activity and generally acted as "spokesmen for the people, sounding boards for their leaders, and vehicles for complaints against officialdom."<sup>59</sup> The tradition has continued both on the federal level and in the states, amidst an accompanying controversy about the bounds of this power. The importance of the investigative function, however, has not been questioned. Although not explicitly set out in the U.S. Constitution, the grand jury investigative power continues to be exercised on the federal level. While half the states have abolished or severely restricted the grand jury's charging function,<sup>60</sup> all states have retained the investigative function of the grand jury.<sup>61</sup>

### 3.1 Investigative Power

#### 3.1.1 Source of Investigative Power in Alaska

The Alaska Constitution addresses grand juries in Article I, Section 8:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the armed forces in time of war or public danger. Indictment may be waived by the accused. In that case the prosecution shall be by information. The grand jury shall consist of at least twelve citizens, a majority of whom concurring may return an indictment. The power of grand juries to investigate and make recommendations concerning the public welfare or safety shall never be suspended. (Emphasis added.)

The first clause speaks to the grand jury's charging function. The last clause addresses the investigative function. The legislative history of the clause speaking to the investigative function suggests that this function was very important in the minds of the delegates to the constitutional convention, and that the scope of this power was intended to be broad.

#### Constitutional Convention

The Committee on the Preamble and Bill of Rights of the Alaska Constitutional Convention submitted a proposal entitled "Grand Juries, Indictments and Information". The clause that addressed the investigative function read:

...the power of grand juries to inquire into the willful misconduct in office of public officers, and to find indictments in connection therewith, shall never be suspended.<sup>62</sup>

The commentary on the section stated: "The grand jury is preserved, for all purposes, particularly for investigation of public officials."<sup>63</sup> Additional language allowed for prosecution by either indictment or information, and gave the judge power to call a grand jury at the judge's discretion. A Committee member explained the proposal:

This particular provision is exactly Section 16...of the Constitution of the State of Missouri...The grand jury should certainly and definitely be preserved as an investigating agency. There's no question about it at all, and the Missouri provision does exactly that...And that is why the Committee chose the Missouri form. (Hellenthal, 1325).<sup>64</sup>

Delegates to the Constitutional Convention focused discussion on the clause that made indictments optional. An amendment was proposed to make prosecution by grand jury indictment mandatory unless waived, as had been the practice under territorial law. Proponents of the change in the committee proposal argued that the grand jury was not the best charging mechanism. All delegates, however, appear to have supported the continuation of the investigative role of the grand jury:

...I think in Alaska it [charging by grand jury indictment] will be costly and expensive, and I think it is an unreasonable burden to put on the state, and I don't believe that it affords any additional protection to the accused...Now, we have preserved the investigative power of the grand jury...(Buckalew, 1323). (Emphasis added.)

The grand jury once a year investigates the jails [under territorial law] and sometimes is useful where any particular fraud or general scandal has occurred...(Rivers, 1323).

...I am against the use of a grand jury in criminal prosecution...I would say retain the grand jury all right for investigative purposes of officials in public institutions...it serves no useful purpose except for just investigative purposes. (Taylor, 1324)

The grand jury should certainly and definitely be preserved as an investigatory agency. There is no question about it at all...(Hellenthal, 1325).

The debate suggests that some votes for mandatory grand jury indictment may have been cast to assure free exercise of the grand jury's investigative function:

...[I]t is true that the investigative grand jury has been preserved in the bill as set forth here. However, an investigative grand jury will only be called under certain specific circumstances, and somebody is going to have to find conditions pretty bad before an investigative grand jury will be called. Whereas a grand jury which is empaneled regularly, once or twice a year in our division, has full investigative power as well as the power to consider indictments. The grand jury is there and may take any steps that it feels may be necessary towards investigation. (Davis, 1326)

...The grand jury in its investigative power as well as for the fact that it is sitting there as a panel sometimes is the only recourse for a citizen to get justice...(Kilcher, 1328).

The suggestion was made to strike all of the initial proposal, leaving only the amending language mandating indictments. At this proposal it was noted that:

The new amendment does not make any mention of the investigating powers of the grand jury, and I have been told they would still have those powers under the Federal Constitution, but I believe it should be mentioned in our constitution because I think that is one of the most important duties of the grand jury. (Barr, 1344)

The delegate speaking suggested returning to the language in the initial Committee proposal that referred to the grand jury's investigative powers:

The power of grand juries to inquire into the willful misconduct in office of public officers, and to find indictments in connection therewith, shall never be suspended.

When the subject of investigative powers arose again, the language proposed was somewhat different. The new suggested language read:

The power of grand juries to investigate and make recommendations concerning conditions detrimental to the public welfare or safety shall never be suspended. (1344)

The record gives no explanation for the change. In an attempt to understand the new language, another delegate asked:

The present province of our grand jury is to investigate public offices and institutions, not just to investigate anything involving the public welfare. I wonder if [the delegate proposing the language] is intending to try to preserve what we already have now, as the province of the grand jury? Would you consent to having it worded as "investigate public offices and institutions and make recommendations"? (Rivers, 1405)

The delegate proposing the language answered:

No. I think that their power should be a little broader than that...under this provision it would only investigate and make recommendations concerning things that endangered public welfare's safety [sic], and I believe that is what the grand jury is for is to protect the rights of its citizens. (Barr, 1405)

A delegate who spoke in support of the expansion of investigatory powers made an additional suggestion:

Mr. President, my suggestion was that the word "detrimental" be stricken and the word "involving" be inserted because I agree with Mr. Barr that the investigatory power of a grand jury is extremely broad, not as narrow as Mr. Rivers contends. I think a grand jury can investigate anything, and it is true that there is little protection against what they call in the vernacular, a runaway grand jury, but in the history of the United States there have been few runaway grand juries, extremely few, and I think that the broad statement of power that Mr. Barr asked for is proper and healthy. (Hellenthal, 1406)

This suggestion was adopted. The final amendment read:

The power of grand juries to investigate and make recommendations involving the public welfare or safety shall never be suspended.

As the language was incorporated into the constitution, the word "involving" became "concerning" but there is no discussion of this choice in the convention minutes.

#### Alaska Statutes

The Alaska Code of Criminal Procedure in Section 12.40.030 essentially repeats the Alaska Constitution's language concerning grand jury powers:

Sec. 12.40.030. Duty of inquiry into crimes and general powers. The grand jury shall inquire into all crimes committed or triable within the jurisdiction of the court and present them to the court. The grand jury shall have the power to investigate and make recommendations concerning the public welfare or safety.

Two other sections of the code seem to speak to the intended subject matter and scope of the grand jury's independent investigative powers:

Sec. 12.40.040. Juror to disclose knowledge of crime. If an individual grand juror knows or has reason to believe that a crime has been committed which is triable by the court, the juror shall disclose it to the other jurors, who shall investigate it.

Sec. 12.40.060. Access to public jails, prisons, and public records. The grand jury is entitled to access, at all reasonable times, to the public jails and prisons, to offices pertaining to the courts of justice in the state, and to all other public offices, and to the examination of all public records in the state.

The language of the first section above suggests that in addition to reviewing the cases presented by a prosecutor the grand jury is empowered to investigate all criminal or potentially criminal activity that comes to the attention of one or more of its members. The statutory language follows the wording of the original territorial law found in Carter's 1900 compilation,<sup>65</sup> which was preserved through the following years. This statutory power is reinforced by Section 12.40.050, "The grand jury may indict or present a person for a crime...." The use of the word "present" refers to the informal writing of charges by a grand jury.<sup>66</sup>

The language of AS 12.40.060 suggests that the grand jury may have a special responsibility to monitor the public jails, offices pertaining to the courts of justice, and other public offices. This language is similar to that in the corresponding territorial law provision found in the 1900 compilation of laws and retained through subsequent code revisions. However, the statute in the early code that directed the grand jury to investigate prisons and offices pertaining to the courts of justice has been omitted. The reasonable conclusion seems to be that the duty to make such investigations was not to be mandatory, as it was during territorial days, but only optional. The means to make such investigations remains, but the directive is dropped.

Three provisions in Alaska's Criminal Rules hint at the potential investigative, recommending and reporting powers of the grand jury. Rule 6(e) mandates the oath for grand jurors. It resembles the oath of the territorial years, as noted in the 1933 compilation of territorial laws.<sup>67</sup> The current oath reads:

"You and each of you as members of this grand jury for the State of Alaska, do solemnly swear that you will diligently inquire and true presentment make of all such matters as shall be given to you for consideration, or shall otherwise come to your knowledge in connection with your present service...."<sup>68</sup>

The oath clearly includes the duty to investigate "matters" coming to the knowledge of the grand jury independently of the charges presented by a prosecutor.

### 3.1.2 Scope of Investigative Power as Exercised in Alaska

The clear intent of the drafters of the state constitution was to provide the grand jury with broad investigative powers. The language of state statutes is equally broad and no case law in Alaska defines the appropriate subject matter or scope of grand jury investigations.

Grand juries, in practice, have investigated a broad spectrum of subjects. To document the scope of investigations conducted by grand juries in Alaska, we asked judges and attorneys to name and describe all grand jury investigations of their recollection. In addition, state court grand jury records were examined for the years 1961-1984, and library archives records of grand jury proceedings were examined for the years 1884-1960. For the purposes of this study an investigative grand jury was defined as one considering a case for which no indictment had been prepared in advance. Seven categories of investigative grand juries were identified.

#### (1) Complex criminal cases.

Interviewees noted that the grand jury's investigative powers were extremely useful in certain complex criminal cases. Examples of such cases included the 1974 Fairbanks grand jury investigation of a mob incident at the Tanana Valley Fairgrounds that resulted in injury to several persons; the 1970 Anchorage grand

jury investigation of the Cordova fire; the investigation by an Anchorage grand jury in 1970 of the slaying by a police officer of two persons who were engaged in the commission of a felony; and complicated murder cases such as the Investor murders recently considered by a grand jury in Ketchikan.

(2) Patterns of crime.

A Fairbanks grand jury investigated the problem of drugs in Fairbanks high schools, after several instances of drug-related juvenile crime. In 1973, a grand jury, after recognizing the number of crimes being committed on campus, investigated security at the University of Alaska in Fairbanks. A 1976 Fairbanks grand jury investigated the Checker Cab Company after observing the extremely high incidence of felony indictments it had processed against Checker Cab personnel. In January, 1986, a Bethel grand jury issued a report following an investigation into sexual abuse in that community, having noted the large number of sexual abuse cases being brought before them. Grand juries seem uniquely positioned to recognize patterns in criminal activity and to investigate the implications of these patterns.

(3) Alleged misconduct in state government.

Five investigations have been conducted into alleged misconduct in state government. A 1974 Fairbanks grand jury investigated alleged conflicts of interest by public officials in appropriating funds for the Fairbanks flood control project. In 1981 and 1982, grand juries in Juneau investigated unrelated charges of alleged misconduct by two state senators. In 1984, an Anchorage grand jury investigated potentially criminal practices related to property and inventory maintained by the Alaska Division of Fish and Wildlife Protection's Aircraft Section. Finally, a 1985 Juneau grand jury conducted an investigation into the executive branch's handling of state office leasing practices.

(4) Alleged misconduct in local government.

Two grand juries have investigated alleged misconduct in local government. In 1953, a Ketchikan grand jury conducted an investigation into alleged corruption in the Ketchikan police department. A Kenai grand jury in 1973-74 considered

allegations of improper conduct by municipal officials and allegedly inappropriate conduct of a judge.

(5) Potentially criminal activity affecting public welfare or safety concerns.

An Anchorage grand jury in 1964 investigated waste of game animals; in 1965, alleged irregularities in a local election; in 1966, the use of listening devices; in 1967, drug abuse by minors; and in 1969, the public exhibition of adult motion pictures. All of these subjects involved potential criminal activity, and clearly affected public welfare or safety concerns.

(6) Noncriminal (civil) investigation of criminal justice system.

Grand juries have investigated the effectiveness of police operations in Bethel in 1977 and 1983; and the operation of the jail in Barrow in 1983, following an escape. In Fairbanks and in Anchorage grand juries routinely have investigated the condition of the jails and related institutions virtually every year until the early 1970s.

(7) Noncriminal (civil) investigation of conditions affecting public welfare or safety.

A few investigations have arisen in totally civil contexts (in addition to the noncriminal evaluations of the criminal justice system's policies, practices, and facilities). In 1962 and 1964, Anchorage grand juries investigated traffic safety and road signs; in 1964, city zoning; and in 1965, water and sewer service.

3.1.3 Scope of Investigative Power at the Federal Level and in Other States.

Federal Level

Federal grand juries have the duty to inquire into violations of the criminal laws of the United States. Broader investigative powers are not statutorily defined, but appear in case law to be exercised in the context of criminal inquiries.<sup>69</sup> The 1970 Organized Crime Control Act specifically provided that special grand juries could be called to investigate organized crime.<sup>70</sup>

## Other States

States often do not define the subjects of grand jury investigation. In some states where the subjects of permissible investigation are not stated, initiation of investigations is restricted. Other states provide judicial review of grand jury investigative reports, and/or procedures to protect individual rights. These approaches will be considered in the next section of this report.

## California

The California grand jury is a creature of county government. In addition to inquiring into crimes, it has been granted a gradually increasing "watchdog" role over a variety of county government activities. In 1851 the California legislature directed the grand jury to investigate "the condition and management of the public prisons."<sup>71</sup> In 1880 the California state legislature gave the grand jury the responsibility of making "a careful and complete examination of the books, records and accounts of all officers of the county...."<sup>72</sup> The state legislature has continued to expand the boundaries of the grand jury's investigative domain, including authorization to make inquiry into and report on the "needs of all county officers". The grand jury may recommend the abolition or creation of county offices and comment on the adequacy of the existing "method or system of performing" county duties.<sup>73</sup> It may evaluate salaries paid to various public officials;<sup>74</sup> the operation of special-purpose assessing or taxing districts located wholly or in part within the county;<sup>75</sup> and the state of the fiscal affairs of any incorporated city within the county.<sup>76</sup> A 1975 California Supreme Court case clearly states that these statutory provisions limit the grand jury's investigating authority "to the specifically enumerated fields."<sup>77</sup>

## Missouri

The Missouri Constitution provides that the grand jury shall have the power to:

- (1) investigate all characters and grades of crime;
- (2) inquire into the willful misconduct in office of public officers.<sup>78</sup>

Missouri statutes provide that the grand jury shall have the power to:

- (1) examine public buildings;
- (2) inquire into violations of the game and fish law, the election laws, the various liquor laws, and such other violations as the court may direct;
- (3) inquire into the failure or refusal of county and municipal officers to do their duty, as provided by law; and
- (4) make inquiry into any violations by county officers of laws relating to the finances or financial administration of the county.<sup>79</sup>

#### Pennsylvania

Pennsylvania courts recognize two types of grand juries. The legislatively-authorized "charging" grand jury also conducts investigations, and is referred to as an "investigating grand jury." Initiation of an investigation by this type of grand jury must be "necessary because of the existence of criminal activity within the county which can best be fully investigated using the investigative resources of the grand jury."<sup>80</sup> A grand jury may also be empaneled by the court solely for performing investigatory duties, and is referred to as a "special grand jury."

The courts of Pennsylvania have limited the power of both types of grand juries by enumerating five subject requisites, all of which must be present to initiate an investigation:

- (1) the subject matter of the investigation must affect the community as a whole rather than as individuals;
- (2) the investigation must be aimed at conditions as opposed to individuals;

- (3) the ordinary processes of law enforcement must be inadequate to deal with the alleged crimes;
- (4) the investigation must have a defined scope, directed at crimes, and supported by information indicating the existence of systematic crime or widespread conspiracy; and
- (5) the information must come from direct knowledge or a trustworthy source.<sup>81</sup>

Pennsylvania's judicial system does not allow for civil investigation by grand juries. Pennsylvania courts have held that although a grand jury may review alleged illegalities in a state agency or local government, it cannot be directed to consider the quality of administration in government agencies.<sup>82</sup>

#### 3.1.4 Initiation of Investigation

Methods for initiating investigations differ among jurisdictions. They may vary depending on the subject of the investigation or by the person(s) calling for grand jury action.

##### Initiation: Law and Practice in Alaska

Statutory procedures in Alaska distinguish initiation of an investigation from the exercise of the grand jury's usual charging duties.<sup>83</sup> In general, investigations are initiated by the district attorney. In the case of major investigations, the district attorney may request that a grand jury be empaneled to investigate that case alone. On occasion investigations have been called sua sponte by the judge sitting in the jurisdiction.

One Alaska statute provides that "if an individual grand juror knows or has reason to believe that a crime has been committed which is triable by the court, the juror shall disclose it to the other jurors, who shall investigate it."<sup>84</sup> This provision suggests that an investigation might be initiated at the request of an

individual grand juror. Legal commentators Frankel and Naftalis caution against such practice. Speaking of the earliest grand juries, they remark: "Drawn from the rural neighborhood in which they sat, the grand jurors themselves were primary sources of 'evidence' reporting and acting on things they knew firsthand or had heard, including rumors and gossip." The commentators add: "Today, in the swirling anonymities of the great cities where grand juries mostly sit, it would be the rare (and indeed somewhat questionable) case where a grand juror acted on anything within his or her personal ken, rather than upon knowledge acquired for the first time from testimony and exhibits 'presented' by a government lawyer in the grand jury room."<sup>85</sup>

Routine safeguards have been exercised in Alaska. Judges and prosecutors have said that the majority of grand jurors, not counting the juror requesting the investigation, have had to vote to undertake any investigation. If the investigation has been taken up, the grand juror requesting it was excused from grand jury duty and called as a witness in the ensuing investigation.

Prosecutors interviewed in the course of this study noted that private citizens occasionally request the grand jury to investigate a matter. Prosecutors report that they ordinarily review these requests before presenting them to the grand jury and made a recommendation regarding the grand jury's action. The grand jury then decides by majority vote whether to initiate an investigation.<sup>86</sup>

### Initiation: Law and Practice in other Jurisdictions

#### Federal

The federal district courts are empowered to summon investigative grand juries at their discretion, or at the request of the attorney general.

#### Pennsylvania

A Pennsylvania court may charge a grand jury to conduct a special investigation, or an investigative grand jury can be initiated by either a "petition" or a "memorial." A petition is a request filed by the district attorney

or attorney general. A memorial is a request filed by a private citizen. Petitions and memorials must meet the subject matter test for investigative grand juries set out earlier in this chapter. The grand jury cannot initiate an investigation on its own motion. Under Pennsylvania's legislative scheme for investigative grand juries, which apparently operates parallel to the judicial scheme, no memorials are provided for. The statute requires that the district attorney's petition state that the convening of the grand jury is necessary because of the existence of criminal activity within the county which can best be fully investigated through the use of the resources available to the grand jury.<sup>87</sup>

### Other States

The legal tests in most states are not as clearly defined as those in Pennsylvania. The courts in all states surveyed have the power to call the grand jury. The district attorneys in all states have the power to request a grand jury. Beyond these generalizations, procedures vary. Five states allow grand juries to be called by public petition: Nebraska, Nevada, New Mexico, North Dakota, and Oklahoma. Each of these states specifies a mandatory process operating at the county level which can be activated by a modest number of persons.<sup>88</sup>

### 3.2 Grand Jury Power to Issue Reports

The grand jury practice of commenting or reporting on investigative findings has early roots. Records of such "reports" exist from the 1600s in England and the American colonies and have been subject to criticism from the beginning.

Most jurisdictions have held that the power to report is not coextensive with the power to investigate. Grand jury reports have been criticized as a potential violation of an individual's right not to be publicly condemned for wrongdoing without the due process established by law, especially the right to be heard. When indictments are issued, individuals have the opportunity to present a case at trial. When a grand jury issues a report accusing an individual of wrongdoing, that individual often has no guaranteed means for response.

### 3.2.1 Source of Reporting Powers in Alaska

The Alaska Constitution states: "The power of grand juries to investigate and make recommendations concerning the public welfare or safety shall never be suspended."<sup>89</sup> (Emphasis added.) The language is repeated in Sec. 12.40.030 of the Alaska Statutes.

One delegate to the Constitutional Convention expressed concern about the power to make recommendations:<sup>90</sup>

From my first impression and my prime objection to this particular amendment is that I think and feel certain it will open the door, for example, the grand jury might have under investigation the conduct of some particular public office, for example the governor, or any public official, the local tax collector. They don't have enough evidence to return an indictment but this would give them the power to blast him good and hard, and I think it would lead to all kinds of trouble, and I think it is an unheard of provision. The recommendation of the Committee provided that the grand jury could investigate, they could return indictments, but it certainly did not give them the privilege to more or less defame somebody if they did not have quite enough action for a bill. Under this they could discredit him completely, and he would have no way of answering. He might be able to come back and get the report of the grand jury stricken from the records of the court, but the damage would then be done. I think it is extremely dangerous because a citizen would not have any protection. Once it was published, the only thing he could do would be then come in and ask the court to strike portions of it. For that reason I would object to it. (Buckalew, 1405)

Delegate Barr responded to these concerns:

They do not necessarily have to defame any person or mention him by name. If the tax collector was using methods not acceptable to the public, they might make a recommendation for a change in the system of tax collection, etc., and I think it would be their duty to do so. (Barr, 1405)

The grand jury's recommending and reporting powers were not further addressed by the delegates. Although a number of important issues were raised in this exchange, including whether reports should issue; what reports should contain; under what circumstances reports could issue; and rights of persons criticized in reports, none were resolved.

The grand jury's reporting power is not addressed in any other statute or rule, nor do the written charges and instructions authorized under Rule 6(h) address this power. The only Alaska-related reference to this subject can be found in "The Alaska Grand Jury Handbook", an undated monograph "distributed by the Supreme Court of Alaska", "based on the Original Draft Prepared by the Section of Judicial Administration of the American Bar Association." (This handbook apparently has been distributed only in Anchorage to some grand juries. It presumably has no official basis as the source of Alaska law or practice.) In Section III(b) "Grand Jury as Investigative Body", the pamphlet states that a grand jury cannot "specify individuals as being personally responsible for the conditions which it criticizes...This is because such a report gives the individual criticized no opportunity to give his reply thereto, as he could were this criticism to be the subject of an Indictment for crime."<sup>91</sup>

### 3.2.2 Scope of Reporting Power as Exercised in Alaska

The exchange between delegates at the constitutional convention should be considered in the context of territorial practices. During territorial days grand juries in Alaska were governed by the general laws of Oregon. Those laws mandated that the grand jury inquire into the condition and management of every prison in its judicial district and into the condition and management of the offices pertaining to the courts of justice in the district. No language in those laws specifically addressed any reporting powers or duties of grand juries.<sup>92</sup>

Grand juries in territorial days were convened once a year in each of the state's four districts. The grand juries inspected the jails and reported their findings and recommendations to the court along with their summaries of indictments and not true bills issued during the term. These reports generally included additional comments and recommendations, based on simple observation rather than formal investigation, about the general administration of criminal justice and about conditions related to crime in the community. Records of territorial grand juries show only one fully-developed investigative report, the Final Report of the Grand Jury for the Special October 1953 Term, In the District Court for the Territory of Alaska, Division Number One at Ketchikan. This report is referred to as the "Creek Street Report," Creek Street being the street along which the Ketchikan houses of prostitution stood.

Grand jury records since statehood show that the practices of inspecting jails and commenting on jail conditions, on courthouse facilities, on criminal justice procedures, and on general crime conditions in the community, continued for the first few years. In Anchorage and Fairbanks comments appeared on almost every grand jury report until the early 1970s. About this time more grand juries were being empaneled at these court sites, serving shorter terms. With this development more attention was given to the charging function and less to conducting investigations.

Case-specific reports resulting from full investigations are rare. The report of the Sheffield case is the longest report issued in the state. It is one of the few reports since statehood to criticize named individuals in the context of alleged criminal activity, and the only report to include portions of the transcript of grand jury proceedings. The typical report in Alaska has been two to three pages, including a brief summary of findings and a list of recommendations.

A 1974 report issued by a Fairbanks grand jury on alleged misconduct in state office included a statement that no violation of law had occurred. A later Anchorage grand jury, investigating potentially criminal activity by state officials, issued a two-page report that included: (1) the subject of the investigation; (2) the fact that witnesses were heard; (3) the decision not to return any indictments; (4) the recommendation that the recommendations of the Division of Legislative Audit regarding property handling procedures in that agency be followed; and (5) the request that the report be transmitted to the Commissioner of the Department.

No public report was issued at the close of the Kenai investigation in 1974. The grand jury did send a letter, however, to the Commission on Judicial Qualifications calling attention to purportedly improper conduct on the part of a Kenai judge. This type of action was also taken by a Fairbanks grand jury, which noted in its report that it had provided a confidential recommendation to the Commission on Judicial Qualifications.

The Fairbanks grand jury that investigated the patterns of felony indictments it observed being returned against Checker Cab personnel: (1) stated its observation of the pattern of felony indictments; (2) found that many Checker Cabs

were operating with defects that endangered occupants and other vehicles; (3) noted that it had heard conflicting testimony from the Chief of Police, City Manager, and the Cab Company concerning the existence and enforcement of mandatory periodic safety checks on the cabs; (4) made a number of recommendations including review of personnel records; (5) requested that the police chief and the city manager establish a method of inspection and enforcement of safety standards for cabs and report back to the grand jury with their plan in 30 days; and (6) requested specifically that copies of the report be distributed to all five local radio stations, both local newspapers, the city council, city manager, mayor, and owners of local cab companies. A 1972 Fairbanks grand jury that investigated campus security, noted the high incidence of crime on campus and made detailed recommendations for the protection of students, faculty, and employees. Another Fairbanks grand jury that investigated drug abuse in high schools described its findings and made recommendations for improved criminal justice procedures.

Investigations of problems in the criminal justice system have produced a few case-specific reports in addition to comments made as part of the grand jury's summary report. The 1977 Bethel grand jury reviewing the effectiveness of police investigations stated its purpose in its report: "to evaluate some of the problems confronting those responsible for this most important area of our criminal justice system, and to offer recommendations as to how it may be improved." The report summarized the testimony of witnesses regarding police department efficiency. The last witness was the Chief of Police, who was given a summary of the testimony of previous witnesses and the opportunity to present his specific concerns. The grand jury then made several recommendations encouraging better training, reporting, investigation and follow-through of investigations, and monitoring of these procedures. The grand jury requested that its report be made a matter of public record.

The 1983 Bethel grand jury investigating "problems with the handling of criminal investigations in Bethel" found that "[t]he Bethel Police Department has repeatedly failed to follow basic minimum legal requirements which has made the prosecution of many cases difficult or impossible."<sup>93</sup> Its primary recommendation was "that a policy be jointly established by the Bethel Police Department and the District Attorney's office that would formally outline the procedures to be followed by Bethel Police Officers in their relationships with the District Attorney's office."<sup>94</sup>

The 1983 Barrow grand jury investigating policies and procedures at the Barrow jail following the escape of a prisoner issued a report suggesting stricter procedures for the transport of prisoners. The Superior Court judge at Barrow forwarded the report to the Public Safety Director and the Corrections Facility Director.

A 1967 Fairbanks grand jury report made a point of exonerating a state trooper in a fatal shooting, made recommendations regarding the prevention of marijuana use in the schools, and conducted an investigation of jail conditions in Fairbanks. The grand jury report criticized management of the jail generally and held the named superintendent responsible. The grand jury's report included recommendations for policy, personnel, inspection, supervision, and maintenance changes.

### 3.2.3 Reporting Powers of the Federal Government and Other States

A signer of both the Declaration of Independence and the United States Constitution and later an Associate Justice of the U.S. Supreme Court, James Wilson, made this observation in 1791:

The grand jury are a great channel of communication, between those who make and administer the laws, and for whom the laws are made and administered. All the operations of government, and of its ministers and officers, are within the compass of their view and research. They may suggest publick improvement, and the modes of removing publick inconveniences: they may expose to publick inspection, or to publick punishment, publick bad men, and publick bad measures.<sup>95</sup>

A 1965 Fifth Circuit case stated: "To me the thing [is] this simple: the Grand Jury is charged to report. It determines what it is to report."<sup>96</sup>

A sponsor of the 1970 Organized Crime Act commented during Congressional hearings about grand juries to be charged under it that:

...the precise boundaries of the reporting power have not been judicially delineated...the authority to issue reports relevant to organized crime investigations has been specifically conferred upon the special grand juries created by this title. The committee does not thereby intend to

restrict or in any way interfere with the right of regular grand juries to issue reports as recognized by judicial custom and tradition.<sup>97</sup>

The statute may well serve as a model in both federal and state courts, for striking a fair balance between protection of the public and protection of the individual in grand jury reporting procedures. The act addresses proper subjects for reports, provides guidelines for judicial review, and also gives an opportunity for named individuals to respond.

A grand jury empaneled under the Organized Crime Act is empowered to submit a report on two subjects:

- (1) concerning noncriminal misconduct, malfeasance, or misfeasance in office involving organized criminal activity by an appointed public officer or employee as the basis for a recommendation of removal or disciplinary action; or
- (2) regarding organized crime conditions in the district.<sup>98</sup>

### California

The California Penal Code lists local government activities which the grand jury should review and specifically calls for reports on these subjects. California courts have held that the grand jury's investigation and reporting authority is limited to the specifically enumerated fields. The only other statutory limitation on the reports of California grand juries is that "[a] grand jury shall make no report, declaration, or recommendation on any matter except on the basis of its own investigation of the matter...."<sup>99</sup>

### Missouri

The Missouri grand jury had the constitutional duty and authority after 1875 to report the results of its investigation of the official acts of officers having charge of public funds. This provision has been dropped from Missouri's present

constitution, which gives the grand jury the power to "investigate and return indictments for all character and grades of crimes" and the power "to inquire into the willful misconduct of public officers and to find indictments in connection therewith."<sup>100</sup> The Missouri Supreme Court subsequently has confirmed the limiting nature of the language of both constitution and statutes.<sup>101</sup>

The key Missouri statute lists several specific areas for grand jury inquiry and investigation. This statute explicitly directs that the grand jury "examine public buildings and report on their conditions."<sup>102</sup> The Missouri Supreme Court noted that "reporting power is not expressed in connection with the other specific areas or in connection with the general areas of law violations which the trial court may direct the grand jury to investigate."<sup>103</sup>

#### New Jersey

In New Jersey, the grand jury may issue a report, or in the terminology of the state's statute, a "presentment" that:

- (1) refers to public affairs or conditions; and
- (2) censures a public official only where his association with the criticized public affairs or conditions is "intimately and inescapably a part of them."<sup>104</sup>

#### New York

A New York statute enacted in 1964 appears to have provided the model for the federal Organized Crime Act of 1970. It includes restrictions on the subject matter of reports, guidelines for judicial review, and an opportunity for named individuals to respond. The New York statute allows grand jury reports:

- (a) concerning misconduct, nonfeasance or neglect in public office or by a public servant as the basis for a recommendation of removal or disciplinary actions; or

- (b) stating that after investigation of a public servant it finds no misconduct, nonfeasance or neglect in office by him provided that such public servant has requested the submission of such report; or
- (c) proposing recommendations for legislative, executive or administrative action in the public interest based upon stated findings.<sup>105</sup>

### Pennsylvania

Pennsylvania's statutes define a grand jury report as a document:

- (1) regarding conditions relating to organized crime or public corruption; or
- (2) proposing recommendations for legislative, executive, or administrative action.<sup>106</sup>

### Washington

A Washington statute provides that, "The grand jury may prepare its conclusions, recommendations and suggestions in the form of a grand jury report."<sup>107</sup>

### ABA Principles and Commentary

The commentary accompanying the ABA Grand Jury Principles states that the purpose of grand jury reports is "to inform the public of situations requiring administrative, judicial, or legislative corrective action--not the castigation of individuals,"<sup>108</sup> and goes on to say that a report may comment on "the job that an office holder is performing; but such reports should not condemn character alone."<sup>109</sup>

CHAPTER 4

THE REPORTING POWER: PROCEDURAL LIMITATIONS

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### THE REPORTING POWER: PROCEDURAL LIMITATIONS

Grand jury recommendations in Alaska are limited only by the requirement that they concern "public safety and welfare." Since no restrictions on content occur in Alaska law, grand jury reports may presumably name names, recommend referral to governmental or nongovernmental bodies, allege indictable conduct and be published whether or not accompanied by indictments. The limitations on report content that exist in other states and the federal system are based on far more restrictive grants of constitutional and statutory authority than are found in the Alaska Constitution. The adoption of substantive limitations in Alaska would therefore require constitutional amendment to restrict the subject matter of investigations, to limit the purposes of reports, or to otherwise effectively suspend the recommendation power of the grand jury.

Constitutional amendment would not be required to establish procedural limitations. Procedures could be adopted that provide for greater due process protection of individuals named or referred to in reports; judicial review of reports; and standards for publication and dissemination of reports. Statutory or court rule amendments could establish procedures and guidelines for grand jury reports.

#### 4.1 Due Process: Protection of Individuals Named or Referred to in Reports.

Basic fairness and constitutional due process may require that unindicted individuals named in grand jury reports be provided with certain protections not currently required by Alaska law. Unindicted individuals named in at least three Alaska grand jury investigative reports lacked a forum or mechanism through which to respond to those criticisms.

Other jurisdictions have recognized the following rights to be part of due process:

1. The right to review the report prior to publication (Florida, New York, New Jersey);
2. The right to present further testimony to the judge or the grand jury (U.S., New York, New Jersey);
3. The right to submit a written response (U.S., New York, New Jersey);
4. The right to move to expunge certain portions of reports (Florida, ABA);
5. The right to in camera hearing and/or appeal (New York, New Jersey);
6. The right to sue grand jury for libel (California);
7. The right to a fair trial or hearing (U.S., New York);  
and
8. The right to review the grand jury transcript (New Jersey).

#### Federal

The Organized Crime Act of 1970 gives an opportunity for named individuals to respond. The act requires that the report be served upon each public officer or employee named in the report. The individual must file an answer within twenty days which "state(s) the facts and law constituting the defense of the public officer or employee to the charges in said report."<sup>110</sup> The reply becomes an appendix to the report, "except for those parts thereof which the court determines to have been inserted scandalously, prejudiciously, or unnecessarily." The report remains sealed for at least 31 days after the answer has been filed or the time for filing has expired, or if an appeal is taken, until all rights of review have expired or terminated. The U.S. Attorney is then charged with delivering a copy of the report,

and appendix, if any, "to each public officer or body having jurisdiction, responsibility, or authority over each public officer or employee named in the report."<sup>111</sup>

Federal courts have carved out exceptions to the grand jury's reporting power that protect basic fairness and the rights of individuals. Most federal courts have held that a grand jury has no authority to issue a report that accuses an unindicted individual of an indictable offense. Some exceptions have been made for reports criticizing federal public officials.<sup>112</sup>

### California

Individuals named in California grand jury reports have no right to reply or expunge. However, a comment in a grand jury report which refers to an unindicted individual is not privileged. Unindicted individuals have the right to sue grand juries for libel.<sup>113</sup>

### Florida

The Florida legislature grants unindicted individuals criticized in a report the right to review the report before it is published, and 15 days to file a motion to seal or expunge the report or portions of the report which are "improper and unlawful."<sup>114</sup>

### Georgia

Indictment of a public official in Georgia must include a statement of "the merits of the complaint," and a copy must be served on the accused before it is presented to the grand jury.<sup>115</sup> The accused public official or public servant (defined in Georgia to be any judge of the probate court, member of any board of commissioners, county judge, or justice of the peace) has the right to testify before the grand jury at the conclusion of the state's evidence. The accused is not subject to cross-examination. The accused and counsel for the accused have the right to be present during the presentation of all evidence, but may not examine witnesses.

## New Jersey

New Jersey's statutes provide additional protections for the public official censured in a report which a judge has determined to be proper. If the judge decides not to strike a report censuring a public official, a copy of the report must be served on the named individual. The public official has ten days to move for an in camera hearing. The individual is granted (1) the right to examine the grand jury minutes, and (2) the right to introduce additional evidence.<sup>116</sup>

## New York

Persons named in a New York report must receive a copy of the report before it is published and are allowed time to file an answer to be appended to the report, or to take an appeal, or both. After such opportunities have expired or terminated, the statute calls for a copy of the report and appendix, if any, to be delivered for appropriate action to each official or body having removal or disciplinary authority over each public servant named in the report.<sup>117</sup>

## ABA

The ABA Model Grand Jury Act provides:

A grand jury should not issue any report which singles out persons to impugn their motives, hold them up to scorn or criticism or speaks of their qualifications or moral fitness to hold an office or position. No grand jury report shall be accepted for filing and publication until the presiding judge submits in camera a copy thereof to all persons named or identifiable and such persons are given the opportunity to move to expunge any objectionable portion of said report and have a final judicial determination prior to the report's being published or made public.<sup>118</sup>

### 4.2 Judicial Review

No guidelines, statutes or case law in Alaska provide standards for judicial review of grand jury reports. Other than the constitutional requirement that the report address some aspect of "the public welfare or safety," judges have no additional guidance in reviewing the subject matter of reports, the circumstances

under which a report should be issued, or the court's obligation to limit or control the dissemination of such reports.

Other jurisdictions have developed guidelines for judicial review. Typical guidelines require the judge to review reports prior to publication for compliance with one or a combination of the following criteria:

- (1) The purpose or subject matter is within the statutory or constitutional scope (U.S., New York, Florida, California, Washington, Missouri, Colorado);
- (2) The rights of persons identified in such reports have been protected (U.S., New York, New Jersey, Florida, Colorado, ABA);
- (3) The findings of the report are based upon facts revealed during the course of the investigation (U.S., New Jersey, Florida, California);
- (4) Findings are supported by evidence presented during the investigation (U.S., New York);
- (5) Release of the report will not prejudice pending trials (U.S., New York, Washington);
- (6) Release of the report will not compromise the grand jury's assurance of confidentiality to witnesses (California); and
- (7) Release of the report would be consistent with the public interest (New York, Washington, ABA).

After review of the report, courts have the authority to:

- (1) Call for further testimony (U.S., New Jersey);

- (2) Seal the report (U.S., New York, Florida, California);
- (3) Refer the report back to the grand jury for amendment consistent with the court's findings (U.S., New Jersey);
- (4) Expunge certain portions or all of the report (New Jersey, Florida, Missouri, ABA);
- (5) Review any reply submitted and possibly expunge portions (U.S., ABA); and
- (6) Hold in camera hearings (U.S., New Jersey, ABA).

#### Federal

The Organized Crime Act provides for judicial review of its grand juries' reports and proceedings with the following guidelines:

- (1) the report must address one of the statutorily authorized subjects;
- (2) the report must be based upon facts revealed during the course of investigation and be supported by a preponderance of the evidence;
- (3) each person named in the report and any reasonable number of witnesses on the person's behalf as designated by that person to the grand jury foreperson were afforded an opportunity to testify;
- (4) that a report addressing the subject of organized crime conditions not criticize identified persons; and
- (5) that the report not prejudice fair consideration of a pending criminal matter.

The judge may direct that additional testimony be taken if the report does not meet these guidelines, or must order the report sealed until the provisions are met.<sup>119</sup>

### California

A 1975 California Superior Court case held that although no California statute specifically authorizes judicial review of reports, a limited review is implicit in the enactment of statutory limits on investigatory and reporting authority. This review power is confirmed by common law decisions. The California court emphasized that "the scope of the superior court's reviewing role is strictly confined to ensuring that reports do not extend beyond the legal boundaries of the grand jury's broad reportorial power."<sup>120</sup> The court further defined its role by saying, "The court's sole function in this realm lies in its power to prevent the official filing of an illegal report: for example, a report on matters which the grand jury has not itself investigated or a report concerning activities of a distant municipality not lying within the grand jury's province."<sup>121</sup> The court in this case specifically noted that, "The superior court possesses no authority to edit or seal a report simply because the court disagrees with the report's conclusions, or believes that its recommendations were hastily reached or were not 'justified.'"<sup>122</sup>

### Florida

In Florida, the judge determines:

- (1) whether a grand jury's report deals with a subject matter that the grand jury is empowered to investigate; and
- (2) whether the grand jury's findings have a reasonable factual foundation in the evidence.

Improper report content has been held to include:

- (1) that which is outside grand jury authority; or

- (2) has no foundational basis in fact; or
- (3) is not germane to the subject matter under investigation.<sup>123</sup>

### New Jersey

Judicial review is defined in New Jersey by statute. Under the statute, the judge's power is extensive. The decision of the judge who reviews a report is subject to review for abuse of discretion by the state or any aggrieved person including any member of the reporting grand jury.<sup>124</sup>

The judge in this state is authorized by statute to examine the "presentment", and:

- (1) if it appears that a crime has been committed for which an indictment may be had, shall refer the presentment back to the grand jury with appropriate instructions (i.e., the report must not accuse an unindicted individual of criminal wrongdoing);
- (2) if a public official is censured, determine conclusively that the condemned action is inextricably related to a noncriminal failure on the part of the public official to discharge a public duty;
- (3) if it appears that the presentment is false, or is based on partisan motives, or indulges in personalities without basis, or if other good cause appears, shall strike the presentment either in full or in part;
- (4) determine if a substantial foundation exists for the public report.<sup>125</sup>

A 1961 New Jersey Supreme Court case established that the judge shall expunge the personal criticism in the report:

- (1) if it appears that the facts on which the condemnation is based are not true; or
- (2) if it appears that the facts on which the condemnation is based are in conflict or productive of diverse inferences; or
- (3) if reasonable question is raised as to whether the grand jury would have acted as it did had it had the additional facts.<sup>126</sup>

The report may not be published until the time for making a motion has expired or a judicial decision is made upon such a motion.

#### New York

The New York statute provides for judicial review to determine that the report:

- (1) addresses the allowed subjects;
- (2) is based upon a preponderance of credible and legally admissible evidence;
- (3) shows that persons named were given the opportunity to appear before the grand jury;
- (4) does not criticize individuals except the public official or servant under investigation; and
- (5) does not prejudice fair consideration of a pending criminal matter.<sup>127</sup>

A 1984 New York Appellate Court interpreted the New York statute to allow permanent sealing of the grand jury report unless three additional judicial review tests were met:

- (1) the grand jury was correctly instructed on the law relating to the matters being inquired into, including the standard of proof at grand jury;
- (2) the grand jury was informed of the option of issuing a report, and was allowed to decide whether to proceed that way; and
- (3) the report is supported by a preponderance of the credible and legally admissible evidence heard by the grand jury.<sup>128</sup>

#### Washington

The Washington statute provides for review not just by one judge, but by "a majority of the judges of the superior court or the county court."<sup>129</sup> The majority of judges are to determine that:

- (1) the findings in the report deal with matters of broad public policy affecting the public interest and do not identify or criticize any individual;
- (2) the release of the report would be consistent with the public interest and further the ends of justice; and
- (3) release of the report would not prejudice any pending criminal investigation or trial.<sup>130</sup>

#### ABA

The ABA Model Act provides that motions to expunge objectionable material from grand jury reports shall be made within ten days of receipt of notice by persons

named in reports. Hearings on motions to expunge are required to be held in camera.<sup>131</sup>

#### 4.3 Publication and Dissemination of Reports

Publication and dissemination of reports and access to the grand jury record on which reports are based have been addressed by other jurisdictions. In some jurisdictions, all grand jury reports may be made public and filed as public records. Elsewhere the decision to publish may depend upon whether or not a report is accompanied by an indictment, or a named party has been held to answer on criminal charges.

New York and New Jersey authorize transmittal of reports critical of public officials to appropriate disciplinary bodies.<sup>132</sup> Colorado and California permit publication of reports to exonerate persons investigated.<sup>133</sup> The federal courts in the Watergate case found limited dissemination of a grand jury investigative report appropriate where the receiving agency guaranteed that the report would remain confidential and where the report:

- (1) drew no accusatory conclusions;
- (2) deprived no named individual of an official forum in which to respond;
- (3) was not a substitute for indictments where indictments might properly have issued;
- (4) contained no recommendations, advice or statements that infringed on the prerogatives of other branches of government; and
- (5) rendered no moral or social judgments.<sup>134</sup>

Solutions to publication and dissemination problems depend, to a large extent, on the alternatives adopted for protection of persons named in grand jury reports and for defining the appropriate scope of judicial review.

## Federal

The best known federal grand jury investigation has been referred to as the "Watergate" investigation. That grand jury handed a report to the court with a two-page letter that gave the purpose of preparing and forwarding the report and its subject matter. The grand jury recommended that the report be transmitted to the Judiciary Committee of the House of Representatives, then considering a motion to impeach the President. The report was submitted together with indictments of seven presidential aides; accusing those aides of various illegal activities. The Watergate special prosecutors did not seek to indict President Nixon because there was a substantial question as to whether an incumbent President could be prosecuted, or as a policy matter, should be.

The contents of the report have never been disclosed.<sup>135</sup> Commentators assume that the report contained accusations of criminal conduct that was summarized without comment by the grand jury.<sup>136</sup> The President's counsel was allowed to read the two-page letter of transmittal and informed the court that the President had no recommendation to make on its release.

The judge held a hearing to allow all interested parties to state their positions concerning the release of the report. He then ordered the report released to the House Committee as requested by the grand jury. The judge emphasized as part of his decision, that the report in this case was not improper in any of the ways that had been noted in federal cases in which the power to report had been denied.<sup>137</sup>

## California

California statutes provide for reports of exoneration. "A grand jury which investigates a charge against a person, and as a result thereof cannot find an indictment against such person, shall, at the request of such person and upon the approval of the court which empaneled the grand jury, report or declare that a charge against such person was investigated and that the grand jury could not as a result of the evidence presented find an indictment."<sup>138</sup>

Colorado

Colorado law provides that a grand jury report or a particular portion of a report may be made public only if the chief judge of the district court finds that the individual or individuals seeking the release of the report will be exonerated.<sup>139</sup> A commentator notes that the use of grand jury reports in Colorado has been "almost completely abandoned" as a result.<sup>140</sup>

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**FOOTNOTES**

FOOTNOTES

1. S. RES. 5 am, 14th Leg., 1st Spec. Sess., 1985 Alaska.
2. ALASKA CONST. art I, §8.
3. S. Res. 5 am, 14th Leg., 1st Spec. Sess., 1985 Alaska.
4. WEBSTER'S NEW COLLEGIATE DICTIONARY (Springfield 1973).
5. Id.
6. Id.
7. See FRANKEL AND NAFTALIS, THE GRAND JURY: AN INSTITUTION ON TRIAL (New York 1977) [hereinafter cited as FRANKEL]; WHYTE, Is the Grand Jury Necessary?, 45 VA. L. REV. 461, 462 (1959) [hereinafter cited as WHYTE]; KUH, The Grand Jury "Presentment": Foul Blow or Fair Play?, 55 COLUM. L. REV. 1103, 1106 (1955) [hereinafter cited as KUH]; Recent Developments in the Law of the Federal Grand Jury, UTAH L. REV. 170, 171 (1977); HOLMES, THE COMMON LAW 207 (Boston/Toronto 1963). Some commentators trace grand jury origins to Greek, Roman, and Scandinavian citizen bodies existing prior to the appearance of the assize in England; however, no link has been established, and information about the bodies is so scarce as to make comparisons meaningless. See also, SCHIMIZZI, Investigating Grand Juries: A Comparison of Pennsylvania's Judicially and Legislatively Created Bodies, 18 DUQ. L. REV. 933, 936-7 (1980) [hereinafter cited as SCHIMIZZI]. For a discussion of the history and role of the grand jury, see also, Costello v. United States, 350 U.S. 359, 362 (1956); see also, United States v. Calandra, 414 U.S. 338, 343 (1974).
8. CASSELL'S NEW COMPACT FRENCH DICTIONARY (New York 1971).
9. FRANKEL, supra note 7, at 9.

10. Id.
11. Id.
12. Id. It is interesting to note that in Connecticut, in cases punishable by death or life imprisonment, neither the State's Attorney nor any counsel for the prosecution is allowed to appear before the grand jury. The prosecutor remains outside the grand jury room and sends the State's witnesses in one at a time for examination by the grand jury. *Cobbs v. Robinson*, 528 F2d 1531, 1538 (2d Cir. 1975), cert. denied, 96 S. Ct. 1419 (1976).
13. See supra note 7.
14. FRANKEL, supra note 7, at 10.
15. KUJH, supra note 7, at 1109.
16. Id. at 1110.
17. WHYTE, supra note 7, at 462.
18. EMERSON, GRAND JURY REFORM: A REVIEW OF KEY ISSUES, NLJ 10 (Washington, D.C. 1983) [hereinafter cited as EMERSON].
19. FRANKEL, supra note 7, at 10.
20. Id. at 10-11.
21. U. S. CONST., amend V.
22. FED. R. CRIM. P. 7(a) provides in pertinent part: "An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information."

23. FED. R. CRIM. P. 17.
24. See 18 U.S.C. §6001 et seq.
25. The Federal Rules of Evidence are made inapplicable to grand jury proceedings. FED. R. EVID. 102; FED. R. EVID. 1101(d) (2).
26. FED. R. CRIM. P. 7 (a).
27. FRANKEL, supra note 7, at 31-32.
28. HASSMAN, Authority of Federal Grand Jury to Issue Indictment or Report Charging Unindicted Persons with Crime or Misconduct, 28 A.L.R. Fed 851, 854. But see ORG. CRIME CONTROL ACT of 1970, 18 U.S.C.A. §§3331-3334.
29. Application of United Electrical Workers, 111 F. Supp. 858 (S.D.N.Y. 1953).
30. See United States v. Cox (CA 5 Miss 1965) 342 F2d 167, cert. denied 381 U.S. 935, 14 L. Ed. 2d 700, 85 S. Ct. 1767 (1965) (Wisdom, J., concurring).
31. See Report & Recommendation of June 5, 1972 Grand Jury, 370 F. Supp. 1219 (D.C., 1974).
32. ORG. CRIME CONTROL ACT OF 1970, 18 U.S.C.A. §§3331-3334. See also, FRANKEL, supra note 7, at 32.
33. The special grand jury's reporting function is limited to situations involving "organized criminal activity"; before the report can be made public the court must be satisfied that it is supported by a preponderance of the evidence; if the report is critical of an identified person, that person and a number of witnesses chosen by that person, must have an opportunity to testify before the grand jury; the report cannot be made public until each public officer or employee named in it has been served with a copy of it, with the right to appeal before the report is accepted and to file an answer to be appended to the report. See also, 1C. WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, §110 (2d ed. 1982).

34. FRANKEL, supra note 7, at 32. See also HASSMAN, supra note 28.
35. Supra note 31, at 1222-1226.
36. *Hurtado v. California*, 110 U.S. 516 (1884).
37. See *Branzburg v. Hayes*, 408 U.S. 665 (1972).
38. New Jersey, South Carolina, Tennessee, Virginia. See EMERSON, supra note 18, at 12.
39. Alabama, Alaska, Delaware, District of Columbia, Georgia, Kentucky, Maine, Mississippi, New Hampshire, New York, North Carolina, Ohio, Texas, West Virginia. Id.
40. Connecticut, Florida, Louisiana, Massachusetts (In Massachusetts felonies punishable by five years or less in state prison may be prosecuted on the basis of a complaint in the District Court. However, if this option is selected instead of prosecuting the case in Superior Court following an indictment, the defendant may not be sentenced to state prison but only to 2 1/2 years in the House of Corrections. Capital offenses and felonies punishable by more than five years in prison must be prosecuted by indictment.), Minnesota, Rhode Island. Id.
41. Arizona, Arkansas, California, Colorado, Idaho, Hawaii (Hawaii legislated this option after the Emerson report was written), Illinois, Indiana, Iowa, Kansas, Maryland, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Vermont, Washington, Wisconsin, Wyoming. Id.
42. FRANKEL, supra note 7, at 15.
43. EMERSON, supra note 18, at 69.

44. See FRANKEL, supra note 7, at 32 "The majority of courts considering the questions have disallowed reports unaccompanied by indictment". BAUERMEISTER, Criminal Rule 6: Grand Jury Procedure, Alaska Court System (September 30, 1985) (unpublished memorandum) [hereinafter cited as BAUERMEISTER] citing, The Grand Jury as an Investigatory Body, 74 HARV. L. REV. 590, 595 (1961); KUH, supra note 7, at 1110, "Despite the historic foundation for the reporting function a practice apparently almost three centuries old...appears to condemn the use of reports by grand juries."
45. FRANKEL, supra note 7; SEARS, Grand Jury May Not Report on Misconduct of Public Official Without an Indictment, 43 MO. L. REV. 350, 354 (1978).
46. FRANKEL, supra note 7.
47. Interim Report of the Grand Jury convened for the March Term of the Seventh Judicial District of Missouri 1976, 553 S.W. 2d 479 (1977).
48. 38 Am. Jur. 2d., Grand Jury §30 (1968).
49. See Camden County Grand Jury, 10 N. J. 23, 89 A.2d 416 (1952); Presentment by Camden County Grand Jury, 169 A.2d 465, 470 (1961).
50. EMERSON, supra note 18, at 70; BAUERMEISTER, supra note 44, at 19-45.
51. "If the history of the grand jury reveals an institution that all too often has failed to achieve its idealized function of buffering innocents from official misuse of the power to prosecute, and if, worse still, it has become perverted into a weapon for harassing and silencing the not-so-loyal opposition, questions about its possible abolition squarely confront us." CLARK, THE GRAND JURY: THE USE AND ABUSE OF POLITICAL POWER (New York 1975); "The most sweeping design for change remains...the still powerful body of opinion that favors abolition of the grand jury. The effort proceeds not only in the states but also in the Congress...." FRANKEL, supra note 7, at 118.

52. More than half of the states have abolished the requirement of an indictment and now give the prosecutor the discretion to choose between the preliminary hearing and the grand jury for case screening. FRANKEL, supra note 7, at 16; EMERSON, supra note 18, at 11-13. See also, EMERSON and AMES, The Role of the Grand Jury and the Preliminary Hearing in Pretrial Sentencing, NIJ (1984). The data for these studies were collected before Hawaii became the 26th State to offer the option, in November of 1982.
53. See RUBINSTEIN, The Grand Jury in Alaska: Tentative Recommendations to the Judicial Council, Anchorage: Alaska Judicial Council (February, 1975), and EMERMAN, Report on Preliminary Hearings Experiment, Alaska Court System (May 22, 1979) (unpublished memorandum). After a one year experiment involving the prosecution of a higher portion of felony cases in Anchorage using preliminary hearings the results were not clear and the experiment was not continued. No further action was taken.
54. ABA GRAND JURY POLICY AND MODEL ACT (1977-82).
55. EMERSON, supra note 18, at 17.
56. Id. at 13-14. See also, ARAGON, The Federal and California Grand Jury Systems: Historical Function, Procedural Differences and Move to Reform, 5 CRIM. JUST. J. 5, (1981).
57. Precise statistics are not available because formal initiation processes do not distinguish between the charging and investigating activities of grand juries. Judges and prosecutors agree that it is the charging function of the grand jury which is exercised in at least 90% of the cases heard. This conclusion is supported by randomly checked totals in the grand jury files of several jurisdictions.
58. ALASKA CONST., art. I, sec. 8; ALASKA STAT. §12.40.030.
59. FRANKEL, supra note 7, at 10.
60. At least twenty-six states have made indictment by grand jury optional. See EMERSON, supra note 18, at 12.

61. Id. at 13.
62. The record of the Constitutional Convention is contained in ALASKA CONST. CONV. PROC. (1955). All discussion concerning grand juries is found in the minutes recorded at 1307-1308, 1322-1344, and 1395-1409. See also, BAUERMEISTER, supra note 44.
63. Id. at 1307.
64. The statements quoted at pp. 16-19 and p. 31 of this report are taken directly from ALASKA CONST. CONV. PROC. (1955) and are referenced by speaker and page number.
65. For a general summary of the law during early days of the Alaska Territory, see CARTER'S ANN. ALASKA CODES, "Introduction" (Callaghan 1900).
66. This use of the word presentment originated in the days of the Grand Assize in England. The members of the Grand Assize routinely "presented" charges to the king. The word presentment is used with a different meaning in Rule 6(o) of the Alaska Criminal Rules of Procedure. There it is used to mean a statement of the facts of an ongoing case that is presented by the grand jury along with their questions to the court for instructions on the law.
67. ALASKA COMP. LAWS §5167 (1933).
68. ALASKA R. CRIM. PROC. 6(e).
69. See, e.g. YTREBERG, Validity and Construction of Statute Authorizing Grand Jury to Submit Report Concerning Public Servant's Non-Criminal Misconduct, 63 A.L.R. 3d. 586 (1975); HASSMAN, supra note 28; Recent Developments in the Law of the Federal Grand Jury, UTAH L. REV. 170, 171 (1977).
70. 18 U.S.C.A., §§3331-3334.
71. 1851 Cal. Stat. ch. 29.

72. CAL. PENAL CODE ch. 109 (1880).
73. 1911 Cal. Stat. ch. 200.
74. 1943 Cal. Stat. ch. 93.
75. 1961 Cal. Stat. ch. 1461.
76. 1973 Cal. Stat. ch. 1036.
77. People v. Superior Court of Santa Barbara County, 531 P2d 761, 765 (California 1975).
78. MO. CONST. art. I, §16.
79. MO. ANN. STAT. §540.020 (Vernon 1986).
80. 42 PA. CONS. STAT. ANN. §4543(b) (Purdon 1980).
81. SCHIMIZZI, supra note 7, at 938-39.
82. See Id. at 934, footnote 4 citing Dauphin County Grand Jury Investigation Proceedings (No. 1), 332 Pa. at 295, 2 A.2d at 787; Appeal of Hartranft, 85 Pa. 433 (1878); Commonwealth v. Bestwick, 396 A.2d 1311, 1315 (Pa. Super. Ct. 1978); Grand Jury Investigation of Western State Penitentiary, 173 Pa. Super. Ct. 197, 203-04, 96 A.2d 189, 192 (1953).
83. ALASKA STAT. §12.40.030.
84. ALASKA STAT. §12.40.040.
85. FRANKEL, supra note 7, at 6.
86. Interview with Harry Davis, District Attorney, Fourth Judicial District, Alaska, November 1985.

87. 42 PA. CONS. STAT. ANN. §4543(b) (Purdon 1980).
88. NEB. REV. STAT. §29-1401 (1979), NEV. REV. STAT. §6.130(1) (1981); N.M. CONST. art II, §14; N.D. CENT. CODE §29-10.1- 02(3) (1974); OKLA CONST. art. II, §18.
89. ALASKA CONST. art I, §8.
90. See supra note 64.
91. ALASKA GRAND JURY HANDBOOK 7.
92. See CARTER'S ANN. ALASKA CODES (Callaghan 1900); COMP. LAWS TERR. ALASKA (1913).
93. SPECIAL REPORT OF THE GRAND JURY IN THE FOURTH JUDICIAL DISTRICT AT BETHEL FOR THE SESSION BEGINNING DECEMBER 8, 1983 AND ENDING APRIL 27, 1984.
94. Id.
95. THE WORKS OF JAMES WILSON, vol. II, 537 (1967), cited in Report and Recommendation of June 5, 1972 Grand Jury, 370 F. Supp. 1219, 1222-23 (1974).
96. U.S. v. Cox, 342 F. 2d 167, 184 (5th Cir.) cert. denied 381 US 935, 85 S. Ct. 1767, 14 L. Ed. 2d 700 (1965).
97. Congressman Poff, 116 CONG. REC. 35-291.
98. ORG. CRIME CONTROL ACT of 1970, 18 U.S.C.A. §§3331-3334.
99. CAL. PENAL CODE §939.9 (West 1985).
100. MO. CONST., art. I, §16.
101. Interim Report of the Grand Jury Convened for the March Term of the Seventh Judicial District of Missouri 1976, 553 S.W. 2d 479 (1977).

102. MO. ANN. STAT. §540.020 (Vernon 1986).
103. Supra note 101.
104. N.J. Ct. Rules 3: 6-9(a).
105. N.Y. CRIM. PROC. LAW §190.85(3) (McKinney 1982).
106. 42 PA. CONS. STAT. ANN. §4542 (Purdon 1980).
107. WASH. REV. CODE §10.27.160 (1974).
108. ABA GRAND JURY PRINCIPLES, Principle 8 comment.
109. Id.
110. ORG. CRIME CONTROL ACT OF 1970, 18 U.S.C.A. §§3331-3334.
111. Id.
112. See, e.g. U.S. v. Briggs, 514 F.2d 794 (5th Cir. 1975).
113. CAL. PENAL CODE §930 (West 1985).
114. FLA. STAT. §905.28(1) (West 1985).
115. GA. CODE ANN. §§89-9907, 9908 (1980).
116. N.J. Ct. Rules 3:6-9(c).
117. N.Y. CRIM. PROC. LAW §190.85 (McKinney 1982).
118. ABA MODEL GRAND JURY ACT §206 (1982).
119. ORG. CRIME CONTROL ACT OF 1970, 18 U.S.C.A. §§3331-3334.

120. People v. Superior Court of Santa Barbara County, 119 Cal. Rptr. 193, 531 P.2d 761, 763 (1975).
121. Id.
122. Id.
123. Miami Herald Publishing Co. v. Marko, 352 So. 2d 518 (1977).
124. N.J. Ct. Rules 3:6-9.
125. N.J. Ct. Rules 3:6-9(c).
126. Presentment by Camden County Grand Jury, 34 N.J. 378, 169 A.2d 465 (1961), in accord, Presentment of the Essex County Grand Jury, 46 N.J. 467, 217 A.2d 874 (1966).
127. N.Y. CRIM. PROC. LAW §190.85(4) (McKinney 1982).
128. Matter of Report of Special Grand Jury, Nassau County, 477 NYS 2d 34 (NY App. 1984); and Matter of April, 1983 Onondoga County Grand Jury, 476 NYS 2d 407 (NY App. 1984).
129. WASH. REV. CODE §10.27.60 (1974).
130. Id.
131. ABA MODEL GRAND JURY ACT §206 (1982).
132. N.Y. CRIM. PROC. LAW §190.85(3) (McKinney 1982); N.J. Ct. Rules 3:6- 9(d).
133. COLO. REV. STAT. §16-5-205(4) (1978); CAL. PENAL CODE §939.91(a) (West 1985).
134. Report and Recommendations of June 5, 1972 Grand Jury, 370 F. Supp. 1219, 1226 (D.C., 1974).
135. See HASSMAN, supra note 69, at 862-3.

136. Id. at 862.
137. Supra note 31, at 1226.
138. CAL. PENAL CODE §939.9(a) (West 1985).
139. COLO. REV. STAT. §16-5-205(4) (1978).
140. EMERSON, supra note 18, at 72.

APPENDIX A

SENATE RESOLUTION REQUESTING  
STUDY & RECOMMENDATIONS

STATE OF ALASKA  
SENATE

1985

First Special Session

Source

SR 5 am

Senate

Resolve No.

4



Requesting Judicial Council recommendations on grand jury investigative procedures.

**BE IT RESOLVED BY THE SENATE:**

WHEREAS Section 9 of Article IV of the Constitution of the State of Alaska provides:

The judicial council shall conduct studies for improvement of the administration of justice, and make reports and recommendations to the supreme court and to the legislature at intervals of not more than two years. The judicial council shall perform other duties assigned by law; and

WHEREAS Section 8 of Article I of the Constitution of the State of Alaska provides in relevant part:

The power of grand juries to investigate and make recommendations concerning the public welfare or safety shall never be suspended; and

WHEREAS the strengthening of the grand jury procedures is vital as both a sword and a shield since as a sword it is the terror of criminals and as a shield it is the protection of the innocent against unjust prosecution; and

WHEREAS the federal government and many states have defined investigative powers and procedures of grand juries; and

WHEREAS under the constitutional mandate the Judicial Council is the appropriate body to study the investigative power of the grand jury and make recommendations to the supreme court and the legislature concerning procedures involved in use of that

power;

BE IT RESOLVED that the Senate respectfully requests the Judicial Council to study use of the power of the grand jury to investigate and make recommendations and that the council make recommendations to the supreme court and the legislature to assure effective and proper use of that power with effective safeguards to prevent abuse and assure basic fairness; and be it

FURTHER RESOLVED that the Senate respectfully requests the Judicial Council to consider a possible amendment to the State Constitution for presentation to the voters for ratification concerning the need to strengthen the grand jury system consistent with due process and standards established through publications including but not limited to materials published by the National Institute of Justice, United States Department of Justice, Grand Jury Reform: A Review of Key Issues, 1983.

APPENDIX B

ADDITIONAL ISSUES

## APPENDIX B

### ADDITIONAL ISSUES

Several issues unrelated to the reporting function were identified during the course of the Judicial Council's grand jury study. These issues are reviewed briefly in this Appendix to provide a resource for future research. The issues fall into three categories: roles of judge, prosecutor and grand jury; rights of investigated individuals; and confidentiality of proceedings, returns and records.

#### Role of the Judge, Prosecutor and Grand Jury

The operation of the grand jury involves a balancing of powers among the judge, the prosecutor, and the grand jury.

#### The Judge

The grand jury is an arm of the court. The judge empanels and charges the grand jury, rules on the question of the grand jury's power and decides matters submitted on presentment. The judge receives and reviews the grand jury's returns and, ultimately, discharges the grand jury.

#### The Prosecutor

The routine operation of the grand jury is directed by the state's prosecutor. The prosecutor decides what cases will be investigated, who will be brought before the grand jury, and what the charges are to be. The prosecutor questions witnesses before the grand jury, presents documents and other physical evidence, and instructs the grand jury on law and procedure.

#### The Grand Jury

The grand jury exercises its charging function by deciding whether or not to indict. In the exercise of its investigative function, the grand jury is empowered to initiate investigations, to call witnesses, and to request that indictments be prepared.

Most questioning is conducted by the prosecutor, although grand jurors are empowered to question witnesses. When grand jurors ask their own questions, the prosecutor can guard against prejudicial matter by stating objections before the witness answers the question. In a 1976 New York case, a judge quashed a grand jury's report because the prosecutor had refused to let the panel question witnesses directly.<sup>1</sup>

### Clarification of Roles

Commentators on grand jury reform<sup>2</sup> suggest that the roles of the judge, prosecutor and grand jury can be clarified through development of a set of uniform and comprehensive instructions to grand jurors.

The judge administers the oath to a newly empaneled grand jury and gives it its "charge". Today in Alaska, the charge is an introduction to the duties, and a reminder of the responsibilities of the grand jury. The judge's charging instructions vary in style from court to court with minor variations in content. The instructions are brief, cursory and formal. In some courts the relevant statutes are read verbatim. The judge's instructions are both read to the grand jurors and provided in written form. In Anchorage an unofficial "Grand Jury Handbook" is available but is not consistently distributed.

After the judge's "charge", each new grand jury is "oriented" by a state prosecutor. The prosecutor describes the criminal justice system and the grand jury's role. In Anchorage the orientation presentation is currently on videotape.

The ABA states, "It is the duty of the court which empanels a grand jury fully to charge the jurors by means of a written charge completely explaining their duties and limitations."<sup>3</sup> The ABA Model Grand Jury Act provides guidelines for the contents of the charge to the grand jury:

Upon empanelment of each grand jury, the court shall properly instruct or charge the grand jury, and shall inform the grand jury inter alia of the following:

- (a) its duty to inquire into offenses against the criminal law alleged to have been committed within the jurisdiction;

- (b) its independent right to call and interrogate witnesses;
- (c) its right to request the production of documents or other evidence; including exculpatory evidence;
- (d) the necessity of finding credible evidence of each material element of the crime or crimes charged before returning a true bill;
- (e) its right to have the prosecutor present it with draft indictments for less serious charges than those originally requested by the prosecutor;
- (f) the obligation of secrecy; and
- (g) such other duties and rights as the court deems advisable.<sup>4</sup>

#### RIGHTS OF INVESTIGATED INDIVIDUALS

Grand jury reform nationally is concerned with the due process rights of witnesses and targets. The grand jury confronts the witness in a secret proceeding and is not required to define its purposes to the witness. Often the witness cannot be accompanied by a lawyer,<sup>5</sup> and may not be aware of his/her legal rights. As a result, a "bill of rights" for witnesses and targets has been suggested. The rights to be guaranteed and safeguarded are:

- To Notice;
- To Counsel;
- Against Self-Incrimination; and
- To Be Heard.

#### Notice

No Alaska statute or rule addresses witness or target rights to notice of their rights. Prosecutors describe informal policies to provide discretionary oral notice. Some guidance may be found in an unpublished memorandum opinion of the Alaska Court of Appeals.<sup>6</sup>

A prosecutor in that case introduced testimony given by the defendant at a preliminary hearing of another individual. One relevant question addressed in the opinion was whether the defendant was entitled to suppression of his statements and

dismissal of his indictment because the prosecutor did not warn him that he was a target witness before interrogating him at the preliminary hearing. The court states in the opinion that, "This is the first case in which we have been asked to hold that a potential defendant must be given target witness warnings before he testified at an accomplice's grand jury proceeding or preliminary hearing."<sup>7</sup> In a footnote that court defined "target witness" to include: (1) persons whom the state already has probable cause to arrest; (2) persons whom the state is either actively investigating or planning to investigate; and (3) persons who, during examination, clearly become the subjects of future investigation. The court added that "A person who fits within one of these three categories would be a 'target' witness unless the state had made a policy decision not to prosecute the witness prior to the time he or she was subpoenaed to testify."<sup>8</sup> The court concluded that, "such a witness is entitled to be warned that he is a suspect and that he should seek independent legal advice before testifying."<sup>9</sup> In another footnote the court stated that its conclusion was based on ABA Standards Relating to the Prosecution Function, Section 3-3.6 (Supp. 1982).<sup>10</sup>

The unpublished opinion goes on to distinguish witness rights from target rights:

While we agree that typical witnesses are not entitled to warnings prior to testifying at civil or criminal proceedings, see 8 J. Wigmore, Evidence Sections 2268-69 (McNaughton rev. ed. 1961), we believe that the target witness is in a substantially different situation from the typical witness in regard to the protection of his privacy. A true target witness is almost certain to incriminate himself if he testifies fully and freely regarding his accomplice's guilt. His exposure is readily foreseen by the prosecution. In contrast, a non-target witness is by definition not known to be involved in the defendant's criminality. The prosecutor cannot therefore intentionally use the defendant's preliminary hearing or grand jury proceeding as a means of building a case against the non-target witness. It is only where the prosecutor knows that he will be proceeding against the witness that he has substantial incentive to turn the preliminary hearing into an inquisition.<sup>11</sup>

An article summarizing relevant case law states that most federal courts faced with the issue of notice in the context of grand jury proceedings have held that

Miranda-type warnings are not required in the grand jury context. Some state courts have approved, but not mandated, witness notice.<sup>12</sup> Actual procedures "vary from jurisdiction to jurisdiction and sometimes from prosecutor to prosecutor."<sup>13</sup> Colorado has outlined the elements of proper notice to witnesses in a 1977 statute, but leaves the application of such notice to the discretion of the prosecutor.<sup>14</sup>

Some states restrict the notice requirement to target witnesses. New Mexico law requires that all targets be notified of their status unless the prosecutor determines that notification may result in flight, endanger other persons, obstruct justice, or the prosecutor is unable with reasonable diligence to notify said person.<sup>15</sup> South Dakota law states that targets may be given the opportunity to testify and if the target chooses to take advantage of this opportunity, notice of all rights must be given.<sup>16</sup>

The relevant ABA principle states that every witness, including target witnesses, should be informed of:

- (1) privilege against self-incrimination;
- (2) right to counsel;
- (3) risks of perjury;
- (4) target status.<sup>17</sup>

The Model Act requires that the subpoena inform witnesses of these rights, as well as the general subject matter of the investigation and the substantive criminal statute or statutes which are alleged to have been violated.<sup>18</sup>

### Counsel

The Sixth Amendment to the U.S. Constitution assures an "accused" the right to counsel. The grand jury target witness is not literally covered, because a target is merely a suspect, not having been formally charged.

The grand jury witness traditionally has been, and generally still is, prohibited from having a lawyer in the grand jury room. At the federal level and in most states, the witness is afforded the right to leave the grand jury room to consult with counsel. Prosecutors assert that this procedure allows sufficient

access to counsel, and that counsel in the grand jury room would disrupt proceedings. Proponents of the right to counsel in the grand jury room argue that the present arrangement is awkward and is itself disruptive, and may not adequately protect witness rights. At least fifteen states now allow counsel in the grand jury room.<sup>19</sup> There is some national reform pressure to extend this practice. The Chairman of the American Bar Association's Grand Jury Committee recently testified before Congress that the grand jury is the only remaining critical stage in the criminal justice process at which a person who desires a lawyer to be present is denied that constitutional right.<sup>20</sup>

Provisions for right to counsel in the grand jury room have been adopted in a number of states, but with considerable variance. In Virginia and Pennsylvania the provision applies to special grand juries that are only investigative. In Washington State, right to counsel is available to all witnesses except those testifying under a grant of immunity. Minnesota and New York, in contrast, give the right to counsel only to witnesses who have specifically waived their right to immunity. In Michigan the right to counsel is only available to witnesses testifying under a grant of immunity. In Arizona and New Mexico, the right to counsel is available to target witnesses. In Colorado, Illinois, Kansas, Massachusetts, Oklahoma, South Dakota, and Wisconsin, the right to counsel is granted to all witnesses.<sup>21</sup>

The ABA Model Act provides:

Counsel

- (a) A witness before the grand jury shall have the right to be accompanied by counsel in his or her appearance before the grand jury. Such counsel shall not be permitted to address the grand jurors, raise objections, make arguments, or otherwise disrupt proceedings before the grand jury. Such counsel is authorized to disclose matters which occur before the grand jury to the same extent as is permitted to the client.
- (b) If the court determines that counsel for a grand jury witness has violated subsection (a), then the court may take such measures as are necessary to ensure compliance with this rule, including exclusion of the offending counsel from the grand jury room.<sup>22</sup>

## Against Self-Incrimination

The grand jury may not force a witness to answer questions or produce records that violate that individual's Fifth Amendment right against self-incrimination. To legally obtain self-incriminating evidence from a witness prosecutors may grant immunity. There are two basic types of immunity:

- (1) Use Immunity: Forbids later use against the witness of either the evidence the witness has been forced to give or evidence derived from his testimony.
- (2) Transactional Immunity: Protects against prosecution for any of the transactions or occurrences that are subjects of the compelled testimony.<sup>23</sup>

Transactional immunity is the broader of the two, and argued by some to be the only workable approach. Alaska statutes offer use immunity,<sup>24</sup> modeled after provisions in federal law.<sup>25</sup> In practice, however, transactional immunity has been granted to some witnesses in Alaska. Those who support transactional immunity argue that use immunity leaves the witness exposed to the danger that new evidence might be found and used against him or her as a result of new leads, new witnesses and new information arising from the compelled testimony. The U.S. Supreme Court addressed this argument by holding that in any later case the burden would be on the prosecutor to prove the absence of any "taint" in the new evidence.

The immunity provisions in other states vary. The broadest right is granted in New York where transactional immunity is granted to all witnesses. Immunity must be specifically waived to allow any prosecution concerning the transactions or occurrences which are the subject of testimony.<sup>26</sup>

## To Be Heard

The right of the target of an investigation to be heard may arise at two stages:

- (1) during the grand jury proceedings; and
- (2) upon the issuing of a report.

The right of a target at the second stage is discussed above in Chapter 4.

No statute in Alaska specifically grants a target the right to testify. In practice, very few targets ask to testify because of the dangers of self-incrimination, and because of the hesitancy to reveal the defense case to the prosecutor. Grand jury reformers suggest that a target should have an unqualified right to testify before the grand jury.

The U.S. Attorney's Manual notes that although there is no legal right to testify, refusal to allow a target to testify may create the appearance of unfairness. The Manual suggests the following guidelines:

Under normal circumstances, where no burden upon the grand jury or delay of its proceedings is involved, reasonable requests by a "subject" or "target" of an investigation...personally to testify before the grand jury ordinarily should be given favorable consideration provided that such witness explicitly waives his privilege against self-incrimination and is represented by counsel or voluntarily and knowingly appears without counsel and consents to full examination under oath.<sup>27</sup>

The provisions of other states vary. States that do grant a right to testify to the target characteristically limit that right. New Mexico law requires that a witness be provided an opportunity to testify except when there is reason to believe the target will flee or obstruct justice or when the prosecutor cannot locate the target.<sup>28</sup> New York grants a right to testify, but the witness must waive all rights to immunity.<sup>29</sup> Under Colorado law, a target may ask to testify, and a written record must be made and kept of all denials and the reason for each. The law also provides for a petition to the court for a hearing on a denial.<sup>30</sup> The American Bar Association recommends that a target of a grand jury investigation be granted the right to testify before the grand jury provided that the witness signs a waiver of immunity.<sup>31</sup>

#### Confidentiality of Proceedings, Returns, & Records

Confidentiality issues include:

- classification of proceedings, returns, records;

- procedures for effecting dispositions (i.e., sealing, expungement, public release); and
- security of proceedings and records.

### Classification

The secret or public nature of grand jury selection, swearing, and charging procedures is not clear. In Anchorage, proceedings in which grand jurors are selected are recorded in "public" tapes in "open" court. The names of grand jurors are announced on the record in open court. After the hearing, the log notes of the proceedings are kept confidential. The names of grand jurors are kept confidential and only released upon order of the court. The procedure in Nome is the same. The procedure is similar in Fairbanks; no one except grand jurors may be in the courtroom. In Ketchikan the names of grand jurors are never announced on the record except for those jurors who are excused or otherwise named in the selection procedure.<sup>32</sup>

Signed indictments, once the accused has been held to answer, are matters of public record. No-true-bills, if the accused has been arrested or otherwise legally "held to answer," are also matters of public record. When a suspect or target never has been legally "held to answer", and the grand jury finds a no-true-bill, this return is not a matter of public record. The draft indictment, the log notes and the recordings in such a situation must be destroyed, leaving no record at all of the proceeding. The classification of log notes and recordings in the other cases described above is not clear. The status of the proceeding at which returns are made, and the records of that proceeding are not clear.

### Procedures

The rule requiring destruction of grand jury returns and records of proceedings in some cases is not enforced because no method of enforcement has been instituted. No time limit for accomplishing the required disposition exists. Because the recording of many proceedings are done one after the other on a reel-to-reel tape, it is difficult to erase or splice out specific portions of the record. Recently a court order issued in the Third Judicial District attempting to address part of the problem. The relevant part of this order states:

The court further interprets Criminal Rule 6(n) as requiring the destruction and/or erasure of the indictment, evidence, minutes, notes and record of any (sic) grand jury proceeding in which a "no true bill" has been returned. However, such indictment, evidence, minutes, notes and records shall be maintained, under seal, for sixty days to provide the state or defendant an opportunity to apply to the court or leave to have access to such materials, should good cause for access thereto be shown.<sup>33</sup>

The above rule does not provide procedures for effecting sealing, expungement, or publication of grand jury minutes and reports. Grand jury records reviewed in the course of this study were not classified uniformly as to their confidentiality.

### Security

The major reasons for grand jury secrecy were listed by the U.S. Supreme Court as follows:

- (1) to prevent the escape of those whose indictment may be contemplated;
- (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors;
- (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it;
- (4) to encourage free and untrammelled disclosure by persons who have information with respect to the commission of crime; and
- (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.<sup>34</sup>

In Alaska, a breach of security occurred during the 1985 state office lease investigation leading to publication of a court recorder's log notes in the media prior to the conclusion of the grand jury's secret deliberations. In other jurisdictions, breaches of confidentiality have resulted from confusion about proper classifications for records of proceedings. In 1980, the General Accounting Office of the federal government conducted a study of the federal district court system to determine sources of grand jury leaks, and ways to address them. The major cause of leaks according to this report was confusion about what information must be kept secret. Approximately 60% of the leaks were attributable to this confusion. The next most frequent source of leaks (about 20%) was the government attorney or workers in that office. The third most common cause of leaks was inadequate security provisions, at about 5%. A few leaks were noted from court reporters and grand jurors. No leaks were attributed to witnesses. Twenty percent of the sources for leaks were unknown.<sup>35</sup>

The recommendations of the GAO report to remedy the occurrence of federal grand jury leaks could be followed in any court system:

- (1) Developing rules and laws which clearly define what must be kept secret during the duration of grand jury proceedings, including specific guidelines for handling (1) preindictment proceedings, (2) grand jury subpoenas, (3) evidence developed independently of a grand jury but later introduced to it, (4) duplicates and copies of original documents presented to a grand jury, and (5) internal government memoranda and other documents that tend to disclose what transpires before a grand jury;
- (2) Reviewing plans so that courts and government attorneys' offices are in a position to react appropriately whenever situations calling for maintaining the confidentiality of grand juror names arise;
- (3) Establishing guidelines setting forth the minimum physical security requirements needed to protect the secrecy of grand jury materials;

- (4) Requiring each custodian of grand jury materials, including court appointed reporters, to establish procedures consistent with the security guidelines and document them in a security plan to be approved by the appropriate court;
- (5) Providing for periodic audits by the court administrator's office of all custodians of grand jury materials to determine whether they are complying with appropriate security plans and whether security procedures need to be improved; and
- (6) Evaluating the physical security around grand jury rooms and developing an appropriate plan to upgrade and modify deficient facilities to insure that the secrecy of grand jury proceedings will not be compromised.<sup>36</sup>

APPENDIX B

NOTES

1. Matter of Four Reports of the Nassau County Grand Jury Designated as Panel No. 4 for the April 1975 Term of the County Court of Nassau County (Nassau Cty. Ct. April 27, 1976).
2. See FRANKEL AND NAFTALIS, THE GRAND JURY: AN INSTITUTION ON TRIAL (New York 1977) [hereinafter cited as FRANKEL]; EMERSON, GRAND JURY REFORM: A REVIEW OF KEY ISSUES, NLJ (Washington, D.C. 1983) [hereinafter cited as EMERSON]; ABA MODEL GRAND JURY ACT (1982).
3. ABA GRAND JURY PRINCIPLES, PRINCIPLE #22.
4. ABA MODEL GRAND JURY ACT §204(1) (1982).
5. Many states are now allowing counsel in the grand jury room for certain purposes or in a limited role. See EMERSON supra note 2, at 16.
6. Cox v. State, No. 677, unpub. op. (Alaska Ct. App. Aug. 22, 1984).
7. Id.
8. Id.
9. Id.
10. Id.
11. Id.
12. SCHNEIDER, The Grand Jury: Powers, Procedures, and Problems, 9 COLUM. J. L. and SOC. PROBS. 681, 715 (1973).

13. EMERSON, supra note 2, at 84.
14. COLO. REV. STAT. §16-5-204(4) (a) (1978).
15. N.M. STAT. ANN. §31-6-11 (1979).
16. S.D. COMP. LAWS ANN. §23A-5-13 (1979).
17. ABA GRAND JURY PRINCIPLES, PRINCIPLE #2.
18. ABA MODEL GRAND JURY ACT §200 (1982).
19. See EMERSON, supra note 2, at 90-91.
20. Grand Jury Reform Act of 1985: Hearings on H.R. 1407 Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, May 8, 1985 (statement of George J. Moscarino, Chairperson, Grand Jury Comm., Crim. Justice Section of American Bar Assoc.).
21. EMERSON, supra note 2, at 90-91.
22. ABA MODEL GRAND JURY ACT §201(1) (1982).
23. FRANKEL, supra note 2, at 77.
24. ALASKA STAT. §12.50.101.
25. See CRIM. JUST. MAN.
26. N.Y. CRIM. PROC. LAW §190.52 (McKinney 1982).
27. U.S. ATTORNEYS' MANUAL §9-11.252.
28. N.M. STAT. ANN. §31-8-11(13) (1979).
29. N.Y. CRIM. PROC. LAW §190.52 (McKinney 1982).

30. COLO. REV. STAT. §16-5-204(4) (1) (1978).
31. ABA GRAND JURY PRINCIPLES, PRINCIPLE #5.
32. BAUERMEISTER, Criminal Rule 6: Grand Jury Procedure, Alaska Court System 108-09, (Sept. 30, 1985) (unpublished memorandum).
33. ORDER NO. 3AN-A0-85-10 (Third Judicial District, Alaska, May 13, 1985).
34. United States v. Proctor & Gamble Co., 35 U.S. 677, 681 n.6 (1958).
35. GAO, Report to the Congress: More Guidance and Supervision Needed Over Federal Grand Jury Proceedings, GGD-81-18 (Washington, D.C. 1980).
36. Id. at pp. 33-34.