THE ALASKA GRAND JURY:

ITS HISTORICAL COMMON LAW DEVELOPMENT,

ITS POWER TO INVESTIGATE ANYTHING OF PUBLIC CONCERN,

& ITS SUPPRESSION BY ALASKAN OFFICIALS WHO FEAR ITS INDEPENDENCE

Most important pages; 23–29, 35, 41, 54, 68, 72, 87, 98, 100, 101, 107, 113, and 117.

BY

DAVID E. IGNELL

POWEREDBYJUSTICE.COM

Juneau, Alaska

August, 2022

AUTHOR'S FOREWARD

My study on the Alaska Grand Jury was inspired by the wrongful conviction and continued imprisonment of Thomas Jack, Jr., a kind, considerate, and honest citizen from the Southeast village of Hoonah, Alaska. Twice tried, but never before a jury of his peers, he remains innocent under the presumption of our laws.

Mr. Jack was convicted only after a second lopsided trial with a new state appointed attorney from hundreds of miles away, forced by a Juneau judge to defend him while completely unprepared. Mr. Jack's case exposes the dark side of all three branches of Alaska's state government – abuse of power and tyranny by the executive branch, political motivations of the judicial branch, and nearly complete indifference by the legislative branch.

When presented with opportunities to correct any one of several glaring violations of Mr. Jack's constitutional rights, officials representing these three pillars of Alaska's government have repeatedly refused to honor their oaths to uphold the Alaska Constitution.

But Alaskans have a fourth pillar of government to help salvage their Constitutional rights -- the Alaska Grand Jury. An impartial body of ordinary citizens, it exists primarily for the purpose of curbing inappropriate government behavior and protecting citizens. As Founder Yule Kilcher told his fellow delegates during the Alaska Constitutional Convention, the Alaska Grand Jury may be the refuge of last resort for the people whose cases are not dealt with properly by the courts, often for political reasons.

Mr. Jack's case supplies ample and compelling evidence that the Alaska Court System and the Alaska Department of Law should be investigated by an Alaska Grand Jury. A key witness in his case from Hoonah, a citizen who previously served his country for 25 years and is an unwavering believer in Mr. Jack's complete innocence stated recently: "prosecutors and judges should be obligated to follow the truth, no matter where it leads."

Other examples of government tyranny by these Alaska government agencies have broken through the surface and undoubtedly many others still lie below. Justice awaits an Alaska Grand Jury investigation to discern the truth behind these cases and make its recommendations to the public.

"The way to right wrongs is to turn the light of truth upon them." Ida B. Wells

TABLE OF CONTENTS

INTRODUCTION AND OVERVIEW OF CHAPTERS

Article I of the Alaska Constitution is our state's version of the national Bill of Rights. Section 8 of the Article establishes the constitutional protections of the Alaska Grand Jury. The final sentence of Section 8 reads: "The power of grand juries to investigate and make recommendations concerning the public welfare or safety shall never be suspended."

This specific sentence was cemented by our Founders into our Bill of Rights in a convincing 44-8 vote at the Alaska Constitutional Convention in 1956. Before that vote was taken, the last convention delegate to speak on the scope of the power embodied in this sentence was John Hellenthal, an Anchorage attorney born in Juneau whose father had practiced law in Alaska since 1905 and had been a territorial judge. Mr. Hellenthal told his fellow Founders, "the grand jury can investigate anything".

Through the adoption of Section 8, our Founders deliberately guaranteed Alaska citizens the continued use of one of the public's most powerful tools to help ensure honest, transparent, and efficient government at all levels. As will be shown in this study, imbedded within the last section of Section 8 are nearly 400 years of American common law precedent to investigate and report to the public on matters which affect our public welfare and safety.

The final four words of that sentence, "shall never be suspended", has special meaning. The grand jury's powers can never be hindered or delayed by government officials. Yet that is exactly what has happened in Alaska for the last 37 years after a Juneau Grand Jury investigated improper conduct by Governor Bill Sheffield's administration, and recommended that he be impeached from office. Following the political firestorm in which our elected senators failed to hold our governor accountable, all three branches of the Alaska government ganged up on the Alaska Grand Jury to obscure its powers in very subtle ways.

The purpose of this study on the Alaska Grand Jury is to restore its broad powers to prominence in our culture. To scrub away the layers of smoke, tarnish, and mud that some misguided officials have tried to obscure it with since the Sheffield affair. For Alaskan citizens to achieve justice through the strength of the grand jury's foundation. To be knowledgeable of the high importance our Founders placed on it despite its cost. To realize the many benefits a strong independent grand jury provides to the public.

To truly understand the broad powers of the Alaska Grand Jury requires us to go way back in time and trace its development under common law -- the form of law most insulated from politics. For those readers who may not be familiar with this term, common law is defined as "the part of law that is derived from customs and judicial precedent rather than statutes". Common law originated in England and continued its development in America; this is the source of the "power" specified in Alaska's Constitution.

Resting on the footings of truth, the Alaska Grand Jury's foundation has been built up brick by brick over centuries of time based on local customs and the will of the people. It developed from necessity into a fortress of independence and freedom from political powers that dominate government. These hallmarks

of the grand jury earned it the reputation as the most reliable body for citizens to counter poor or inappropriate government conduct, and to promote principles of fairness in the administration of justice. Judge Francis Hopkinson, a signor of the Declaration of Independence, called the grand jury "a body of truth and power inferior to none but the legislature itself".

The footings of the Alaska Grand Jury were laid down in England nearly 1000 years ago to help the king ascertain the truth in criminal charges. Over the next few centuries an independence gradually emerged to provide English citizens with a forum to protect themselves from prosecutors and judges who abused their power. The independence of the grand jury continued to grow until eventually it began to protect citizens from the king himself. These common law powers remain with us today to help protect us against State officials who don't honor their oaths to the people.

Chapter 1 will show how the grand jury's independence developed in England, creating a safe haven for all citizens from government officials who abused their political power. The chapter will show how closely the oath taken today by grand jurors in Alaska follows the oath taken by English grand jurors in "ancient times." It will provide examples of how English grand jurors carried out their duties under their oath to properly investigate charges and question witnesses. It will show how under the common law, truth is more easily ascertained when some jurors have personal knowledge of the parties, witnesses, facts, or crime scene.

Chapter 2 will show how the American colonists brought the grand jury concept over from England and expanded its use into matters of civic concern. They added a common law reporting power to the grand jury's independence and investigatory powers to inform the public of important matters in their communities. When grand juries found that government officials or departments weren't acting in the best interests of the public, they reported their findings to the community so that corrective action could be taken. Towards the end of the colonial era, American grand juries also played a prominent role in the struggle for independence.

Chapter 3 will show how grand juries throughout the United States adapted to changing times. They remained a vital component in building and maintaining our principles of democracy and fairness through times of industrial growth, turbulence, and peace. As cities grew, grand juries continued to expose government incompetence and in some cases was the only way to defeat corruption. As corporations grew the grand juries protected citizens from monopolistic activities and price gouging. Chapter 4, as a case study, will document the efforts of grand juries in New York City over decades to battle government corruption and their resourcefulness when government officials tried to stand in the way.

Because of its immense power largely immune to political subjugation, the American grand jury has obviously developed some very powerful enemies over the years. Chapter 5 will show how the common law powers of the grand jury were attacked in some other states leading up to the Alaska Constitutional Convention. Whether these attacks were underwritten by the big government/corporate interests or "fuzzy-minded crackpots" advocating reform, many states saw their common law powers eroded by legislation and in a few states the grand jury was abolished. To counter these attacks, some prominent citizens spoke out in defense of the grand jury and citizen groups were formed.

Chapter 6 will take a quick look at the work of two studies completed in the 1990's calling for the increased use of investigative grand juries in federal courts and in administrative matters. These authors lament the growing disconnect between American citizens and their governments. Recalling the important functions

the common law grand jury served in the past, they advocate for its revival to help rekindle citizen interest in government affairs. The latter of these studies is also important for documenting how the enemies of the grand jury have been able to render it powerless through seemingly innocuous court rules. This is the danger we face in Alaska today. These court rules can lead to dangerous and fearful consequences, such as is the case in Colorado where the truth about hazardous nuclear waste near the city of Denver has been suppressed by federal judges for the last 30 years.

Chapter 7 of this study will begin to segue into events taking place in Alaska by examining a specific case out of New Jersey in 1952; it is of importance to Alaskans for three reasons. First, it documents the historical development of the common law powers of the grand jury just 3 years before the Alaska Constitutional Convention was held. Second, the case opinion was written by a judge who was known to many of our Founders and was recognized on the floor of the Convention. Third, this case was used by the Alaska Attorney General 33 years later to support the publication of the Juneau Grand Jury's report in the Sheffield affair; the case was harshly and unfairly attacked by Mr. Sheffield's lawyers in the ensuing proceedings in the Alaska Senate.

Chapter 8 presents the thoughts of Alaska's Founders regarding the necessity of the grand jury and is deservedly one of the longest chapters of this study. It recounts the lengthy floor debate at the 1955-1956 Alaska Constitutional Convention on the issue of whether the grand jury should be available to citizens accused of crimes. At least a dozen delegates spoke passionately on this subject, many of whom identified instances of false accusations and prosecutorial bias. It shows that the Founders overwhelmingly voted to cement the common law powers of the grand jury into the Bill of Rights, despite its cost to a poor state. The biographies of some of these Founders who spoke up during the debates will be briefly sketched to help illustrate the experience they spoke and voted from.

Chapter 8 also sets out the Convention debate that led to the powerful sentence, discussed at the beginning of this Introduction, which closes out Article I, Section 8 of our Constitution. Compared to the powers of the grand juries impaneled by the federal government and the other 49 states, the raw power of the Alaska Grand Jury ranks among the strongest in the country because of this debate. The Alaska Grand Jury's constitutionally protected investigatory and reporting power under common law can't be watered down by legislators, prosecutors, or judges. Its constitutional standing can be amended only by a vote of the people and therein lies our ability to restore its prominence today instead of tomorrow.

From statehood in 1959 through 1985, the Alaska Grand Jury regularly investigated and reported on perceived shortcomings of state and local government officials and agencies. The Alaska Court System ("ACS") used to tout and encourage this power in its Grand Jury Handbook that it distributed to grand jurors to guide them during their civic duty.

But that all began to change in 1985 after a Juneau Grand Jury investigated former Governor Bill Sheffield and recommended to the Legislature that he be impeached. 10 women and 5 men from Juneau with diverse backgrounds, detailed in a lengthy report the highly influential role Mr. Sheffield and his staff played in steering 10 million dollars of the public's money towards a Fairbanks office building in which one of his political fundraisers held a financial interest. The report detailed with specificity how the Governor was not forthright in explaining his actions, how his Chief of Staff lied to investigators before the grand jury became involved, and how an assistant in the Governor's office followed directions to use a private phone line to alert the fundraiser of the investigation.

Practically overnight, the investigative powers of Alaska grand juries became the enemy of powerful political forces within the executive, legislative and judicial branches. Most of these government officials undoubtedly recognized that if a grand jury had the ability to wield its powers to ascertain the truth and call out a governor, it could do the same to any of them. Those in power must have feared what they and their political parties and organizations could not control. The account of the report published by the Juneau Grand Jury detailing the findings of their investigation and subsequent events in the legislature will be detailed in Chapters 9 through 10.

Following the Sheffield affair and under an unknown amount of pressure from the Legislature, Alaska's judicial branch changed its tune and began to downplay the independence of the Alaska Grand Juries and its broad investigative and reporting powers. In 1987, the Alaska Judicial Council recommended court-imposed rules that would put up roadblocks, i.e., "hinder" the reporting power of the grand juries. In 1988, three judges on the Alaska Supreme Court forced through those rules over the objection of the other two judges on the Court who said the new rules violated Article I, Section 8 of the Alaska Constitution. These actions by the AJC and the ACS will be detailed in Chapter 11.

In 1990, those same three Alaska Supreme Court judges prevented important portions of an investigative report by an Alaska Grand Jury in Anchorage from being published. The report was critical of Anchorage School District officials who had quietly negotiated a termination agreement with a high school teacher having sex with one of his students. The three Supreme Court judges scrubbed out names and details from the report shortly before municipal and statewide elections, preventing Alaskans from knowing the truth. Once again, their two counterparts on the Supreme Court said what the majority was doing violated Article I, Section 8 of the Alaska Constitution. The disturbing actions of the Supreme Court in this 1990 case will be further detailed in Chapter 12.

Since 1990, it appears the Alaska Court System has tried to quietly sweep the independence and investigatory powers of the grand jury under the proverbial carpet. The current Grand Jury Handbook distributed by courts to Alaska citizens chosen to serve on the grand jury bears little resemblance to the original Handbook. Explanation of the investigatory powers appear towards the end of the current Handbook, not the beginning. Contrary to well entrenched common law, grand jurors are now admonished not to research things on their own and told they may be excused if they have personal knowledge of events. Contrary to the original Handbook, the ability of the public to approach the grand jury has been removed. Today, the grand jurors are led to believe they are beholden to the prosecutors, when the truth is the opposite – the prosecutors are beholden to the grand jury. The changes over time to the Alaska Grand Jury Handbook will be detailed in Chapter 13.

History teaches us that the adverse reaction of our public officials to the investigative powers of the Alaska Grand Jury was nothing new. Grand juries have historically earned enemy status by many government officials, whether incompetent, corrupt, or simply in error. Grand juries are the most effective tool that ordinary citizens possess to ensure good government, and Chapter 14 will offer suggestions how Alaskans can restore their grand juries to prominence as an effective watchperson of government affairs. The good news is that we have centuries of common law power on our side which our Founders cemented in our own Bill of Rights. And to get where we want to be, American grand jurors before us have provided a guide for steering around obstacles that misguided government officials might put in our way.

Chapter 1

The English Common Law Foundation of the Alaska Grand Jury

To fully understand the independence and powers of the Alaska Grand Jury it is necessary to begin by closely examining its common law foundation. First established in England centuries before the America colonies were formed, common law embodies the basic principles of truth, fairness, and liberty that guide people who desire to be free and live among each other in peace.

It is these common objectives of ordinary citizens that define the structure of the Alaska Grand Jury, not any rigid or restrictive rules that government officials may unlawfully seek to restrain it with. Indeed, the cornerstone of the Alaska Grand Jury is its independence from government. Alaska grand juries were intended by our Founders to be formed pursuant to common law, to be an unbiased cross section of the community, of short-term duration, without rigid procedural rules, that possess a meaningful voice in protecting citizens from inappropriate government action. Our Founders strongly believed it was necessary to cement this common law independence from government into our Constitution.

The most influential judicial body in our country, the United States Supreme Court, has recognized the heavy influence of English common law on American grand juries. This recognition includes an express acknowledgment of the grand jury's independence, free from government control. In a 1956 opinion, the same year that the Alaska Constitution was formed, the U.S. Supreme Court stated:

> The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor… Grand jurors were selected from the body of the people and their work was not hampered by rigid procedural or evidential rules. In fact, grand jurors could act on their own knowledge, and were free to make their presentments or indictments on such information as they deemed satisfactory… It acquired an independence in England free from control by the Crown or judges.[1]

The English grand jury got its start nearly 1000 years ago, first introduced by King Henry II to aid in the administration of his kingdom. In those earliest times, it was comprised of twelve knights or "good and lawful" men who would disclose under oath the names of individuals believed guilty of criminal charges, and then make a "presentment" of their sworn accusations to a judge. Gradually the grand juries came

[1] Costello v. United States, 350 U.S. 359, 362 (1956).

to also consider accusations by third parties and "indictments" by the king's prosecutors, returning a "true bill" if they found the accusation true or a "no bill" if they found it false.[2]

Over the next several centuries, the English grand jury evolved to become a strong independent power guarding the rights of the people against politically motivated charges, false accusations, and against prosecutors, judges, and even royalty who abused their authority. The grand juries did not have to divulge to the judges the evidence upon which they acted, and when the king's officials abused their authority, the grand jury intervened to protect citizens. With the growth and consolidation of royal power in England, the grand jury became highly prized as defenders of the liberties of the people and shields against government persecution.

The independence of the grand jury was widely celebrated throughout England in 1681, when a grand jury refused to indict Anthony Ashley Cooper, the 1st Earl of Shaftesbury on charges of high treason. These charges had been brought by the king's prosecutors after Mr. Cooper's fiery speech in the House of Lords. In this speech Mr. Cooper had expressed mistrust of the English king, Charles II and urged parliament not to approve any taxes until "the King shall satisfy the People, that what we give is not to make us Slaves."[3] The king sought to silence his political adversary by throwing him in jail, but the grand jury wouldn't let him and protected Mr. Cooper by returning a "no bill".

John Lord Somers, the Lord Chancellor of England at that time, defended the independence of the grand jury by anonymously publishing a treatise entitled, The Security of Englishmen's Lives or the Trust, Power, and Duty of the Grand Juries of England, that examined its historical development.[4] This treatise documented centuries of English common law precedent regarding the grand jury's independence and impartiality. Lord Somers examined the sworn oath of grand jurors and gave a detailed explanation of their inherent duty to thoroughly investigate matters and not rely simply on representations of prosecutors, their witnesses, or advice of judges.

The remainder of this chapter will focus on Lord Somers' observations in Security of Englishmen's Lives. They remain acutely relevant and helpful today in understanding the common law powers of the Alaska Grand Jury as they were cemented into the Alaska Constitution by our Founders centuries later in 1956.

---

[2] Richard D. Younger, People's Panel; the Grand Jury in the United States, 1934-1941 (1963), p. 1. Mr. Younger's 263-page book is an excellent source for retracing the history and common law development of the grand jury first in England, next in colonial America, and finally in the United States following its independence. Professor Younger was a specialist in Civil War and American legal history, earning his PhD at the University of Wisconsin, and was a member of the University of Houston faculty for over 30 years. Portions of People's Panel were in circulation at the time of the Alaska Constitutional Convention so some delegates and consultants may have been familiar with Mr. Younger's work. Chapters 2 through 5 of this study on the Alaska Grand Jury consist mainly of excerpts condensed from People's Panel. Readers interested in a more detailed history of the grand jury are urged to read Mr. Younger's book in its entirety and encourage local libraries to obtain a permanent copy for general circulation.

[3] Mr. Cooper was an influential figure in both England and the America colonies. He had founded the Whig party to promote a constitutional monarchy and oppose the king's efforts to impose absolute rule. Before his fall from the king's favor, he had served as Lord Chancellor of England. He was the patron of John Locke and together they drafted a plan for the Carolina colony known as the Grand Model which included the Fundamental Constitutions of Carolina.

[4] Lord Somers' treatise was later republished with the author's name. An 1821 edition of his work with extensive editorial observations can be found online at https://play.google.com/books/reader?id=1rE0AAAAIAAJ&pg=GBS.PR62&hl=en.

Lord Somers began his treatise by establishing the great importance of the common law grand jury, setting it up on a pedestal aside the legislative branch of government:

> The trust and power of grand juries is, and ought to be accounted amongst the greatest and of most concern, next to the legislative. The justice of the whole kingdom, in criminal cases, almost wholly depending upon their ability and integrity, in the due execution of their office; besides, the concernments of all commoners, the honor, reputation, estates, and lives of all the nobility of England, are so far submitted to their censure…[5]

Regarding the common law qualifications of individuals who could serve on a grand jury, Lord Somers outlined the need for impartial people who were largely independent from the government. They should be known within their community as possessing good and competent character. To guard against them being "corrupted by love of power", it was necessary to make grand jury service temporary in duration.

> Our ancestors thought it not best to trust this great concern of their lives and interests in the hands of any officer of the king's, or in any judges named by him, nor in any certain number of men during life, lest they should be awed or influenced by great men, corrupted by bribes, flatteries, or love of power, or become negligent, or partial to friends and relations, or pursue their own quarrels or private revenges; or connive at the conspiracies of others, and indict thereupon.[6]

> [Grand jurors] ought, by the old common law, to be lawful liege people, of ripe age, not over aged or infirm, and of good fame amongst their neighbors, free from all reasonable suspicion of any design for himself or others upon the estates or lives of any suspected criminals, or quarrel or controversy with any of them. They ought to be indifferent and impartial, even before they are admitted to be sworn, and of sufficient understanding and estate for so great a trust.[7]

Lord Somers emphasized the necessity of grand jurors to remain independent in their quest for truth and justice, beyond the reach of judges. Good grand jurors will listen to, but not necessarily accept judicial advice. Grand juries have many resources at their disposal; it is their prerogative which resources to pursue and which to ultimately rely on. The sole objective of the grand jury is determining the truth to the very best of their ability.

> If it be asked how, or in what manner the juries shall enquire, the answer is ready, -- according to the best of their understandings. They only, not the judges, are sworn to search diligently to find out all treasons and crimes within their charge, and they must and ought to use their own discretion in the way and manner of their inquiry: no directions can legally be imposed upon them by any court or judges. (Emphasis original)

> An honest jury will thankfully accept good advice from judges, as they are assistants; but they are bound by their oaths to present the truth, the whole truth, and nothing but the

[5] John Lord Somers, The Security of Englishmen's Lives, London 1821, supra, note 4, at p. 9.
[6] Id., at pp. 6-7.
[7] Id., at p. 7.

> truth, to the best of their own, not the judges' knowledge: neither can they, without breach of that oath, resign their consciences, or blindly submit to the dictates of others; and therefore ought to receive or reject such advices as they judge them good or bad.[8]

Renowned English jurist Sir William Blackstone later echoed Lord Somers emphasis on the importance of the grand jury's independence from judges and prosecutors to achieve impartial administration of justice. Sir Blackstone observed that even the 'natural integrity' of government officials could be frequently insufficient to overcome their involuntary bias towards others of less stature.

> The impartial administration of justice, which secures both our persons and properties, is the great end of civil society. But if that be entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince, or such as enjoy the highest offices in the state; their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity; it is not to be expected from human nature that the few should be always attentive to the interests of the many. (Emphasis added)[9]

Grand jurors must remain mindful there will be occasions when the judges who advise them may have an agenda not consistent with truth or justice. Lord Somers singled out the courage of a grand jury who stood up to a judge who had attempted to "usurp a lordly dictorian [sic] power" to compel them to reach a conclusion contrary to the evidence:

> Here was a bold battery made upon the ancient fence of our reputations and lives: if that justice's will had passed for law, all the gentlemen of the grand juries must have been the basest vassals to the judges, and have been penally obliged … to have sworn to the directions or dictates of the judges; but thanks be to God, the late long parliament … could not bear such a bold invasion of the English liberty;[10]

The oath sworn by grand jurors was another important topic that Lord Somers addressed in his treatise:

> [O]ur ancestors appointed an oath to be imposed upon them, which cannot be altered, except by act of parliament; therefore every grand juryman is sworn, as the foreman, in the words following, viz:
>
> You shall diligently enquire, and true presentment make of all such articles, matters and things as shall be given you in charge: and of all other matters and things as shall come to your own knowledge, touching this present service. The King's counsel, your fellows' and your own, you shall keep secret: you shall present no person for hatred or malice; neither shall you leave anyone unpresented for favor or affection, for love or gain, or any hopes

[8] Id., at p. 16.
[9] Id., at p. x, Observations, citing Sir William Blackstone, Commentaries on the Laws of England, 1768, volume 3, chapter 23.
[10] Id., at p. 9.

> thereof; but in all things you shall present the truth, the whole truth, and nothing but the truth, to the best of your knowledge; so help you God.[11]

Today in Alaska, the following oath sworn by grand jurors pursuant to Alaska Rule of Criminal Procedure 6.1(c)(1) still closely follows the common law oath taken by Lord Somers "ancestors":

> You and each of you as members of this grand jury of the State of Alaska, do solemnly swear or affirm 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; that you will preserve the secrecy required by law as to all proceedings had before you that you will present no one through envy, hatred or malice, or leave any one unpresented through fear, affection, gain, reward, or hope thereof; but that you will present all things truly and impartially as they shall come to your knowledge accordingly to the best of your understanding.

Lord Somers gave considerable attention to the duties embodied within the grand juror's oath. Each juror had a responsibility to diligently seek out the truth of the matter and to guard against false informers and pretenders. They were required to acquaint themselves with the backgrounds and reputations of witnesses and those accused, and not be ignorant of relevant facts they could inquire of. Grand jurors by law must be from the neighborhood where the alleged crime was committed, and it was expected that at least some of them might have personal insight into the circumstances.

These various duties are more succinctly addressed in the following excerpt which should serve as a useful guide for Alaska grand jurors:

> [T]heir express oath binds them to be diligent in their enquiries, that is, to receive no suggestion of any crime for truth, without examining all the circumstances about it, that fall within their knowledge; they ought to consider the first informers, and enquire as far as they can into their aims and pretenses in their prosecutions; if revenge or gain should appear to be their ends, there ought to be the greater suspicion of the truth of their accusations; ...
>
> Next the jury are bound to enquire into the matters themselves, whereof any man is accused, as to the time, place, and all other circumstance of the fact alleged. There have been false informers that have suggested things impossible; … The jury ought also to enquire after the witnesses, their condition and quality, their fame and reputation, their means of subsistence, and the occasion whereby the facts, whereof they bear witness, came to their knowledge. …
>
> Neither may the jury lawfully omit to enquire concerning the parties accused of their quality, reputation, and the manner of their conversation, with many other circumstances; from whence they may be greatly helped to make right inferences of the falsehood or truth of the crimes whereof any man shall be accused. The jury ought to be ignorant of nothing whereof they can enquire, or be informed, that may in their

[11] Id., at p. 13.

understandings enable them to make a true presentment or indictment of the matters before them. …

'Tis certainly inconsistent with their oaths to shut their ears against any lawful man that can tell them anything relating unto a crime in question before them: no man will believe, nor can they themselves think that they desire to find and present the truth of a fact, if they shall refuse to hear any man who shall pretend such knowledge of it, or such material circumstances, as may be useful to discover it; whether that which shall be said by the pretenders will answer the juries' expectations, must rest in their judgments, when they have heard them.

It seems, therefore, from the words of the oath, that there is no bound or limit set (save their own understanding or conscience) to restrain them to any number or sort of persons of whom they are bound to enquire; they ought first and principally to enquire of one another mutually, what knowledge each of them hath of any matters in question before them: the law presumes that some, at least, of so many sufficient men of a county, must know or have heard of all notable things done there against the public peace; for that end the juries are by the law to be of the neighborhood to the place where the crimes are committed. If the parties, and the facts whereof they are accused, be known to the jury, or any of them, their own knowledge will supply the room of many witnesses. Next, they ought to enquire of all such witnesses as the prosecutors will produce against the accused; they are bound to examine all fully and prudently to the best of their skill;[12] …

As for the better discovery of the truth of any fact in question, the credit of the witnesses, and the value of the testimonies, it is the duty of the grand inquest to be well informed concerning the parties indicted; of their usual residence, their estates, and manner of living; their companions and friends with whom they are accustomed to converse: such knowledge being necessary to make a good judgement upon most accusations; but most of all in suspicions, or indictments of secret treasons, or treasonable words, where the accusers can be of no credit, if it be altogether incredible that such things as they testify should come to their knowledge.[13]

Lord Somers repeatedly emphasized the need to guard against false testimony and to closely weigh the credibility of witnesses. He suggested methods that grand jurors could apply to deter orchestrated testimony, which was perceived to be of particular risk when presented through the prosecution:

[T]hey are to search out the truth of such informations [sic] as come before them, and to reject the indictment if it be not sufficiently proved; and farther, if they have reasonable suspicion of malice, or wicked designs against any man's life or estate by such as offer a bill of indictment; the laws of God, and of the kingdom, bind them to use all possible means to discover the villany [sic]; and if it appear to them (whereof they are the legal judges) to be a conspiracy, or malicious combination against the accused, they are bound

[12] Id., at pp. 13-16.
[13] Id., at pp. 19-20.

by the highest obligations upon men and Christians, not only to reject such a bill of indictment, but to indict forthwith all the conspirators, with their abettors and associates.[14] …

> For prevention of such plotters of wickedness as now abound, was that statute … in these words: 'To eschew the mischiefs and damage done to divers of the commons by *false accusers*, which oft-times have made the accusations more for revenge and singular benefit, than for the profit of the king, or his people; which accused persons, some have been taken, and sometimes caused to come before the king's council by writ, and otherwise, upon grievous pain, against the law.[15] (Emphasis original)

> Witnesses may come prepared, and tell plausible stories in open court, if they know from the prosecutor to what they must answer; and have agreed and acquainted each other with the tales they will tell; and have resolved to be careful, that all their answers to cross interrogatories, may be conformable to their first stories; and if these relate only to words spoken at several times in private to distinct witnesses, in such a case, evidence, if given in open court, may seem to be very strong against the person accused, though there be nothing of truth in it.

> But if such witnesses were privately and separately examined by the grand inquest as the law requires, and were to answer only such questions as they thought fit, and in such order as was best in their judgments, and most natural to find out the truth of the accusation, so that the witnesses could not guess what they should be asked first, or last, nor one conjecture what the other had said, (which they are certain of when they know beforehand what the prosecutor will ask in court of every of them, and what they have resolved to answer) … they [the grand jury] might possibly discern marks enough of falsehood…[16]

The Security of Englishmen's Lives cautions us that the common law powers of the grand jury can never be taken for granted. Powerful forces at odds with the public's best interest are always at work, seeking to gradually erode the grand jury's power. The public must be diligent in preserving its power to protect their freedom and property:

> I know too well, that the wisdom and care of our ancestors, in this institution of grand juries, hath not been of late considered as it ought; nor the laws concerning them duly observed; nor have the gentlemen, and other men of estates, in the several counties, discerned how insensibly their legal power and jurisdiction in their grand and petit juries is decayed, and much of the means to preserve their own lives and interests, taken out of their hands.[17]

---

[14] Id., at p. 11.
[15] Id., at p. 12.
[16] Id., at pp. 26-27.
[17] Id., at pp. 8-9.

Lord Somers recognized that the beneficiary of a strong grand jury is not only the public, but the king (i.e., the executive branch of government). The public's faith in the administration of justice is of great benefit to the king's ability to rule peacefully, and officers of the court who would dare undermine that faith was a matter of great concern. Lord Somers stated that prosecutors who abuse their power against members of the public, abuse the king as well, and should be dealt with appropriately:

> The prosecutors themselves, notwithstanding their big words, and assuming to themselves to be for the king, if their prosecution shall be proved to be malicious, or by conspiracy against the life or fortune of the accused, they are therein against the king, and ought to be indicted at the king's suit for such prosecutions done against his crown and dignity. And if an Attorney-general should be found, knowingly, guilty of abetting such a conspiracy, his office could not excuse or legally exempt him from suffering the villainous judgment, to the destruction of him and his family. 'Tis esteemed, in the law, one of the most odious offences against the king, to attempt, in his name, to destroy the innocent, for whose protection he himself was ordained. …
>
> Whoever is trusted in that employment, dishonors his master and office, if he gives occasion to the subjects to believe that his master seeks other profits or advantages by accusations than the common peace and welfare: … Profit or loss of that kind ought to have no place in judicial proceedings against suspected criminals, but truth is only to be regarded; and for this reason the judgments given in court of human institution, are, in Scripture, called, the judgments of God, who is the God of truth.[18]

Later in his treatise, Lord Somers returned once again to the critical concept of prosecutors following the truth in all regards. When prosecutors abused that trust, at a minimum they were imprisoned for a year and barred from advocating again in any court:

> [The king's prosecutors] take an oath to serve the people (whereof the party accused is one) as the king himself, and to minister the king's matters duly and truly after the course of the law to their cunning; not to use their cunning and craft to hide the truth, and destroy the accused if they can.
>
> They are also obliged … to put no manner of deceit or collusion upon the king's court, nor secretly to consent to any such tricks as may abuse or beguile the court or the party, be it in causes civil or criminal; and it is ordained, that if any of them be convicted of such practices he shall be imprisoned for a year and never be heard to plead again in any court; and if the mischievous consequence of their treacheries be great, they are subject to further and greater punishments.
>
> Our ancient law book, called 'The Mirror of Justice', cap. 2. Sect. 4, says, *that every [prosecutor] is chargeable by his oath not to maintain or defend any wrong or falsehood to his knowledge, but shall leave his client when he shall perceive the wrong intended by*

[18] Id., at p. 33.

> *him; also, that he shall not move or proffer any false testimony, nor consent to any lies, deceits, or corruptions whatsoever in his pleadings*.[19] (Emphasis original)

In addition to prosecutors, Lord Somers also singled out judges as bearing a high level of responsibility for ensuring that justice is meted out fairly:

> [Judges are required to] make diligent inquisition after all manner of falsehoods, deceits, offences, and wrongs done to any man; and thereupon to do justice according to the law; so that in the whole proceedings in order unto trial, and in the trials themselves, the thing principally intended, which several persons are severally in their capacities obliged to pursue, is the discovery of truth.[20] (Emphasis original)

Lord Somers illustrated this important duty by providing a few examples of English judges who succumbed to corruption or other sinister influences and failed to uphold the king's dignity by perverting justice. The consequences were often severe, at times even capital.

During the reign of Edward the First in the year 1289, the Archbishop of Canterbury made a speech to parliament specifying offences by the judges in the land -- breaking the Magna Carta, inciting the king against his people, and violating laws under pretense of administering them. Parliament then found that all but two judges had violated their duties and condemned them to punishments ranging from banishment, perpetual imprisonment, to forfeiture of their estates.[21]

One hundred years later during the reign of Richard the Second, eleven judges were sentenced to death, for subscribing malicious indictments against the law and giving false interpretation of ancient laws. Lord Somers wrote that "it would be an endless work to recite all the examples of this kind that are found in our histories and records" but didn't want to conclude without documenting the following episode in which two judges were hanged for attempting to undermine the grand jury:

> [B]ut that of Empsom and Dudley [two judges in the early 1500s] must not be omitted; they had craftily contrived to abolish grand juries, and to draw the lives and estates of the people into question without indictments by them; and by surprise, and other wicked practices, they gained an act of parliament for their countenance. Hereupon false accusations followed without number; oppression and injustice broke forth like a flood; and to gain the king's favor, they filled his coffers. The indictments against them, mentioned in Anderson's Report, p. 156, 157, are worth reading; whereby they are charged with treason, for subverting the laws and customs of the land in their proceedings without grand juries, and procuring the murmuring and hatred of the people against the king, to the great danger of him and the kingdom.[22] (Emphasis original)

In the wake of Lord Somers treatise, other influential voices in England spoke up in support of the importance and independence of the grand jury from the courts. Sir John Hawles in his pamphlet, The

---

[19] Id., at pp. 53-54. Mirror of Justice was a law textbook from the early 14th century.
[20] Id., a p. 50.
[21] Id., at p. 54.
[22] Id., at pp. 55-56. Lord Somers goes on to account how nearly 100 years later, judges were deterred from obeying illegal commands from Queen Elizabeth because of their recollections of the fates of Empson and Dudley.

Englishman's Rights, denied the right or power of any court to fine or imprison a grand jury; he also characterized the grand jury as an institution designed to prevent oppression. Henry Care's English Liberties or Free Born Subject's Inheritance also emphasized the importance of maintaining the independence of inquests from judicial interference. Bishop of Salisbury Gilbert Burnet, fluent in Dutch, French, Latin, Greek, and Hebrew identified the grand jury as "one of the greatest outworks of liberty."[23]

During the second half of the 17th century through the first half of the 18th century the grand juries in the American colonies began to evolve and build upon the foundation established by their English progenitor. Chapter 2 will address how the colonists expanded the grand jury's role in their lives beyond criminal charges into matters of civic concern.

[23] See, Younger, supra note 2, at p. 2.

Chapter 2

Colonial Times: Common Law Powers Extended to Civic and Patriotic Matters

In America, the colonies incorporated the English common law grand jury into their legal systems. Over time these colonial grand juries extended the scope of their investigations beyond criminal matters into civic affairs of the government, and they began to report these findings to the public. These developments established additional and important common law precedents for the investigative and reporting power of grand juries, later guaranteed to Alaskans by our Founders.

The first regular colonial grand jury in America convened in 1635 in Massachusetts Bay Colony soon after its founding. Its Governor, former English lawyer John Winthrop, instructed the jurors to report all crimes and misdemeanors that came to its attention. The jurors responded by presenting more than 100 offenders, including several of the colony's magistrates.[24]

A year later the grand jury of Plymouth Colony convened for its first time, its 17 members elected at the town meetings. Governor William Bradford instructed the assembled grand jurors to "enquire of all abuses within the body of the government". This charge reflected the existing independence and investigatory powers of the grand jury, but now added civic matters to its jurisdiction. The grand jury's resulting presentments took on a flavor of public reports intended to increase the community's awareness and knowledge on matters of interest.

In subsequent years the Plymouth grand jury sharpened their focus on matters of community interest. The Plymouth grand jury complained of the lack of surveyors for repairing the highway. It questioned the right of the governor and assistants to sell land to certain individuals, demanding to know which lands were to be reserved for purchasers and why a treasurer had not been chosen. It called out individuals who failed to serve the public adequately – for neglecting the ferry across the river, for grinding corn improperly, and for giving short measure in selling beer.[25]

As colonial towns grew and matured, the grand jury became an instrument for popular participation in all levels of government, whether municipal, county, or provincial. Through their presentments, grand juries served to arouse public opinion on the need for civic reforms and motivated public officials into action.

In the first half of the 18th century in both Boston and Philadelphia, grand juries took the lead in forcing the city to pave streets in ruinous condition. Presentments in Philadelphia demanding a paid watch resulted in passage of an ordinance setting up a board of wardens empowered to erect and maintain streetlamps, and to appoint watchmen.[26]

---

[24] Id., at p. 6.
[25] Id., at p. 7.
[26] Id., at pp. 7-20.

Grand juries in Annapolis followed this pattern when they complained of the condition of city streets, docks, and landings. In 1766, they protested incompetence and corruption in the city council. The jurors issued a "remonstrance" against neglected streets, the refusal of city officials to account for the proceeds of lotteries, and the failure of council members to attend meetings.[27]

In Charleston, grand juries called attention to laxity in the city administration. They publicly identified the failure of constables and magistrates to enforce the Sabbath observance laws, disorderly behavior of the town watch, and neglect of officials to regulate the town markets properly. They suggested civic reforms, including an increased watch, better lighting, and the organization of a fire company.[28]

As the colonial era drew to a close, the American grand jury had evolved over the previous century to become an indispensable part of government in each of the colonies. In addition to evaluating criminal charges, grand juries now acted as local representatives that generally reflected the desires of the public at large. They presented their findings to the public. They proposed new laws and protested abuses in government. They enforced or refused to enforce laws guided by their collective sense of justice and protected their fellow citizens against indiscriminate or unfair prosecution by outsiders.[29]

When the American colonists began to clash with representatives of the English government, they also began to see the grand jury in an enhanced light as a protector of their liberties against an oppressive government. Lord Somers' treatise and similar writings of other Englishmen such as Sir Hawles and Henry Care found their way to the colonies and served as guides to the independence of grand juries.[30]

On the eve of the American Revolution, grand juries followed the common law precedent established centuries earlier by their English predecessors in refusing to enforce certain criminal statutes and unpopular regulations. They failed to find a true bill when royal or "loyal" prosecutors sought to enforce criminal statutes favorable to England, among them the laws regulating trade. As a collective bodies of citizens with diverse backgrounds, grand juries were in an excellent position to take the lead in opposing the English government.[31]

In Massachusetts, grand jurors were toasted as "volunteers in the cause of truth and humanity", defending the people from tyranny. This reputation received an assist from a 1765 Boston grand jury that refused to indict the leaders of the Stamp Act riots. In 1768 a Suffolk grand jury refused to indict the editors of the Boston Gazette for libeling the royal Governor after the Chief Justice threatened the panel, "they might be damned if they did not find a true bill."[32]

A 1769 Boston grand jury denounced soldiers quartered in the town for breaking and entering dwellings, waylaying citizens, and wounding a justice of the peace during a riot. In a similar vein, they refused to indict persons charged by the royal prosecutors of enticing soldiers to desert the king's army. When local merchant and leader John Hancock was harassed by the royal authorities, the Boston grand jurors publicly censured the prosecutor for "having received so many lucrative court favors."[33]

---

[27] Id., at p. 18.
[28] Id., at p. 18.
[29] Id., at p. 26.
[30] Id., at p. 21.
[31] Id., at p. 27.
[32] Id., at p. 28.
[33] Id., at p. 29-30.

In 1770, a Philadelphia grand jury took matters even further; in addition to refusing to indict colonists accused of breaking royal trade laws, it proposed a series of protests against the British tea tax. It denounced the use of tea tax proceeds to pay the salaries of government officials. It declared its support of an agreement reached by local importers to shun British goods and pledged support towards a broader colonial program encouraging non-consumption of British goods.[34]

In 1774, the British government tried to counter the open mutiny of the Massachusetts grand juries by altering the selection of its members. The people were accustomed to electing their grand jurors at town meetings, but the royal government tried to change the system by authorizing its sheriffs to select them. This attempt to maneuver around the elective grand jury rankled the hearts and minds of local citizens. People assembled in town meetings where they refused to consent to any change in the Massachusetts constitution and denied the authority of any grand jurors chosen by the sheriffs. Shortly before the royal government forced the new selection process into effect, the duly elected Suffolk County grand jurors including Paul Revere and John Hancock's brother, refused to take their oath in front of the judge. They adjourned to a tavern where they voted to publish their reasons for refusing to take the oath.[35]

Following the British Parliament's passage of the Coercive Acts in reaction to the Boston Tea Party, grand juries in other colonies began to oppose the royal government. In November of 1774, forty local townsmen from the village of Greenwich, New Jersey called an impromptu tea party after British ships had unloaded their goods and stored them in the cellar of a house near the marketplace. The group removed the tea chests from the cellar and burned them in an adjoining field. When the royal government brought criminal charges against the townsmen, the Chief Judge admonished the grand jurors about the need to punish the "wanton waste of property". However, the grand jury refused to return "true" bills on the indictments. When the judge brought the grand jurors back in and repeated his lecture, they exercised their independence from the court and remained steadfast in their refusal to indict.[36]

Even some of the British government's local judges shifted their loyalties and became influential supporters of the independence movement. One such judge was William Henry Drayton, born on his father's farm near Charleston, South Carolina but educated in England. Originally opposed to independence he was appointed to the Colony's Court in 1774. Later that year Judge Drayton wrote the American Claim of Rights which supported the Continental Congress; the British government responded by removing him from all posts. Judge Drayton replied by becoming a key member of the colony's rebel government.

During the winters of 1774 and 1775, Mr. Drayton traveled through various South Carolina districts urging the people to assert their rights and maintain their freedom. One local grand jury responded with a "a veritable little Declaration of Independence" in which they denounced the "most dangerous and alarming nature of the power exercised by Parliament" in its taxation and legislation of the colonies.

Grand juries in other colonies followed suit in the increasingly open revolt by Americans against the royal government. In February 1775, New York City grand jurors protested the "many oppressive acts of

[34] Id., at pp. 30-31.
[35] Id., at pp. 31-32.
[36] Id., at pp. 33-34.

Parliament". A grand jury in New Castle, Delaware agreed to promote a tax to create a fund for the defense of Delaware.[37]

In April of 1776, Mr. Drayton addressed a Charleston grand jury declaring that the colonies' complete independence from England was "the necessity of manifest destiny" and the "Almighty created America to be independent." The grand jurors responded by presenting as a public grievance the "unjust, cruel and diabolical acts of the British Parliament" and warned those who "through an ignorance of their true interests and just rights and from a want of proper information may be misled by our enemies."[38]

Following the Declaration of Independence on July 4, 1776, many grand juries throughout the colonies adopted patriotic resolutions denouncing Great Britain and urging all persons to support "the war for freedom." Frequently they endorsed the newly drafted state constitutions, expressing "unfeigned satisfaction" with the liberties guaranteed.[39]

In addition to their political protests, revolutionary era grand juries did not neglect to address local problems important to the people of their districts. Some grand juries recommended price controls for bacon, flour, and other essentials. Other grand juries protested the poor conditions of roads and ferries, and the laxity of local law enforcement. Grand jurors throughout the colonies made certain that local agencies continued to provide basic services while political changes took place on higher levels. They scrutinized local public officials and drew attention to cases of neglect. The recommended new laws when they felt it was necessary. They inspected public records, audited local books, and set tax rates.[40]

A staunch defender of the local grand jury was Founding Father James Wilson, nominated by George Washington as one of the original Associate Justices of the United States Supreme Court. In a series of law lectures delivered in Philadelphia in 1790, Judge Wilson placed no limit upon a grand jury's area of inquiry. He viewed the grand jury as an important instrument of democratic government by serving as a "great channel of communication between those who make and administer the laws and those for whom the laws are made and administered." Another Founding Father, Judge Francis Hopkinson echoed the observations of Lord Somers a century earlier when he wrote of the grand jury as "a body of truth and power inferior to none but the legislature itself."[41]

The original draft of the U.S. Constitution was silent on the topic of grand juries, despite such broad and influential support for the institution in the fledging country. This omission was deliberate on account of constitutional delegates who wanted to avoid significant discussion of a federal court system because of the divide between Federalists who favored a strong central government, and Anti-Federalists who favored strong, individual state rights. Had there been an attempt to define the relationship between federal and state courts and their grand juries, ratification of the Constitution may have failed. Governor Morris, a substantial contributor to the final draft of the Constitution and author of the Preamble would

[37] Id., at pp. 34-35.
[38] Id., at pp. 35-36.
[39] Id., at p. 36.
[40] Id., at pp. 36-37.
[41] Id., at p. 41 and p. 60. Judge Hopkinson was nominated by President George Washington as the first federal judge of the Eastern District of Pennsylvania. He is also recognized as the designer of two early versions of our national flag.

later explain that on the issue of federal courts and grand juries, "it became necessary to select phrases which would not alarm others."[42]

Despite this effort of the Founders to avoid controversy, the right to indictment by a grand jury in all federal criminal cases became an important topic at several state conventions convened to ratify the Constitution. Massachusetts recommended the U.S. Constitution be amended to provide for grand jury indictments before a person could be tried for a capital offense. The conventions of New York and New Hampshire followed suit. Accordingly, the first Congress in September 1789 proposed 12 amendments to the U.S. Constitution, one of which ultimately became the Bill of Rights Fifth Amendment's guarantee of a right to a grand jury indictment for all infamous or capital crimes.[43]

The Judiciary Act, also passed by Congress in September of 1789 required federal grand juries to attend each session of the federal circuit and district courts. Federal marshals selected federal grand jurors in much the same manner as the states, but those federal grand juries were more limited in scope by investigating and presenting charges which violated specific federal laws.

Federal grand juries developed into instruments of a centralized federal government which had been granted limited powers under the Constitution (at least as originally interpreted by the Supreme Court). Local grand juries continued their dominance of local and state matters, whether criminal or civic. An important distinction between the two systems was the inability of federal grand jurors in local venues to become sufficiently familiar with the operation of the centralized U.S. Government. Conversely, their counterparts serving in the state system retained the ability to check on the performance of local officials and suggest policies.[44]

The inherent conflicts between the Federalists (proponents of central power) and the Anti-Federalists (proponents of state's rights) led to political battle lines being drawn over grand juries throughout the new nation. In 1793 President Washington issued his highly controversial Proclamation of Neutrality which subjected citizens to criminal punishment or forfeiture if they "aided hostilities" among a number of European countries at war with each other.[45] Local citizens sitting on federal grand juries refused to indict some of their community members who were charged. Federal judges reacted by using their persuasive position as a platform to promote Federalist policies; these practices antagonized Anti-Federalists who resented the breach of judicial neutrality in domestic political matters.

The Sedition Act passed by Congress in 1798 resulted from confusion over whether federal grand juries had the power to return indictments where federal law had not been violated. The Sedition Act was also highly controversial and substantial conflict followed. Federal Judge Samuel Chase succeeded in persuading a federal grand jury in Richmond to indict Philadelphia publisher Thomas Callender for defaming Congress and the President of United States. A federal grand jury in Vermont indicted a congressman for characterizing U.S. President John Adams as having an "unbounded thirst for ridiculous pomp, foolish adulation and selfish avarice." Anti-Federalists began accusing federal grand juries as being

---

[42] Id., at pp. 44-45.
[43] Id., at pp. 45-46.
[44] Id., at pp. 46-47.
[45] The Proclamation identified Austria, Prussia, Sardinia, Great Britain, and the United Netherlands on one side and France on the other. France had been a major ally of the colonies during the Revolutionary War, providing supplies, arms, troops, and naval support to the Continental Army.

partisan. Thomas Jefferson accused Federalist judges of perverting grand juries "from a legal to a political engine" by inviting them "to become inquisitors on the freedom of speech".[46]

Anti-Federalists responded in their newspapers that federal judges were "converting the holy seat of law, reason and equity into a rostrum from which they can harangue the populace under the pretense of instructing a grand jury." During Alien and Sedition trials, a Kentucky judge told the grand jury that its proper place was "as a strong barrier between the supreme power of the government and the citizens". Just as their predecessors in England centuries earlier, their duty as jurors was to shield the innocent from "unjust persecutions".

Those opposed to the Federalists gained the upper hand politically after the election of 1800 when Thomas Jefferson was elected President. The Republican-led repeal of the Judiciary Act in 1801 caused Federalist Judge Chase to increase the intensity of his speeches to federal grand juries on political matters. In 1804 the Republicans retaliated by bringing articles of impeachment against Judge Chase; he was charged with making improper attempts to induce grand juries to indict publishers on political grounds, and with delivering several intemperate political addresses to grand juries. The House voted to impeach Judge Chase, but the Senate voted to acquit, failing to generate the requisite 2/3 vote.

To many citizens of the new republic, the federal courts had become like the former royal courts due to political prosecutions under the Sedition Act, the Neutrality Proclamation, and partisan addresses by Federalist judges. Many federal grand jurors followed the lead of their English and colonial predecessors by refusing to indict their fellow citizens on unpopular federal laws. When federal grand juries returned true bills on federal charges, they were often viewed as improperly influenced appendages of the federal courts rather than as representatives of the people.

On the other hand, local grand juries, possessing full common law powers of investigation and indictment and concerning themselves primarily with problems of local government, continued to be viewed favorably by most citizens. Like their English predecessors, they were regarded as barriers between the public and unjust government prosecutions. But now they were fully vested with an additional power under common law – to keep a watchful eye on public officials and their administration of civic matters.[47]

[46] Id., at pp. 47-51.
[47] Id., at pp. 47-55.

Chapter 3

Industrial America: Protecting the Public from Corrupt Government and Big Business

Towards the end of the 19th century as the United States accelerated its transition into an industrial powerhouse, grand juries adapted to the changing environment. As more immigrants arrived, urban centers grew in population and wealth. Some governments attracted opportunists and politicians who saw opportunities to make a career out of applying power to benefit their own interests over the people.

As the size of governments increased, these officials became increasingly insulated from the public. Some of them banded together to manipulate businesses, loot city treasuries, or promote criminal behavior they benefited from. Well-organized political machines were developed that made it difficult to oust ethically challenged officials from control. It was in the grand jury that ordinary citizens often found their most potent weapon to protect the public's welfare, and to rescue their cities from government incompetence and abuse of power.

Similarly, as corporations and industrial trusts grew more powerful, American grand juries proved to be a capable watchdog of illegal or inappropriate business practices that negatively impacted the public. Banking failures were a common occurrence towards the start of the 20th century, so grand juries investigated bank closures and suggested remedies. Monopolistic practices of companies in industries that provided basic goods and services to the public – insurance, energy, farm machinery, cigarettes -- also attracted the attention of local grand juries. Even labor disputes drew grand jury scrutiny.

In the burgeoning practice of political bonding among corporate and government leaders, valuable gas, street railway and other franchises were often bought and sold in ways that harmed the public's welfare. Corporations and trusts which benefitted from biased decisions of government officials threw their financial support behind candidates which catered to them. The public grew increasingly helpless.

Elected officials at the top of the chain developed the ways and means of unduly influencing lower level employees below them. A culture of "to get ahead, you have to go along" developed within many administrations, paralyzing internal self-correction. Some governments began to serve themselves rather than the people. Citizens concerned with the general welfare of the public found that grand jury investigations and reports were often their only effective recourse for promoting the public's welfare.

Moving in chronological order from the late 19th through the mid-20th century, the following excerpts from Mr. Younger's book demonstrate a remarkable variety of public concerns that American grand juries began investigating and reporting on. These examples are important in helping Alaskans understand the common law powers of the Alaska Grand Jury. They provide significant texture to Delegate Hellenthal's statements during the Alaska Constitutional Convention, discussed later in Chapter 8, that "the grand jury can investigate anything" and "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".

These examples help support the conclusion in Chapter 10 that the criticism heaped on the Juneau Grand Jury's report by Mr. Sheffield's lawyers and certain Alaska legislators was unequivocally unfounded. These examples also help support the conclusions in Chapters 11-13 that the subsequent views and actions taken by the Alaska Legislature, the Alaska Judicial Council, and the Alaska Court System to diminish the grand jury's constitutionally protected reporting powers of official misconduct were completely inappropriate.

In 1877, a railroad labor strike in Pittsburg resulted in the Pennsylvania state militia firing into a crowd and killing 28 people. A mob of 4000 workers retaliated against the militia resulting in significant destruction to railroad property. A judge asked a county grand jury to investigate, which issued subpoenas for several high-ranking state officials including the governor, secretary of state, and adjutant general. After a month-long investigation, the grand jury issued a report finding that the blame for the incident primarily fell on railroad and government officials. The grand jury report denounced the role of the militia as a "blunder from first to last" culminating in the "wanton murder" of 28 people while also censuring the strikers for their lack of respect for lawful authority.[48]

In 1890, several large New York City banks abruptly went out of business. Following an investigation by the local grand jury, it issued a public report denouncing the "bold and reckless" financial dealings of bank officials. The report warned the public that New York state banking laws were hopelessly inadequate as officers could transfer the entire capital stock of their bank without notifying stockholders or depositors. The grand jury called attention to redressing state laws that provided no criminal remedy for fraudulent banking operations.[49]

In 1893, a St. Paul, MN grand jury uncovered procedures "almost criminal in their nature" in connection with bank failures there; their report called for legislation to rescue banking from "its deplorable condition". That same year a Fargo, ND grand jury denounced local bankers for engaging in improper practices. Following up on findings three years previously, a New York grand jury demanded "radical changes" in the system of bank examinations, finding the work of most state examiners "insufficient and misleading."[50]

In 1894, a Colorado Springs, CO grand jury investigated a mining labor strike and indicted 37 of the strikers on charges of riot; it also rebuked the governor and adjutant general for interfering with the sheriff's attempts to restore order. In 1897, 3000 striking coal workers clashed with a sheriff's posse in Pennsylvania resulting in the death of 19 miners and the wounding of 40 others. The grand jury investigating the incident found the sheriff was to blame and indicted him and his men for murder.[51]

When decisions by the United States Supreme Court weakened federal anti-trust protections against harmful business monopolies, local grand juries throughout the country stepped into the void. In 1896 a New York grand jury investigated allegations that the American Tobacco Company was restraining and preventing competition in the supply and price of cigarettes. In 1899, a local judge asked the grand jury

[48] Id., at pp. 213-214.
[49] Id., at p. 209.
[50] Id., at p. 210.
[51] Id., at p. 217.

of Covington KY to investigate monopolistic activities because there was "little likelihood the McKinley administration will destroy the trusts." The judge complained the attorney general tasked with destroying the trusts "owes every dollar he ever had in his life to trusts" and was owned by them.[52]

In 1901, a Minneapolis, MN grand jury took on widespread municipal corruption where the city had become controlled by a mayor who "possessed an inexplicable power over a large number of voters who believed he was for the people." The mayor's brother was the police chief and together they had established a lucrative system of profiting from the activities of con men, gambling dens, brothels, and saloons. In their operation, police officers were expected to pay monthly fees to keep their jobs while forbidden to make certain arrests; prostitutes were required to pay 'fines' each month.

The proactive Minneapolis grand jury took the proverbial bull by the horns. They didn't sit back and wait for evidence to trickle into them; the grand jurors split up to avoid attention and went out on the town to investigate. When the county attorney became non-cooperative and tried to stop the investigations, the grand jury disregarded his instructions. When prosecutors refused to work any further, the grand jury hired its own detectives. It took two years and the empaneling of two separate grand juries, but eventually the corrupt municipal leaders were brought to justice and a moral law and order re-emerged in the city. The local Minneapolis newspaper applauded the grand jury, writing their actions had "made a political revolution by the orderly processes of law."[53]

In 1902, coal shortages throughout the United States set off a series of local grand jury investigations. A Delaware County, OH grand jury forced retail dealers to disband their coal exchange. In Chicago, IL the city council asked the grand jury to investigate an acute coal shortage, which then discovered a dealer's plot to set minimum prices and destroy all competition. In Toledo, OH the grand jury charged dealers with criminal conspiracy while in Cleveland, retailers dissolved their association rather than face a grand jury probe.[54]

In 1906, large campaign contributions by insurance companies drew protests leading to a grand jury investigation of New York Life. Falsified records and "dummy transactions" were found, leading to several indictments of well-connected officials. The following year the grand jury investigated Metropolitan Life, finding a series of security manipulations designed to mislead the public of its true financial condition and a double set of books hiding loans to executives at low rates. More indictments and more investigations of other insurance companies followed.[55]

Between 1905 and 1907, county grand juries throughout Kentucky investigated International Harvester Company and the monopoly they held upon the farm machinery business. Two counties indicted the corporation for attempting to fix prices while four other counties hauled the company into court for violations of the state anti-trust laws.[56]

In 1906 a grand jury from Hancock County, OH took on monolithic Standard Oil Company, investigating it for violating the Ohio anti-trust laws. The grand jury returned 939 separate indictments for attempting

---

[52] Id., at pp., 219-220. See also, New York Times, June 15, 1899.

[53] For a more thorough discussion of the efforts of the Minneapolis grand juries in cleaning up its city, see Nino Monea, Going Rogue: Independent Grand Juries throughout America, 72 Me. L. Rev. 275, 279-294 (2020).

[54] Younger, supra, note 2, at p. 220.

[55] Id., at p. 213.

[56] Id., at p. 221.

to force competitors out of business. A 1908 a grand jury in Sioux County, IA followed suit and investigated Standard Oil for cutting prices in the town of Alton; they found the corporation had used the same tactics to destroy competition in their county.[57]

After 20 years of failed attempts, in 1906 San Francisco, CA grand juries were finally able to break through decades of widespread municipal corruption there. A political machine partially funded by the Southern Pacific Railroad controlled almost every part of the local government, including some judges and at times even the selection of the local grand jurors. The San Francisco political machine had even received assistance from the California Supreme Court which issued rulings restricting the grand juries' efforts.

The logjam began to break when a citizen's committee headed by a crusading newspaper editor, influential civic leaders, and an honest district attorney were able to persuade a judge to discharge a "controlled" grand jury and select a new panel with the help of a special prosecutor and detective. The political machine responded by trying to oust the district attorney and appointing one from their own ranks. In a courtroom hearing that drew a large public audience, the judge instructed the grand jury to act without fear, favor, or affection, saying there is "no higher duty devolved on a citizen".

The San Francisco grand jurors succeeded in drawing out confessions of some officials by offering them immunity from prosecution, and the corrupt structure began to crumble. A local newspaper lauded the grand jury as "a most ancient and important factor in our legal and civic life…Upon it the community depends for legal, honest and disinterested investigation."[58]

In 1913, the milk and cream industry caught the scrutiny of a grand jury in Hennepin County, MN. After their investigation, the grand jury indicted six corporations and eight individuals, finding they controlled a large percentage of the trade in milk and cream in Minneapolis. That control had enabled the monopolists to prevent competition and raise the price of those commodities, thereby harming the public's welfare.[59]

In the early 1920's an Oklahoma grand jury probing state corruption was about to indict 21 officials when the judge dismissed the jury; aroused citizens responded by petitioning for another panel to complete the investigation. In 1923, the chief of police, a judge, and two county commissioners resigned when a local grand jury in Kansas City, KS launched an investigation into rumored corruption.

In 1929 a Pittsburg, PA, grand jury recommended legislation to end fraudulent assessment of taxes and illegal registration of voters; they concluded that the only concern of many commissioners was "drawing their salaries." That same year a grand jury probe in Philadelphia led to a complete reorganization of the police department. In 1933, an Atlanta, GA grand jury threatened to indict the county commissioners if they did not institute reforms. When the judge rebuked the grand jurors for their efforts, the citizens organized a grand juror's association to encourage future panels to uphold their inquisitorial rights.[60]

In 1933, a Cleveland, OH grand jury began a probe of the city police department, eventually issuing a report that announced the entire city had been intimidated by union racketeers who received protection from city officials. They declared the local criminal court "neither merits nor receives the respect or

[57] Id., at p. 221.
[58] Id., at pp. 199-207. See also, Monea, supra, note 53, at pp. 294-308.
[59] Id., at pp. 221-222. See also, State v. Minneapolis Milk Co., 124 Minn. 34 (1913).
[60] Id., at pp. 232-234.

confidence of the people." The grand jury criticized the prosecutor's office, saying its talent was "well below par" and chiding the Cleveland Bar Association for its lack of concern.[61]

In 1936, a Boston, MA grand jury reported that school commissioners were guilty of selling promotions and appointments. In San Francisco, CA and 30 years after the grand juries' initial unraveling of widespread municipal corruption there, the local grand jury found that inefficiency and corruption had re-infiltrated the city police. A special panel in Buffalo, NY, exposed bribery and fraud in the municipal government. A Miami, FL, panel found that bribery had played an important role in establishing electric rates. A Greensboro, NC, grand jury initiated an inquiry into a primary election and reported on many irregularities to the people. [62]

In 1937, a Philadelphia, PA grand jury commenced a seventeen-month long investigation against vice and racketeering. In addition to over 100 indictments for gambling and prostitution, it called for the immediate dismissal of 41 police officers on grounds of inefficiency and dishonesty. When state officials withdrew financial support to halt further exposures, the grand jury appealed directly to the Pennsylvania Supreme Court, which allowed them to continue. The panel recommended a complete reorganization of the police department and even called out the district attorney, accusing him of using the investigation for political purposes.[63]

The foregoing examples are just a sampling of the grand jury's important contributions to the public welfare throughout America. Imagine how much worse off citizens in America would be today without those common law powers to investigate and report.

[61] Id., at p. 234.
[62] Id., at p. 236.
[63] Id., at p. 236.

Chapter 4

Common Law Independence Defeats Government Corruption: A Case Study

One of the most widely documented illustrations of the positive results that can be achieved by an American grand jury applying its common law investigatory and reporting powers comes from New York City. For decades, local grand juries there battled against government misconduct, the corrupt powers of "Tammany Hall", and the tentacles of organized crime. Where all other reform efforts failed, the grand jury succeeded because of the significant common law power, independence, and dedication of grand jurors who refused to accept existing standards of vice and government misconduct in their community. Even uncooperative and obstructive prosecutors could not prevent the resourceful citizens from achieving their objectives.[64]

During the late 1860's William ("Boss") Tweed and his Tammany Hall cohorts had gained complete control of the New York City government, including judges who presided over the courts and state and local officials that accepted bribes. In 1870, Boss Tweed's political machine gained the authority to issue bonds, gaining almost complete autonomy to plunder the city treasury at will and to hide the rapidly growing deficit. For example, when twelve million dollars was spent to build a new courthouse half of the bond proceeds went into the pockets of Tweed and his followers.

In 1870 a citizen backed reform movement was unable to unseat the well-entrenched Tweed regime. The following year a council of political reform was organized and at a protest meeting it was demonstrated how the city debt had *quadrupled* in just two years; however, no lasting opposition of substance materialized from this council. The New York Times took a run at the problem by publishing details of the corruption and bringing to light the various methods by which the public treasury was being looted. The Times reporting aroused the city residents, but the newspaper was unable to procure sufficient evidence to base a prosecution upon.

A second public protest meeting called by the council attracted a large crowd of citizens who approved resolutions appointing an executive committee of seventy individuals to gather evidence. Although this evidence enabled the council to instigate civil actions against Tweed for unlawfully taking money from the city, the committee lacked the necessary powers to launch a widespread criminal investigation.

Up to this point, the ballot box, a newspaper crusade, public meetings, and a citizen's investigating committee had all been largely ineffective against the Tweed regime. However, things began to change after a grand jury began to investigate. The grand jury's broad authority to subpoena witnesses and records, made effective by its contempt powers and ability to indict witnesses for perjury, enabled it to

[64] Id., at pp. 182-190, and pp. 234-236. See also Monea, supra, note 53 at pp. 308-322.

obtain critical evidence. The secrecy that attended all investigating sessions enabled witnesses to safely disclose to the grand jury what they knew.

The grand jury's first step was to summon the leaders of the citizen's committee and others whose testimony convinced the jurors that widespread corruption indeed existed. Next, they set out to find evidence against city officials without the assistance of the district attorney's office. Using their subpoena power, they summoned witnesses and interrogated them in secret session.

To ensure all possible sources of information were investigated, the jurors split up into committees of two and three. They went out into the city to visit banks to check on the accounts of public officials, they called at the homes of witnesses who were unable to come to the jury, and they checked on the operations of each of the city departments. In off duty hours, many of the jurors continued to track down information on their own that could be useful in tracing frauds to the guilty parties.

Over the course of three months, the grand jury completed their investigation and returned indictments against Boss Tweed and several others within his regime, including the City's mayor and comptroller. The judge commended the jurors on the efficiency of their investigation and observed they had concluded "one of the most important, extraordinary and eventful sessions that has ever marked the history of an American grand jury." Although the ensuing legal proceedings and trials played out for several years, the independent-minded grand jury effectively ousted the Tweed regime from control of New York City.

A decade later, the services of the New York grand jury were again needed to battle government misconduct. An 1884 grand jury censured the Department of Public Works for not protecting the city against "designing contractors"; their report disclosed that favoritism, extravagance, and waste prevailed in the department to a disgraceful extent. An 1886 grand jury investigated the City Council and returned indictments against several members who had sold their votes to award street railway franchises to a low bidder. A subsequent grand jury investigated the private company receiving the bid and indicted its president and other officers.

The New York grand jury issued a public statement against the medical directors of a mental hospital after investigating its condition. The jurors attributed the root of the problem to "political jealousies, personal dissensions and improper methods." Two years later a special grand jury reported a great many excise cases that were languishing in the district attorney's office. Their report revealed the situation indicated either "a lack of disposition to prosecute or a lack of efficiency" by the district attorney.

In 1900, a New York City grand jury probing illegal gambling operations soon butted heads with a Tammany controlled district attorney. Witnesses ordered to appear either disappeared from the city or were reluctant to testify in the district attorney's presence for fear of being placed on the Tammany "black-list".

The jurors began to subpoena their witnesses directly, refusing to go through the district attorney. In the matter of a particular witness, the district attorney refused to leave the room when the grand jury foreman requested him to. The jurors then arose and marched to a courtroom where the Recorder upheld the right of the grand jury to control their own investigation and exclude the district attorney.

During the rest of their investigation the grand jurors bypassed the district attorney and went directly to the Recorder for legal assistance. At the close of its term, the grand jury issued a presentment that severely criticized the district attorney. They protested that every effort to fix the responsibility for

criminal neglect on the part of the police department had been "persistently discouraged or headed off" by him and they recommended the governor to remove him from office.

The grand jury concluded the police department's neglect of gambling and prostitution activities stemmed from a direct interest in the maintenance of illegal establishments. A New York judge expunged the grand jury's presentment, but its foreman responded by forwarding a copy to Governor Theodore Roosevelt who then appointed a special commissioner to proceed against the district attorney.

Being the financial capital of the nation, New York City was an especially difficult place to keep corruption down. In 1935 illegal activities generated annual revenue estimated at one half to one billion dollars. An established organized crime "racket" existed for most industries – bakeries, barbers, trucking, poultry, and restaurants. The situation was so bad that Mayor LaGuardia threatened to disbar lawyers who represented mob bosses.

In 1935, the NYC district attorney gave pretenses of concern by promising to convene a grand jury investigation into the corruption and vice. In addition to illegal gambling, the investigation was needed to probe a sex trafficking network where women were been brought in from other states, forced to work as prostitutes and turn over 75% of their earnings to their handlers. When they were arrested by honest police, the crime bosses would bail the women out, give them a new name, and force them to work in a new area.

The grand jury began receiving anonymous letters providing names and addresses of racketeers. Subpoenas were issued by the grand jury, but the district attorney's process servers reported the witnesses could not be found. Just as their predecessors had done 35 years earlier, the grand jury learned that to be effective they needed to bypass the district attorney and his investigators; the grand jurors started interviewing witnesses on their own. The press labeled this exercise of independence as "a striking illustration of the inherent power of a grand jury – which some officials have been prone to overlook in recent years."

The grand jury asked the governor to fire the district attorney and give them a special prosecutor to assist the investigation. They barred the district attorney from their meetings and started drawing up names of potential replacements. The district attorney responded by withdrawing his staff and agreeing to have one of his cronies appointed as the new prosecutor appointed. However, the grand jury refused to accept this substitute and the governor eventually appointed Thomas Dewey as a special prosecutor.

As special prosecutor, Mr. Dewey was given 10,000 square feet of office space, twenty attorneys and a squad of researchers. His staff questioned 3000 witnesses in 4 weeks. Under Mr. Dewey's direction a new special grand jury was formed to specifically take on organized crime. This special grand jury sat for 4 months, heard testimony from 500 witnesses, and issued 29 indictments. Its final report disclosed that a handful of criminal overlords ruled the city, assisted by an army of lieutenants and henchmen.

A successor grand jury was impaneled which picked up the work of its predecessor. It broke open another multi-million-dollar prostitution ring involving 100 women and 10 men across 41 brothels. The grand jury targeted the managers who exploited the women and took 90% of their earnings. Caught up in the sweep was mobster Lucky Luciano and 8 of his henchmen who were convicted on 62 counts of compulsory prostitution. Mr. Luciano had been arrested 11 times before with hardly any consequences, so his ensuing

conviction shattered the idea that mobsters were protected from legal retribution. The grand jury broke the back of organized racketeering in New York City.

Citizens across the country followed the exploits of the New York City special grand juries and special prosecutor Dewey. In 1937 the Reader's Digest publicized the work they had done and encouraged readers that corruption in communities across the country could be attacked in the same way. The Grand Juror's Association in New York began to receive inquiries from people throughout the United States, including some who had been previously unaware that such a powerful institution like the grand jury existed. It is likely that some of the delegates to the Alaska Constitutional Convention had read these accounts and were familiar with the success of the New York grand jury in protecting the public's welfare.

Chapter 5

The Grand Jury's Historical Enemies: Politicians and Fuzzy-Minded Crackpots

The American grand jury's unique ability to hold government and corporate interests accountable has earned it some formidable opponents over the years. Occasionally judges have sought to curb its common law powers to investigate matters. Politicians have sometimes tried to retaliate directly against grand juries investigating them, but those frontal assaults typically serve to draw more public attention to their misdeeds and don't work out too well.

The primary battleground for assaulting the grand jury's common law powers has been inside state legislative halls and constitutional conventions. Typically led by lawyers or "reformists" on behalf of special interest groups and/or misguided politicians, these attempts have focused first on removing the protections that many states, like Alaska, have written into their constitutions. Once those are removed, one of two objectives begins to emerge – either to completely abolish the grand jury in that state, or to weaken it by passing legislation to weaken its common law powers. The special interest groups have many buzz words to trap the hearts and minds of the public into incurring self-inflicted wounds – "archaic", "outdated", "reform", "costly" are a few of those words.

Some of the first attacks on the grand jury were based on personal attacks by lawyers on the intelligence of the "ordinary" citizens serving on the panels. In 1886, a New Jersey prosecutor condemned the grand jury as an arbitrary, irresponsible, and dangerous part of government which should be the domain of official responsibility. He stated, "it is difficult to see why a town meeting of laymen, utterly ignorant both of law and the rules of evidence, should be an appropriate tribunal. The summoning of a new body of jurors at each term insures an unfailing supply of ignorance."[65]

In 1897, an Illinois lawyer urging abolition of the grand jury told members of the Attorneys Association that the average grand juror possessed few of the qualifications essential to his duties. In 1905, the Iowa Bar Association adopted a resolution to abolish the right to grand jury indictments, with the support of a judge who stated, "let us do away with a few things and maintain the law for the benefit of the lawyers who are to convict guilty men."[66]

These attacks on the grand jury met resistance from judges like Harman Yerkes from Pennsylvania. In 1901, Judge Yerkes supported grand juries as a means of extending popular control over government. He told jurors that representative bodies such as theirs were not outmoded or useless. In troubling times, Judge Yerkes stated, "the divided, yet powerful and also combined responsibility of the secret session of the grand jury … has worked out great problems of reform and correction." Abolition of the grand jury

[65] Id., at p. 141.
[66] Id., at pp. 144-145.

would leave the accused citizen completely at the mercy of "an unjust or unwise judge or district attorney".

Judge Yerkes dismissed arguments that because the United States wasn't ruled by a tyrannical king, grand juries had ceased to be necessary as guardians of individual liberty. The way he saw it, tyrants even more irresponsible than the despots of old sought to dominate local, state, and national governments. Giant business monopolies restless of legal restraints and party bosses who didn't hesitate to break judges and create courts were as much a danger to freedom in the United States as tyrannical kings in England. Judge Yerkes saw grand juries as powerful agencies of the people, effective challengers to business or mob boss domination of government.[67]

Opponents of the grand jury eventually learned that attacking the education of laymen had an unpleasant and undemocratic tone that tended to rally support for the grand jury among the public. The special interest groups began to shift the focus of their public opposition towards challenges based on time and money.

In 1911, a Houston attorney told members of the Texas Bar Association that the grand jury was a "useless and unnecessary piece of legal machinery" that cost Texas counties between $100,000 and $200,000 each year, taking men away from their homes and businesses. In 1912, a similar argument was presented in Ohio at its constitutional convention. In 1915, lawyer and former U.S. President William Taft, appeared before the New York State Constitutional Convention and attacked the grand jury as a "bulky and costly" institution that substituted a legal expert for an unwieldy body of laymen.[68]

Ex-Civil War soldier and publisher George Putnam countered Mr. Taft's views, becoming an outspoken defender of the grand jury system. Mr. Putnam had served on New York grand juries over a period of 35 years and became convinced that no other institution provided such a degree of popular participation in government. He openly challenged the views of Mr. Taft stating, "there is no other way citizens can bring criticism directly to bear upon public officials." Mr. Putnam viewed the grand jury as more than mere bodies of law enforcement. During their term, grand jurors acted as representatives of the people of the county and in that capacity could summon any public official, high or low.[69]

Mr. Putnam felt that when grand juries ceased to sit, the cause of popular government would suffer great damage. He and other citizens, convinced of the necessity of preserving the grand jury, organized the Grand Jury Association of New York County. They sought to publicize the importance of the grand jury to democratic government and to blunt the attack on its layperson consistency.

Mr. Putnam's efforts in organizing the Grand Jury Association paid off in later years. In 1946, grand jury opponents had managed to pass a bill through the state legislature preventing grand juries from making presentments against individuals for misconduct that did not constitute a crime. The NY Grand Jury Association teamed up with newspapers, civic and business groups to urge the governor to veto the bill. They rallied around the point that the grand jury was the only local body that could effectively reprimand lax and indifferent public officials. In heeding their pleas and vetoing the bill, the governor warned

[67] Id., at p. 147.
[68] Id., at pp. 145-146.
[69] Id., at pp. 147-148.

legislators that the power of grand juries should not be impaired and should remain "the bulwark of protection for the innocent and the sword of the community against wrongdoers."[70]

The common law powers of the New York grand jury had first come under attack a century earlier from the state's Code Commission. In 1849 under the guise of "legal reform" the commissioners referred to grand jury service as a burdensome duty and stated they would have recommended its complete abolition but for its constitutionally protected stature. The commission opined that "limits must be placed to the extent of its powers and restraint must be placed upon their exercise" and recommended the legislature implement this limitation by adopting a proposed code of criminal procedure.[71] However the New York legislature rejected their proposed rules and did not attempt to limit the power of grand juries.[72]

The first attempt to completely abolish the grand jury system by legislative action occurred in Michigan during 1859. The state constitution there had been revised nine years earlier and no longer guaranteed the right of a grand jury indictment in criminal matters. The state's Judiciary Committee, led by a Detroit attorney issued a scathing report of the grand jury, blasting the lack of education of most jurors and the inability of the courts to control the direction of investigations. The legislature followed suit, abolishing the use of the grand jury in criminal matters and in civil matters limiting investigations to those requested by a judge.[73]

Following the conclusion of the Civil War, "reformers" in Wisconsin attacked the grand jury, pointing to the speed and ease in which Michigan prosecutors were able to charge alleged criminal offenders without having to go through a grand jury for indictments. In 1869 the Wisconsin legislature passed a bill abolishing the grand jury in the spirit of advancement and reform. The Wisconsin voters approved the measure the following year; a grand jury could only appear when specifically called by a judge.[74]

From 1875-1884, anti-grand jury forces in Nebraska, Colorado and Iowa were able to remove the constitutional guarantee of a grand jury in criminal cases, leaving the matter up to the legislature. The anti-grand jury forces also made substantial progress in 1889 when 6 territories came into the Union as states and considered the role of the grand jury in their constitutional conventions. Idaho, Montana, and Washington authorized the grand jury only for special occasions while North Dakota, South Dakota and Wyoming left it up to the legislature which then abolished the grand jury. In these states, the issue typically boiled down to monetary savings on the one side and the people's ability to check government officials on the other.[75]

Other states that directly considered the issue kept the grand jury, however. In 1872, delegates at the West Virginia constitutional convention voted down proposals to eliminate the grand jury in criminal proceedings. In Ohio, the delegates to the 1878 Third Constitutional Convention were swayed by "reform advocates" to delete the guarantee of a grand jury indictment in all criminal cases, but the citizens of Ohio refused to amend the constitution when it came to a vote. "Reform" efforts to eliminate the grand jury

---

[70] Id., at p. 241.
[71] Id., at p. 65. Chapter 12 of this study will explore how in 1988, 3 judges on the Alaska Supreme Court accomplished what the NY Code Commission failed to do by unilaterally imposing similar restrictive rules on the Alaska Grand Jury. The 2 dissenting judges felt these rules clearly violated the Alaska Constitution.
[72] Id., at p. 65.
[73] Id., at pp. 68-69.
[74] Id., at pp. 69-70, 149-150.
[75] Id., at p. 151.

actually backfired in Missouri when its investigatory powers were strengthened instead – a constitutional mandate was passed requiring the grand jury to investigate at least once a year all officials in charge of public funds.[76]

In California, the public's right to a grand jury was adopted into the state's original Constitution. In 1902, the legislature tried to abolish the grand jury, but the institution had gained a reputation as a protector against municipal corruption and voters overwhelmingly rejected a proposed constitutional amendment to limit its investigatory powers. In 1907, an editorial appeared in the San Francisco Examiner saying, "[t]he Grand Jury has always been disliked by politicians. It is the only body charged with investigating public offices, and the only part of the prosecuting machinery that does not have to go before a political convention."[77]

In 1906, the delegates framing the constitution for Oklahoma agreed to abolish regular meetings of the grand jury, but they did not wish to leave the issue of summoning a grand jury entirely up to the local judges. They empowered the people to call a grand jury at any time by obtaining the signatures of 100 taxpaying residents in a county.[78]

In Oregon, "reformists" sought to abolish the grand jury system at the initial constitutional convention of 1857; they were led by a lawyer who wanted to replace the system with professional prosecutors. The current and former Territorial Chief Justices came to the defense of the system and were able to save it but were unable to secure a constitutional guarantee. Forty years later, the Oregon opponents of the grand jury finally won out and removed it as a protection in criminal proceedings. However, by 2008 the residents had seen enough of district attorneys using criminal prosecutions for political purposes and voted by a margin of 2-1 to restore grand juries in their state through a constitutional amendment. Throughout this period the grand jury remained in effect for investigations of civic matters and uncovered several violations by State officials in disposing of public lands.[79]

Opposition to the investigatory power of the grand jury also developed from its ability to expose prominent officials and upset the balance of political power. In 1938, Pennsylvania politicians became engaged in a heated battle before the primary election. Dissident elements within the Democratic Party leveled charges of corruption and fraud against the Democrat governor's administration. The district attorney in the state capitol petitioned for a special grand jury investigation and the court summoned a panel.

The governor responded with a radio address to the people that the grand jury probe was a "politically inspired inquisition, to be conducted by henchmen of the Republican State Committee." The attorney general appealed to the state supreme court to halt the grand jury investigation which subsequently declared it had no such power. The governor then summoned a special session of the legislature "to repel an unprecedented judicial invasion of the executive and legislative branches of our government." He charged the judges and district attorney with abusing their authority and requested legislation to block

---

[76] Id., at pp. 150-151.
[77] Id., at p. 153. See also, Monea, supra, note 53, at p. 296.
[78] Id., at p. 153.
[79] Id., For the discussion of the efforts to abolish the Oregon grand jury in criminal proceedings see pp. 153-154. For discussion of the effectiveness of the Oregon grand jury in investigating improper land transactions, see pp. 179-181.

the probe. The Governor's legislative friends rushed through a retroactive law suspending all investigations of public officials. A legislative committee launched an investigation, but the court in which the investigation was pending impounded all the evidence. The dispute went back to the state supreme court which declared the law restricting investigations unconstitutional and reminded the legislators they could not abolish the grand jury.[80]

This example in Pennsylvania of public officials going to any length to prevent the grand jury from investigating them, motivated neighboring New York to strengthen its grand jury system. Rallying behind the slogan, "What happened in Pennsylvania can happen here", the delegates at the 1938 New York state constitutional convention meeting made certain the grand jury would remain the people's shield against official corruption. They added a new clause to the constitution providing that inquiries into official misconduct could never be suspended. [81]

The State of Washington followed the lead of New York. In 1941, citizen organizations succeeded in getting the legislature to approve a constitutional amendment requiring at least one grand jury per year in each county. The amendment went so far as to bar prosecutors from advising grand juries but then the State Association of Prosecutors launched a vigorous campaign against the amendment and was able to defeat it in a referendum.[82] At its 1943 constitutional convention, the delegates of Missouri revised the constitution to insert a specific provision that the power of grand juries to investigate misconduct in public office could never be suspended.

As mentioned in the preceding chapter, in the decade preceding the Alaska Constitutional Convention one of the most nationally well-known advocates of the grand jury was former special prosecutor Thomas E. Dewey. In 1943 Mr. Dewey had become the Governor of New York, swiftly becoming a national candidate in the presidential elections of 1944 and 1948. He led the moderate faction of the Republican Party during the 1940s and 1950's.

Mr. Dewey spoke at a meeting hosted by the Grand Jury Association of New York in 1941 while he was a District Attorney. He urged the Association to "exert constant vigilance and resistance against the attempts by 'highly educated, fuzzy-minded crackpots trying to undermine the administration of criminal law' by advocating abolition of the grand jury system. He declared the grand jury represented "the conscience of the community and stands as the only effective bulwark against a return of the District Attorney's office to political control and incompetence." [83]

The last two paragraphs of the New York Times article reporting Mr. Dewey's speech appears below:

> The grand jury, he said, is the only body which has a continuous existence and is able to bring to book at all times persons who would pervert justice and public offices. Far from being an out-moded institution, he declared, the grand jury actually is a leader in adapting law administration to modern forms. (Emphasis added)

[80] Id., at pp. 237-238.
[81] Id., at p. 239.
[82] Id., at p. 239.
[83] Id, at p. 240; New York Times, Grand Jury System Vital, Says Dewey, May 2, 1941.

'When you are sitting,' he continued, 'you are practically the boss of the town. If you don't believe it, just send a subpoena to the biggest official in town and see how quickly he responds and how humbly he tells his story.' (Emphasis added)

Chapter 6

Recent Perspectives: Grand Jury Service Increases Public Interest in Civic Affairs

Up to this point we have followed the development of the common law powers of the grand jury through the first half of the 20th century. Before turning our attention specifically to the Alaska Grand Jury, it is worth taking a quick look at two more recent studies that align with the works of Lord Somers and Professor Younger. These studies highlight the growing disconnect between the American people and their governments. They call for an increased use of the grand jury in our country to help restore citizens' faith, participation, and sense of pride in government.

In 1992, Professor Ronald F. Wright published an article entitled "Why Not Administrative Grand Juries".[84] Mr. Wright has an impressive resume, currently serving as Executive Associate Dean for Academic Affairs at Wake Forest University Law School since 2014. He began his teaching career at Wake Forest in 1988 and has served as a Visiting Professor of Law at Stetson University, University of Alabama, University of Arizona, Washington and Lee University, and North Carolina State University. Mr. Wright received his law degree from Yale University where he was editor of the Yale Law Journal. He has published eight books on legal topics and written numerous articles, reviews, and essays.

Mr. Wright began his article with the following thought-provoking and clairvoyant paragraph:

> The people care nothing for their bureaucrats. The typical citizen of the United States, a nation founded on the notion that the people must govern themselves, knows next to nothing about the daily administration of government. Although the government affects their lives profoundly, citizens interact with government agencies without any conviction that they could influence an outcome. And as participation and familiarity with public affairs dwindle, alienation and indifference grow. This detachment from the administrative work of government appears to be part of the larger pattern of declining voter turnout and apathy. There is reason to fear that Americans are losing any sense of community.

Mr. Wright's article proposes using citizen panels modeled after the grand jury to monitor or perform some of the administrative tasks handled by government agencies. To support this proposal, Mr. Wright outlined the common law investigatory and reporting powers of the grand jury. He emphasized the historical duties of the grand jury to monitor government officials, to report their findings to the public, and if necessary, to recommend the removal of public officials. Mr. Wright cited to Judge Wilson's opinion that the grand jury serves as a channel of communication between the people and the government and

[84] Ronald F. Wright, Why Not Administrative Grand Juries? 44 Admin. L. Rev., 465 (1992).

identified the ability of the grand jury to help shape public policy. Mr. Wright's explanation of these functions is excellent, portions of which are provided below:

> [L]ocal grand juries also monitored governmental activity other than criminal enforcement. For example, many grand juries early in the nation's history issued reports criticizing the condition of local roads, public buildings, or prisons. Grand juries criticized local officials for not providing adequate accounting of public funds or for spending public funds unwisely; they upbraided officials for not attending official meetings or for failing to supervise subordinates in local government. On occasion, they even would criticize the court supervising their work for failing to carry out the court's various administrative duties. To facilitate these monitoring functions, grand juries generally had free access to the records of local government. A grand jury could choose for itself any activity of local government to be the subject of an inquiry and report, which would be addressed to the court and the public at large.
>
> Perhaps the most far-reaching monitoring power of the grand jury was its power, which still exists in a few states, to initiate the removal from office of elected officials. The grand jury, after an investigation of an official's misconduct, could initiate adversarial proceedings that might ultimately result in the removal of the official. Grand jury reports from time to time called for the removal of appointed officials, as well.[85] …
>
> James Wilson, among the most influential of the drafters of the federal Constitution, fully recognized the importance of the grand jury as a 'great channel of communication, between those who make and administer the laws, and those for whom the laws are made and administered.' The importance of this body came not only from its power to indict or refuse indictment, but also from its powers to administer and shape public policy:
>
> > 'All the operations of government, and of its ministers and officers, are within the compass of their view and research. They may suggest public improvements, and the modes of removing public inconveniences; they may expose to public inspection, or to public punishment, public bad men, and public bad measures.'
>
> Judges who instructed grand juries about the significance of their duties during this time also emphasized the importance of popular participation in the administration of the laws. They stated time and again that grand juries could simultaneously make law enforcement more effective and prevent arbitrary exercises of administrative power. The grand jurors generally received these instructions enthusiastically and arranged to have the remarks published in the newspaper for distribution to the public. …
>
> Alexis de Tocqueville, writing about the American republic in 1840, declared that the jury system (which he defined broadly enough to include grand juries) was primarily a 'political institution' that put control of public affairs into the hands of the people. 'The jury system

[85] Id., at pp. 470-472.

as understood in America seems to me as direct and extreme a consequence of the dogma of the sovereignty of the people as universal suffrage.' [86]

Professor Wright's article points out the grand jury's valuable role in helping to educate citizens of their important civic responsibilities, and to encourage their increased participation in government affairs:

> The perceived benefits of a grand jury system ran in more than one direction. Although grand juries were believed to improve the administration of public law and policy, supporters of grand juries also suggested that the institution improved the civic virtue of the grand jurors themselves. In particular, grand jury service educated the jurors about the nature of their political institutions and fostered a sympathetic attachment between the jurors and their government.
>
> One form of education for the grand juror came from the instructions of the judge who supervised the work of the grand jury. The supervising judge would instruct the grand jurors about their legal duties, and remind them of the importance of their task and the need for regular attendance. The judge would sometimes identify for the grand jury a line of inquiry to pursue and not leave the agenda entirely in the hands of the prosecutors or the grand jurors themselves….
>
> Judges gave these charges in a self-conscious effort to educate grand jurors. The content of their charges stressed the importance of jurors who could transcend self-interest. They pointed to grand jury service as a contribution to a government that would promote liberty and thereby make it easier for others to exercise civic virtue. Their charges also underscored the need for grand jurors to educate their fellow citizens regarding the operation of government: 'Inform and practically convince everyone within your respective spheres of action'.
>
> Other enthusiasts of the grand jury during this period similarly emphasized the value of grand jury service in educating citizens. Anti-Federalists such as The Federal Farmer thought jurors were just as important to the daily public life of a community as elected representatives: 'Their situation, as jurors and representatives, enables them to acquire information and knowledge in the affairs and government of the society; and to come forward, in turn, as the sentinels and guardians of each other.'
>
> Tocqueville dwelt at some length on the value of the jury experience in preparing citizens for self-government. He suggested that jury service installs 'some of the habits of the judicial mind into every citizen, and just those habits are the very best way of preparing people to be free.' It teaches 'equity in practice,' encourages jurors to take responsibility for their actions, and makes the jurors feel that they 'take a share' in society and its government.
>
> Education was not the only perceived benefit of jury service. The grand juror's experience, administering the laws of the land, fortified the attachment between the citizen and the commonwealth. Even when the grand jury corrected the errors of public officials, the participants developed a respect for the law that enabled them to hold

[86] Id., at pp. 477-478.

> officials accountable. Francis Lieber noted the tendency of jury service to strengthen an attachment between the citizen and the commonwealth. 'It binds the citizen with increased public spirit to the government of his commonwealth, and gives him a constant and renewed share in one of the highest public affairs, the application of the abstract law to the reality of life – the administration of justice.'[87]

Alaska desperately needs a rekindling of the political attachment that Mr. Wright, Alexis de Tocqueville, and Francis Lieber believe is so important to a healthy democracy. Statistics currently available through our Division of Elections reveal voter turnout is steadily dropping and in 2018 set a record low of under 50%. A revival of the investigatory and reporting powers of the Alaska Grand Jury should help reverse this alarming trend.

Professor's Wright's recognition of the grand jury's ability to educate and encourage public participation in government matters was echoed by Professor Renee B. Lettow (now Lerner) in her 1994 article titled Reviving Federal Grand Jury Presentments. [88] In discussing the benefit of increasing grand juror's participation in government affairs, Professor Lerner used the same quote of Francis Lieber that Professor Wright had cited – "jury service binds the citizen with increased public spirit". On the additional benefit of increasing a citizen's civic education she used another quote from Alexis de Tocqueville,

> [The jury] should be regarded as a free school which is always open and in which each juror learns his rights, comes into daily contact with the best-educated and most-enlightened members of the upper classes, and is given practical lessons in the law. [89]

Professor Lerner is another legal scholar/historian with impressive credentials. She graduated summa cum laude in history from Princeton University and was a Rhodes Scholar at Oxford University where she studied English legal history. At Yale Law School she was Articles Editor of the Yale Law Journal and later clerked for Justice Anthony Kennedy of the U.S. Supreme Court. Professor Lerner is a co-author of the book History of the Common Law: The Development of Anglo-American Legal Institutions (2009). She is currently the Donald Phillip Rothschild Research Professor of Law at George Washington University Law School.

Her article, Reviving Federal Grand Jury Presentments focused on the grand jury's historical common law powers in federal court settings. Ms. Lerner pointed out the emphasis given by early federal judge James Wilson to the independence of the grand jury – "grand jurors are not appointed for the prosecutor or for the court; they are appointed for the government and for the people".[90] Later in her article, she cited again to Judge Wilson and then to John Jay, the first Chief Justice of the U.S. Supreme Court as examples of federal judges emphasizing the importance of the grand jury's power to investigate and to criticize the conduct of public officials.[91]

However, Ms. Lerner's study is most valuable to Alaskans for helping to demonstrate how the enemies of grand juries can neutralize their investigatory powers by adopting subtle court rules that give judges more control over those reporting powers. The impact can be disastrous, leaving citizens more frustrated and

[87] Id., at pp. 479-481.
[88] Renee B. Lettow, Reviving Federal Grand Jury Presentments, 103 Yale L.J. 1333 (1994).
[89] Id., at p. 1357.
[90] Id., at p. 1338.
[91] Id., at p. 1355-1356.

exasperated than ever. Professor Lerner used a federal case in Colorado known as Rocky Flats, to illustrate how a federal judge used federal court rules to try to intimidate federal grand jurors and prevent them from informing the public about the extent of hazardous nuclear waste infiltrating their water supply.

To better understand how a debacle like Rocky Flats could ever unfold, recall our previous discussion in Chapter 2. The Fifth Amendment to the US Constitution guaranteed the right to a grand jury in federal criminal matters but did not extend those protections to the common law investigatory powers of the federal grand jury. To recap, this omission by our nation's Founders was deliberate because of 1) the tension between the Federalists and Anti-Federalists; 2) local grand jurors' unfamiliarity with federal laws; and perhaps most importantly 3) local grand juries were considered more important because they handled most day-to-day matters at a time when the federal government powers were limited.

After the Fifth Amendment was adopted, we saw in Chapter 2 how influential federal judges like James Wilson and John Jay continued to praise and promote the reporting powers of the federal grand juries. However, over time Mr. Dewey's enemies, the "fuzzy-minded crackpots" gained momentum in their "reform" efforts. Without the constitutional protection of the grand jury's reporting power, the federal court system eventually adopted restrictive court rules that subtly harnessed investigative reports. The federal grand jury completely lost its independence if the judge disagreed with their conclusion; centuries of common law independence was wiped out. Ms. Lerner observed:

> For all practical purposes, the Federal Rules of Criminal Procedure have abolished the grand jury's presentment power…such judicial discretion guts the power. Confusion arises because the Rules smother the presentment power without doing so explicitly. The Rules conflict with traditional federal practice, and, because the Supreme Court has offered no guidance, lower courts have floundered in trying to discern (or make) the law.[92] (Emphasis added)

The Rocky Flats case highlighted by Professor Lerner provides an alarming example of what can happen when the reporting power of the grand jury can be restrained by judicial discretion through court rules. In 1989, a federal grand jury in Colorado began investigating the operations of a federal facility developed in 1952 to produce uranium and plutonium components for use in nuclear weapons. The facility was massive, covering 6500 acres and located on a plateau known as Rocky Flats, about 15 miles northwest of Denver. Rockwell International operated the facility.[93]

In the late 1980s, reports of environmental problems began to surface. The facility was shut down in 1989 after being raided by federal FBI and EPA agents who documented numerous violations of federal anti-pollution laws. An estimated 3500 people turned out for a demonstration outside the facility. Today the former nuclear weapons facility is a Superfund site, inaccessible to the public, with billions of dollars spent trying to clean up the hazardous waste.

---

[92] Id., at p. 1343. Professor Lerner's observations support the conclusions reached in Chapters 11 and 12 of this study that the Alaska Judicial Council and the Alaska Supreme Court illegally harnessed the power of the Alaska Grand Jury by proposing and adopting Alaska Criminal Rule 6.1, which is similar to the federal rules.

[93] Id., at pp. 1349-1353. Additional details of the Rocky Flats case are also presented in the Wikipedia page "Rocky Flats Plant" and The Denver Post, More than 60 boxes of documents from the Rocky Flats grand jury probe have gone missing, July 30, 2019, online.

The Colorado grand jury was charged to investigate whether any criminal activity had occurred in connection with these significant environmental problems. The Colorado grand jurors undertook a thorough investigation, questioning 110 witness and reviewing 2000 exhibits. They found the federal government and its contractors had engaged "in a continuing campaign of distraction, deception and dishonesty" while discharging hazardous and radioactive matter into local water supplies.

The grand jurors felt that based on the evidence they had gathered, eight individuals should be charged criminally including employees of Rockwell and the Department of Energy. Federal prosecutors ignored these recommendations and reached a plea agreement with Rockwell in which the company admitted to ten environmental crimes and paid 18 million dollars in penalties -- a sum equal to the amount of bonuses Rockwell had received from the government for operating the facility. The Colorado grand jurors were so upset with this decision that with the help of a prosecutor's manual, the grand jury drafted up its own "indictment" and presented it to the judge along with a report criticizing the prosecutors' handling of the case.

The federal judge reacted by sealing all the grand jury's documents including their report. Matters quickly escalated between the people and the federal government. The grand jury retaliated by leaking information to the press. The judge retaliated by asking the Justice Department to investigate the jurors for violations of their secrecy oath. The jurors appealed to the President and requested a special prosecutor to investigate the Justice Department's handling of the case. National publicity ensued and the Justice Department eventually dropped its investigation of the grand jurors.

Both the federal judge and prosecutor left a bad impression on the grand jury, evidencing an alarming disconnect reminiscent of colonial grand juries dealing with the local representatives of a distant central government. According to the jurors, the government prosecutor had a condescending attitude. One juror claimed he "treated us like third-graders". Another juror claimed he "didn't give us credit for having any sense". When the jurors began to clash with the prosecutor and presented the judge with written questions regarding the extent of their powers, his ensuing advice amounted to little more than "mumbo-jumbo" to them. At the beginning the federal judge had told them not to "yield your powers nor forgo your independence of spirit", yet after the jury exercised that independence, the judge referred them to the Justice Department for criminal investigation.

Professor Lerner succinctly summed up the state of affairs that left Colorado citizens so disillusioned with their government:

> Jurors have repeatedly expressed frustration with a judicial system that requests their services for two years yet denies them the power to make public their accusations. Seven jurors appeared on NBC's Dateline and Shirley Kyle's comment was representative: 'It makes me mad because if what we say or did doesn't mean anything, why did they choose to have a special grand jury?' Rocky Flats demonstrates how current secrecy rules thwart the people's ability to influence their own government and heighten the already towering level of exasperation with that government.[94] (Emphasis added)

Ms. Lerner wrote these underscored words almost 30 years ago. On a national scale, we can see today where that level of exasperation with our government has risen to. It's hard to fathom where the level

[94] Id., at p 1353.

must be today for those citizens living near Rocky Flats, fearful of cancer-causing substances in their water supply. Decades later, residents are still trying to get to the sealed grand jury records for help in resolving reports of remaining environmental hazards, including lost plutonium. In 2019, federal prosecutors informed those residents via email that the 65 boxes of sealed documents in their custody had been “lost”.

Chapter 7

Justice Vanderbilt's Analysis of Presentments and his Impact on the Alaska Constitution

When the Alaska Constitutional Convention first convened in the fall of 1955, one of the most recognized, contemporary judicial authorities in the United States on the common law powers of grand juries was Chief Justice Arthur Vanderbilt of the New Jersey Supreme Court. Judge Vanderbilt was nationally known for his efforts in court reform and the adoption of his ideas into the revised New Jersey state constitution in 1947. From 1937-1938 he was President of the American Bar Association. He served for many years as the Dean of the New York University Law School and on two occasions declined consideration for the U.S. Supreme Court.

The Alaska Constitutional Convention hired as its consultant Dr. Sheldon Elliott, Dean of New York University Law School and Director of the Institute of Judicial Administration.[95] Dr. Elliott's credentials included previous experience with the California State Constitutional Revision Committee and the Los Angeles Committee on Reorganization of City Government.[96] When Dr. Elliot was introduced as a legal consultant to the delegates by President Egan on December 1, 1955, he singled out Judge Vanderbilt's influence upon his work and the delegates:

> I shall give credit where credit is due. The inspiration for [the Institute's] establishment and the spade work in getting the money from the Rockefeller Foundation and getting it going both came from [Judge Vanderbilt], whose name I am sure is known to many of you. [97]

Three years earlier in 1952, in a case called In re Camden Grand Jury, Judge Vanderbilt had written the opinion of the 6-1 majority of the New Jersey Supreme Court in a case involving the presentment power of the grand jury.[98] One of the five other judges in the majority was Justice William C. Brennan, who in 1956 would be appointed to the United States Supreme Court where he served for 34 years, becoming in the words of his colleague Justice Antonin Scalia, "probably the most influential Justice of the 20th century."

---

[95] See, Folder No. 205.1, Committee on Preamble and Bill of Rights, Dorothy Awes, Chairman at pp. 9, 18 (1955), available online at http://www.akleg.gov/pdf/billfiles/ConstitutionalConvention/Folder%20205.1.pdf.

[96] See, Folder No. 192, Consultants, at p. 4. Available online at http://www.akleg.gov/pdf/billfiles/ConstitutionalConvention/Folder%20192.pdf.

[97] Proceedings, infra, note 113, p. 473.

[98] In re Camden Grand Jury, 10 N.J. 23, 89 A.2d 416 (1952), later distinguished in In re Presentment by Camden Co. Grand Jury, 34 N.J. 378, 169 A.2d 465 (1961). 33 years later, the 1952 Camden opinion by Judge Vanderbilt would be cited as authority by the Alaska Attorney General in support of publication of the Juneau Grand Jury's report to the public in the Sheffield investigation, which opinion Governor Sheffield's lawyers then attacked.

In Camden, the pertinent facts involved a local grand jury investigation following an attempted jail break at the county jail. The grand jury examined 59 witnesses at 12 special sessions and took 1500 pages of testimony. In addition to various indictments of public officials, the grand jury issued a lengthy report enumerating irregularities and conditions at the county jail and made a series of specific recommendations. The report was challenged by the sheriff who was the subject of the grand jury's criticism.

At the beginning of his extensive 33-page Camden opinion, Judge Vanderbilt stressed the importance of the investigative grand jury in maintaining a healthy democracy and the necessity for embarking on such a thorough analysis of its function.

> The matters involved in this appeal are so vital to the sound administration of justice, and some of them are so widely misapprehended that we deem it essential to present the facts and our views of the pertinent principles of law in considerable detail.[99] …
>
> We must constantly keep in mind not only that in the last analysis every civil right that we treasure necessarily depends on the orderly administration of the criminal law, but also that the sound administration of government at every level depends in large measure on enlightened and informed public opinion and that in this field the grand jury not only has rights but grave responsibilities.[100] (Emphasis added)

Judge Vanderbilt made several references to the common law power of the American grand jury, following its English predecessor. His observations were consistent with those previously made by Lord Somers and several Justices of the U.S. Supreme Court, as well as the later observations of Professors Younger, Wright and Lerner. Citing to previous authority on the practice of grand juries in East Jersey in 1682, Judge Vanderbilt also drew attention to the lack of rigid structure or comprehensive rules restricting the operations of grand juries:

> 'Grand juries were directed to appear at the County Courts; but what made them eligible, or whom they should be composed, by whom they should be summoned, and what were to be their duties, was not stated….The early settlers in East Jersey were mostly Englishmen, and as such were thoroughly acquainted with the principles of common law as it existed in the mother country, where courts of similar name and like character were to be found. These courts in England were governed by the rules of that universal law so dear to every Englishman's heart. The English colonists had drunk deep and long draughts from the fountain of liberty.…
>
> [T]hey were equally unyielding when their political freedom was endangered, and watchful in guarding against any action by Governor, or State, or Legislature which seemed at all like interference with their rights as citizens. This feeling pervaded all classes and led them to seek to discover what were the best foundations to civil liberty; so they studied the principles of the common law of England and needed no statute to enable them to understand how to conduct the courts provided for them. They needed only

[99] Id., at p. 26.
[100] Id., at p. 34.

courts properly constituted; and falling back on their knowledge of the modes of procedure in similar courts in the mother country, they required nothing more.

There was a remarkable fact connected with the legislation respecting these early courts. In the law constituting them there was no provision for their guidance; no rules by which they were to be governed, no mode established by which their judgments were to be enforced; there was no Practice Act, nor anything like it. The statutes constituting them were the simplest possible; the tribunals were created, their titles given, and the times and places when and where they were to meet; and that was all.'[101]

Judge Vanderbilt turned his attention to considering the common law powers of the investigatory grand jury under the auspices of the New Jersey Constitutional Convention of 1947. He cited an opinion from the New Jersey Attorney-General's office which summarized the practice in that state and the inherent common law principles on which it is grounded. In pertinent part, this opinion states:

The right of a grand jury to make an inquiry independently of the prosecutor of the county is an inherent common law right which is in no wise affected by this provision in the Constitution. …

A grand jury also has the fundamental right to inquire into any matters which are pertinent to an exercise of its powers and is universally so charged by the court when entering upon its duties.[102] (Emphasis added)

Judge Vanderbilt then noted the distinction between the common law (which prevails in Alaska) and the statutory enactments of some states when considering the grand jury's ability report its findings to the public.

We are not unaware of a respectable body of authority in other jurisdictions that frowns on the exercise by the grand jury of its common-law right to make presentments of matters of public concern unaccompanied by indictments. In some of these jurisdictions the powers of the grand jury are governed by statute and the problem there is solely one of statutory construction, but such is not the case here. A practice imported here from England three centuries ago as part of the common law and steadily exercised ever since under three successive State Constitutions is too firmly entrenched in our jurisprudence to yield to fancied evils.[103] (Emphasis added)

Consistent with the host of highly respected judges and scholars both proceeding and following him, Judge Vanderbilt stressed that increasingly complex government makes the common law investigatory and reporting powers of the grand jury even more essential than they were in previous centuries. As we saw

[101] Id., at pp 39-40, citing 1 Whitehead, Judicial and Civil History of New Jersey 372-373 (1897).
[102] Id., at p. 62.
[103] Id., at p. 65.

in Chapter 6, his views on this critical aspect of the grand jury were echoed 50 years later by both Professors Wright and Lerner.

> If presentments of matters of public concern were found necessary in the public interest in the relatively simple conditions of English and colonial life three centuries ago, how much more essential are they in these days when government at all levels has taken on a complexity of organization and of operation that defies the best intentions of the citizen to know and understand it. What is not known and understood is likely to be distrusted. What cannot be investigated in a republic is likely to be feared. The maintenance of popular confidence in government requires that there be some body of laymen which may investigate any instances of public wrongdoing. [104] (Emphasis added) …
>
> The grand jury provides a readily available group of representative citizens of the county empowered, as occasion may demand, to voice the conscience of the community. There are many official acts and omissions that fall short of criminal misconduct and yet are not in the public interest. It is very much to the public advantage that such conduct be revealed in an effective, official way. No community desires to live a hairbreadth above the criminal level, which might well be the case if there were no official organ of public protest. Such presentments are a great deterrent to official wrongdoing. By exposing wrongdoing, moreover, such reports inspire public confidence in the capacity of the body politic to purge itself of untoward conditions.[105] (Emphasis added) …
>
> The dangers to a public official or a private citizen from unfounded presentments are far less than those attending the other forms of public investigations we have mentioned, by reason of the care with which grand juries are selected, the secrecy with which they deliberate and the judicial control of such presentments when they are handed to the court. Of course, if grand juries are selected on a partisan basis, partisan presentments might result. The remedy therefor is not to abolish presentments but to abolish partisan grand juries.[106]

Through his detailed recounting in Camden of society's benefits from the grand jury, Judge Vanderbilt highlighted the importance of 1) the common law investigatory and reporting powers of the grand jury; 2) the grand jury's unique ability to generate public trust in governments of increasing complexity; 3) a properly functioning investigatory grand jury's ability to proactively deter official misconduct and serve as a vital check and balance; and 4) the critical and absolute necessity of properly selected, non-partisan grand jury.

When the delegates of the Alaska Constitutional Convention convened in 1955, they had the benefit of evaluating almost 200 years of grand jury practice in the United States. At their disposal were all the arguments for and against the grand jury's investigative and reporting power that this study has referenced. The delegates also had the luxury of comparing the condition of the public welfare in states that had strong grand jury powers vs. those states that had weak grand jury powers. The importance and virtues of the grand jury expressed by nationally known advocates such as Thomas Dewey in 1941 and Judge Vanderbilt in 1952 were likely familiar to some, if not many, of our Founders.

---

[104] Id., at p. 65.
[105] Id., at p. 66.
[106] Id., at. p 67.

As the following Chapter will detail, the issue whether to preserve the grand jury in the Alaska Constitution became the subject of considerable debate at the Convention. Those delegates in support of preserving the grand jury's broad common law powers in the Constitution and insulating it from executive, judicial, and legislative attack, won overwhelmingly. The one delegate who spoke out against increasing the constitutional protection of its broad investigatory powers in civic matters lost in an extremely lopsided vote. It wasn't a close and contest and as we shall see, the 8 delegates from the Juneau area were unanimously in favor of increasing the constitutional protections of the grand jury's broad powers.

Chapter 8

Alaska's Founders Decisively Protect the Grand Jury and Its Investigative Powers

The 55 delegates to the Alaska Constitutional Convention (or "ACC") convened from November 8, 1955, through February 6, 1956. These 55 Founders of Alaska's Constitution had been elected by territorial residents and their regular occupations were as businesspeople, homemakers, miners, fishermen, attorneys, territorial officials, and pilots. The meeting site of the ACC was the University of Alaska in College, AK, near Fairbanks. The relative seclusion of the campus facilities provided an excellent setting for the delegates to meet and confer on Constitutional issues. The secluded site was deliberately chosen over the territorial capitol of Juneau to minimize intrusions from the entrenched lobbying interests there.[107]

Mother Nature provided a huge assist in keeping distractions at the ACC to a minimum; on the first day of the Convention the temperature was minus 18 degrees and in later days dipped to minus 50 degrees. It got so cold that car tires froze flat. The lobbyists and other organized groups didn't show up; left alone, the delegates, their advisors, and convention staff were able to concentrate their efforts on what was best for the people.

The format of the ACC was influenced by recent constitutional conventions in New Jersey and Hawaii. A few committees were formed to deal with procedural issues of the convention, while others were formed to deal with different substantive areas of the constitution. Each of the delegates generally served on two committees. The Committee on Preamble and Bill of Rights (or "Rights Committee") was tasked with considering 1) the preamble to the Constitution; 2) an Article establishing a Declaration of Rights; and 3) an Article on Health, Education, and Welfare. Issues pertaining to the future of the grand jury in Alaska were first considered by the Rights Committee.

The seven members of the Rights Committee were a blend of professionals with backgrounds in law, business matters, and ethics. The committee was chaired by Dorothy Awes, a lawyer from Anchorage and its vice-chair was Ada Wein, a businesswoman from Fairbanks. Other members of the committee and their respective occupations were John Hellanthal (Anchorage lawyer with extensive Juneau roots), Robert McNealy (Fairbanks lawyer), Seaborn Buckalew (Anchorage lawyer), James Doogan (Fairbanks businessman), and Rolland Armstrong (Juneau clergyman).[108]

---

[107] KTOO, Alaska Statehood Pioneers: In Their Own Words, Transcript of Episode 1: The Constitutional Convention and Statehood, available online at https://www.ktoo.org/video/alaska-statehood-pioneers-constitutional-convention-and-statehood/.

[108] Folder No. 205.1 at p. 4, Committee on Preamble & Bill of Rights – Minutes, The Alaska State Legislature, Constitutional Convention available online at www.akleg.gov/pdf/billfiles/ConstitutionalConvention/. For occupations, see online webpage at www.alaska.edu. (Home/History and Facts/Alaska History/Creating Alaska/Constitutional/Convention/Delegates).

The Rights Committee had as its consultant Dr. Sheldon Elliott, who as noted in the previous chapter was the Dean of New York University Law School and Director of the Institute of Judicial Administration. Another consultant was Dr. Donald Moberg, Professor of History and Political Science at the University of Alaska.[109]

The Rights Committee held their first meeting on November 15 and over the next 3 weeks met on roughly fifteen occasions. The committee's minutes reflect that William A. Egan, President of the ACC attended several of the meetings.[110] During the course of its deliberations the Rights Committee concluded the grand jury should be preserved in the Alaska Constitution for all purposes. In its Commentary on the Preamble and the Declaration of Rights, the committee singled out the investigation of public officials as the grand jury's most important function.

> The grand jury is preserved, for all purposes, particularly for investigation of public officials. A grand jury of twelve is provided as adequate for performance of its functions. The article provides for alternative procedure of indictment or information, and allows the judge to call the grand jury at any time. Many states have found the same or similar procedure to be most satisfactory. (Emphasis added).[111]

The Rights Committee transmitted its proposed Preamble and Bill of Rights, along with its supporting Commentary to Mr. Egan on December 15.[112] Section 7 of the Bill of Rights contained the language pertaining to the grand jury, as set forth below.

> Section 7. The grand jury shall consist of twelve citizens, any nine of whom concurring may find an indictment or a true bill; Provided, that no grand jury shall be convened except upon an order of a judge of a court having the power to try and determine felonies; but when so assembled such grand jury shall have power to investigate and return indictments for all character and grades of crime; and that 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. (Emphasis added)
>
> No person shall be prosecuted criminally for felony other than by indictment or information, which shall be concurrent remedies, but this shall not be applied to cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger.

Notably, the grand jury's power that "shall never be suspended" was its ability to inquire into willful misconduct of public officers.

On the forty-second day of the Convention, December 19, Chairwoman Awes presented her committee's proposed Bill of Rights to the other delegates. She explained to the delegates there were about 19 sections in the Article each dealing with a different subject, so she would point out a few things in general

---

[109] Folder No. 205.1, supra, note 104, at pp. 10, 12.
[110] Id., at pp. 3, 5, 6, 7, 9, 10, 13.
[111] Folder No. 205, at p. 15. Committee on Preamble & Bill of Rights – Miscellaneous, The Alaska State Legislature, Constitutional Convention available online at www.akleg.gov/pdf/billfiles/ConstitutionalConvention/.
[112] Id., at p.2.

and then mention a few specific provisions. One of the first sections in the Alaska Bill of Rights that Ms. Awes addressed was the one concerning grand juries. She told her fellow delegates:

> Section 7 which pertains to grand juries is also different from the Federal. We preserved the grand jury, but we changed the number of grand jurors from 23 to 12, and we also modified the use of it somewhat. We are not substituting something entirely new but something which has been tried in other states and is found to be more efficient and economical without in any way taking away any protection which the people have or should have.[113]

The economic considerations referenced by Chairwoman Awes in her introduction were a big issue to many of our Founders. Future governor Jay Hammond would ultimately vote against statehood because in his words "our ability to finance and administer was very dicey." In the mid 1950's Alaska had a population of roughly 70,000 people spread out over its 665,000 square miles. In Mr. Hammond's opinion, "there was no economic potential immediately on the horizon, fishery, timber, mining, trapping all gone downhill."[114]

The entire delegate body first took up its consideration of the Alaska Grand Jury on January 5, 1956. Under the Right's Committee's original proposal, a person accused of a crime didn't have the absolute right to a grand jury investigation of the charges, but rather could be prosecuted on "information". This meant that if anyone was accused of a crime, it was entirely up to the prosecutor to decide whether to take the matter to trial.[115] A grand jury could only be convened upon the order of a judge, but there was no requirement for a judge to impanel a grand jury.

Delegate Ralph Rivers, an Alaska resident since 1906 who had served a few years previously as Alaska's Attorney General, was the first delegate to address the proposed structure of the grand jury. He wondered if it would be a better practice to require the grand jury to investigate criminal charges, unless the accused decides to waive that right and consent to be tried on information. Chairwoman Awes responded that the Rights Committee had considered that alternative procedure but decided to go with their proposal because it had been adopted in some other states. She felt the committee's proposed method speeded up the criminal process yet still seemed to protect the rights of the accused. If a district attorney started getting carried away with his zealousness or political ambitions, the governor had the right to call the grand jury.

Mr. Rivers responded that was another part of the proposal that bothered him. He felt there should be a grand jury every year to carry out its "particular purposes." He worried that a grand jury might never be called if it was discretionary. He asked what other part of a constitution would provide for a grand jury? Ms. Awes acknowledged it was usual practice to preserve the grand jury in any bill of rights. She justified the Committee's recommendation by referencing the economic issue again; by putting the decision in the

---

[113]Alaska Constitutional Convention, PART 1, Proceedings (1955-1956) at pp. 1091-1092. A copy of Proceedings is available online at http://www.akleg.gov/pdf/billfiles/ConstitutionalConvention/Proceedings/Proceedings%20-%20Complete.pdf.

[114] KTOO, supra, note 107.

[115] Judge Vanderbilt had discussed prosecutions "on information" in his Camden opinion, noting its "checkered career in England, particularly by reason of its used by the Stuarts for the prosecution of political misdemeanors." See, Camden, supra, note 98, at p. 37.

hands of a government official, "you're not spending a lot of money by calling a grand jury when there is no real need for it." Mr. Rivers replied that if the proposal clarified who the proper official was, then he would go along with it.[116]

The next delegate to speak on the issue of the grand jury was Warren Taylor, a lawyer from Fairbanks. Mr. Taylor had been an Alaska resident since 1909 and at age 65 was one of the oldest delegates. In matters of criminal justice, he had significant experience serving as a U.S. Marshall in Cordova for 13 years and as a U.S. Attorney for 6 years.[117] Mr. Taylor noted widespread abuses in criminal prosecutions based on information rather than on grand jury investigations:

> Now I have felt that great injustices have been done in the Territory of Alaska through the failure of a grand jury to sit. I have known possibly hundreds of men who would be arrested shortly after a grand jury had convened in the fall and they would sit in jail until the following fall before their case was even considered by the next grand jury, and I know of many instances in which the accusation was very frivolous, and when the grand jury had considered that case they would bring in that it was "not a true bill" and there a year of a man's life is gone because of some accusation made against him. If we do not have grand juries to say whether or not there is probable cause, I think we would be possibly better off in the administration of justice.[118] (Emphasis added)

Despite his high praise of grand juries and their ability to weed out frivolous charges, Mr. Taylor was expressing concern with the economic realities that Ms. Awes had spoken to. In a sparsely populated Territorial Alaska where grand juries met infrequently, people falsely accused were having to sit in jail for up to a year before their charges were considered. Ms. Awes responded that the Committee members had all felt the grand jury should be preserved for criminal matters, but they were very much aware of the resulting difficulties from the infrequency that it met.

Towards the end of the day, Anchorage lawyer Edward Davis proposed an amendment that followed the alternative procedure that Mr. Rivers had raised earlier. Mr. Davis had been an Alaska resident since 1939 and served as President of the Anchorage Chamber of Commerce in 1946. He would later become the third president of the Alaska Bar Association and following statehood served as a Superior Court judge in Anchorage for 14 years.[119]

Mr. Davis's proposed amendment ensured an accused person the absolute right to a grand jury investigation and indictment; proceedings by information could only be allowed if the accused waived his grand jury rights. Mr. Davis requested that discussion on the amendment be postponed until the following day when two absent members of the Rights Committee could be present to explain their reasoning in the original proposal.[120]

---

[116] Proceedings, supra, note 113, at pp. 1281-1282.
[117] See biography for Warren A. Taylor presented by the University of Alaska, Creating Alaska, available online at https://www.alaska.edu/creatingalaska/constitutional-convention/delegates/taylor/.
[118] Proceedings, supra, note 113, at p. 1286.
[119] See biography for Edward V. Davis presented by the University of Alaska, Creating Alaska, available online at https://www.alaska.edu/creatingalaska/constitutional-convention/delegates/davis/.
[120] Proceedings, supra, note 113, at pp. 1307-1308.

The next morning, the amendment was the first substantive matter taken up by the delegates. A vigorous debate quickly developed whether grand jury investigations and indictments should be required to prosecute citizens accused of felonies. Proponents for both sides of this issue generally agreed that citizens needed protection from false accusations and overzealous prosecutors.

The issue boiled down to the effectiveness of the protection offered by the grand jury and whether that protection was worth the cost. Speaking on both sides of the issue were lawyers, lawmen, and lay people – many of them leaders in their respective Alaskan communities. Their viewpoints are set out below in detail because they demonstrate widespread consensus among our Founders on two important issues still relevant in Alaska's criminal justice system today. First, unduly biased, or overzealous prosecutors are a real threat that the public needs to be protected from. Second, the consequences of this danger can be so severe that the cost of the grand jury's protection should not be an issue, even in a state that is financially challenged.

Delegates Rivers and Taylor were among the first to speak on the morning of January 6, regarding the use of grand juries in criminal indictments. In his speech Mr. Rivers, the former Alaska Attorney General, twice stated the grand jury "serves as useful purpose". Mr. Taylor followed by supporting the grand jury for investigating public officials but labeling its use in criminal matters as a "historical tradition" that had "outlived its usefulness" in formulating a "modern document". In his opinion, use of the grand jury in criminal proceedings was in the same class as the "dodo" bird – done for and gone:

> Now we are trying to formulate a modern document, a modern constitution in this Convention. Just because a grand jury is a historical tradition dating from the time of the drawing of the Federal Constitution, why do we have to hang on to those old traditions that have outlived their usefulness? Let us make this modern and up-to-date, and I think that doing away with the grand jury will expedite the criminal procedure …. I think that the grand jury is in the same class as the dodo; it's done for, it is gone and we might as well relegate it to oblivion where it belongs because it serves no useful purpose except for just investigative purposes.[121]

The most vocal opposition to Mr. Davis's amendment came from Anchorage lawyer Seaborn Buckalew, a member of the Rights Committee. At age 35, Mr. Buckalew was one of the youngest and most recent Alaskan residents among the delegates, having arrived in 1950. During his career, he was an Assistant Adjutant General for the Alaska National Guard, a U.S. District Attorney for the 3rd Judicial District, and a Superior Court Judge for the 3rd Judicial District from 1973 to 1989.[122]

Ironically, Mr. Buckalew seemed to agree with his opponents regarding the first concept above – he felt the indictment process was so dominated by prosecutors that it offered no real protection to citizens. In Mr. Buckalew's opinion, the cost of grand juries was not justified because they didn't assert their independence enough; he referred to the grand jury proceedings as "sort of a rubber stamp deal".

> Mr. President, I think that probably we should advise the nonlawyer delegates that at the time the grand juries convene the prosecutor controls all the proceedings. The

[121] Id., at p. 1324.
[122] See biography for Edward V. Davis presented by the University of Alaska, Creating Alaska, available online at https://www.alaska.edu/creatingalaska/constitutional-convention/delegates/buckalew/.

> prosecutor decides what witnesses shall be called. The accused does not have a right to be represented by counsel. It is a secret proceeding which is more or less geared and controlled by the prosecutor and most of the time it is something that is just sort of a rubber stamp deal, and actually I can't see that it affords an accused person much protection at all, and usually it works the other way because a prosecutor will convene a grand jury just to get the testimony of his weak witnesses under oath, and he might call a grand jury to more or less buck up some of his witnesses, and it can be used for all kinds of things, … and I can see where here in Alaska, if we followed this amendment, it would be awfully costly on a small state, and I figured that if it afforded any protection, regardless of the cost, I would vote for the amendment, but I can't see that it protects the citizens, and as I say, he has no rights before the grand jury, and as a matter of fact, I think it is more beneficial to the government than it is to the citizen.[123] (Emphasis added)

Yule Kilcher, a farmer and journalist from Homer who had been an Alaska resident since 1936, immediately followed Mr. Taylor countering his analogy to the dodo bird and Mr. Buckalew's view on the issue of cost. Mr. Kilcher had a unique background among the delegates that provided him an extremely valuable perspective on government tyranny. Born in Switzerland in 1913 and educated at the University of Berne and the University of Berlin, he left Europe in the mid 1930's as the Nazis were rising in power.[124]

Mr. Kilcher appears to have had a dynamic and influential personality. Today's University of Alaska website tells us that Mr. Kilcher's 660-acre homestead near Homer became a popular stop for musicians, military figures, and politicians. Visitors ranged from German millionaires to Hollywood producers to Cambodian priests. Longtime friend Dixie Belcher of Juneau said Mr. Kilcher positively impacted the lives of everyone who met him. Alaska Governor Tony Knowles ordered state flags flown at half-staff on the day of his funeral.

Mr. Kilcher, who had undoubtedly witnessed significant losses of liberty in pre-war Nazi Germany, said the cost angle should not be mentioned "when civil liberties are in question." He called the grand jury "an invaluable right", the only safeguard a citizen has when their case is not dealt with properly, "very often for political reasons". Up until then the delegates had heard only lawyers talk about the grand jury and he felt it important for a "non-lawyer" to be heard:

> I think a nonlawyer should speak about this matter too, and I am very surprised that one time the dodo bird should be a symbol and the next time the eagle. I am also surprised that one day they are going to be rabid reformists and reject conventions when it is handy, and the next time we are frowning upon innovation when it is equally handy. I think that the grand jury essentially is an added protection to the citizens, specifically to the criminal cases. I am in favor of the amendment, and I think the cost angle when civic liberties are in question should not be mentioned.[125] (Emphasis added)

Following these remarks by Mr. Kilcher, some of the delegates spoke in favor of Mr. Taylor's view focusing primarily on the cost angle. Mr. Davis countered their thoughts in a rather lengthy rebuttal. He said the

---

[123] Proceedings, supra, note 113, at p. 1325.

[124] See biography for Yule F. Kilcher presented by the University of Alaska, Creating Alaska, available online at https://www.alaska.edu/creatingalaska/constitutional-convention/delegates/kilcher/.

[125] Proceedings, supra, note 113, at p. 1324

grand jury is not always under the control of the prosecutor and cited as an example the recent grand jury in Anchorage that returned approximately ten "no true bills". He felt it was important to "preserve the right to have the criminal matters investigated by a grand jury if the accused wants it done that way."[126]

Mr. Kilcher followed up on Mr. Davis's point by providing the delegates with more detail on the roots of his opinion:

> I recall personally a situation eight or nine years ago that brought it to my attention forcefully how the grand jury can be utterly vital. I think the grand jury can to some extent come into play in situations that your amendment yesterday was trying to remedy. 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, to get redress from abuse in lower courts. It is the only place where a citizen who had a just case but who was refused to have his just case treated in in the lower court, as it is now in the Territory, the commissioner's court, to appeal directly to the grand jury is the only way. If the commissioner refuses to have the case appealed in superior court, this is my personal experience, it is the only safeguard a citizen occasionally has when for any reason and very often for political reasons, a case is not dealt with properly. The grand jury can be appealed to directly, which is an invaluable right to the citizen.[127] (Emphasis added)

These expressions of opinion by Mr. Davis and Mr. Kilcher seemed to turn the tide, prompting more delegates to speak. Marvin "Muktuk" Marston soon ventured into the debate. Mr. Marston was a builder and businessman from Anchorage, who had been an Alaska resident since 1940. He would later be appointed "Alaska's Goodwill Ambassador" by Governor Egan and become a Lifetime Honorary Member of the Cook Inlet Native Association.[128]

Later in life, Mr. Marston would write a book about the Alaskan Eskimos in World War II that Senator Ernest Gruening introduced as "a story of epic dimensions and significance." Senator Gruening's introduction gives further insight into the patriotic character of this Alaskan Founder:

> Marvin R. Marston had worked as a miner in northern Ontario. He had served in World War I. When the Second World War loomed, he felt a patriotic desire to serve again. Next to nothing was known about Alaska in military circles, but Marston's "bush" experience seemed to authorities in the national capital to qualify him for that remote area. Early in 1941, commissioned as a major, he found himself in the newly authorized Fort Richardson-Elmendorf complex near Anchorage.[129]

Mr. Marston threw his support behind Mr. Davis's proposed amendment. He spoke about an "Artic friend" of his who had been falsely accused and would have lost his job and "been a derelict on the shores

---

[126] Id., at pp. 1326-1327.
[127] Id., at p. 1328.
[128] See biography for Marvin Marston presented by the University of Alaska, Creating Alaska, available online at https://www.alaska.edu/creatingalaska/constitutional-convention/delegates/marston/.
[129] Muktuk Marston, Men of the Tundra: Alaska Eskimos at War (1969, 1972), Introduction by Senator Ernest Gruening. Selected sections available online at http://www.alaskool.org/projects/ak_military/men_of_tundra/men_of_tundra.htm.

of white man's civilization" had the grand jury not investigated and summoned Mr. Marston to testify. The grand jury found a "no true bill" and now the man "is a free citizen, has his job, and is doing all right".

> Mr. President, may I speak on this? I had a case of an Arctic friend of mine who came afoul of the law and landed in the jail, and I took him out, got his bail, and the grand jury was good enough to send for me to talk for him. If that man had had to sit there for trial he wouldn't have had the money to fight it, he would have lost his job and been a derelict on the shores of white man's civilization. I went before the grand jury. They found what I learned was a no true bill handed to him, and he is a free citizen, has his job and is doing all right. On that basis I am going to vote for Mr. Davis's amendment and preserve that grand jury.[130]

Robert McNealy, a lawyer from Fairbanks who was on the Rights Committee, next jumped into the fray and spoke at length. Mr. McNealy had been an Alaska resident since 1940 and had previously worked as a federal law enforcement officer and prosecutor.[131] Speaking from personal experience, he agreed with Mr. Buckalew that in 99 of 100 cases a prosecutor can convince a grand jury to indict. However, he expressed a more neutral position, acknowledging that when the appointed prosecutors become a little overzealous, sometimes a grand jury will return a "no true bill". His speech on these points was:

> I feel that this grand jury situation is important enough to possibly take up a few more minutes of the time of the delegates here but again, I don't think that it is something that I am not too strongly persuaded for or against the amendment…. [A]ny prosecuting attorney before the grand jury, if he really wants an indictment, in I would say 99 out of 100 cases he could secure the indictment because you can furnish hearsay evidence to the members of a grand jury….The only thing at all that I could speak in favor of the grand jury for is simply this, that occasionally our appointed prosecutors become a little overzealous and want to secure a number of convictions and in some of those instances a grand jury will return a no true bill.[132]

Mr. McNealy continued by providing the delegates with an example of the significant harm that can result from false accusations and overzealous prosecutors:

> Even more important I think is the fact that during the time I was in office, they had citizens here who came in with the complaints against others and in three or four instances that I remember distinctly, they were prominent citizens of the town here. Charges were filed against them and it was presented direct to the grand jury, and the grand jury heard the evidence and returned a no true bill….[T]hey were more or less prominent citizens of the town who were not criminally inclined, and it was a secret indictment in three cases the parties did not even know the charges were filed before the grand jury.

---

[130] Proceedings, supra, note 113, at p. 1328.

[131] See biography for Robert J. McNealy presented by the University of Alaska, Creating Alaska, available online at https://www.alaska.edu/creatingalaska/constitutional-convention/delegates/mcnealy/. Mr. McNealy was an outspoken critic of establishing the Alaska Judicial Council to select judges, saying "It is nonsense to say it is nonpolitical. It is the most political situation and fraught with all sorts of elements which make for politics here. The AJC's conduct outlined in Chapter 11 following the Sheffield affair would likely been of little surprise to him.

[132] Proceedings, supra, note 113, at p. 1331.

Another noteworthy point that Mr. McNealy raised was the inability of the public to hold their prosecutors accountable through the election process, thereby increasing the dangers of prosecuting on information without the involvement of the grand jury.

> I think the ordinary criminal is, or the person charged with a crime is well protected by the system of information but the only thing that could offset that would be if the state prosecutors are elected and not appointed by the judicial council then it may be that since they are elected officials, they may not be so prone to jump out and start prosecutions under information.[133]

Next to speak on the merits of the issue was Ralph Robertson, a Juneau attorney and like Mr. Rivers, an Alaskan resident since 1906. A founder of the well-known Juneau law firm of Robertson, Monagle, and Eastaugh, he had served as the Mayor of Juneau from 1920-23 and President of the Juneau School Board from 1924-47.[134] Mr. Robertson called Mr. Davis's amendment a "great thing" and spoke from his personal extensive experience in Juneau courts:

> I have defended a good many of the accused. I have watched for the past several years down in the First Division, and it seems to me that the use of an information against the accused is being greatly overdone and being done without entire fairness to the accused.[135]

Chairwoman Awes then spoke up to let everyone know that her silence on the grand jury should not be taken by the other delegates as a sign she did not favor the proposal of the Rights Committee:

> I do favor [the bill] the way it stands. I agree with everything that Mr. Buckalew has said because I felt that he and some of the others on the Committee knew more about criminal law than I did. I preferred to let them speak, but I don't want it implied that I do not favor this provision, I do.[136]

Mildred Hermann, a lawyer from Juneau who had been a resident here since 1919 soon jumped into the debate. Ms. Hermann had arrived in Juneau as a schoolteacher from Indiana, but later became a lawyer after studying law with Judge Wickersham and taking correspondence courses.[137]

---

[133] Id. Mr. McNealy would later address the ACC on the need to give the public the right to elect judges. His concerns with non-elected judges and prosecutors combined with the grand jury's "rubber stamp" of the charges against Thomas Jack from Hoonah provides a chilling example of the danger that the Founders hoped to avoid. Unlike the example provided by Mr. Marston, the Juneau Grand Jury did not summon any of several witnesses in Hoonah that would have testified to his innocence of all charges. Mr. Jack's case represents a broken criminal justice system in Alaska where non-elected prosecutors completely control the grand jury proceedings because the citizens are not properly educated of their independence and duty to investigate. Non-elected judges then allow the prosecutors to get away with withholding important evidence from the grand jury.

[134] See biography for Ralph E. Robertson presented by the University of Alaska, Creating Alaska, available online at https://www.alaska.edu/creatingalaska/constitutional-convention/delegates/robertson/.

[135] Id., at p. 1333.

[136] Id., at p. 1333.

[137] See biography written by Janice Taylor, Gastineau Channel Memories, Volume I, 1880-1959 at p. 220 (2001).

Ms. Herman told the delegates of her considerable experience as a defense attorney. She spoke of the "misplaced zeal" of some district attorneys and the "lack of reverence" she had for some of them, even though she had one in the family and was quite fond of him. She said she had seen "a great many innocent people plead guilty rather than wait for then grand jury". She had seen enough innocent people convicted to know that our justice system is far from perfect. In her view the grand jury protects the public, and she announced her intention to vote for Mr. Davis's amendment:

> I thought I would stay out of this hassle, but I feel constrained to stand and say I approve of Mr. Davis's amendment, and I also have had a considerable volume of experience as a defense attorney….I also have seen the misplaced zeal of some of our district attorneys that Mr. Robertson mentioned, and my 20 years experience as an attorney in the courts of Alaska, exclusively, have given me no reason to have too much reverence for district attorneys even though I have one in the family, and I think very highly of him. The fact of the matter is that I have seen a great many innocent people plead guilty rather than wait for the grand jury to meet. I have also seen innocent people convicted, not a lot of them, but I have seen it enough to know that it is done and that our system of justice as it now stands is far from perfect…There is no reason on earth why a grand jury cannot be called to be available any time that there is business to be considered and that the indictments by grand jury can be preserved in that way… but there is also a considerable volume of people that appear to be tried that appear in court that are unjustly called there. I don't believe in protecting the guilty but I do believe in considering them innocent until they are proved guilty. I have from personal experience found that the grand jury protects the public, not the criminal or the alleged criminal, but the public as a whole.[138] (Emphasis added)

Vic Rivers, an engineer from Anchorage and lifelong Alaska since 1906 spoke briefly in favor of Mr. Davis's amendment. Former Deputy U.S. Marshall Steve McCutcheon from Anchorage, another lifelong Alaskan resident since 1911, spoke next. He was opposed to Mr. Davis's amendment, agreeing with Mr. Buckalew on the minimal level of protection provided by grand juries. He said grand juries hear only evidence presented by the prosecutor, perhaps not realizing the extent of their duty to investigate the truth of the matter independently, embodied in each of the juror's oaths:

> [I]t is true that a grand jury does not protect the public from an overzealous prosecutor. An overzealous prosecutor can present such types of evidence as is necessary to bring in a true bill… A grand jury only hears the evidence that is presented by one person, the prosecutor…[139] (Emphasis added)

Mr. Davis wrapped up the debate on his proposed amendment with the following speech:

> Mr. President, I almost wish I had not brought this matter up, but to my notion it is vital, and that is the reason I did bring it up and that is the reason I am speaking for the third time. I want to make it clear that I am not at all interested in those persons that Mr. Hellenthal has called, 'those persons evilly disposed'. Those persons can take care of themselves. I am interested in the occasional person who is charged with a crime and

[138] Proceedings, supra, note 113, at pp. 1334-1335.
[139] Id., at p. 1336.

> who is completely innocent of that crime, and so far as I am concerned if even one person is charged with a crime, who is innocent, and who may have the matter disposed of without having to stand trial, it's worth the cost, and it seems to be apparent here from everything that has been said that, in spite of the fact the district attorney controls the grand jury, in spite of the fact that he presents evidence that would not be received in a court at law, in spite of the fact that the grand jury hears only one side of the thing, the grand jury occasionally, and we might say even frequently, finds there is not cause to hold a man for trial who has been charged by the district attorney.[140] (Emphasis added)

Mr. Egan brought the debate to a close and after a short recess, the delegates voted. Mr. Davis's amendment passed by a very large margin, 39-12.[141] Over half of the "no" votes had spoken during the debate, while a much smaller percentage of the "yes" votes had expressed their opinions. The debate appears to have caused both Mr. Rivers and Mr. Taylor to change their minds; they voted "yes" for the amendment after originally supporting the Rights Committee's proposal because of the cost of grand juries and the infrequency that they met. The message of the delegates in the 39-12 vote was clear – prosecutorial misconduct, whether ranging from bias to overzealousness to abuse must be guarded against, no matter the cost. Especially in a state system where the public does not have the opportunity to elect their prosecutors and judges.

The only other aspect of the Rights Committee's recommendations on the Alaska Grand Jury to receive significant attention from the delegates was its power to investigate public officials. The committee seemed a little unclear regarding the extent of the grand jury's investigative powers into civic matters. The proposed language in Section 7 specifically protecting the grand jury's investigation into willful misconduct of public officers seemed more confined than the language in its commentary that "[the] grand jury is preserved, for all purposes, particularly for investigation of public officials."

In the floor debate that ensued on this issue it became apparent that Mr. Buckalew and John Hellenthal, both members of the Rights Committee, viewed this issue differently. Mr. Buckalew was opposed to unlimited investigative and reporting powers of the grand jury while Mr. Hellenthal was very much in support of them. As it would turn out, Mr. Buckalew was the only delegate to express any opposition to protecting the extremely broad investigatory and reporting powers under common law of the Alaska Grand Jury.

During the prior debate regarding the use of grand juries in criminal proceedings, some of the delegates had made some passing references to its investigative powers in civic matters. These comments are useful in demonstrating that while there may have been substantial vocal disagreement regarding use of the grand jury in criminal matters, there was practically no disagreement towards its use in civic matters. Except for Mr. Buckalew, the need for its extremely broad common law powers was unquestioned.

Mr. Rivers, the former Attorney General who initially opposed the use of grand juries in criminal matters thought they served a useful purpose in investigating things like jails, frauds, and scandals. He said:

> Mr. President, I started the discussion on this point yesterday when I asked the Chairman of the Committee what they had thought about it and what their thinking was. The grand

[140] Id.
[141] Id., at p. 1337.

> jury once a year investigates the jails and sometimes is useful where any particular fraud or general scandal has occurred, and I think they serve a useful purpose."[142]

Mr. Taylor, who had previously expressed that the use of grand juries in criminal matters should go the way of the "dodo", also favored retaining the grand jury for investigative purposes of officials and public institutions. He said:

> I would say retain the grand jury all right for investigative purposes of officials and public institutions, but why not proceed the same as most of the states do?... we might as well relegate it to oblivion where it belongs because it serves no useful purpose except for just investigative purposes.[143]

Delegate John Hellenthal was an Anchorage lawyer who was a lifetime resident of Alaska, having been born in Juneau to a family with extensive roots here. His father Simon had arrived in 1905 to join his older brother Jack in the practice of law, and in 1916 they built the Hellenthal building located at 100 North Franklin Street. Simon moved to Valdez in 1935 after being appointed by President Roosevelt as a Territorial Judge where he traveled with his staff in the "Floating Court", a boat which held court proceedings in various towns and villages in Alaska. John went "outside" to obtain his law degree from Notre Dame University and returned to Juneau to practice with his uncle. During World War II, Delegate Hellenthal enlisted in the U.S. National Guard where he was stationed at Fort Richardson in Anchorage. After the war, he served as the Anchorage City Attorney from 1948-1952.

Mr. Hellenthal had been opposed to the grand jury's use in criminal proceedings and was one of the 12 delegates to cast a "no vote" to Mr. Davis's amendment. During the debate on that issue, he had briefly expressed the following thoughts on the grand jury's usefulness in civic matters:

> The grand jury should certainly and definitely be preserved as an investigating agency. There is no question about it at all… [144]

Mr. Davis, whose amendment was instrumental in preserving the grand jury's role in criminal investigations had also spoke favorably during the prior debate of the "regular" grand jury's ability to investigate matters and take any steps it feels is necessary in connection with an investigation. He also alluded to the ability of special, investigative grand jurors to be called when conditions get "pretty bad."

> Now it 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 impaneled 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.[145] (Emphasis added)

---

[142] Id., at p. 1323.
[143] Id., at p. 1324.
[144] Id., at p. 1325.
[145] Id., at pp. 1327-1328.

The preceding statements were made during the debate on the use of grand juries in criminal matters but are important for showing the intent of delegates who did not feel a need to speak up during the ensuing debate on the scope of the investigatory power. After the floor overwhelmingly voted to require the grand jury's use in criminal cases, the delegates next considered and voted on some other provisions in the proposed Bill of Rights. Section 7 received some additional attention regarding its application to military events and the number of grand jurors that would sit on a panel.

Delegate Lucien Barr from Fairbanks then introduced a new amendment pertaining to the grand jury. Mr. Barr was a former cavalryman, parachute jumper, and test pilot who moved to Alaska in 1932 to work for a Yukon gold expedition. He became a bush pilot and one of Alaska's early aviation pioneers; he also served for a time as a U.S. Marshall in the Fourth Judicial District.[146]

Mr. Barr's proposed amendment substantially increased the Constitutionally protected investigative and reporting powers of the grand jury in civic matters. Expanding to matters far beyond the initial scope of "willful misconduct in office of public officers, and to find indictments in connection therewith" the constitutional protection that Mr. Barr sought would now extend fully to the grand jury's common law investigatory and reporting powers. His amendment read:

> The power of grand juries to investigate and make recommendations concerning conditions detrimental to the public welfare or safety shall never be suspended.[147]

Mr. Buckalew objected to Mr. Barr's proposed amendment. The relatively young newcomer to Alaska felt that anything short of a criminal indictment should not be reported to the public. He was worried that the report could damage the person's reputation and there would be little that person could do about it. In saying "I think it is an unheard-of provision" he demonstrated his lack of knowledge of the extensive common law history of the investigatory and reporting powers of the grand jury. There is certainly nothing in his following statement that would indicate he favored protecting 'incompetent officials from the public' over 'protection of the public from incompetent officials':

> 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

[146] See biography for Lucien 'Frank' Barr presented by the University of Alaska, Creating Alaska, available online at https://www.alaska.edu/creatingalaska/constitutional-convention/delegates/barr/.
[147] Proceedings, supra, note 113, at pp. 1403-1404.

> would be to then come in and ask the court to strike portions of it. For that reason I would object to it.[148] (Emphasis added)

Delegate R. Rivers then asked for clarification from Mr. Barr on the extent of the powers involved in his proposed amendment. Was he content with expanding the protected investigative and reporting powers just to "public offices and institutions" or did he want to extend that protection even further to "investigate anything involving the public welfare".

Critically, the alternative amendment offered by Mr. Barr increased the protection of the grand jury's reporting power; the phrase "make recommendations" was significantly broader than the "find indictments" language in the original proposal of the Rights Committee. This distinction had been stressed by Judge Vanderbilt in his quote that "no community desires to live a hairbreadth above the criminal level" in explaining how presentments (same thing as recommendations) are a "great deterrent to official wrongdoing."[149]

Mr. Rivers' specific statement and question of clarification to Mr. Barr on the delegate floor is as follows:

> 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 Mr. Barr 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?[150]

Delegate Barr replied that the power should be even broader than investigating and making recommendations as to public offices and institutions. He said the purpose of the grand jury is to protect the rights of citizens:

> No. I think that their power should be a little broader than that. I don't know what the powers are right now exactly, but I do know that they make recommendations concerning other things than public offices and officers, and under this provision it would only investigate and make recommendations concerning things that endangered public welfare's safety, and I believe that is what the grand jury is for is to protect the rights of its citizens. 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.[151]

Mr. Hellenthal spoke next, clarifying for all delegates that the grand jury can investigate anything. His response also downplayed the concerns of Mr. Buckalew that a public official could be undeservedly "blasted pretty good" by saying "in the history of the United States there have been few runaway grand juries, extremely few". The speech from the lawyer son of a territorial judge, showing his familiarity with the common law history of the grand jury, is as follows:

---

[148] Id.
[149] See Chapter 7, supra, page 46, footnote 106.
[150] Proceedings, supra, note 113, at p. 1405.
[151] Id., at pp. 1405-1406.

> 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.[152] (Emphasis added)

No other delegate joined Mr. Buckalew in his opposition to Mr. Barr's expansive amendment. Delegate George Sundborg[153] from Juneau then moved to amend Mr. Barr's amendment by striking the words "detrimental to" and inserting "involving", thereby expanding the grand jury's protection even further. Mr. Barr was agreeable to Mr. Sundborg's revision, and his amendment went to vote.

The delegates of the AAC overwhelming rejected Mr. Buckalew's concerns and voted 44 to 8 in favor of expanding the protected powers of the grand jury. Joining in the majority was Mr. Rivers, the former Alaska Attorney General who asked for the clarification on Mr. Barr's amendment and asked if he was willing to limit it just to recommendations following investigation of "public offices and institutions". The Alaska Grand Jury's ability to investigate and make recommendations on anything involving the public welfare remains protected by our Constitution today.

All 8 delegates from the Juneau area unanimously voted in favor of Mr. Barr's expansive amendment. Delegates Hermann, Robertson, and Sundborg were joined by pharmacist H.R. Vanderleest, teacher Katherine Nordale, businessman Doug Gray, businesswoman Dora Sweeney[154] and clergyman Rolland Armstrong.

Mr. Buckalew was the only one of 55 delegates to voice any opposition to constitutionally protecting the exceptionally broad investigatory and reporting powers of the Alaska Grand Jury. Mr. Hellenthal quickly countered his opposition by saying grand juries can investigate anything; he saw the broad powers as "proper and healthy". Mr. Sundborg followed by expanding the proposed amendment even more from "detrimental to the public welfare" to "involving the public welfare." 39 delegates had voted against Mr.

---

[152] Id., at p. 1406.

[153] Mr. Sundborg arrived in Juneau in 1938 to work for the Juneau Empire as the editorial writer and reporter on the federal and territorial beat. He left the paper in 1941 to work for the newly opened Alaska regional office of the National Resources Planning Board. In 1946 he became the General Manager for the Alaska Development Board and in that capacity spent several months in Washington D.C. at the request of E.L. Bob Bartlett trying to get an Alaska Statehood bill through Congress. Around 1954 he started up a weekly newspaper, the Juneau Independent, and later moved to Fairbanks where he became editor of the Daily News-Miner. After Statehood, he moved to Washington D.C. to serve as administrative assistant to Senator Gruening for 10 years. See, George Sundborg, Gastineau Channel Memories, supra, note 137, at pp. 490-492.

[154] Dora Sweeney (nee' Lundstrom) arrived in Juneau as an infant around 1907. After graduating from JDHS she attended business college in Seattle, returning to Juneau to work for the Hellenthal law firm followed by the Bureau of Indian Affairs, the Territorial Health Department, Shattuck Insurance Agency and Sommers Construction Company. She served in the final two legislatures of the Alaska Territory and following statehood was elected three consecutive terms to the Alaska State House for 3 consecutive terms until her retirement in 1965. During her lifetime, this remarkable lifelong Alaskan received too many awards to list here, suffice it to say Mrs. Bill Egan remembered her for her "friendliness, honesty, and for her efforts to do the right thing for all Alaskans, just not the citizens of Juneau." See, Katherine A. Brown, Gastineau Channel Memories, supra, note 137, at pp. 495-496.

Buckalew's attempt to remove the use of grand juries in criminal matters, but even more delegates, 44, voted against his attempt to restrict the constitutionally protected common law powers of the grand jury.

Perhaps Mr. Buckalew's distrust of grand juries stemmed from his apparent lack of knowledge of the common law or perhaps from being a more recent arrival to Alaska. In contrast, Mr. Hellenthal was born in Juneau and had lived his entire life in Alaska, the son of a local judge and nephew of a local lawyer. Perhaps the difference in their opinions was Mr. Hellenthal's familiarity with Alaskan citizens and willingness to trust them to independently investigate and convey their findings to the public on matters of importance. Perhaps Mr. Hellenthal also knew from experience of Alaska's vulnerability to powerful "outside" financial interests and the need to hold wayward government officials in check.

When the Alaska Constitution was unanimously adopted by our Founders a few months later in 1956, the citizens' right to a grand jury was cemented into Article I, Section 8 and read as follows:

> 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, of majority of who 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 common law power of the grand jury preserved for Alaskan citizens in Section 8 shares the same footing with other important principles of our freedom found in Article I (the Declaration of Rights) such as Freedom of Speech (Section 5), Freedom of Religion (Section 4), Due Process (Section 7), Civil Rights (Section 3), and Habeas Corpus (Section 13).

None of these inherent rights can be unilaterally taken away from us by the Alaska Legislature, the Alaska Governor, or the Alaska Supreme Court. Article XII of the Alaska Constitution guarantees us the only way to amend any Constitutional right is through a formal proposal that passes by a 2/3 vote in both the Alaska House and Senate. At that point the proposal must be taken to the people of Alaska at the next general election. Following all those steps, only then by a majority vote of the people can a Constitutional Amendment become valid.

Chapter 11 will discuss how the Alaska Judicial Council would later acknowledge the investigatory power of the grand jury protected by the Alaska Constitution is very broad. The Council also acknowledged the protection inherent in the phrase "never be suspended" means the common law powers of the Alaska Grand Jury can never be hindered or delayed. In 1987 they would issue a report, stating:

> 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. The broad general power can never be hindered or delayed.[155]

Since Section 8 of Article I was adopted in 1956, it has never been amended. The legislature can't pass any statute that "hinders or delays" an Alaska Grand Jury from exercising its broad investigatory and reporting powers. Neither can the Alaska Supreme Court adopt procedural rules that "hinders or delays" these broad common law powers. Yet, as we shall see in Chapter 12, that is exactly what three judges on Alaska Supreme Court attempted to do. Thankfully, their two colleagues stuck to their guns and called them out on it.

But first we will explore a Juneau Grand Jury's investigation of its Governor in 1985, which drew the historical enemies of the grand jury out into the open.

[155] AJC 1987 Report, infra, note 157, Executive Summary at I.

Chapter 9

A Juneau Grand Jury Investigates Governor Sheffield and Recommends His Impeachment

Up until 1985, the Alaska Grand Jury appears to have regularly investigated and reported their findings to the public on a variety of topics. A 1987 Pennsylvania law review article with access to some internal State of Alaska documents asserted in a footnote that:

> Grand juries in Alaska frequently issue public reports pursuant to their state constitutional authority "to investigate and make recommendations concerning public welfare and safety. This constitutional provision is unique to Alaska…. Between 1961 and 1971, Alaska Grand Juries issued 28 reports on a wide variety of topics, including overcrowding in state prisons, sentences for criminal defendants, drug abuse by minors, and the use of electronic listening devices. … Moreover, two previous reports had criticized public officials and recommended their discipline or removal. … (discussing two grand jury reports that recommend discipline or removal of correctional officers)[156]

A 1987 report published by the Alaska Judicial Council (the "AJC 1987 Report) identified at least another dozen grand jury investigations occurring after 1971.[157] Their report provided only summary information regarding these Alaska grand jury investigations and reports, but concerns of misconduct by government officials appears to have been a reoccurring theme.[158]

- In 1965 an Anchorage grand jury investigated alleged irregularities in a local election.
- From 1973-74 a Kenai grand jury considered allegations of improper conduct by municipal officials and allegedly inappropriate conduct of a judge.
- In 1974 a Fairbanks grand jury investigated alleged conflicts of interest by public officials in appropriating funds for a local flood control project.
- From 1981-1982 Juneau grand juries investigated 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 Aircraft Section of Fish and Wildlife.

---

[156] Barry Jeffrey Stern, Revealing Misconduct by Public Officials through Grand Jury Reports, 136 U. Pa. L. Rev. 73, 80, note 17 (1987), citing Memorandum from Don C. Bauermeister, Court Rules Attorney, to Arthur H. Snowden, II, Administrative Director, at 80-91 dated Sept. 30, 1985; also citing Memorandum from Daniel W. Hickey, Chief Prosecutor, to Harold M. Brown, Attorney General, at 28-29 dated August 20, 1985.

[157] Alaska Judicial Council, The Investigative Grand Jury in Alaska, (the "AJC 1987 Report") Executive Summary at p. I (1987). The AJC's 1987 Report states "state court grand jury records were examined for the years 1961-1984…" While researching this study, the author contacted officials with the Alaska Court System to obtain prior grand jury investigation reports but was unsuccessful in obtaining any.

[158] Id., at pp. 18-20. App. A. 1 (1987)

- In 1985 a Juneau grand jury investigated the administration of Governor Bill Sheffield in its handling of a state office lease in Fairbanks.

In addition to investigations of potential misconduct by government officials, the Alaska Grand Jury looked into other issues concerning the public welfare and safety of its citizens, including:[159]

- From 1960 to the early 1970s, Fairbanks and Anchorage grand juries investigated the conditions of jails and related institutions virtually every year.
- In 1962 and 1964, Anchorage grand juries investigated traffic safety and road signs.
- In 1964, an Anchorage grand jury investigated city zoning practices and in 1965 investigated municipal water and service.
- A 1970 Anchorage grand jury investigated of the Cordova fire.
- A 1970 Anchorage grand jury investigated the slaying of two people by a police office.
- A 1973 Fairbanks grand jury investigated of security at the University campus following several crimes committed on campus.
- A 1974 Fairbanks grand jury investigated a mob incident at the Tanana Valley Fairgrounds that resulted in injury to several people.
- A 1976 Fairbanks grand jury investigated the Checker Cab Company following an extremely high incidence of felony indictments against its personnel.
- 1977 and 1983 Bethel grand jury investigated the effectiveness of police operations.
- A 1983 Barrow grand jury investigated the local jail.
- A 1986 Bethel grand jury investigated a large number of sexual abuse cases being brought in that community.

The most extensive and well-known of all these Alaska Grand Jury investigations occurred 37 years ago in Juneau, filling the headlines of newspapers across the state. At the end of February 1985, the State's Department of Administration (the "DOA") had signed a lease for 32,000 square feet in a downtown Fairbanks office building (the "Fifth Avenue Center"). The cumulative rent to be paid by the State under the Fifth Avenue Center lease during the next ten years was substantial, approximately $10,000,000.[160]

Ordinarily, DOA employees would have evaluated the State's need for this lease, determined the parameters for location and lease terms, and managed a competitive bid process between property owners in the Fairbanks downtown area. However, abnormalities throughout the lease process caused these DOA employees to complain to the State's Department of Law (the "DOL"), which began to investigate the circumstances surrounding the lease.

The DOL was able to determine that a major political fundraiser and friend of Governor Bill Sheffield had obtained a draft of the State's bid documents before they were made publicly available. Critical changes had been made to the lease parameters following this leak which eliminated all competition for the lease other than the Fifth Avenue Center. On April 8, 1985, the DOL investigators met with Mr. Sheffield's Chief

[159] Id, at pp. 18-20.

[160] In the Matter of: Grand Jury Proceedings for the Grand Jury Convened in Juneau, Alaska, Commencing April 24, 1985, Report of the Grand Jury Concerning the Investigation Conducted into the Fairbanks Consolidated State Office Lease with the Fifth Avenue Center, (the "Sheffield Report"), July 1, 1985, p. 1.

of Staff in a recorded interview at his office to find out if he knew how the political fundraiser obtained the draft DOA documents.[161]

The Chief of Staff denied knowing how the fundraiser obtained the bid documents, when in fact he knew they had been sent directly to the fundraiser by Mr. Sheffield's Executive Assistant at his specific request. Even worse, immediately after talking with the investigators the Chief of Staff met privately with the Executive Assistant, telling her to go to a telephone outside the Capitol Building and alert the fundraiser that investigators knew about his receipt of the bid document.[162] (These latter facts were eventually discerned because of the ensuing Juneau Grand Jury's investigation.)

Knowingly making a false statement during an official investigation was not a crime in Alaska if it was not made under oath.[163] Having no authority to compel witnesses to take an oath, the State's investigators were at the mercy of the Chief of Staff's ethical choices. The DOL investigators decided to ask the Juneau Grand Jury, using their common law powers, to help them figure out if Mr. Sheffield had acted inappropriately by funneling ten million dollars of State funds to a group his political fundraiser and friend was part of.[164]

Before the grand jury investigation began, Mr. Sheffield was known throughout Alaska as a wealthy hotel owner who hadn't held elective office until becoming the state's Governor in December 1982. Mr. Sheffield's campaign had spent a record $2,500,000 to win that election, accumulating significant debt including a $500,000 personal loan from the wealthy candidate. Before the election, Mr. Sheffield had campaigned for votes on the promise he would be more immune to special interests because of his personal contributions.[165] He said Alaska had been good to him and wanted to repay the state's generosity by personally financing his costs.[166]

Public concern regarding potential conflicts of interest by Mr. Sheffield in his decisions as Governor and his fund-raising activities had already surfaced before the Fairbanks lease investigation commenced. Shortly after taking office Mr. Sheffield had met with federal authorities in Washington D.C. and reversed his campaign promise to delay oil exploration in the Bering Sea to enable further impact studies on marine life. He had then attended a series of fund-raising events in New York, Dallas, Houston, and Denver, using a private jet owned by a Dallas based energy company that had recently acquired substantial interests in

[161] Id., at p. 12.
[162] Id., at p. 12.
[163] Id., at p. 13.
[164] Also contributing to the decision by the Department of Law to request the Juneau Grand Jury to investigate may have been concerns of the Alaska Attorney General and the State's Chief Prosecutor with their "job security". The Chief of Staff testified that in early in March 1985, one of Mr. Sheffield's political advisors had recommended the Governor request the Attorney General's resignation because of a separate inquiry involving the North Slope Borough. The Chief of Staff also testified that at the time, Mr. Sheffield wanted to terminate the Chief Prosecutor, but the Attorney General stood in the way. When the grand jury began their investigation there no further internal discussions on these matters because the Governor's office knew the investigation had to run its course. See, Transcript of John Shively, p. JS-215 through 219 in the Juneau Grand Jury proceedings. Indeed, shortly after the Senate decided not to impeach Mr. Sheffield his administration asked the Chief Prosecutor to resign.
[165] New York Times, Alaska Governor Convenes an Inquiry on Himself, April 14, 1983, Section A, p. 18.
[166] New York Times, Full Alaska Senate to Question Governor Today, July 26, 1986, Section A, p. 8.

Alaska and contracted with the State. Approximately $160,000 had been raised for Mr. Sheffield at these events, attended mostly by oil industry officials.[167]

On April 24, 1985, the Juneau Grand Jury commenced their investigation into the Fifth Avenue Center lease. The jurors heard opening remarks from Dan Hickey, the Chief Prosecutor for the Department of Law. Mr. Hickey outlined the jurors' important investigatory duty preserved under the Alaska Constitution and the powers they possessed in that regard. He stated:

> The Grand Jury, however, under our Constitution has a whole separate function and responsibility and that's an investigatory function. Particularly in matters that involve public trust, in matters that involve government, and in complex matters where the assistance of the Grand Jury is required in conducting the investigation itself. There are a number of powers that the Grand Jury has available to it, including the power to subpoena witnesses to require them to come here and give testimony under oath, the power to subpoena records, in many cases to subpoena records that might otherwise be confidential….[168]

Mr. Hickey then told the jurors of their unique ability to get to the bottom of troublesome matters, especially those that involve the integrity of our government.

> On the other hand, the Grand Jury, as a matter of our Constitution, also has an investigatory responsibility and that could include for example, as you may recall the Judge instructed you when you were first seated, doing things like examining the conditions in the local jails, if that comes to your attention. But beyond that, in its investigatory capacity, the Grand Jury is the instrument of government that is uniquely positioned to get to the bottom of a particularly complex matter, particularly a matter that draws into question the integrity of our government process. And that's really what this case is all about.[169] (Emphasis added)

Following Mr. Hickey's opening remarks, the Juneau Grand Jury went on to meet for 21 days over the next 10 weeks. Former Watergate prosecutor George Frampton was hired as special counsel to represent the Juneau Grand Jury. The grand jurors heard testimony from 44 separate witnesses, and received 161 exhibits, totaling a few thousand pages of documents. Individuals subpoenaed by the grand jury to testify included Mr. Sheffield, his Chief of Staff, his Executive Assistant and his Executive Secretary, the Commissioner of Administration, the political fundraiser, and other individuals with an ownership interest in Fifth Street Center.

Mr. Sheffield testified on April 25 and was summoned a second time on June 12. Besides Mr. Sheffield, several other witnesses were also recalled. The Chief of Staff tried to quash his subpoena but after receiving a grant of immunity from the grand jury, testified for two days on June 25 and 26. He admitted lying to Department of Law investigators during the April 8 interview and throwing away documents in his

---

[167] New York Times, April 14, 1983, supra, note 165.
[168] In the Matter of: Grand Jury Proceedings for the Grand Jury Convened in Juneau, Alaska, Commencing April 24, 1985, Transcript of Grand Jury Proceedings, April 24 & 25, 1985, Volume I, p. 21.
[169] Id., at p. 26.

files after the press requested access to them.[170] He told the Juneau Grand Jury he did so to protect Mr. Sheffield from embarrassment and exposure.

After listening to the witnesses and reviewing the documents which the Juneau Grand Jury subpoenaed, they were able to discern what had gone down behind closed doors in the offices of the Governor and his administrators, as summarized in the next six paragraphs of this study:

The fundraiser was part of a syndicate that purchased the Fifth Avenue Center in mid-1983, several months after Mr. Sheffield won the election. That same year the fundraiser had been responsible for raising $92,000 for Mr. Sheffield to help settle campaign debts by hosting an event at his home. The sole tenant of Fifth Avenue Center was scheduled to vacate shortly, in March of 1984. The syndicate financed their acquisition through a local bank with a short-term loan that was due in mid-1984. [171]

In early 1984 Mr. Sheffield showed his Chief of Staff a folder of materials on the Fifth Avenue Center and told him it would be an ideal building in which to consolidate government offices in Fairbanks. The Chief of Staff began trying to persuade State agencies to lease the building; he initially pressured the Department of Natural Resources ("DNR") to relocate there even though they repeatedly told him the downtown location did not suit their needs. To appease the Chief of Staff, DNR personnel took the unusual step of trying to locate other state agencies who could take the space in a downtown building the DNR had no interest in. Mr. Sheffield and the Chief of Staff also applied pressure on the DOA Commissioner, a political appointee, to find tenants for a downtown location.[172]

DOA employees put together a draft Request for Proposal ("RFP") which established a zone in downtown Fairbanks which would be an acceptable location for the future site of state agencies and set the date for the intended occupancy. There was evidence the Governor instructed his Chief of Staff to review the RFP before it was publicly released to prospective bidders. Around the same time the RFP was sent to the Chief of Staff, the fundraiser hosted a birthday party fundraiser for Mr. Sheffield and some of the building owners asked the fundraiser to obtain the bid documents.[173]

Mr. Sheffield directed his Executive Assistant to send the draft RFP to the fundraiser via expedited delivery using his personal funds. The fundraiser later flew to Juneau to meet with Mr. Sheffield and his Chief of Staff, giving them a copy of a map that depicted a "core" area in downtown that the owners of the Fifth Avenue Center felt would be most appropriate for the state offices; the fundraiser also wanted the lease commencement date in the draft RFP to be accelerated. The fundraiser gave Mr. Sheffield and his Chief of Staff a typed, legal description of the smaller, "core area" that could be substituted into the RFP. The Governor and his Chief of Staff understood that the purpose of the smaller area and accelerated start date was to eliminate all potential competition for the lease. Mr. Sheffield would later testify to the Juneau Grand Jury that it was "highly probable" this meeting occurred, but he had no recollection of it.[174]

After this meeting the Chief of Staff contacted the DOA Deputy Commissioner and instructed him to make the changes to the RFP requested by the fundraiser. The Deputy Commissioner then discussed the matter with an Assistant Attorney General and determined it didn't look good to conduct a competitive bid with

[170] Sheffield Report, supra, note 160, at p. 12.
[171] Id., at p. 24.
[172] Id., at pp. 23-31.
[173] Id., at pp. 35-38.
[174] Id., at pp. 38-42.

only one bidder; a "bid waiver" for authority to negotiate a sole source contract should be obtained. The bid waiver required the opinion of DOA that the sole source contract was "in the best interest of the State." Two DOA employees reluctantly signed off on the bid waiver.[175]

During the ensuring negotiations over lease terms, the fundraiser and the leasing broker for the Fifth Avenue Center called the Chief of Staff to complain on several occasions. The DOA employees felt the State was being compromised and "undercut" by these tactics, believing certain confidential information was being leaked to the ownership group which gave them a negotiating advantage. Eventually the DOA employees recommended to their supervisors that the lease not be signed, but the DOA's Deputy Commissioner and Commissioner approved it anyway. The lease was signed at the end of February 1985.[176]

During their investigation, the Juneau Grand Jury heard evidence that the troubling circumstances involving the Fifth Avenue Center were not unique, but one that followed a pattern in other State leases. However, the grand jury did not have an opportunity to investigate the circumstances surrounding these other leases.[177]

Upon concluding their investigation, the Juneau Grand Jury was faced with a difficult decision on how to proceed. Criminal indictments and prosecutions against the Governor and his staff for their actions would be difficult because of Alaska's inadequate laws against such behavior. The grand jurors established the following set of seven goals and decided to choose the course of action which best served those goals:

1. To be positive, constructive and impartial in our outlook and actions.
2. To best serve the public interest, as viewed in the widest sense.
3. To hold elected and appointed public officials accountable for their actions.
4. To encourage changes in public policy, regulations and laws so as to better protect the public interest in the future.
5. To enhance public awareness of the facts of wrongdoing or abuse of office by public officials, to the greatest extent possible.
6. To make sure insofar as possible that justice is served.
7. To provide a deterrent against wrongdoing and abuse of office by public officials in the future.[178]

The Juneau Grand Jury ultimately decided that the best course of action was to prepare a public report that set forth the relevant evidence and their recommendations. They developed an outline which expressed certain concerns and incorporated a list of specific recommendations to the public. They asked their attorneys to prepare a draft report that they reviewed and directed certain changes. The final version was an exceptional and detailed 69-page report (the "Sheffield Report") describing their findings of fact surrounding the fundraiser's interest in the Fifth Avenue center, the circumstances behind the lease, and the influence of the Governor and his staff in the process. After reviewing the final version, they voted unanimously to approve it. [179]

---

[175] Id., at pp. 42-50.
[176] Id., at pp. 50-55.
[177] Id., at p. 11. See also statement by Senator Jan Faiks during Senate inquiry, infra, p.76.
[178] Id., at pp. 5-6.
[179] Id., at p. 6.

The Sheffield Report began by stating the evidence "discloses serious abuse of office by Governor William Sheffield and his Chief of Staff" and "the Sheffield Administration has not best served the interests of the public and is unfit to fulfill the inherent duties of public office." (Original emphasis). The Grand Jury recommended the Legislature be called into special session to initiate impeachment proceedings against the Governor.[180]

The Juneau Grand Jury didn't limit their criticism to just Mr. Sheffield. Their report stressed the importance that all state employees have an obligation to serve the public loyally, honestly, and faithfully in the performance of their official duties. The Sheffield Report states:

> A public servant is under a duty to exercise his official discretion reasonably and in a manner faithful to the public he serves. The law requires a public servant, when acting in the performance of his duties, to advance and protect the interests of the government and the public, placing them above the interests of any private person. The duty of loyal and faithful service is one of the duties inherent in the nature of every public servant's office.[181] (Emphasis original)

Besides impeachment and the admonition to all public servants, the Sheffield Report made several other recommendations to the public, citing its express authority to do so under Article I, Section 8 of the Alaska Constitution. The Juneau Grand Jury felt these recommendations were necessary to help prevent a recurrence of the conduct of government officials that the grand jury found so troubling.

1. Cancellation of the Fairbanks office building lease and a restarting of the procurement process.
2. Passage of legislation or a regulatory code of ethics to govern the conduct of executive branch officials with appropriate disciplinary sanctions.
3. Enactment of new procurement regulations that provide additional independence from higher level intervention on behalf of favored political interests.
4. A reminder to all State employees that each of them have an obligation to faithfully serve the public interest first.
5. A legislative review of the adequacy of existing statutes pertaining to lobbying activities.
6. Amending the legal definition of confidential information to specifically include draft and unreleased competitive bid proposals and their specifications.
7. Enactment of regulations detailing specific standards and procedures for approving bid waivers; conducting market surveys in bid waiver situations; and providing public input on major projects.[182]

The Juneau Grand Jury didn't want to just leave their recommendations in the hands of the legislators through. The grand jurors felt it was important that all Alaskans be fully informed of their findings to dispel rumors floating around and gain public support for their recommendations. They directed their attorneys to seek the approval of the Juneau Superior Court Judge for the publication of the Sheffield Report.

---

[180] Id., at pp. 1-2.
[181] Id., at pp. 1-2.
[182] Id., at pp. 17-20.

Mr. Hickey and Mr. Frampton prepared and filed a legal brief in support of publishing the Sheffield Report, citing several cases in support of the grand jury's request. One of those cases was Judge Vanderbilt's opinion in Camden, from which they cited two paragraphs quoted earlier in Chapter 7 of this study. The attorneys also pointed out the historic reporting power of the grand jury under Section 8 of the Alaska Constitution.[183]

At the court hearing to consider the publication of the Sheffield Report and in a show of their solidarity, all 15 grand jurors appeared before Superior Court Judge Rodger Pegues even though they knew only their 3 officers needed to be present. The Grand Jury Foreperson began the hearing by directly addressing the judge. She informed Judge Pegues the grand jurors desired to remain in session and not be discharged until the Court had determined the entire Sheffield Report was appropriate for public release as submitted. She concluded her presentation to the judge with the following statement:

> We of the grand jury strongly feel that our deliberations have been as thorough as possible and that the attached report reflects a true and complete account of the testimony and evidence before it. Because of the publicity surrounding this case, in particular recent stories speculating on our deliberations, we feel that it is in the best interests of the public that a full and accurate report of our findings and conclusions be available immediately for widespread review and discussion.[184]

After hearing from the Foreperson and the grand jury's attorneys, Judge Pegues determined the report was within the authority and jurisdiction of the Juneau Grand Jury. His reasoning followed centuries of common law practice in America. He acknowledged he had no authority to seal or edit the report if he disagreed with some of its findings, conclusions, or recommendations:

> But when the grand jury has completed its work, then it is normal course to make a report. Reports have been made for years [indisc.]. If the report falls within the grand jury's jurisdiction and as a result of their own investigation, and particularly if it concerns a public matter as this one does, then it should be released. And the Superior Court – this court – should possess no authority to seal it or edit it because I might disagree with some of the conclusions or because I believe any of its recommendations are not justified. That is not the role of the Court. The Court's sole function is its power to prevent the grand jury from making an illegal report. That is, a report beyond its jurisdiction; a report that's not the result of its investigation. The report here, which I read through last night, clearly is neither. It is on the subject of the investigation and it is a result of the investigation. So there is no reason I know of why it should not be released.[185] (Emphasis added)

In conclusion, the collective actions and decisions of the 15 Juneau residents who served on the 1985 Juneau Grand Jury stands not only as a road map for other grand juries in Alaska, but for the entire nation.

---

[183] In the Matter of: Grand Jury Proceedings for the Grand Jury Convened in Juneau, Alaska, Commencing April 24, 1985, Memorandum in Support of Motion to Publish the Report of the Grand Jury Pursuant to the Request of the Grand Jury, ("GJ Memorandum"), p. 3.

[184] In the Matter of: Grand Jury Proceedings for the Grand Jury Convened in Juneau, Alaska, Commencing April 24, 1985, Transcript of Presentation of Grand Jury Report Before the Honorable Rodger Pegues, July 2, 1985, Volume XII of XII Including Indexes ("GJ Presentation Transcript") at pp. 2718-2719.

[185] Id., at pp. 2723-2724.

Their investigation into the truth of the matter was exceptionally thorough. The goals they collectively chose were admirable. Their recommendations put the public's interests first. The Sheffield Report substantially raised public awareness of highly inappropriate conduct within the Governor's administration. Lord Somers would have been proud of the Juneau Grand Jury.

Their thorough, non-partisan investigation and report enabled the public to discern the truth and make Alaska a better place for its citizens. Their findings suggested the State of Alaska treasury was available to those who sought to increase the power of the political machine, similar to the situation in New York City a century earlier during the days of Boss Tweed.

Imagine how much worse off Alaska's coffers might have been after 1985 if our Founders hadn't so strongly felt the Alaska Grand Jury should always have the power to investigate and make recommendations to the public. Imagine the political machine that might have firmly entrenched itself in Alaska back in 1985. But as the following chapters will show, the Alaska government has tried to put the Alaska Grand Jury under its thumb since then. What has been going on behind closed doors at state offices these past 35 years? Are Alaskans confident their treasury has not been raided?

Chapter 10

Politicians give our Governor a Pass and Attack the Grand Jury's Reporting Powers

Back in Chapter 5, we discussed how some politicians are one of the grand jury's historical enemies. In 1985, Alaska politicians lived up to this unbecoming reputation as adversaries of the people. Not surprisingly, the first politician to attack the Juneau Grand Jury's report was Mr. Sheffield, its most influential one. He and his administration had been caught red handed. Trapped, with little to dispute other than what motivations were locked in their client's mind, Mr. Sheffield's attorneys targeted the reporting powers of the Alaska Grand Jury.

Senators belonging to Mr. Sheffield's Democrat political party soon jumped on board with the mission to "shoot the messenger". One of them, Robert Ziegler from Ketchikan was quoted as saying:

> This grand jury was led down a path where it violated every sense of fairness and decency. It embarked on courses of action that are unethical and illegal. It has turned its legal function into a political morass.[186]

Not surprisingly, ethics and the scales of justice took on a political tilt in the Senate where Democrats and Republicans interpreted the conduct of our Governor differently. As this study will show towards the end of this chapter, toes were being stepped on, the political stakes were huge, and those in political control of the treasury had a lot of public money to bargain with.[187] After the Senate Rules Committee ("SRC") had concluded its own "mini-investigation" the four Republican senators on the SRC issued a majority report and the lone Democrat senator on the SRC issued a separate minority report.

This chapter will take a closer look at how Alaska politicians reacted to the Sheffield Report by the Juneau Grand Jury. How the Alaska senators gave Mr. Sheffield a pass after hearing from their own attorney that his conduct raised "serious ethical issues". How the attorneys for Alaska's elected Governor misrepresented to the senators the common law reporting power of the Alaska Grand Jury. How all twenty senators, nearly an equal amount from each party, unanimously passed a resolution designed to undermine those reporting powers. How the 15 ordinary citizens comprising the Juneau Grand Jury bonded together in the face of the political attacks, and in the end felt proud to be Alaskans and do something meaningful for the public.

Three weeks after Juneau Superior Court Judge Rodger Pegues approved the public release of the Sheffield Report, the Alaska Senate assembled in a specially called session in Juneau to consider the grand jury's recommendations. Statements in the transcripts of the Senate sessions that followed suggest some

[186] New York Times, Full Alaska Senate to Question Governor Today, July 26, Section A, Page 8.
[187] See footnotes 216 and 217, infra.

of them weren't too happy about having their summer plans disrupted by a group of ordinary citizens immune from their political control. The New York Times reported it this way:

> With a motion for impeachment requiring approval of 14 of the 20 senators, senatorial displeasure with any stage of the process bodes ill for impeachment. While few senators have indicated approval of the office space lease in Fairbanks, at least seven have shown irritation with various aspects of the case being presented to them.[188]

The senators retained Samuel Dash, a former Watergate prosecutor, as their attorney to provide legal advice and to guide them through the impeachment proceedings. Mr. Sheffield's interests were represented by a team of attorneys he hired, including Philip Lacavara, also a Watergate veteran, and John Conway. The Juneau Grand Jury and its attorneys did not participate as a party in the proceedings; however, Mr. Hickey was called as a witness.

In his opening remarks to the 5 members of SRC and the other 15 senators during the afternoon session of July 22, 1985, Mr. Dash told his Alaska Senate clients that the facts in the Sheffield Report raised "serious ethical issues" that undermined public confidence in government. All 20 Alaska Senators heard the following statement from their own legal expert:

> There is ample evidence in the Grand Jury testimony that the Governor's office tampered with the lawful procurement procedures of the Department of Administration with the knowledge of the Governor to promote a political and financial supporter. Such activity undermines the confidence of the public in government and raises serious ethical questions, and the Legislature should consider the statutory reforms recommended by the Grand Jury as a means of preventing this kind of activity in the future.[189] (Emphasis added)

These remarks alone should have established the credibility of the Sheffield Report and elevated it beyond reproach. Yet that wasn't all Mr. Dash told his clients that afternoon -- there may have been more wrongdoing by the Sheffield administration. Mr. Dash referred to additional allegations of inappropriate conduct by Mr. Sheffield that had not been fully investigated yet, indicating that he lacked the necessary resources to undertake an independent investigation as required under the Alaska Constitution:

> I am aware of a number of additional allegations concerning the Governor's conduct which have been publicly disclosed and partially investigated. However, to my knowledge, none of these investigations has resulted in any findings by a judicial or legislative agency. This Committee presently does not have the necessary staff resources or time to undertake an independent investigation and to decide these collateral allegations in the complete and fair manner required by the Constitution of Alaska.[190] (Emphasis added)

---

[188] Id.

[189] Alaska State Legislature, Senate Rules Committee, Inquiry into the Report of the Grand Jury of the First Judicial District, Superior Court, State of Alaska dated July 1, 1985 (hereinafter "Senate Inquiry"), Transcript of proceedings on Monday, July 22, 1985, from 1:30-4:00pm (hereinafter "July 22 afternoon session"), p. 79.

[190] Id., at p. 48.

During the next Senate session later that evening on July 22, Mr. Dash told his clients he was recommending there was no impeachable offense. Republican Senator Jan Faiks asked Mr. Dash to explain, and the Senate's own attorney responded by pointing to the inadequacy of Alaska ethics laws on official misconduct, regardless of how "improperly" the Governor's office may have acted.

> The emphasis I placed on my recommendation that, as improper as this activity may have been in terms of the ethics of a governor's office and standards that should be set in such activities, the law in Alaska seems to be that you need two things in order to bring about a conviction for official misconduct or the kind of conduct less than crime for an impeachable offense under clear and convincing evidence. (Emphasis added)
>
> The important element is that the Governor would have had to be the prime actor, the principal actor, in seeing to it that these changes in the RFP which led to a single bidder – and, therefore, an improper bid document – that the Governor was the principal actor in that….
>
> Similarly, there's another element that the statute incorporated with the other statutes dealing with bid waiver…. And the evidence was unclear before the Grand Jury and it's unclear in this record whether, despite any political favoritism, whether actually signing up that lease with Fifth Avenue center was, in fact, under those circumstances in the public interest…. And therefore, since that evidence isn't clear – it's certainly not clear through clear and convincing evidence – it is the basis of my recommendation that, although I think the Legislature ought to pick up the recommendations of the Grand Jury for the reforms that it has presented to you, that I don't believe that this Committee has sufficient evidence before it in order to find, by clear and convincing evidence, an impeachable offense because of those activities.[191]

A short time later, Sen. Faiks asked Mr. Dash to discuss the extreme pressure that State employees and various people felt from the Governor's office in handling the Fifth Avenue Center lease. She asked if there was anything in the Alaska Statutes that would help those state employees in similar circumstances. She told Mr. Dash and her Senate colleagues heard that she had just been alerted to pressure from the Governor's office on another State lease in a different set of circumstances. Sen. Faiks asked Mr. Dash how the Legislature could protect the system and the process if there is no recourse to that kind of pressure.

Mr. Dash responded by acknowledging that the problematic ethical behavior was certainly increasing under Mr. Sheffield's administration. The Senate's attorney repeated his earlier opinion that the core problem was Alaska's lack of adequate laws to deal with unethical behavior by State officials:

> There's no question that the evidence of the Grand Jury – especially the evidence coming from staff people in the Department of Administration – indicated that certainly within

[191] Senate Inquiry, Transcript of proceedings on July 22, 1985, from 7:00-9:00pm (hereinafter "July 22 Evening Session"), at pp. 107-110.

> the past two years or year this was an increasing situation, and the concern that you raise, Senator Faiks, is a real one.
>
> I think that what Alaska faces is perhaps inadequate legislation to deal with it, inadequate standards to deal with it; and, to that extent, I think that ought to be a top priority of the legislature. But it – but we cannot – I know that the Committee cannot look at it now from the point of view of its present duties in light of the existing legislation.[192] (Emphasis added)

From the foregoing quotes of Mr. Dash, we see that the Senate's own attorney agreed with the Juneau Grand Jury's findings of fact. He agreed there were serious ethical issues in the Governor's office. He agreed the problems weren't limited to a single episode and the improper pressure was increasing. He even agreed that the primary problem was the legislature's failure to adopt adequate legal consequences and supported the grand jury's recommendations.

By all indications, Mr. Dash might have recommended the Senate impeach Mr. Sheffield if Alaska had appropriate statutes on its books. The main problem was the existing laws. They required the Alaska Grand Jury and the senators to do something next to impossible – to establish with clear and convincing evidence what was going on inside of Mr. Sheffield's head.

Backed into a corner with such unbecoming facts, Mr. Sheffield's lawyers apparently decided their best legal strategy was to challenge the "legality" of the Sheffield Report and the motives of Chief Prosecutor Mr. Hickey. They had no legal precedent in Alaska to support their attack, so they ignored the grand jury's reporting powers under common law and butchered the intent of our Founders inherent in the last sentence of Article I, Section 8.

Taking the bait from Mr. Sheffield's lawyers, Democrat Senator Bill Ray asked Mr. Dash whether he thought the Juneau Grand Jury had exceeded its authority. In the second paragraph below Sen. Ray referred to a 1961 New Jersey case which followed the Camden opinion by Justice Vanderbilt in 1952, discussed extensively in Chapter 7. Mr. Dash responded that this issue was outside the scope of his engagement and was basically irrelevant. For a second time, his response to his clients' questions should have stopped the Senate from directing further criticism towards the Juneau Grand Jury's decisions, but it didn't.

> Senator Ray: I just have one other question there. It might end up with two or three questions here, because I asked it earlier; and I'd like to know, from Mr. Dash: You've read the information from Mr. Conway?
>
> In here he cites that the Grand Jury was misinformed on the scope and authority, and then he quotes a New Jersey case here which says – out of context, but it gives the general idea – it says, here: "A Grand Jury transcends its powers when it reprobates and disparages an individual on the basis of its opinions of the testimony he gave on appearance before it." And then it goes on to say that they have – they exceeded their authority – this is what the Hamlin County (ph.) Grand Jury in New Jersey, 1961. Do you think that the Grand Jury in this case exceeded its authority?"

[192] Id., at pp. 116-117.

Mr. Dash: I haven't addressed that issue, Senator Ray. What the law in Alaska is with regard to Grand Jury reports generally is covered both by statute and also covered by the Constitution. I read those provisions. The statute authorizes the Grand Jury to investigate and make recommendations with regard to the welfare of the state, and safety.

Senator Ray: But they said –

Mr. Dash: The Constitution says that those powers should not be in any way interfered with. It is true, I think, in this case, that the Grand Jury did not issue a report to the public without the approval of the court. This was a normal process where the Grand Jury makes its return to the court and makes it a request of the court, but it was the Court that ordered that the report be sent to the Senate and disclosed.

Senator Ray: Well, it – if I might Mr. Chairman?

Chairman Kelly: (Nods head up and down.)

Senator Ray: Then there is a possibility that the Court erred in releasing the information and should have sent it back to the Grand Jury?

Mr. Dash: I don't think I can answer that, Senator Ray, because it's not the issue I was directed to research and present to this Committee.

Chairman Kelly: Senator Sackett.

Senator Ray: I would – I would –

Chairman Kelly: Senator Ray.

Senator Ray: Yes, I would think that that would be a basic thing, where you start your presentation, to know whether you have any evidence or not.

Mr. Dash: But Senator Ray –

Senator Ray: Yes.

Mr. Dash: Assuming – assuming that the Grand Jury erred without stating that, without having researched it and being able to give you that as a fact – assuming they've erred, it has no relevance to the jurisdiction of this Committee or the evidence that this Committee has had. If evidence comes to you anonymously and it was substantial evidence that would lead you, as a member of the Senate, or a group of the Senate, to consider that impeachment ought to be looked into, then this, the power of the Senate, is broad. The constitutional provision that impeachment shall be done by the Legislature has no restrictions on it in terms of how it begins.[193] (Emphasis added)

Throughout the remainder of the Senate proceedings, some of the Senators showed no interest in listening to the advice of their own attorney. Mr. Sheffield's attorneys would continue to assert that the publication of the report was wrong – that the public had no right to know the "serious ethical" conduct that the Governor's administration was engaging in. Incredibly, despite Mr. Dash telling his clients that the Juneau Grand Jury had the constitutionally protected right to investigate and make recommendations, these senators chose to listen to Mr. Sheffield's lawyers instead of Mr. Dash. Even more astounding, at

[193] Id., at pp. 110-112.

the conclusion of the special session, all twenty senators would unanimously vote to approve a resolution that sought to undermine the reporting power of the Alaska Grand Jury.

After Mr. Dash had finished his opening presentation to the Senate, Mr. Lacavara, part of Mr. Sheffield's defense team, began his opening presentation by immediately attacking the legality of the Juneau Grand Jury's report:

> We have examined this question, whether the Grand Jury acted beyond its lawful, indeed, beyond its constitutional bounds, and I feel very strongly that the Senate should be aware that that is, in fact, the case; that the Grand Jury was misled, either deliberately or negligently, about its lawful functions, and so was the Superior Court.[194]

Mr. Lacavara continued his attack by claiming our Founders had deliberately removed language from the Alaska Constitution that would allow the Juneau Grand Jury to criticize his client,

> [T]he framers of the Alaska constitution…specifically considered language that would have authorized grand Juries in this State, as part of their investigative functions, to make reports that criticize public officials. That language was challenged as too easily subject to abuse, and it was removed during the Constitutional Convention.[195]

These representations to the Alaska Senate by the Governor's attorney were erroneous. As we saw in Chapter 8, the Alaska delegates did not remove any language from the proposed Constitution that would have authorized reports critical of public officials. The amendment that was proposed by Delegate Barr towards the end of the delegate's session on grand jury issues expanded, not restricted the constitutional protection of the investigatory and reporting powers that were already on the table. There was no language in the amendment that was removed because it was too broad. Mr. Buckalew's lone objection had been overwhelmingly rejected by the 44-8 vote.

Mr. Lacavara continued his attack on the Sheffield Report by going after the Camden opinion that Judge Vanderbilt had written in 1952.

> [T]he prosecutors, read to the Grand Jury, when they – the prosecutors raised the idea of a report containing an impeachment recommendation – from a New Jersey case that purportedly approved this kind of public accusation. They neglected to tell the Grand Jury that that case had been specifically overruled by the New Jersey Court so that the New Jersey Court brought itself into alignment with every other American jurisdiction with which I am familiar.[196]

These additional representations by Mr. Lacavara to the Senate were also erroneous on a few grounds:

- Judge Vanderbilt's opinion in the Camden case was not specifically overruled and continued to be cited as good authority by the New Jersey Supreme Court.[197]

---

[194] Id., at p. 122.
[195] Id., at p. 123.
[196] Id., at p. 123.
[197] See, Reportorial Power, infra, note 233, at footnote 7, p. 296. See also, In re Addonizio, 53 N.J. 107, 248 A.2d. 531, 541 (1968).

- The Grand Jury's brief to Judge Pegues in support of publishing the report had cited other cases besides Camden from other jurisdictions that supported the ability of grand juries to criticize public officials.[198]
- Mr. Lacavara failed to acknowledge a series of Florida Supreme Court opinions that routinely authorized Grand Jury reports to be critical of public officials.[199]
- As discussed extensively in Chapters 2 through 6, there is very strong common law precedent of American grand juries to investigate and criticize public officials. This precedent still applies in states like Alaska where our Constitution clearly states that "the power of grand juries to investigate and make recommendations concerning the public welfare or safety shall never be suspended." The Juneau Grand Jury exercised their common law powers and duties in the most admirable fashion, yet the Governor's attorneys showed complete disdain for the constitutional rights of the people.

The next day on July 23, Mr. Sheffield's attorneys continued their assault on the Juneau Grand Jury and its attorneys by filing a 24-page Memorandum Regarding Grand Jury Report (the "Governor's Memorandum"). The leading argument raised in the Governor's Memorandum was headlined, "The Prosecutors Misled the Court and the Grand Jury About the Permissibility of Releasing the Grand Jury Report." Even the next two headlines in the Governor's Memorandum followed suit, "The Prosecutors Failed to Inform the Court or the Grand Jury of Controlling Legal Principles", and "The Power to Issue a General Report on Issues of Public Administration Does Not Include the Right to Accuse Specific Officials of Misconduct".[200]

A central component of these arguments advanced by Mr. Sheffield's attorneys was that grand jury reports criticizing public officials are "not compatible with principles of due process and fundamental fairness." Mr. Sheffield's attorneys claimed their client was not given due process of law, citing a legal treatise which stated a public official has a right to be heard before being condemned by a grand jury. They claimed the grand jury had "neither the constitutional authority nor the evidentiary foundation" to pronounce Mr. Sheffield "unfit" for office.[201]

For Mr. Sheffield's lawyers to promote these arguments they had to completely ignore centuries of common law established in England and America. They had to ignore widely known authorities like Lord Somers, Justice Wilson, and Professor Younger. There was absolutely no statutory authority in Alaska that limited the reporting power of the grand jury, nor could there be given the constitutional protections our Founders granted us.

---

[198] See, GJ Memorandum, supra, note 183, citing several cases in pp. 1-7.

[199] See, Miami Herald Publishing Co., v. Marko, 352 So. 2d523 (Fla. 1977) "Implicit in the power of the grand jury to investigate and expose official misconduct is the right of the people to be informed of its findings." Ryon v. Shaw, 77 So.2d 455 (Fla. 1955) "To hold that it cannot be done or to say that there are limitations on telling the truth about what the grand jury may find when it investigates would greatly hamper the conduct of democratic processes" and "there is no greater deterrent to evil, incompetent and corrupt government than publicity." Owens v. State, 59 So.2d 254 (Fla. 1952), "if [public employees and officials] are lacking in the common courtesy attached to the duty vested in them, whatever the delinquency may be, the Grand Jury has a right to investigate and make a fair report of its finding."

[200] Bill Sheffield, Governor, Memorandum Regarding Grand Jury Report, dated July 23, 1985, by John M. Conway and Philip A. Lacovara, see, pp, 1, 2 & 4.

[201] Id., at p. 21.

The Juneau Grand Jury's thorough examination provided an excellent example of the kind of investigation that Lord Somers described is necessary for grand jurors to carry out their oath. Under common law, it is the responsibility of the grand jury alone, not the judge, to determine what is the truth – to determine what testimony to accept and what testimony to reject. As Judge Pegues had correctly stated, he had absolutely no authority to substitute his judgment for the grand jury's. Judge Pegues followed nearly 1000 years of common law history in approving the Sheffield Report for public release, but Alaska's Governor allowed his attorneys to show no respect for that precedent.

Other arguments raised by the Governor's lawyers – lack of due process, lack of an opportunity to be heard, and lack of an evidentiary foundation – were simply not true. The Juneau Grand Jury gave Mr. Sheffield two opportunities to explain his actions involving the Fairbanks lease. As noted in the previous chapter, Mr. Sheffield had an opportunity to explain things on April 25; the transcript of his first testimony to the Juneau Grand Jury spanned 33 pages. Before Mr. Hickey finished his questioning, he not only gave Mr. Sheffield an opportunity to make any general statement he wanted, but apparently gave him advance notice of this opportunity:

> [Hickey:] That's all the specific questions that I have, Governor. As I indicated to you before you came over this morning to testify, I asked you if you had some general statement about this particular matter that you would like to make to the grand jury; this is the time to do so.
> [Sheffield:] Thank you. I've been giving a lot of thought to this in the last two or three days since all of this became aware of the project and the problems that might have been with it….[202] (Emphasis added)

Following Mr. Hickey's questioning, two of the grand jurors followed up with the Governor by asking him several of their own questions. This specific question and answer exchange spanned 7 of the 33 total pages of the transcript of Mr. Sheffield's initial testimony.[203] The exchange is an excellent example of the participation level in an investigation that all grand jurors, since the time even before Lord Somers, should follow.

On June 12, Mr. Sheffield was given a second opportunity to testify before the Juneau Grand Jury. By then the grand jurors had heard testimony from 40 other individuals over several weeks and had a much better grasp of the circumstances and the roles of various individuals. Mr. Sheffield's second appearance was much more extensive than his first and dominated the testimony heard by the grand jurors that day. His second testimony spanned 88 pages of transcript, longer than the combined testimony of the other 3 witnesses they heard that day. After Mr. Hickey had concluded his questions, Mr. Frampton asked the Governor questions on behalf of the Grand Jury and again, some of the individual jurors asked questions. The last 21 pages of the 88-page transcript documented these exchanges, including roughly 25 questions asked directly by the grand jurors themselves.[204] Again, the Juneau grand jurors were admirably engaged in the process.

Besides Mr. Sheffield's two opportunities to explain the circumstances in a favorable light, the Juneau Grand Jury heard from other witnesses who owed their employment to Mr. Sheffield and undoubtedly

[202] Transcript of Grand Jury Proceedings, April 24 & 25, 1985, Volume I, at p. 306.
[203] Id., at pp. 307-313.
[204] Transcript of Grand Jury Proceedings, June 11 & 12, 1985, Volume VII, at pp. 1713-1800.

were motivated to cast their boss in a favorable light as well. Mr. Sheffield's Chief of Staff testified two entire days on June 25 and 26 and his Executive Secretary testified on April 25 and June 18. Mr. Sheffield's Executive Assistant testified on April 25 and again on June 18. The DOA Commissioner, an appointee of Mr. Sheffield, testified on April 30. Cumulatively, Mr. Sheffield, his Chief of Staff, his Executive Secretary and his Executive Assistant were granted 8 opportunities to present the administration's version of the pertinent facts. Yet Mr. Sheffield's attorneys asserted in the Senate he was not given an adequate opportunity to be heard.

In addition to these administrative officials who served at Mr. Sheffield's will, the Grand Jury also heard from the political fundraiser and others connected with the Fifth Avenue Center, who were also undoubtedly motivated to cast the Governor's conduct in a favorable light. The fundraiser testified on May 7, his testimony covering 80 pages of transcript.[205] Both the leasing broker for the office building and his associate testified in early May, their testimonies aggregating over 150 pages of transcript.[206] The Juneau Grand Jury heard over 200 pages of testimony from four other individuals withing the ownership syndicate of the Fifth Avenue Center.[207]

Mr. Sheffield was afforded substantial due process by the Juneau Grand Jury, and there can be absolutely no reasonable doubt their resulting findings had a strong evidentiary basis. Mr. Sheffield's basic problem was the fact the Juneau grand jurors heard his testimony and did not find him very credible; his lack of credibility and candor was a recurring theme throughout the Sheffield Report, as evidenced by the following excerpts:

- "the Grand Jury did not believe that a full and completely candid explanation of the events in question had been made";[208]
- "Mr. Sheffield's extraordinarily poor recollection as to any knowledge or discussions he may have had or actions he may have taken regarding this matter"[209];
- "the Grand Jury "has grave concerns regarding the testimony of Governor William Sheffield that he has absolutely no recollection of, among other things [specifying 3 items] …and further testified that he was 'surprised' when he learned that a sole-source negotiation had begun. The Grand Jury believes that Governor Sheffield's testimony reflects a lack of candor and a disrespect for the laws of this state"[210]; and
- "Governor Sheffield clearly does recall the late September telephone conversation in which [the fundraiser] when he requested the RFP. But he claimed in his sworn testimony that he had absolutely no recollection of the October 2 meeting, shortly thereafter."[211]

The Governor's Memorandum also purported to tell Alaska's senators about the intent behind the last sentence of Article I, Section 8. But Mr. Sheffield's attorneys didn't tell the whole story and left out important portions of the Constitutional Convention when the powers of the Grand Jury were discussed

[205] Transcript of Grand Jury Proceedings, May 7, 8, & 14, 1985, Volume V, at pp.1167-1247.
[206] Transcript of Grand Jury Proceedings, May 6, 1985, Volume IV, at pp. 763-825; Volume V, supra, note 205, at pp. 1068-1163.
[207] Volume IV, supra, note 206, at pp. 826-931, 932-1017; Volume V, supra, note205, at pp. 1028-1067, 1247-1263.
[208] Sheffield Report, supra, note 160, at p. 5.
[209] Id., at p. 13.
[210] Id., at p. 14.
[211] Id., at p. 59.

by our Founders. The Governor's Memorandum quoted what Mr. Buckalew and Mr. Barr said but failed to make any mention of Mr. Hellenthal's statement that immediately followed, when he stated the grand jury can investigate anything and its broad power is proper and healthy.[212]

The Governor's Memorandum also failed to mention that 1) Mr. Buckalew was the only delegate to voice any opposition to the expanded powers of the grand jury; 2) Mr. Buckalew voted against the proposed amendment and was joined by only 7 other delegates who voted "no"; and 3) 42 other delegates sided with Mr. Barr and Mr. Hellenthal in voting for the increased protection, overwhelming rejecting Mr. Buckalew's opposition.

On this issue of the delegates' intent and as discussed in the next chapter, the independent Alaska Law Review pointed out in a 1986 article that "Delegate Buckalew apparently believed that his concerns about the amendment were not abrogated."[213] Unfortunately, as Mr. Dash had admitted in his opening remarks, he was not only unprepared to challenge the assertions of Mr. Sheffield's lawyers on this issue, but he had no intention of addressing them because they were irrelevant for the Senate's purpose. Mr. Sheffield's supporters knew there was nothing standing in their way to continue these unfounded assaults on the grand jury's reporting power, and they took full advantage of the opportunity.

Following the opening statements of the attorneys on July 22 and their review of the Governor's Memorandum, the Senators commenced their own independent investigation into the Governor's involvement in the Fairbanks lease. For a variety of reasons as set forth below, the Senate investigation paled in comparison to the Juneau Grand Jury's. These shortcomings provide compelling evidence that the legislative branch is not an appropriate forum to investigate any matter which may have political implications.

- The Senators condensed their investigation into a period of less than two weeks compared to the ten weeks the grand jury took to investigate.[214]
- The Senators called only 8 witnesses compared to the 44 called by the Juneau Grand Jury; half of these witnesses consisted of Mr. Sheffield, his Chief of Staff, his Executive Assistant and the fundraiser. The other 4 were the Attorney General, two State attorneys under him, and a Deputy Commissioner. Incredibly, the Senate did not call any of the State employees who felt pressured by Mr. Sheffield's administration into taking actions they felt were not in the public's best interest.[215]
- The Senate proceedings were far less efficient because of their public nature open to the media. Most of the 8 witnesses were questioned by anywhere from 10-15 Senators, some of whom later

[212] These statements are presented in their entirety in Chapter 8, supra.
[213] See, Reportorial Power, infra, note 233, at p. 310.
[214] The files and transcripts of the Senate proceedings indicate the senators did not have a solid grasp on the facts surrounding the Fifth Avenue Center lease, largely because of an inability to process a large volume of material in a short amount of time. For example, as the Senate inquiry drew to a close, Senator Jan Faiks stated, "…I don't know about the rest of my fellow Senators, but, in my head, everything started meshing together and I couldn't remember who said what to whom and at what time, or even if it was in Alaska or not; I was getting so confused." Senate Inquiry, Transcript of proceedings, Saturday August 3, Rules Committee Deliberations, Day 12, p. 2121.
[215] The 8 witnesses called by the Senate were the Governor, his Chief of Staff, Executive Assistant, and political fundraiser with the ownership interest in the Fairbanks building, the Deputy Commissioner of Administration, the Attorney General, the Chief Prosecutor and an Assistant Attorney General. Approximately 40 witnesses examined by the Juneau Grand Jury were not called by the Senate. See, Index, Senate Rules Committee Witness List, at p. 29.

asked follow-up questions. Mindful of Winston Churchill's famous quip that politicians should "never let a crisis go to waste", Alaskans can only speculate how much of the legislative investigation was more about political posturing and campaigning rather than discerning truth.

Perhaps the most compelling evidence establishing the incompetency of the Legislature to investigate anything of political value were subsequent admissions of its own members. The public hearings and high stakes being played for put senators on both sides of the aisle under tremendous political pressure. A few days after the Senate hearings had concluded, Democrat Bettye Fahrenkamp was quoted as saying, "there were toes stepped on…that it will take years for people to get over, and I think that's sad."[216]

Her Republican counterpart in Fairbanks, Senate President Don Bennett provided even more candid detail of this political pressure, alluding to the enormous amount of lobbying that took place. "I think you should know that possibly some of the gravest forces that I've seen in my nine years in Juneau were reflected in that pressure". Sen. Bennett said much of the pressure came from some of the many Sheffield appointees to boards, commissions, councils, and offices.

Sen. Bennet implied that the whole impeachment process came down to money. He predicted Mr. Sheffield would have a long memory about which senators pressed for answers. "For many, many months he'll remember each and every one of us who made him a star" and the evidence will be seen by "which districts have gold-plated centerlines on their highways as opposed to those that don't get a shovel turned over."[217]

At the conclusion of the Senate's investigation, further evidence surfaced that in the Alaska Senate their quest for truth was at the mercy of politics. On August 5, 1985, the four Republican members of the SRC issued a report which stated in pertinent part[218]:

> '9. Probably every one of the twenty senators has his or her own opinion of exactly what happened to cause us to have to sit together in this unhappy judgment. None of us can look inside another's heart or mind, however, and Governor Sheffield says he cannot remember a number of the events, the recollection of which would have clarified his personal involvement in this matter and made our judgment easier.
>
> '10. It is the opinion of a majority of the Rules Committee that the evidence that an impeachable offense occurred, though substantial, does not rise to the level of 'clear and convincing evidence'. The Rules Committee also believes that sufficient support to approve one or more articles of impeachment is not available in the full Senate.
>
> '11. We therefore offer this report as an affirmation to the members of the public and those state employees who came forward and put their careers in jeopardy and as a condemnation of those within the state system who have, according to the record we

[216] Sam Bishop, Senator says furor really hurt Alaska, Fairbanks Daily News-Miner, August 10, 1985, at p. 5.
[217] Susan Fisher, Bennett forecasts Sheffield won't forget his adversaries, Fairbanks Daily News-Miner, August 10, 1985, p. 5.
[218] See, Senate Journal, Alaska State Legislature, Fourteenth Legislature, First Special Session, Juneau Alaska, Monday, August 5, 1985, Twenty-second Day, pp. 1489-1493.

ourselves have developed, abused the public trust and brough discredit upon themselves and this administration.

'12. A lack of a recommendation to impeach the governor should not be interpreted, however, as in any way condoning the standard of behavior that has brought us here. The Governor's Chief of Staff has admitted to lying to prosecutors and destroying evidence. There is also testimony that other evidence was directed to be to be destroyed. There is a clear pattern of persons in the Governor's Office being more concerned with deniability than accountability. We find that there was clear failure on the part of the Governor to set the tone for his administration: a failure to declare standards of appropriate conduct for his appointees in achieving the Governor's goals. (Emphasis added)

The lone Democrat on the SRC issued his own "Supplemental Report" in which he specifically noted his "non-concurrence" with significant portions of paragraphs 10-16 of the majority's report and submitted his own views.[219]

All five members of the SRC seemed generally complimentary of the efforts of the Juneau Grand Jury. Paragraph 20 of the majority report, in which all 5 members concurred in, "strongly endorsed" the remaining six recommendations of the Juneau Grand Jury's Report (i.e., adopting an executive branch code of ethics, state employee awareness of ethical obligations, revised procurement and competitive bidding procedures, improved campaign financing laws, etc.). All 5 members also concurred in the last two paragraphs of the majority report which stated:

'23. The committee agrees with the Grand Jury that, '…government officials must always aim for what is best for the public, not merely for what might be 'okay'. Every public official has a duty of loyal, faithful and honest service which is clearly inherent in the responsibilities of public office at all levels.'

'24. The 15 citizens sitting on the Grand Jury have expressed goals that everyone in public service must aspire to but were plainly lacking in the conduct of some of the Administration officials involved here. Alaskans will not tolerate those who violate this duty. (Emphasis original)

Despite their consensus in issuing these compliments, all five members of the SRC still found grounds to criticize the Juneau Grand Jury and called for controlling its investigatory power:

'21….In particular, the Grand Jury should have been instructed that impeachment is a political process and not a substitute for judicial remedies.

'22….We also recommend that a resolution requesting Judicial Council recommendations of grand jury investigative procedures be approved.

The outspoken critics of the Grand Jury's reporting powers were not limited to Senators from the Democrat Party and the Governor's lawyers. Republican Senator John Sackett maintained the grand jury

[219] Id., at pp. 1494-1499.

had no business issuing a report that criticized Mr. Sheffield by name if it did not indict the governor for a crime. He said,

> Under our system, there are only the absolutes of guilt and innocence. There is no middle ground. In this instance, the grand jury led, in my opinion, by an overzealous prosecutor or prosecutors, was unable to find guilt and unwilling to find innocence. The grand jury has passed the buck. It has failed in its responsibility to the people of Alaska.[220]

Before the Senate proceedings concluded, Democrat Senator Frank R. Ferguson from Kotzebue introduced a floor statement that read in pertinent part:

> While I find nothing wrong with a grand jury, when authorized, to release a report containing recommendations concerning the public welfare and safety, I find the legal basis of allowing a grand jury to issue a report naming a public official without returning an indictment to be deliberately or unprofessionally negligent.[221]

Democrat Senator Vic Fischer then introduced Senate Resolution No. 5 that called for the question of grand jury powers to be examined by the Alaska Judicial Council. Apparently, there was some language in SR No. 5 critical of the grand jury that was removed by an amendment by Republican Senator Halford who defended the grand jury's right to make the report; Mr. Halford's amendment to SR5 was adopted by a narrow 11-9 margin in which the 11 Republicans in the Senate voted to remove the critical language while their 9 Democrat counterparts voted to keep it in. After two more subsequent amendments, Senate Resolution No. 5am was adopted unanimously in a 20-0 vote.[222] It read,

> 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 the 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.

The Alaska Senate had now unanimously joined the Governor's attack on the Alaska Grand Jury. Any reformers opposed to the grand jury concept, who Mr. Dewey had called forty years earlier the "fuzzy-minded crackpots" now had an opening in Alaska. Was the real reason the constitutionally protected Alaska Grand Jury was being attacked by all 20 members of the Alaska Senate, because they unanimously

---

[220] Stan Jones, No impeachment; Senate recess near, Fairbanks Daily News-Miner, August 5, 1985, p. 1.
[221] Twenty-second Day, supra, note 218, at pp. 1499-1500.
[222] Id., at pp. 1500-1503.

recognized its power to, in Mr. Dewey's words, "send a subpoena to the biggest official in town and see how quickly he responds and how humbly he tells his story"?

The next day following the Senate's decision not to impeach Mr. Sheffield, the foreperson of the Juneau Grand Jury was quoted as saying:

> The jury's two major goals were to give the matter the widest possible exposure so that that public could make up its own mind and public officials could be held accountable. I think that however the Senate hearings have turned out I would certainly have to agree that our two major emphases have been completed.[223]

After the special session of the Senate adjourned, the public learned a few things about the ten women and five men who served on the Juneau Grand Jury when it was asked to investigate the Fifth Avenue Center lease. On August 9, 1985, the Fairbanks New Daily-Miner published an article based on their August 7 interview of 9 of the 15 jurors. The 9 jurors agreed to be interviewed on the condition their names not be used. One juror said, "It's primarily because our identity was such a subject during the impeachment proceedings and we felt so strongly that the grand jury process relies on the anonymity of the jurors."[224]

Prior to the Miner's interview and despite the substantial evidence against Mr. Sheffield's administration, some people had accused the Juneau Grand Jury of being a Republican cabal, out to ruin a Democrat governor shortly before the 1986 elections. That allegation turned out to be baseless. Of the nine jurors interviewed, none were Republican, 1 was a Democrat, and 8 were independent. All nine had voted for Mr. Sheffield in 1982.[225]

Apologists for Mr. Sheffield's administration launched another accusation towards the Juneau Grand Jury – that they were a "pack of wrathful state employees out for revenge on a big-business boss who was impatient with bureaucrats and bureaucracy." That one turned out to be baseless as well. The Juneau Grand Jury consisted of 4 housewives, 3 state employees, 3 private enterprise people, two retirees, one municipal employee, one non-profit employee and one consultant.[226]

The interview of the grand jurors revealed that when the Juneau Grand Jury first commenced their investigation in April the individual grand jurors were evenly divided, with about a third for the governor, a third against, and a third undecided. However, by the end they were nearly unanimous with 14 jurors voting to issue the report on their findings to the public and the remaining juror voting to indict on criminal charges. In their words, there was "no one for innocent".[227]

The jurors revealed that at times they met in unrecorded work sessions without the prosecutors and deliberated on their own. At other times they called or recalled witnesses the prosecutors had not planned to call. They made the decision to grant Mr. Sheffield's Chief of Staff immunity from prosecution so they could force him to testify. They wanted to get to the bottom of the truth as well as possible.

---

[223] Stan Jones, Sheffield: 'I'm glad it's over', Fairbanks Daily News-Miner, August 6, 1985, pp. 1, 5.
[224] Stan Jones, Inside look at the grand jury, Fairbanks Daily News-Miner, August 8, 1985, p. 1.
[225] Id., at pp. 1, 15.
[226] Id., at p. 15.
[227] Id.

During the interview, one juror cited Mr. Sheffield's ability to remember events that were favorable to his case, but not those that were harmful. She said they "really had problems with his selective amnesia". Another woman reported, "one question I wanted to ask him was, did you have your lobotomy before or after you were elected?"[228]

The Sheffield Report had been attacked as soon as it was released to the public in early July. Some senators even demanded the identities of the jurors so they could be hauled before them to explain their actions. One juror said, "it hurt me to know these people, before they even sat down and read it and thought about it, said how bad the grand jury was doing." Another juror said, "I personally believe [the attack] was deliberately planned to shift the focus from the governor's office to the grand jury as part of the defense strategy."[229]

The grand jurors talked about how stressful the ordeal was, especially towards the end. But they all said it was worth it. One man said, "I was walking down the street when it was all over and the report was issued and I was really proud to be an Alaskan." One woman said, "We got to be really good friends because of that sense that we had to share this weight for the state. There have not been very many people who have had to carry that weight around."[230]

In hindsight, none of the grand jurors wished they would have done things differently. One juror said, "I feel the report was the appropriate way – the only way – the pubic was going to know in a timely manner what went on." Another juror said, "The fact that government is run this way just eats me." Another juror added "I'm ashamed of [the Governor]."[231]

The anonymous, non-partisan Grand Jury did a better job of getting to the truth than any other type of investigative body could have done. In front of the randomly selected, unbiased, and short-term Juneau Grand Jury, the truth had the best chance of succeeding against the strong headwinds of political intimidation and partisan persuasion faced by the 20 Senators who evaluated the Governor's conduct. The public was educated as to shameful practices by the executive branch and government transparency was increased. The Senate adopted resolutions to carry out some of the Grand Jury recommendations. An informed citizenry armed with the truth eventually voted out an incumbent with a problematic administration; Mr. Sheffield was defeated in his own party's Democratic primary in 1986.

A Guest Opinion article appeared in the August 6, 1985, edition of the Fairbanks Daily News Miner, authored by Dick Randolph titled "Alaska must correct cause of corruption." At the time Mr. Randolph was a former State legislator and member of the Libertarian Party who had been instrumental in repealing the state income tax following the sizable increase in oil revenues. Mr. Randolph pointed out questionable dealings by State officials in both the Legislative and Executive branches since the advent of billions of discretionary dollars from oil taxes and royalties. He wrote:

> These circumstances…are only predictable and ongoing results of the political system having an abundance of wealth which the politicians need not go to the people to acquire not to account for.

[228] Id.
[229] Id., at pp. 1,15.
[230] Id., at p. 15.
[231] Id.

The solution sought by Mr. Randolph and any other American citizen can be found in the Alaska Grand Jury. The Alaska government proved in the Sheffield affair that its citizens should never rely on their officials to self-regulate themselves. The Alaska Grand Jury is our best hope for citizens to ensure fair and honest government. Re-educating the public and the three branches of government on the tremendous powers of the Alaska Grand Jury will lend significant help to achieving that goal.

Let us citizens never forget the sentiments of the San Francisco newspaper nearly 80 years ago:

> "[t]he Grand Jury has always been disliked by politicians. It is the only body charged with investigating public offices, and the only part of the prosecuting machinery that does not have to go before a political convention."[232]

In the next Chapter we shall see that when the Alaska Judicial Council finally issued its report in response to SR5am, it concluded that the Alaska Grand Jury and Judge Pegues had acted properly in publicly releasing the Sheffield Report. The Council agreed the Alaska Grand Jury has the power to investigate and report on government misconduct. The AJC reached the same conclusion that Judge Wilson, Judge Yerkes, Judge Vanderbilt, and Mr. Dewey had reached over the preceding 200 years, and the same conclusion that legal experts like Professors Younger and Wright reached subsequently.

The charges by Mr. Sheffield's lawyers and some of Alaska's Senators against the Juneau Grand Jury actions were completely out of line. But as we shall see, the Alaska government forged forward with its attack on the Alaska Grand Jury.

[232] See Chapter 5, supra, at p. 33.

Chapter 11

The Alaska Judicial Council Sides with the Politicians, then Sidesteps the Constitution

One of the first legal reviews to be published regarding the Juneau Grand Jury's investigation and the public Sheffield Report was a 36-page article appearing in the 1986 Alaska Law Review, entitled The Reportorial Power of the Alaska Grand Jury ("Reportorial Power").[233] The principal issue addressed in Reportorial Power was whether the Alaska Grand Jury "possesses the authority to issue reports critical of identifiable individuals". As discussed in Chapter 10, Mr. Sheffield's attorneys and some Senators vehemently claimed no such power existed. However, Reportorial Power concluded that the Sheffield Report and its ensuing publication was proper.

Reportorial Power acknowledged there was a split of opinion throughout the country on the desirability of the grand jury's strong reporting powers under common law. It found that some authorities have praised such reports as "necessary to deter official wrongdoing", while other authorities have denounced them as "foul blows" that deny procedural fairness to the criticized individual.

In its footnote citing to authorities in support of both positions, Reportorial Power cited the Camden case and took a view opposite to that of Mr. Sheffield's attorneys who told the Alaska Senate that the case had been "overruled". Rather, Reportorial Power stated that the subsequent 1961 NJ Supreme Court case "confirmed the basic principles of Camden but disapproved of the court's failure to remove certain allegations in the report that were not connected with the detrimental public conditions."[234]

Much like this study has done, Reportorial Power stated that "an examination of the historical development of the functions of the grand jury is essential to understanding how the grand jury should operate today. Similarly, Reportorial Power undertook a summary of the grand jury's common law development in England, colonial America, and finally Alaska. With respect to arguments against the reporting power of the grand jury, Reportorial Power stated, "the historical development of the grand jury weakens the force of this argument." With respect to arguments favoring reports, Reportorial Power cited Judge Vanderbilt's opinion in Camden with approval.[235]

In addressing the law in Alaska, Reportorial Power began by reciting Article I, Section 8 of the Alaska Constitution, and noted the historical precedent in Alaska of grand juries issuing reports criticizing specific officials. In discussing Mr. Buckalew's opposition to the expanded powers suggested by Mr. Barr, Reportorial Power correctly noted that "Delegate Buckalew apparently believed that his concerns about

---

[233] Frank W. Cureton, The Reportorial Power of the Alaska Grand Jury, 3 Alaska Law Review 295 (1986). Reportorial Power was written by Editor Frank W. Cureton, who at the time was a student at Duke University Law School which publishes the Alaska Law Review. Mr. Cureton received his J.D. degree in 1987 and an LLM in Taxation from NYU in 1991.

[234] Id., at p. 296.

[235] Id., at p. 304.

the amendment were not abrogated because he was one of the eight delegates who voted against the amendment."[236] Attached as an Appendix to Reportorial Power were the Minutes of the Proceedings of the Alaska Constitutional Convention containing the entire dialogue of the delegates on this issue and the identity of the "yeas" and "nays" in the ensuing 44-8 vote; included were the important items the Governor's Memorandum to the Alaska Senate had omitted.

Reportorial Power conducted a survey of the relevant law in other jurisdictions. It found that 24 other states had expressly addressed the authority of grand juries to issue reports critical of specific individuals, finding that in 7 other states besides Alaska, the legislature or the courts had specifically authorized these types of reports. The article cited to Nevada which "has a grand jury statute that is quite similar to the grand jury provision in the Alaska Constitution and judicial decisions in Nevada have held that the grand jury may issue reports naming specific individuals." Reportorial Power also looked at federal authority on the subject and found some decisions allowing grand jury reports critical of specific persons.[237]

Reportorial Power wrapped up its analysis by looking at potential reform measures, concluding that because of the "shall never be suspended" language in the Alaska Constitution, "any reform measures adopted must not 'suspend' the reporting power."[238] The last potential reform addressed by the article was "pre-publication factual review by the trial court" which cited limitations applied in New York and New Jersey.

What Reportorial Power said next is important, in evaluating subsequent actions of the Alaska Judicial Council and the Alaska Supreme Court which will be discussed later in this chapter and the next:

> Adopting one of those standards in Alaska would raise significant constitutional questions. Of course, the framers of the Alaska Constitution did not intend that there be false or misleading recommendations. However, granting the grand jury the power to investigate and make recommendations implies that the grand jury should be the body that evaluates the evidence disclosed by the investigation. Allowing a trial judge to reweigh that evidence and perhaps to suppress the recommendation would usurp the grand jury's power. It would appear that such a level of review would contravene the suspension clause.[239] (Emphasis added)

In February of 1987, three months after Reportorial Power was published and 18 months after the adoption of Senate Resolution No. 5am, the Alaska Judicial Council finally published its recommendations in a report entitled, The Investigative Grand Jury in Alaska (the "AJC's 1987 Report").[240] The AJC's 1987 Report was 58 pages long including 140 footnotes. The Chairman of the Council was Alaska Supreme Court Chief Justice Jay Rabinowicz who would later join the majority in the controversial 1988 passage of Supreme Court Order 938 and its 1990-1991 rulings in the case of O'Leary v. Superior Court.[241]

---

[236] Id., at p. 310.
[237] Id., at p. 316.
[238] Id., at p. 322.
[239] Id., at p. 325.
[240] Alaska Judicial Council, The Investigative Grand Jury in Alaska, February 1987. (hereinafter "AJC's 1987 Report")
[241] For the discussion of SCO 938 and O'Leary, see Chapter 12, infra.

To the Council's credit, their report acknowledged several important functions of the investigative Grand Jury that are well protected by the Alaska Constitution. As Reportorial Power had done 3 months earlier, these acknowledgements heaped even more conclusive proof on the view that the attacks on the Juneau Grand Jury's Report by Mr. Sheffield's lawyers and some of the Senators were unequivocally off base.

On the issue of investigating and reporting on public officials, the AJC's 1987 Report acknowledged the grand jury's common law roots and concluded:

- The investigatory and reporting power of the Alaska Grand Jury is broad and covers virtually everything of public concern. It can't be hindered or delayed;[242]

- The grand juries of England and of the colonies … generally acted as 'spokesmen for the people, sounding boards for their leaders, and vehicles for complaints against officialdom';[243]

- The investigatory powers preserved by the Constitution particularly apply to investigations of public officials,[244] and later suggesting the Grand Jury may have a special responsibility to monitor the courts of justice or other public offices, citing to Alaska Statute 12.40.060;[245] and

- 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.[246]

On the prospect of a constitutional amendment requested by the Senators to curb the powers of the Alaska Grand Jury, the AJC's 1987 Report concluded:

- 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 purpose of reports, or to otherwise effectively suspend the recommendation power of the grand jury;[247] (Emphasis added) and

- While a constitutional amendment restricting the grand jury's investigative powers could reduce the due process concerns of public officials, an amendment would substantially alter the role of the grand jury envisioned by the delegates of the Alaska Constitutional convention.[248]

[242] Id., at Summary, p I.
[243] Id., at p. 13.
[244] Id., at p. 14.
[245] Id., at p. 17.
[246] Id., at Summary, p. II.
[247] Id., at p. 34.
[248] Id., at Summary, p. II.

On issues pertaining to the procedural process of launching a grand jury investigation, the AJC's 1987 Report concluded:

- The Alaska Grand Jury can investigate potentially criminal or noncriminal public welfare or safety matters on the request of 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;[249]

- The Grand Jury clearly has a duty to investigate matters coming to their attention independently of the prosecutor, citing to the oath taken by grand jurors;[250] (Emphasis added) and

- in the case of major investigations, a special panel can be requested.[251]

After citing to the importance placed by Alaska's Founders on the grand jury reporting function and concluding the Sheffield Report was well founded under existing law, the Alaska Judicial Council could have easily ended its 1987 Report right then and there. The Council could have sent an abbreviated report back to the Alaska Legislature to assure all of them that the Juneau Grand Jury had acted appropriately. At that point it would have been up to the Legislature to consider whether they wanted to risk proposing and voting on a Constitutional amendment that would undermine the ability of Alaska citizens to hold government officials accountable.

However, for unknown reasons the Council seemed determined to please the Alaska Senate at the expense of violating the Alaska Constitution. In a bizarre fashion, devoid of any legal authority and contrary to the conclusions reached in Reportorial Power, the AJC's 1987 Report recommended the adoption by the Alaska Supreme Court of extensive court rules that would have to be followed before a Grand Jury report could be made public. Pages IV through VI of the Report's Executive Summary set forth Proposed Criminal Rule 6.1 for Grand Jury Reports.

The AJC's 1987 Report explained its rationale for this extensive set of recommended rules as follows:

> 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. [252]

Proposed Criminal Rule 6.1 extended the protections available to public officials far beyond the law as applied by Judge Pegues in the Sheffield Report. The Council's recommendations unconstitutionally hindered the Alaska Grand Jury's ability to report its findings to the public by requiring a court to first find that 1) the report is supported by substantial evidence, and 2) the report does not infringe upon any protected rights or liberties of that person.

---

[249] Id., at p. 12.
[250] Id., at p. 18.
[251] Id., at p. 23.
[252] Id., at Summary, p. II, and see similar statement at p. 34.

Lawyers representing public officials criticized by the Alaska Grand Jury could coast a loaded cement truck without a driver through the loopholes proposed by the AJC in Criminal Rule 6.1. Had these standards been in effect in 1985, Mr. Sheffield's lawyers would likely have been able to stop the publication of the Sheffield Report and kept the public in the dark. The four Republican senators on the Senate Rules Committee had said there was substantial evidence of impeachable conduct by Mr. Sheffield, but their Democrat colleague disagreed with that statement.

Under the Council's proposed Criminal Rule 6.1, would judges nominated by the Alaska Judicial Council and selected by a Democrat governor fail to find "substantial evidence" where Democrat officials were involved? If the criticized public official was Republican would the same evidence be decided the other way? Regardless of the constitutional protections, should politically appointed judges even be making these calls in cases that have political ramifications?

The AJC's 1987 Report went way out on the proverbial limb. Without citing any supporting authority, it said their recommended restrictions could be implemented "either by legislation or court rules". The Council did not bother to discuss how these rules didn't qualify as a "delay or hindrance" that violated the Alaska Constitution. Their report gave no explanation why these substantively restrictive rules wouldn't require an amendment to the Constitution that couldn't be accomplished without a ratification by the people.

The Alaska Senate knew a constitutional amendment was required, but the Alaska Judicial Council, chaired by the Chief Justice of the Supreme Court showed little respect for the Constitution. Besides violating Article I, Section 8, the Council was also recommending a breach of the doctrine of separation of powers. It was putting the Alaska Supreme Court into a legislative role to protect State officials like Mr. Sheffield who fell short of the expectations of Alaska's "ordinary" citizens.

Recall in Chapter 5 the New York Code Commission's 1849 effort to curb grand jury reports by proposing restrictive rules. That effort failed when the New York legislature refused to follow the Commission's recommendations. Reportorial Power had specifically concluded 3 months earlier that allowing the trial court to "weigh" the evidence "would contravene the suspension clause" of Article I, Section 8. Also recall the discussion about Rocky Flats in Chapter 6, where Professor Lerner stated "for all practical purposes [similar rules] have abolished the grand jury's presentment power…such judicial discretion guts the power." As Chapter 12 will discuss next, Alaska Supreme Court Justices Burke and Compton would soon express the same concerns; they weren't buying into the constitutional coup the AJC was recommending. But they were the minority in a 5 judge panel.

Another outrageous fallacy of the AJC's 1987 Report was its contention the proposed recommendations for grand jury investigative reports were "generally analogous to the protections afforded to an indicted [criminal] defendant." An earlier report on the Alaska Grand Jury adopted by the Council in 1975 (the "AJC's 1975 Report") had recognized that the prosecutor's ability to control the grand jury in criminal indictments offered almost no protection to those accused. The AJC's 1975 Report twice used the phrase "rubber stamp" to describe the grand jury's role in most criminal indictments, saying "one can justifiably conclude that the grand jury's theoretical screening purposes are not operating effectively in practice."[253]

[253] Michael L. Rubenstein, "The Grand Jury in Alaska: Tentative Recommendations to the Judicial Council" (February 1975), at pp. 23-24, p. 37 ("the grand jury gives the appearance of acting as a 'rubber stamp' in a great

It's hard to comprehend how the Alaska Judicial Council, which calls itself an "independent citizen's committee", could be so concerned with the protection of public officials, yet so disinterested in the protection of Alaska citizens falsely accused of crimes and denied their Constitutional rights. A comparison of the protections given Mr. Sheffield, prior to the adoption of Criminal Rule 6.1, and those denied Mr. Jack, after the AJC's 1975 Report, serves as a case in point of the double standard so prevalent in the Alaska Court System.

Prior to Rule 6.1, Mr. Sheffield was given two extensive opportunities to explain his actions to the grand jury and the witnesses supporting him also were given several opportunities. The Juneau Grand Jury heard both sides. After the AJC's 1975 Report, Mr. Jack and the several witnesses who felt he was innocent were not only denied the opportunity to testify before the grand jury, but the Juneau prosecutors suppressed substantial exonerating evidence that his first attorney was pleading with them to disclose. The situation boils down to this: The Juneau Grand Jury that indicted Mr. Jack heard only one side of the story: the Juneau Grand Jury that recommended Mr. Sheffield's impeachment heard both sides of the story. The Alaska Judicial Council proposed rules to give public figures like Mr. Sheffield even more protection while doing nothing for ordinary citizens like Mr. Jack.

When Mr. Jack brought his case to the Alaska appellate courts, none of the eight appellate judges had any problem with the grand jury indicting him on only one side of the story. Those appellate judges even blessed the prosecution's exclusion of substantial exonerating evidence from the grand jury. They also allowed the prosecution's use of inadmissible hearsay before the grand jury, saying it wasn't material.

The span of time between the Sheffield and Jack cases is 25 years. The troubling question of why Alaska appellate judges promoted a double standard to benefit political figures but nothing to benefit people like Mr. Jack must be asked and answered. Similarly, the Alaska Judicial Council must respond to the question of why it recommended rules that increased the protection of political figures, knowing that protections of falsely charged citizens are practically non-existent. [254]

The AJC's 1987 Report had even more shortfalls. It omitted the fact that Mr. Barr's amendment to increase the Grand Jury's constitutionally protected common law powers went to a vote and won in a landslide, 44-8. The Council's analysis ignored the fact that not one of the other 55 delegates on the floor spoke in support of Mr. Buckalew's objection, indicating his views were widely rejected. As we shall see in the next chapter, Alaska Supreme Court Justices Burke and Compton called out this point in their O'Leary dissent, saying "moments after Delegate Buckalew spoke against the proposal, the convention voted, by an overwhelming margin, to adopt it." [255]

One of the more bizarre aspects of the AJC's 1987 Report was its repeated citation to a book written by a federal judge in New York while he was under fire for his lenient sentencing in a case.[256] In one of these

---

many cases."); and ("Prosecutors who support the information system concede that in most cases the grand jury acts only to 'rubber stamp' the district attorney's decision.")

[254] Alaska Supreme Court Justices Burke and Compton would raise a similar point in their dissent in the O'Leary case, infra, note 258, at p. 178.

[255] See, O'Leary, infra, note 258, at pp. 176-177.

[256] In the body of its Report and in 15 of its first 46 footnotes, the 1987 Report cited a publication by Frankel and Naftalis, The Grand Jury: An Institution on Trial (New York 1977). According to his Wikipedia page, Mr. Frankel was a U.S. District Court judge known as helping to establish federal sentencing guidelines. In 1976 Mr. Frankel came under attack for what prosecutors deemed a lenient sentencing (4 months out of possible 8 years) in a case where

citations, the AJC advanced a rather absurd proposition that was completely irrelevant to the reporting power of the Grand Jury, It was a swipe at another fundamental common law power of the grand jury that was expressly codified in Alaska – the ability of the grand jury to investigate things known to individual grand jurors. Was the AJC planting the seeds for additional attacks on the common law powers of the Alaska Grand Jury?

> 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.' 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 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.' (Emphasis added).[257]

To recommend a change in policy by applying the "swirling anonymities" of New York City where millions of people reside, to matters of local affairs in small Alaska communities from Ketchikan to Kenai to Kotzebue, seems outrageous. To suggest it is "somewhat questionable" for grand jurors to act on their own knowledge overlooked centuries of firmly established common law practice. Back in England perhaps the bones of Lord Somers caused the ground to rumble when the AJC 1987 Report was published.

Worst of all, to suggest that grand juries should dutifully give full faith and credit to prosecutors in criminal cases ignores the clearly expressed apprehensions of many of our Founders before they voted overwhelming to ensure the grand jury's participation. The Council was now promoting additional restrictions on the independence of grand jurors, thereby increasing their reliance on the prosecutors that they had criticized in their 1975 Report. The Council was even criticizing an existing Alaska Statute that codified an important common law power of the grand jury. It's almost unfathomable that the Alaska Judicial Council could be so eager to undermine the constitutionally protected powers of the Alaska Grand Jury.

If the Alaska Judicial Council had felt compelled to cite someone from New York as an authority, it certainly could have resorted to a much more authoritative source than a local judge under fire for lenient sentencing. For instance, the 1987 Report could have quoted future Governor and presidential candidate Thomas Dewey who praised the common law power of the grand jury and referred to its distractors as "fuzzy-minded crackpots". Or it could have quoted nationally known publisher George Putnam who spoke

---

a certain individual had pled guilty to defrauding nursing homes of $2.5 million in Medicaid funds. A year after writing the book, Mr. Frankel resigned as a judge at the relatively young age of 57, returning to private practice for the next 24 years. The AJC's heavy reliance on this source and virtual silence on well-regarded authorities such as Lord Somers, Professor Younger, and Judge Vanderbilt suggests the Council acted as an advocate for the legislature and not in a neutral capacity, let alone as an "independent citizen's committee".

[257] AJC's 1987 Report, at pp. 23-24.

favorably of the grand jury when he said, “there is no other way citizens can bring criticism directly to bear upon public officials”.

The AJC’s 1987 Report relied on questionable and inapplicable authority critical of the grand jury while omitting well established authority that was supportive and explained the necessity of the broad reporting powers of the Alaska Grand Jury. Its report avoided discussing the rich history of common law reporting powers found in England, colonial America and in the United States. It omitted any reference to Professor Younger’s monumental book on the history of the grand jury. It avoided Judge Vanderbilt’s influence at the Alaska Constitutional Convention and ignored his extensive discussion in Camden of the grand jury’s common law powers. These were unconscionable omissions yet 3 judges of the Alaska Supreme Court would soon label the AJC 1987 Report a “comprehensive and scholarly report”.

Chapter 12

The Alaska Supreme Court Follows Suit and Ventures out onto very Thin Ice

A year and a half following the publication of the AJC's 1987 Report, Alaska Supreme Court Justices Matthews, Rabinowicz and Moore followed suit and forced through the adoption of Criminal Rule 6.1. This new rule squarely imposed judicial control over the reporting powers of the Alaska Grand Jury. The rule adoption was contained in Supreme Court Order 938 dated September 8, 1988, with an effective date of January 15, 1989. The two other judges on the Alaska Supreme Court, Justices Burke and Compton, disagreed with their colleagues and dissented. They were of the view that Criminal Rule 6.1 violated Article I, Section 8 of the Alaska Constitution.

Justices Burke and Compton weren't pushovers. At the time of SCO 938's adoption, Justice Edmond W. Burke had sat on the Alaska Supreme Court since his appointment by Governor Jay Hammond in 1975. He had been Chief Justice from 1981 to 1984. Justice Allen T. Compton had sat on the Alaska Supreme Court since his appointment by Governor Jay Hammond in 1980. He was the Chief Justice of the Court from 1995 to 1997. Clearly, their views were well regarded and their opinions on the constitutionality of these proposed criminal rules carried some weight.

Alaska's "ordinary" citizens have been given little explanation why the Supreme Court made such a controversial move in adopting Criminal Rule 6.1 over the objection of Justices Burke and Compton. On the surface, there was nothing forcing the Supreme Court to pass SCO 938. The situation wasn't akin to a dispute that parties petition the Supreme Court to decide -- even in those situations the Supreme Court has discretion whether to hear the case and issue a ruling. There must have been a very compelling, undisclosed reason for the three judges to be so bold and bring the reputation of the Supreme Court so far out onto thin ice.

SCO 938 has the appearance of legislation disguised as a court rule for the purpose of avoiding a constitutional amendment. The adoption of Criminal Rule 6.1 raises significant questions regarding the integrity of the Alaska Supreme Court and whether its judicial function was compromised by political interests. This stigma persists among Alaskans today, as concerns of political favoritism at the highest levels of the Alaska Court System abound among citizens interviewed in advance of this study.

In Senate Resolution No. 5am, the Alaska Senate had requested the Alaska Judicial Council to study the grand jury's investigatory and reporting power, to make recommendations, and to consider a possible amendment to the State Constitution to strengthen due process considerations. Whether it was appropriate for the legislative branch to request help from the Alaska Judicial Council in overturning a clause in the Alaska Constitution is beyond the scope of this study. The answer to that question may depend on what branch of government the Alaska Judicial Council falls under. For readers unfamiliar with the Council's membership, the executive branch appoints 3 members who serve staggered 6-year terms, the Alaska Bar Association appoints 3 members, who also serve staggered 6-year terms. The Council is

then chaired by the Chief Justice of the Alaska Supreme Court who is also a member of the Alaska Bar Association, meaning the bar association essentially controls Alaska's judiciary. (In the author's previous experience with the AJC, the Chief Justice has dominated its public proceedings). For purposes of this study, what is important is that in 1985 all 20 Alaska Senators understood they were powerless to undermine the reporting power of the Alaska Grand Jury without a constitutional amendment.

Alaska's citizens may forever be in the dark about the primary forces within the Alaska Judicial Council, the Supreme Court and the Legislature that were responsible for hindering the power of the Alaska Grand Jury without a constitutional amendment. 35 years have passed since the AJC's 1987 Report was issued, meaning many witnesses have either passed on or their memories have faded; the most reliable evidence would likely be documentary. What is indisputable however, are the big gaps in the known timeline, suggesting there was likely significant internal dissension between the supporters of the AJC's 1987 Report and those who believed Criminal Rule 6.1 was unconstitutional.

To recap the timeline, Senate Resolution No. 5am had passed on August 5, 1985. According to Reportorial Power, the AJC completed a draft of its report in February 1986 and provided it to the editors of the Alaska Law Review at Duke Law School. Reportorial Power was published in the Alaska Law Review in December 1986. The AJC published its final report in February 1987.

The Alaska Supreme Court didn't adopt the proposed criminal rules until September of 1988, one and a half years after AJC's 1987 Report was published and two and a half years after its initial draft. Does this extended passage of time suggest considerable dissension behind closed doors at the Alaska Judicial Council and Alaska Supreme Court? What was Justice Rabinowicz's role, as Chairman of the AJC, in the outcome of its Report? Were there any state politicians the 3 Supreme Court judges were anxious to protect? Were any of those Supreme Court judges under the undue influence of state politicians? As Judge Vanderbilt had astutely pointed out in Camden, "what is not known and understood is likely to be distrusted". What is known however, is that Justices Burke and Compton wouldn't budge on their convictions of unconstitutionality, and their three colleagues decided to recklessly press forward on the dangerous ice.

Following the controversial adoption of SCO 938, it didn't take long for the 3 judges on the Alaska Supreme Court to apply their newly imposed restrictions on the reporting power of the grand jury to protect public officials and leave the public in the dark. In late 1989, an Anchorage Grand Jury investigated the conduct of the local school district, police department and district attorney's office in connection with their roles in handling a teacher's sexual relationship with students at Bartlett High School.

Like their fellow grand jurors in Juneau, the Anchorage Grand Jury prepared a substantial report of its findings and recommendations in March of 1990, criticizing the actions of the school district. Much to the chagrin of the Anchorage Grand Jury and local citizens, the Alaska Supreme Court suppressed substantial portions of this report, interpreting Criminal Rule 6.1 in a very liberal manner that absolutely shredded the constitutionally protected, common law rights of the Alaska Grand Jury. The three judges of the Supreme Court majority built an addition to their teetering house for bad law upon the melting ice -- the fundamentally unsupported AJC 1987 Report which they labeled "a comprehensive and scholarly report".[258]

[258] O'Leary v. Superior Court, Third Judicial District, 816 P.2d 163, 170-171 (1991)

The publicly available facts in the O'Leary case available from online sources can be summarized as follows:[259]

In May of 1989, Anchorage school officials learned that a 44-year-old teacher had a sexual relationship with a 17-year-old student and possibly with at least one more student. School officials confronted the teacher who resigned, but the officials did not report the matter to the police. The police didn't learn about the situation until September when a youth services agency alerted them.

The police raided school district offices on October 3 and Bartlett High School offices on October 6. The school district quickly sued the police about the raid and was joined by the ACLU and the NEA. The raids produced documents showing that the teacher received a monetary bonus and a promise of secrecy from the district in exchange for his resignation. The agreement prohibited the teacher from teaching in Alaska but left him free to teach in other states.

Following their investigation, the Anchorage Grand Jury issued a report which addressed the actions of the participants and criticized administrators from Bartlett High School and the Anchorage School District. Unlike the Sheffield Report, Rule 6.1 was now in effect meaning the Superior Court judge was required to review the Anchorage Grand Jury report under those guidelines before it could be made public.

The Superior Court judge provided a copy of the report to the individuals named in the report and gave them an opportunity to request a hearing. While the judge was conducting this review, the Anchorage Police Chief filed an application claiming Rule 6.1 was unconstitutional. The police chief was joined by two Anchorage papers, the grand jury and two prosecutors.

The Superior Court finished its judicial review of the Report and issued a final order on August 7, 1990, finding the report was acceptable and could be published on August 21. The "interested parties"[260] named in the report appealed and the publication was delayed pending the Supreme Court's decision.

After oral arguments the Supreme Court ordered that some portions of the Report be released but required the names of the interested parties to be deleted. The Supreme Court also halted the publication of some 70 pages providing the factual background of the dispute. At that point elections involving the Anchorage municipal assembly and school board seats were just two weeks away.[261] The actions of the Alaska Supreme Court kept the media and voters in the dark as to all the facts and the role of certain public officials.

One year later in August of 1991, and in a 3-2 decision, the Alaska Supreme Court issued its final decision and opinion in the O'Leary case. The 3 Supreme Court judges prevented the names and extensive factual background from being published even though the Superior Court judge had specifically found that the new hurdle in Rule 6.1 of *substantial evidence* had been met by the Anchorage Grand Jury.

Justices Burke and Compton objected on constitutional grounds as they had with SCO 938, but this time they issued a dissenting opinion. They highlighted the clear mandate of Alaska's Founders at the Constitutional Convention who overwhelmingly rejected the notion that the common law investigatory

[259] See generally, O'Leary, Id. See also, Richard Mauer, Special to the New York Times, Schools and Police Battle Over Search, New York Times, October 17, 1989, Section A, Page 16.

[260] Presumably the school district officials who were criticized in the Grand Jury Report.

[261] Separate from the Anchorage municipal elections, statewide elections were a little over two months away and it is unknown whether any of the interested parties protected by the Supreme Court were running for state office.

and reporting power of the grand jury could be limited. They contrasted the competing opinions expressed by Delegates Buckalew and Hellenthal, and then pointed to the "overwhelming margin" that approved the expanded powers.[262]

In their own words, Justices Burke and Compton felt Rule 6.1 'mocks' the clear Constitutional intent of Alaska's founders, stating:

> This procedural rule is not the least bit deferential to the "anti-suspension" clause. Indeed, it mocks it. If the language of [Section 8] is not clear enough, the rejection of Delegate Buckalew's objections to it persuade me that the constitutional debate has both addressed and answered the question whether the "anti-suspension" clause is to be construed restrictively or expansively. Only an expansive construction is consistent with its plain language and the debate and vote….
>
> The grand jury, and not the courts, can choose matters on which it reports and recommends, and the manner in which to do so. Its constitutional power shall never be suspended by the overlay of cumbersome procedures which provide for private judicial adjudications and review of whether the report it is to publish adversely reflects on someone, or otherwise violates his or her constitutional rights.[263] (Emphasis added)

Justices Burke and Compton also raised the issue addressed previously in this Chapter with respect to the double standard of protection given to public figures but denied to criminal defendants like Mr. Jack. The dissenting judges specifically asked why the public officials named in the Anchorage Grand Jury report should be entitled to more protection under the Alaska Constitution than individuals identified in criminal indictments who are given no opportunity to be heard.

> I fail to understand why the reputation interest of some persons is to be protected by Criminal Rule 6.1 procedures, while the same interest of another receives no protection. The court provides no guidance, for it fails to articulate why the reputation interest of some persons is of constitutional magnitude, while the reputation interest of others is not apparently so elevated.[264]

In O'Leary, the public officials criticized by the Anchorage Grand Jury's report had been given the opportunity to testify, defend their actions, and point to other evidence in their favor, just like Mr. Sheffield had been given. In both cases involving public officials, the grand juries heard both sides and those named in the reports had an opportunity to be heard. Regardless of the politics that were involved, in the opinion of this author, it was inexcusable for the three Supreme Court justices who forced SCO 938 and the O'Leary decision down the public's throats to feel more compelled to protect public figures up for re-election than presumably innocent citizens like Mr. Jack facing a lifetime in prison.

Recent commentaries continue to support the principle that grand juries serve an important function by publicly reporting on non-criminal indiscretions of named public officials. In 2000, Dr. Katy J. Harriger, professor of politics, constitutional law and civic engagement at Wake Forest University followed the

---

[262] O'Leary, supra, note 258, at p. 176-177.
[263] Id., at pp. 178-179.
[264] Id., at p. 178.

thoughts of thoughts of Judge Vanderbilt 50 years earlier when she wrote in her book, The Special Prosecutor in American Politics:

> The line between traditional public corruption and unethical but not criminal behavior is unclear….The fact that [public officials] are not criminals does not necessarily mean that they are ethically fit to hold public office, and criminal investigation encourages us to focus on the first question instead of the second. More effective special grand juries can help the American people focus on the key question of whether a government official has crossed an ethical line and violated the public trust.[265]

In 2007, Michael Buchwald, currently an attorney with the U.S. Department of Justice, echoed these sentiments in his article Of the People, by the People, for the People: The Role of Special Grand Juries in Investigating Wrongdoing by Public Officials:

> Public officials owe a fiduciary duty to the public and therefore must comply with a more demanding standard of conduct than that required by the criminal law. Where official misconduct or violation of the public trust does not rise to the level of criminal activity it should be worthy of some sanction nonetheless, such as removal from office. This heightened standard of conduct should apply equally to elected and appointed officials.[266]
>
> Similarly, there is an equally compelling public interest to make any official misconduct public knowledge, even if it is not criminal.[267]
>
> Grand jurors, as lay citizens unconnected to any branch of the government are the ideal individuals to reprimand public officials for behavior that is wrong, yet perhaps not criminal. [citing with approval a portion of the Camden opinion by Judge Vanderbilt] [268]
>
> When the individual affected is a public official, a report on his misconduct in office would be fully justifiable…. Public servants, especially elected officials, occupy positions of public trust, and as trustees of the public welfare these officials assume a risk that they will be the subject of close scrutiny and public comment.[269] (Emphasis added)

Applying these standards, "ordinary" citizens like Mr. Jack should be entitled to even more protection at the grand jury level than government officials like Mr. Sheffield. Hopefully, one day soon the Alaska Supreme Court will learn to see it that way too and unwind the considerable damage its internal policy decisions have wreaked.

---

[265] Katy J. Harriger, The Special Prosecutor in American Politics, p. 243 (2d rev. ed. 2000), cited by Buchwald, infra, fn. 266 at p. 97. Dr. Harriger is the co-author and editor of American Constitutional Law, 12 ed. (Carolina Academic Press 2019) and has authored a variety of books and articles.

[266] Michael F. Buchwald, Of the People, by the People, for the People: The Role of Special Grand Juries in Investigating Wrongdoing by Public Officials, 5 Geo. J.L & Pub. Policy, 79, 97 (2007).

[267] Id., at p. 99.

[268] Id., at p. 101.

[269] Id., at pp. 105-106.

Chapter 13

Alaska Courts System Revise their Handbook to Downplay the Grand Jury's Independence

In addition to the Alaska Court System's ("ACS") assault on the Alaska Grand Jury through controversial rules and Supreme Court decisions, perhaps just as damaging is its failure to properly educate Alaska citizens about their duties and powers under the common law.

Since statehood, the ACS has provided grand jurors with an instructional guide of their powers and duties called the Alaska Grand Jury Handbook (the "Handbook"). The first edition of the Handbook in 1962 did a commendable job of emphasizing to grand jurors their independence and many of their common law powers.[270] Since then, the Handbook has undergone a radical transformation which has either removed or reduced the prominence of several of those previously addressed powers.[271]

In discussing federal grand juries, Mr. Buchwald noted the significant negative impact that occurred when citizens serving on them are not properly educated by government officials:

> Presumably, grand juries stopped investigating on their own and writing reports because they did not know they had this common law power. It was never abolished by federal statute, but today grand jurors remain ignorant of their power and limit their role to considering charges put forward by the federal prosecutor. In fact, the standard 'charge' judges give to a new federal grand jury does not advise them of their power to investigate and issue reports. Furthermore, there is no explanation of this reporting power in the Handbook for Federal Grand Jurors, which grand jurors receive during orientation to acquaint themselves with their duties and responsibilities. Instead, there is the following statement in the Handbook that would dissuade a grand jury from investigating anything without the federal prosecutor's blessing...[272]

Today, most Alaskan grand jurors likely have a lower level of understanding of their duties and powers than our previous generations and Founders did. There may be extremely few grand jurors who understand the common law duty in their oath to thoroughly investigate matters in the manner laid out by Lord Somers in Chapter 1.

---

[270] The 1962 edition of the Alaska Grand Jury Handbook is attached to this study as Appendix "B". The copy of the Handbook, distributed by The Supreme Court of Alaska, does not contain a date of publication but contains a date stamp of October 25, 1962, by the National Criminal Justice Reference Service which has been granted permission to reproduce the material by the Alaska Court System.

[271] During the author's research for this study, the most current Handbook available on the ACS website was dated May 2019 and was used to compare with the 1962 version. The ACS published a new handbook on their website in July of 2022. The author has not conducted a comparative analysis between the 2019 and 2022 versions.

[272] Buchwald, supra, footnote 266, at pp. 86-87.

The disturbing truth that some Alaska prosecutors could probably convince some grand jurors to "indict a ham sandwich" is borne out by a review of the transcript of Mr. Jack's first grand jury indictment. The prosecutors used completely leading questions of the witnesses and suppressed exonerating evidence that the grand jurors could have inquired about. Had the grand jurors been familiar with Hoonah and its residents, they would have recognized there were major holes in the prosecutor's pitch. However, before a Juneau grand jury, the prosecutors likely knew they could get away with an unconstitutional indictment because grand jurors have not been properly educated on the type of investigation their oaths require.

The 1962 Handbook informed grand jurors of the important role they played in keeping the government in check. Sadly, today that is no longer the case. The 2019 version of the Handbook essentially represents a 180-degree turnaround. It instructs grand jurors that the prosecutor is in control and the jurors must be careful to shut their eyes and cover their ears to the world around them. The individual worldly experience of each grand juror is being washed out of the process, replaced by a framework controlled by government officials. Moreover, the 2019 Handbook attempts to limit the rest of the public from accessing the grand jury to consider grievances against the government.

The 1962 Handbook left little doubt that the grand jurors were an independent body, in complete charge of the proceedings. The printed guidelines were suggestive – what the grand jury "should" do, not what it "must" or "shall" do. The district attorney was not only an advisor, but the 1962 Handbook warned that even the best of advisors are sometimes in error. The grand jury could investigate crimes or other matters brought to its attention by individual jurors or by private citizens – while it might be wise to consult with the DA on these matters, it wasn't mandatory.

The following excerpts from the 1962 Handbook highlight the Alaska Grand Jury's independence:

- In time of peace no citizen can perform a higher duty than that of Grand Jury service. No body of citizens exercises public functions more vital to the administration of law and order.[273]
- The importance of its powers is emphasized by the fact that it is an independent body answerable to no one except the court itself.[274] (Emphasis added)
- Not only in theory, but in actual historical fact, the importance of the Grand Jury has been demonstrated…This power of the Grand Jury to protect the citizens from the despotic abuse of power has been repeatedly exerted not only in England, but in this country, even before the Declaration of Independence.[275] (Emphasis added)
- [In connection with criminal indictments, generally the Grand Jury] hears only the evidence presented by the district attorney; but when it has reason to believe that other evidence within reach will explain away the charge, the Grand Jury should order such evidence be produced, and for that purpose may require the district attorney to issue process for witnesses.[276]
- Charges of crime may be brought to your attention in several ways: 1) by the Court, 2) by the district attorney, 3) from your own personal knowledge, or from

[273] 1962 Handbook, p. 3. (Page 2 is the table of contents, so this instruction appears near its beginning)
[274] Id., at p. 4 (the last sentence of the section 'Importance of the Grandy Jury'). See also, p. 12.
[275] Id. (near top of page, beginning paragraph of 'Origin of Grand Jury')
[276] Id., at p. 5.

matters properly brought to your personal attention, 4) by private citizens heard by the Grand Jury in formal session, with the Grand Jury's consent….As to matters brought to your attention in classes (3) and (4) above, emanating directly or indirectly from the Grand Jury itself, it would be wisest to consult with the district attorney or the Court, in advance of undertaking a formal investigation by the Grand Jury, although this is not mandatory. In any event, you will generally have to consult with them in the end, if the Grand Jury decides that a person should be proceeded against criminally, in order to obtain aid in drafting the proper form of Indictment.[277] (Emphasis added)

- In order that the Grand Jurors may not be subjected to partisan secret influences, no one has the right to approach an individual member of the Grand Jury in order to persuade him that a certain Indictment should, or should not, be found. Any such individual should be referred to the district attorney, in order that he may be heard by the Grand Jury as a whole. On the other hand, a citizen is at liberty to apply to the Grand Jury for permission to appear before it in order to suggest or urge that a certain situation should be investigated by it.[278] (Emphasis added).
- In addition to the duty of the Grand Jury to hear evidence and decide whether formal criminal charges should be proceeded with, the Grand Jury has the additional important duty of making investigations on its own initiative, which it can thereafter report to the Court. Thus a Grand Jury may investigate how officials are conducting their public trust, and make investigations as to the proper conduct of public institutions, such as prisons and courts of justice. This gives it the power to inspect such institutions, and if desired, to call before them those in charge of their operations, and other persons who can testify in that regard. If as a result of such investigation the Grand Jury finds that an improper condition exists, it may recommend a remedy.[279] (Emphasis added).

As the footnotes for each of the above clauses indicates, the foregoing instructions appeared in the first four pages of text in the 1962 Handbook. The critical importance of their duty, their complete independence from the prosecutor, the real risk of despotic government action in this country, the ability to ask for additional evidence that will explain away the charge, the ability to alert other grand jurors as to evidence or circumstance and the option to investigate without the court's or prosecutor's prior blessing, and the right of citizens to apply directly to the grand jury to be heard -- all of these important functions of the Alaska Grand Jury were disclosed up front and center to Alaskan grand jurors in 1962.

The 1962 Handbook clearly portrayed the District Attorney as an advisor and warned grand jurors that even the best of them will sometimes be in error. The 1962 Handbook specified that grand jurors must be independent and express their opinions. In other words, the 1962 Handbook was telling grand jurors they needed to think for themselves:

- Since [the district attorney] is a public official, usually of experience in this work, and of both intelligence and sincerity, he will naturally be the constant legal

[277] Id., at pp. 5-6.
[278] Id., at p. 6.
[279] Id., at pp. 6-7.

advisor to the Grand Jury. However, the best of advisers are sometimes in error. Thus, if a difference of opinion arises between him and the Grand Jury, the matter should be brought before the presiding Judge for his ruling.[280] (Emphasis added)

- Wait until the district attorney has finished, ordinarily, before asking questions of a witness. It usually happens that the evidence you are seeking will be brought out. Be independent, but not obstinate. Be absolutely fair – you are acting as a judge. Express your opinion, but don't be dictatorial. Every juror has a right to his own opinion.[281] (Emphasis added)
- When considering undertaking any special investigation, it is wise to consult the district attorney beforehand, so that he may arrange routine business accordingly and advise you as to other matters bearing on such investigation.[282]

The 2019 edition evidences a substantial change somewhere along the way in the mindset of the Alaska Court System officials responsible for educating grand jurors. The introduction is silent about the grand jury's critical important investigative function. It isn't until page 12 that the Handbook mentions the grand jury's power to "investigate and make recommendations concerning the public welfare of safety, deferring further explanation of that power until page 24. It downplays the grand jury's independence in launching investigations on its own initiative or that of private citizens – following the lead of the AJC's 1987 Report that criticized this important power on the authority of Mr. Frankel.

When the 2019 Handbook finally gets around to explaining the grand jury's investigating powers it states, "generally, grand jury investigations are initiated by the district attorney. They can also be initiated by the presiding judge or by members of the grand jury."[283] This language represents a notable departure from the 1962 Handbook which instructed grand jurors they had the" additional important duty of making investigations on their own initiative."

The 2019 Handbook also curtails the important ability of citizens to appeal directly to the grand jury. The 1962 Handbook expressly stated: "a citizen is at liberty to apply to the Grand Jury for permission to appear before it in order to suggest or urge that a certain situation should be investigated by it." The 2019 version makes the prosecutor the gatekeeper for citizen inquiries:

> Prosecutors also sometimes receive letters from the pubic addressed to the grand jury, requesting investigations. In these situations, the prosecutor will probably conduct a preliminary investigation and make a recommendation to the grand jury about whether to take action.[284]

The 2019 Handbook attempts to make the prosecutor the gatekeeper of the information the grand jurors can consider and discourages them from considering information coming from outside the courtroom.

---

[280] Id., at p. 11.

[281] Id., at p. 13. Page 9 indicates the Foreman should take an active role in questioning witnesses, "The witness will ordinarily be questioned first by the district attorney, then by the Foreman, and then, if desired, by other members of the Grand Jury, each of who is free to ask all proper questions of any witness." Even the 1962 Handbook falls short of the common law standards documented by Lord Somers.

[282] Id., at p. p. 14.

[283] 2019 Grand Jury Handbook, at p. 26.

[284] Id.

The introduction states “a grand jury hears evidence only from the prosecutor.” Page 7 tells grand jurors a) they can’t conduct any independent research, b) must avoid news reports that might mention criminal activity, and c) must decide the case based solely on the evidence presented in the grand jury room. These purported limitations are way out of bounds when compared to the common law powers outlined by Lord Somers and the historical function of the Alaska Grand Jury.

Such limitations also cut against the clearly expressed concerns of many Constitutional Convention delegates who spoke of their awareness that prosecutors will sometimes omit important evidence. The original 1962 Handbook was in sync with the expressed will of the delegates; it stated, “when it has reason to believe that other evidence within reach will explain away the charge, the Grand Jury should order such evidence to be produced, and for that purpose may require the district attorney to issue process for witnesses.” The 1962 Handbook later reiterated this power, “Indeed the Grand Jury itself may insist on the calling of additional witnesses”.

The 1962 Handbook gave members of the public the right to persuade the Alaska Grand Jury as a whole, whether a person should or shouldn’t be indicted. It was only concerned with “partisan secret influences”, instructing that no one had a right to approach an individual grand juror to persuade him on a matter of indictment. It was only in that situation where such a person should be referred to the district attorney,” in order that he may be heard by the Grand Jury as a whole.” The prosecutor had no right to limit who are what the grand jurors heard. Any citizen could freely approach the entire panel of the grand jury without any interference from the prosecutor.

Page 16 of the 2019 Handbook attempts to restrict a grand juror with knowledge of a defendant or a case from telling other jurors about it without taking the witness stand. To support this assertion, the 2019 Handbook twists around the language of AS 12.40.040 which states that an indictment can’t be found upon a statement of a grand juror without that juror being sworn and examined as a witness. The statute naturally applies in a case where there is no other evidence upon which an indictment can be found. To suggest that a grand juror can’t share information with other grand jurors that might lead to other witnesses being called has absolutely no basis. Under common law, grand jurors have a duty to obtain information and share it with the group so that the truth can be best ascertained.

The 2019 Handbook promotes this dangerous limitation on the common law power of grand juries even further. At page 23, it states that if a grand juror accidentally hears something about the case, he or she should tell the prosecutor without the other grand jurors present. The Handbook then asserts the prosecutor can unilaterally decide whether the grand juror should be disqualified. The willingness of the Alaska Court System to give prosecutors this kind of power over the grand jury is bewildering and suggests a coordinated attempt by the Alaska Court System and the Department of Law to erase the independence of the grand jury developed centuries ago.

The 2019 Handbook downplays the ability of the grand jury to call in a defendant to testify. The introduction states, “a grand jury hears evidence only from the prosecution”. Page 15 reinforces this theme by stating “the grand jurors only hear the prosecutor’s side of the case and not the defendant’s”, while Page 19 emphasizes the defendant will not be present. It is not until page 20 that the 2019 Handbook finally admits the grand jury has the right to call the defendant to testify. The 1962 Handbook was much more up front on the ability of the grand jury to offer this opportunity to the accused.

The 2019 Handbook states that a grand juror who knows the defendant would most likely be excused for cause from hearing that case. The 1962 Handbook contained no such limitation and under the common law documented by Lord Somers, it was expected and hoped that some of the grand jurors would be knowledgeable of some aspects of the case. The 1962 Handbook specifically allowed a grand juror to consider criminal charges from their own personal knowledge, and further instructed that consulting with the district attorney or the court was not mandatory. If a grand juror has reason to believe that an accused person is innocent, he or she should be at liberty to share that valuable information with the other grand jurors.

For the reader's convenience, an excerpt from Lord Somers' treatise appearing earlier in Chapter 1 is repeated below because of its importance in outlining the type of independent investigation required by grand juries. A comparison of Lord Somers' highly authoritative work to the 2019 Handbook demonstrates that today, Alaska grand jurors are being grossly misinformed about the duties inherent in their oath.

> [T]heir express oath binds them to be diligent in their enquiries, that is, to receive no suggestion of any crime for truth, without examining all the circumstances about it, that fall within their knowledge; they ought to consider the first informers, and enquire as far as they can into their aims and pretenses in their prosecutions; if revenge or gain should appear to be their ends, there ought to be the greater suspicion of the truth of their accusations; ...
>
> Next the jury are bound to enquire into the matters themselves, whereof any man is accused, as to the time, place, and all other circumstance of the fact alleged. There have been false informers that have suggested things impossible; … The jury ought also to enquire after the witnesses, their condition and quality, their fame and reputation, their means of subsistence, and the occasion whereby the facts, whereof they bear witness, came to their knowledge. …
>
> Neither may the jury lawfully omit to enquire concerning the parties accused of their quality, reputation, and the manner of their conversation, with many other circumstances; from whence they may be greatly helped to make right inferences of the falsehood or truth of the crimes whereof any man shall be accused. The jury ought to be ignorant of nothing whereof they can enquire, or be informed, that may in their understandings enable them to make a true presentment or indictment of the matters before them. …
>
> 'Tis certainly inconsistent with their oaths to shut their ears against any lawful man that can tell them anything relating unto a crime in question before them: no man will believe, nor can they themselves think that they desire to find and present the truth of a fact, if they shall refuse to hear any man who shall pretend such knowledge of it, or such material circumstances, as may be useful to discover it; whether that which shall be said by the pretenders will answer the juries' expectations, must rest in their judgments, when they have heard them.

> It seems, therefore, from the words of the oath, that there is no bound or limit set (save their own understanding or conscience) to restrain them to any number or sort of persons of whom they are bound to enquire; they ought first and principally to enquire of one another mutually, what knowledge each of them hath of any matters in question before them: the law presumes that some, at least, of so many sufficient men of a county, must know or have heard of all notable things done there against the public peace; for that end the juries are by the law to be of the neighborhood to the place where the crimes are committed. If the parties, and the facts whereof they are accused, be known to the jury, or any of them, their own knowledge will supply the room of many witnesses. Next, they ought to enquire of all such witnesses as the prosecutors will produce against the accused; they are bound to examine all fully and prudently to the best of their skill; …
>
> As for the better discovery of the truth of any fact in question, the credit of the witnesses, and the value of the testimonies, it is the duty of the grand inquest to be well informed concerning the parties indicted; of their usual residence, their estates, and manner of living; their companions and friends with whom they are accustomed to converse: such knowledge being necessary to make a good judgement upon most accusations; but most of all in suspicions, or indictments of secret treasons, or treasonable words, where the accusers can be of no credit, if it be altogether incredible that such things as they testify should come to their knowledge.[285]

Citizens serving on the Alaska Grand Jury need to be properly educated. Appropriate and massive changes to the Handbook to bring it into compliance with common law and the Alaska Constitution are needed immediately.

[285]Chapter 1, supra, at pp. 9-10.

Chapter 14

Restoring the Alaska Grand Jury's Prominence

For those Alaskans reading this study, hopefully by now there is little doubt in your minds that the grand jury is the appropriate body to investigate and report on anything that affects our public welfare. The Alaska Grand Jury is not burdened by the politics and bias that inevitably engulfs the legislative, executive, and judicial branches which attempt investigations. Citizens with concerns of government incompetence, waste, neglect, or corruption should be encouraged to present their facts and observations to their local grand jury. The common law is very clear -- it is up to the grand jurors to decide among themselves what and who they want to investigate – no judge or prosecutor can decide for them.

Similarly, grand jurors need to be vigilant for matters of public welfare that might benefit from their investigatory and reporting powers. As the 1962 Handbook stated, they have the "additional important duty of making investigations." All Alaskan grand jurors must be mindful of the public trust that has been placed on their shoulders for a short period of time.

In today's internet era, the investigatory and reporting powers of the Alaska Grand Jury are needed more than ever. The delivery of news content has changed considerably with local newspapers being forced to make drastic staff cuts. As a result, the media services in Alaska are ill equipped to undertake the type of investigative reporting that in times past brought government misconduct or corruption to the surface.

Fortunately for Alaskans, we have the foresight of Delegates Kilcher, Hellenthal, Barr, Hermann, Marston, Davis, Taylor, and others who spoke up passionately and cemented the common law powers of the grand jury into our Constitution. We are assured that going forward no executive, legislative, or judicial action is necessary to restore these powers of the Alaska Grand Jury. The necessary tools already belong to us and all we need to do is take them out of the toolshed. We the people have centuries of historical precedent behind us and at our disposal.

Alaskans have the ability to hold all government employees accountable, not just high-level officials. In Chapter 9 we saw how in its Sheffield Report, the Juneau Grand Jury made it a point to remind all State employees that "each of them has an obligation to faithfully serve the public interest first". This comment was undoubtedly directed in part to Mr. Sheffield's assistant who served her superior and not the citizens, when she left her office and went to a nearby hotel lobby to place a call to the fundraiser alerting him the Governor's role in the Fifth Avenue Center lease was under investigation.

In the future, simply knowing they might be summoned by the grand jury (as Mr. Sheffield's assistant was) should help keep many government employees on the straight and narrow path in putting the public's interests first. The grand jury's power to enforce transparency in government affairs has many advantages. For instance, recall Chapter 5 containing the quote by Mr. Dewey alluding to this benefit:

When you are sitting, you are practically the boss of the town. If you don't believe it, just send a subpoena to the biggest official in town and see how quickly he responds and how humbly he tells his story.

The Alaska Grand Jury is the appropriate body of citizens to ensure that government officials are true to their oaths and properly serve the public. Through their investigative and reporting power, ordinary citizens can have a meaningful voice in government. This ability to participate in matters of government will likely promote their future engagement in civic affairs.

Indeed, the Alaska Constitution begins with the words, "All government originates with the people, is founded upon their will only…" When citizens become disengaged from participating in government, when out of frustration only 50% of Alaskans vote, then we all lose.

For those Alaskans who may harbor any doubts about trusting the Alaska Grand Jury to act appropriately, recall the words of Delegate Hellenthal in Chapter 8 that "runaway" grand juries are rare. The random selection process and the short-term duration of service virtually assures us that an impartial body will result. No other body of people sanctioned by our Constitution has as much hope of being impartial as the Alaska Grand Jury. The exemplary work of the Juneau Grand Jury in their investigation of Mr. Sheffield's administration supports the accuracy of Mr. Hellenthal's views.

The Juneau Grand Jury was a diverse group of citizens with no overall bias. They operated in anonymity and maintained that status even after they were discharged by Judge Pegues. No permanent power channels were established. They took their oath, fulfilled their duty, discerned the truth, and then moved on. They felt a sense of pride in the work they did and the sacrifices they made, knowing that by informing their fellow citizens of the truth, Alaska would become a better place.

These individuals who served on the Juneau Grand Jury and their families deserve an apology from Alaska state officials. The Legislature and Governor should jointly pass a resolution in the winter session of 2023, apologizing to the members of the Juneau Grand Jury for their treatment by the politicians who preceded them. The resolution should acknowledge the members as dutiful citizens who fulfilled their oaths and commend them for discerning the truth and doing what they felt was right for the benefit of all Alaskans. Their work should be highlighted in future grand jury Handbooks as an example of how grand juries should fulfill their important civic duty.

The Alaska Court System needs to overhaul their treatment of the grand jury. First and foremost, the Supreme Court should immediately issue an Order rescinding Criminal Rule 6.1 and its unconstitutional hindrance on the grand jury's reporting power, and vacating their O'Leary decision. They should destroy all recent versions of the Handbook and distribute the 1962 Handbook to grand jurors on an interim basis while a new, updated one is assembled. The Court System should develop a program that properly educates grand jurors and establish an online depository where all grand jury reports can be accessed by citizens.

The burden of enforcing the Alaska Constitution falls on its judges. By swearing their oaths, Alaska's judges have assumed the duty to ensure that the constitutionally protected, common law investigative and reporting powers of the Alaska Grand Jury are neither hindered nor delayed. They are also the individuals entrusted with ensuring that grand jurors honor their oaths and ascertain the truth when prosecutors seek criminal indictments.

Each judge in Alaska should become intimately familiar with the common law roots of the Alaska Grand Jury and its importance to our Founders. They should understand and promote the vital role that our grand juries play in ensuring a healthy democracy and increasing public interest in government. They should study the works of both Lord Somers and Professor Younger, becoming conversant with the nearly 1000 years of common law precedent that are documented in those two works. They must ensure their actions incorporate important common law concepts including the grand jury's independence and what a proper investigation should look like.

All Alaska judges must strive to follow the law and hold prosecutors accountable when they violate the Alaska Constitution and don't present exonerating evidence to the grand jury to gain a criminal indictment. Our Founders recognized this as a problem, yet 50 years later, Juneau prosecutors had apparently no difficulty withholding important evidence from the grand jury in Mr. Jack's case. Mr. Jack's counsel later objected to this practice, but the Juneau Superior Court judge and all the appellate judges had the DA's back. In addition to violating the Constitution these indefensible indiscretions also violate the prosecutors' oaths and lead to public mistrust of the criminal justice system.

Superior Court judges should also strive to educate the grand jurors on their common law powers and the duties inherent to their oaths. Educational materials distributed by the Alaska Court System such as the Handbook should be reviewed by the judges and not provided to grand jurors if they do not accurately portray their common law rights and responsibilities. Grand jurors should <u>never</u> be led to believe they can't do their own investigations or satisfy their own curiosity.

Superior Court judges should communicate frequently with grand juries under their charge to ensure they completely understand their duties and are administering them properly. The judges should take it upon themselves to periodically check in with the grand jurors to ensure they are taking an active role in the investigations and using their independent judgment to evaluate evidence. They must ensure that the citizens fully comprehend their independence from both the prosecution and the court and aren't simply "a rubber stamp".

When deficiencies are noted, the judges should take appropriate action being mindful that indictments are not valid if the grand jurors have not properly carried out their oaths. Judges must do everything in their power to wipe out the abuses that have led to the commonly known phrase that "prosecutors can get a grand jury to indict a ham sandwich." Any Alaskan judge hearing that phrase repeated in his or her district should be personally embarrassed and feel compelled to resolve that perception.

Superior Court judges should take it upon themselves to level out the playing field in grand jury investigations. Ordinary citizens facing a possible grand jury criminal indictment should be given the same or even greater level of thoroughness that was given to Mr. Sheffield and the Anchorage School District officials. After all, doesn't Article I, Section 1 of the Alaska Constitution require that all persons are entitled to equal protection under the law?

Judges should satisfy themselves that grand juries have an awareness of the reputation and character of an accused person and any witnesses. How can reputation not be a relevant factor in properly screening for the false or staged testimony that Lord Somers cautioned grand jurors to be watchful for? Most citizens needing the services of an auto mechanic or plumber will check out their reputation before making a decision. Why on earth should a grand jury handle an indictment or presentment any differently?

All Alaska judges need to ensure that local issues are being considered by local grand jurors. According to the common law as documented by Lord Somers, grand jurors should be from the "neighborhood" where an incident is said to have occurred; it was considered a benefit if any members knew some of the parties or facts and shared those thoughts with the entire group. For example, a Juneau Grand Jury may not be qualified to consider the facts of a criminal case in Petersburg or a municipal matter in Hoonah. Besides a lack of familiarity with those communities, some of the non-local grand jurors may lack sufficient motivation to discern the truth.

The majority opinion in O'Leary stated that "the courts of the state of Alaska have the constitutional duty to review actions by agencies of the state in order to ensure compliance with all provisions of the Alaska Constitution." When a judge becomes aware that a state agency may have violated the constitutional rights of an individual, then they should take it upon themselves to call on the grand jury to investigate those actions. Indeed, both the 1962 and 2019 versions of the Alaska Grand Jury Handbook assert a judge can request the grand jury to initiate an investigation.

When a grand jury investigates a matter involving the conduct of an Alaska official or agency, the Superior Court judge responsible for its charge should ensure that the grand jury has the services of an independent special counsel without any conflicts of interest. In those cases, it may also be necessary for the judge to arrange for the services of an investigator to assist the grand jury. In circumstances where the matter to be investigated is complex, it may be appropriate for the judge to empanel a special grand jury that can focus singularly on that task.

Precedent for the retention of a special counsel from outside Alaska in grand jury investigations involving the State of Alaska was firmly established in the Sheffield investigation. The State government paid for the services of George Frampton to be special counsel for the grand jury. As Mr. Frampton was a former Watergate prosecutor and presumably a top caliber attorney, the amount of expense to retain a quality attorney from the "outside" should not be an issue. This point goes all the way back to the words of Delegate Kilcher who said cost should not be an issue when the freedom of someone wrongfully prosecuted or convicted is at stake.

The Legislature has work to do as well. They should begin making sure that their policies encourage the role of the Alaska Grand Jury; perhaps a grand jury will want to assist them in that role. All elected representatives should ensure both they and their key staff members understand the important role of the Alaska Grand Jury in government, particularly in a highly centralized system like Alaska where citizens don't have the right to select their judges, prosecutors, and law enforcement.

Those in the legislative branch should understand through the Sheffield affair that highly political bodies are typically incompetent to undertake investigations to discern the truth. All legislators should ensure that grand juries are properly funded, either as an arm of the Alaska Court System or separately; they should ensure that grand juries have access to special counsel and staff when necessary. Legislators should recognize that grand jury investigations will be less necessary if they enact laws that penalize elected representatives, prosecutors and judges who do not honor their oath and protect the Alaska Constitution.

The Alaska Judicial Council should be thoroughly investigated by a grand jury to understand as much as possible what happened in the past and make recommendations on how to avoid similar problems in the future. Internally the Council should be ashamed of their past and undertake some serious soul searching. How on earth did an "independent citizen's committee" allow itself to end up advocating and catering to the desires of politicians? Even worse, what motived them to violate the Alaska Constitution to destroy one of the people's most valuable tools to ensure good government?

Structurally, how can the Alaska Judicial Council be for the people when its chairman is an un-elected judge and members of the Alaska Bar Association always control the majority vote? The author has participated in Alaska Judicial Council public hearings over the past two years and in each one the Chief Justice dominated the proceedings. The Alaska Judicial Council appears to act as arm of the judicial branch which means it should have no business in helping to set any kind of policy.

The Alaska Judicial Council's stance in its 1975 Report on the grand jury in criminal cases is troubling as well. The report acknowledged the grand jury gives the appearance of acting as a "rubber stamp" for the prosecution and that "if prosecutorial control is truly as great as would appear, then the grand jury can no longer be effective as a check on the powers of the district attorney." Despite knowing how important the grand jury's involvement was to our Founders, the Council didn't promote policy changes to enhance its common law independence and powers. Instead, they recommended the grand jury be eliminated in felony cases, with judges given the power to assess the probability of guilt or innocence through a "preliminary examination".

Alaskans today are of the same mind set as our Founders. We don't want the Alaska Grand Jury to "rubber stamp" the decisions of prosecutors who seek criminal indictments for personal or political gain, suppressing important evidence in the case. The Alaskan people want an independent grand jury equipped with the education and the tools to be an integral and meaningful part of the sword and shield process. Hopefully, the Alaska Judicial Council will begin advancing the interests of the people instead of the self-serving interests of those politicians who fear the common law powers of the Alaska Grand Jury.

Alaskan citizens may want to consider forming a non-partisan Grand Jury Association like the citizens in New York did. The critical concept embodied in such an organization is its non-partisanship where political parties have no standing. Judge Vanderbilt's thoughts on this topic in Chapter 7 are instructive and are worth repeating here:

> Of course, if grand juries are selected on a partisan basis, partisan presentments might result. The remedy therefor is not to abolish presentments but to abolish partisan grand juries.

Partisanship and political allegiances are perhaps the grand jury's most dangerous internal enemies, and one that its external enemies will attempt to neutralize it with, even if such accusations are baseless. Just ask the members of the Juneau Grand Jury who investigated Mr. Sheffield, how much more viciously they would have been attacked if partisanship had creeped into their ranks.

To be effective in supporting the Alaska Grand Jury, any citizen organization must make non-partisanship one of its guiding principles. Its membership ranks should mirror a cross section of all Alaskans eligible to serve on the grand jury in terms of political party, racial and gender statistics. Its leadership should not

be outspoken about their political allegiances and be ever vigilant that their organization maintains its impartiality.

An impartial Grand Jury Association would be valuable in helping to educate state officials and jurors about the powers and duties of the grand jury. The Association could help establish valuable channels of communications that could help local grand jury's resolve issues and even help coordinate investigations that supplement one another. The Association could act as a watch committee, to help make sure grand juries are able to properly exercise their common law powers and to provide support when needed.

In closing, it seems most appropriate to reflect a second time on the words of Associate Supreme Court Justice James Wilson, who in Chapter 2 viewed the grand jury as a "great channel of communication between those who make and administer the laws and those for whom the laws are made and administered."

Officials that want to improve communications between the people and government will act to promote the Alaska Grand Jury. Those officials who don't care what Alaskans have to say will act to destroy it.

Appendix A

ABOUT THE AUTHOR

Mr. Ignell was born and raised in Juneau, Alaska. Following graduation from high school he attended Sheldon Jackson College in Sitka on a basketball scholarship. He has many fond memories of traveling throughout Southeast Alaska before his legal career began, playing basketball in the packed gyms of small towns and villages, getting to know the locals by staying in their homes up to four to five days at a time.

Mr. Ignell received his law degree from the University of San Diego and is currently an inactive member of the California State Bar. During law school he had the privilege of clerking for the Honorable John J. Hargrove, U.S. Bankruptcy Judge, researching issues of law and drafting legal opinions for publication in West's Bankruptcy Reporter. He also worked for Professor Kenneth Culp Davis, known as the "Father of Administrative Law", researching case law developments for inclusion in Mr. Davis's nationally respected treatise. While active as an attorney Mr. Ignell appeared on a regular basis in federal and state courts, focusing primarily on Chapter 11 bankruptcy reorganizations and commercial real estate litigation. His clients consisted primarily of federal banking regulators and financial institutions.

Feeling like a hired gun most of his career, even after winning a challenging case establishing new legal precedent, Mr. Ignell decided to quit practicing law. For the next two decades he worked in the commercial real estate loan industry, eventually forming his own company. In 2012 Mr. Ignell began returning to his Southeast roots to spend time with his mother before she passed away. He purchased an older apartment building in Hoonah, living there a few months each year with his family and renovating the building under the guidance of his father who had spent his entire career in Juneau as a custom home builder.

In 2017 the words of Proverbs 31:8 came to him and took hold in his heart – to speak up for the rights of those that need an advocate. The next year he saw an interview of Brian Banks who had served years in prison after being falsely accused; it inspired him to work as a volunteer for the California Innocent Project. With the CIP he analyzed case files and made recommendations whether an inmate appeared to be completely innocent of all charged crimes.

In December 2018 his father passed away, just short of his 90th birthday. A few days later a lifelong family friend heard of his work for the Innocence Project and told him about Thomas Jack, Jr., from Hoonah, an inmate at the Lemon Creek jail who many people believed was innocent. Mr. Ignell began looking into Mr. Jack's situation by talking with a few residents from Hoonah whom he knew and trusted. He then reviewed the case files at the Juneau courthouse and found a disturbing ruling by the judge regarding evidence presented to the grand jury. He contacted Mr. Jack's family who brought him additional documents, including transcripts of interviews, grand jury proceedings and his two trials. He spent the next several months analyzing these documents and put together a 60-page report detailing Mr. Jack's wrongful conviction and violations of his Constitutional rights.

Mr. Ignell sent his report to the Alaska Innocence Project which responded that regrettably, there wasn't much they could do. However, he learned from them that Mr. Jack's case is not unusual, they frequently receive similar cases from "up north". He sent his report to Alaska's Attorney General, Governor, and Chief Justice which was summarily dismissed by the first and ignored by the latter two.

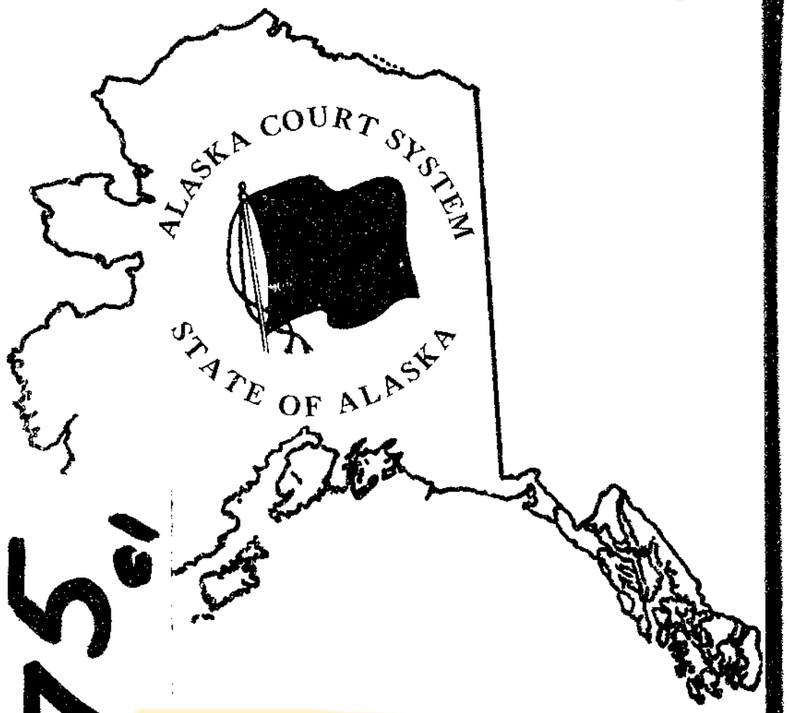
Mr. Ignell began writing as a forensic journalist to inform the public of the disturbing truths behind Mr. Jack's wrongful conviction and the violations of his Constitutional rights. When established news outlets in Alaska would not publish his articles, he formed the website PoweredByJustice.com.

Believing that politics within the Alaska Court System have prevented Mr. Jack from receiving justice over the past 12 years, Mr. Ignell has attempted to gain Mr. Dunleavy's attention to grant a Pardon for Innocence. To date, not only has Mr. Dunleavy shown no interest in meeting with him, his administration has been responsible for taking additional disturbing action against Mr. Jack during his incarceration.

In 2021 Mr. Ignell re-established residency status in Alaska and the following winter testified before the Senate and House Judiciary Committees, alerting them to Mr. Jack's plight as representative of systemic problems in Alaska's criminal justice system. In the spring of 2022, another lifelong family friend from Juneau told Mr. Ignell about a case in Kenai involving a local citizen's efforts to have a grand jury investigate the Department of Law and the Alaska Court System. Conducting research into this area, this book on the Alaska Grand Jury began to emerge.

Appendix B

ALASKA GRAND JURY HANDBOOK (1962 Edition)



ALASKA GRAND JURY HANDBOOK

DISTRIBUTED BY

The Supreme Court of Alaska

Based on the Original Draft Prepared by
The Section of Judicial Administration
of the
American Bar Association

TABLE OF CONTENTS

Alaska Grand Jury Handbook

I. IMPORTANCE OF THE GRAND JURY.

This Handbook is intended for citizens who have been selected as members of the Grand Jury, and are about to report to carry out their duties in that regard.

Clearly a ". . . government of the people, by the people, and for the people," as Abraham Lincoln tersely described the American form of Government, requires the active participation of every citizen in at least two important civic duties, first to exercise the voting privilege, second to serve on juries. As Harlan Fiske Stone, late Chief Justice of the United States Supreme Court, said:

> "Jury service is one of the highest duties of citizenship, for by it the citizen participates in the administration of justice between man and man and between government and the individual."

In time of peace no citizen can perform a higher duty than that of Grand Jury service. No body of citizens exercises public functions more vital to the administration of law and order.

The powers and functions of Grand Juries differ widely from those of trial or petit juries. The petit jury actually tries the case and renders the verdict after hearing both sides. The Grand Jury does not try the case. The Grand Jury does not hear both sides. Its function is simply to hear witnesses as to a charge of crime and to determine whether or not the person or persons so charged should be brought to trial on such charges.

The Grand Jury is both a sword and a shield of Justice—a sword, because it is the terror of criminals, a shield, because it is the protection of the innocent against unjust prosecution. These important powers obviously create equally grave responsibilities to see that such powers are in nowise perverted or abused. With its extensive powers, a Grand Jury might unless motivated by the highest sense of justice, find indictments not warranted by the evidence and thus become a source of oppression to our citizens. On the other hand, a

Grand Jury might dismiss charges against those who should be proceeded against. The importance of its powers is emphasized by the fact that it is an independent body answerable to no one except the court itself.

II. ORIGIN OF GRAND JURY

Not only in theory, but in actual historical fact, the importance of the Grand Jury has been demonstrated. It had its origin more than seven centuries ago, in England, from which, in large part, this country inherited its legal system. It was recognized in Magna Carta granted by King John of England at the demand of the people in 1215 A.D., and some say its origin was even earlier. This power of the Grand Jury to protect the citizens from the despotic abuse of power has been repeatedly exerted not only in England, but in this country, even before the Declaration of Independence. For instance, in New York City, in 1735, a Colonial Governor demanded that a Grand Jury find a formal criminal charge against the editor of a newspaper called the Weekly Journal, who had held up to scorn certain of the deeds of the Royal Governor. The Grand Jury denied this demand, and refused to indict. Many similar instances could be cited.

However, such cases are exceptional. As a rule the Grand Jury is the source of indictments which authorize the prosecution of those accused of crime. Such is the importance of the Grand Jury in its control of the initiation of prosecutions for serious crime, as distinguished from petty offenses, that the authority of the Grand Jury is recognized in the Constitution of the United States and in the Constitutions of most of the states of the Union, including that of Alaska.

III. NATURE OF THE GRAND JURY

(a) The Accusing Body as to Serious Crimes

As above indicated, the Grand Jury is the principal body which has the right to determine whether a person shall be tried for a serious crime unless that person himself waives, or gives up, that right. This means that no one can be prosecuted for serious crime except by vote of the Grand Jury.

Thus the citizens themselves, by this representative body of Grand Jurors, hold in their own hand the control of the maintenance of law and order throughout the state, through prosecution for crime. The importance of this power cannot be overestimated.

The above does not apply to minor crimes and traffic violations, for which prosecution is generally initiated by the district attorney, without action by the Grand Jury, through proceedings called informations or complaints. Indeed, if this were not so, the Grand Jury would be so submerged with complaints on minor offenses that it could not perform its more important duties.

In performing its duties, the Grand Jury should bear in mind that it does not finally try the case. Generally it hears only the evidence presented by the district attorney; but when it has reason to believe that other evidence within reach will explain away the charge, the Grand Jury should order such evidence to be produced, and for that purpose may require the district attorney to issue process for witnesses. The Grand Jury then determines whether or not the evidence presented, without considering the defense, justifies an indictment, which is a formal charge of crime, according to the legal principals of which the presiding judge and district attorney will advise the Grand Jury. If the evidence is sufficient, it votes an indictment, "a true bill," to be formally drafted by the district attorney. If not, the Grand Jury will vote "not a true bill."

Charges of crime may be brought to your attention in several ways: (1) by the Court, (2) by the district attorney, (3) from your own personal knowledge, or from matters properly brought to your personal attention, (4) by private citizens heard by the Grand Jury in formal session, with the Grand Jury's consent.

The bulk of your work will probably be concerned with charges falling within classes (1) and (2) above. Here the defendant will probably have been held preliminarily on a charge by a committing Magistrate for action by the Grand Jury. The defendent will therefore either have given bail or be in custody, in default of bail awaiting your action.

Your action should therefore be reasonably prompt, and result in voting either for or against an Indictment. As to matters brought to your attention in classes (3) and (4) above, emanating directly or indirectly from the Grand Jury itself, it would be wisest to consult with the district attorney or the Court, in advance of undertaking a formal investigation by the Grand Jury, although this is not mandatory. In any event, you will generally have to consult with them in the end, if the Grand Jury decides that a person should be proceeded against criminally, in order to obtain aid in drafting the proper form of Indictment. In most instances this type of Grand Jury investigation will concern persons not then in custody. In the event you vote a true bill, indictment or presentment against such person, such indictment or presentment should be endorsed by you as "secret"—not to be given publicity until released by the Court.

In order that the Grand Jurors may not be subjected to partisan secret influences, no one has the right to approach an individual member of the Grand Jury in order to persuade him that a certain Indictment should, or should not, be found. Any such individual should be referred to the district attorney, in order that he may be heard by the Grand Jury as a whole. On the other hand, a citizen is at liberty to apply to the Grand Jury for permission to appear before it in order to suggest or urge that a certain situation should be investigated by it.

You will further bear in mind that as a Grand Juror you are a public official, with the duty of protecting the public by enforcing the law of the land. Thus even if, perchance, you should think a certain law unduly harsh, that should not influence your judgment in carrying out your duties as a Grand Juror. As a citizen you have the right to endeavor to change the law. As a public official and Grand Juror it is your duty to enforce the law as it exists.

(b) Grand Jury as an Investigatory Body

In addition to the duty of the Grand Jury to hear evidence and decide whether formal criminal charges should be proceeded with, the Grand Jury has the additional important duty of making investigations on its own initiative,

which it can thereafter report to the Court. Thus a Grand Jury may investigate how officials are conducting their public trust, and make investigations as to the proper conduct of public institutions, such as prisons and courts of justice. This gives it the power to inspect such institutions, and if desired, to call before them those in charge of their operations, and other persons who can testify in that regard. If as a result of such investigation the Grand Jury finds that an improper condition exists, it may recommend a remedy.

On the other hand, there are distinct limitations as to what a Grand Jury may do in the course of such investigations and in its Report. Specifically, "a Grand Jury cannot forage at will upon any whim it may entertain." It can only investigate such matters as are within its jurisdiction, geographic and otherwise. Nor, can a Grand Jury in such a Report 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. Further, the Grand Jury should bear in mind that both in these investigations and as to indictments, the duty of secrecy is paramount.

IV. ORGANIZATION. OATH. OFFICERS.

When you report for duty as a Grand Juror, the presiding Judge will consider such excuses as may be presented. But because of the great importance of your duty as a member of the Grand Jury, and because it is a distinct honor to serve as a member of the Grand Jury, obviously you will not permit anything but a real emergency to stand in the way of your performing this outstanding civic duty. You will already have been properly selected as a qualified Grand Juror when you read this, but the Court will be glad to advise you with regard to exemption from service if you so desire.

When you report with the other members of your Grand Jury, you will be conducted to Court, where your Foreman—your presiding officer—and your Deputy Foreman or Assistant will be appointed by the Judge. The Court will have

them and you sworn in, under an oath which itself states your important powers and responsibilities.

After you have been sworn, the presiding Judge will advise you formally by written instructions, and in greater detail, as to how to conduct these duties and the responsibilities that are yours. This address is called "The Charge to the Grand Jury." This charge by the Court, plus such other instructions as may be given you by the Court, are your controlling guide. The district attorney will also give you his advice, as a skilled official, as to how your duties should be performed. But in the event of question, the Court will rule authoritatively on these matters. You will note that this Handbook does not purport to state the principals of law that govern you as a Grand Juror. Its purpose is simply to give you a clearer understanding of the general nature of your functions, with some practical suggestions as to carrying out such functions. You should go to your oath and to the Court itself for the sole authoritative statement of your powers, functions and duties as Grand Juror.

Upon receiving from the Court its "Charge to the Grand Jury" you will become a part of the Grand Jury. You will then be escorted to the Grand Jury Room, where you will prepare to hear the testimony, and see the documentary evidence, as presented by the district attorney, in the cases to be brought to your attention.

V. PROCEDURE

(a) Quorum

A Grand Jury consists of not less than 12 nor more than 18 members; of the total membership not less than twelve must always be present to constitute a quorum for the transaction of business. If less than this quorum exists, even for a moment, the proceedings of the Grand Jury must stop. Hence it is important that any Grand Juror who finds that an emergency interferes with his presence at a scheduled meeting of the Grand Jury, should advise the Grand Jury Foreman promptly, in order to see whether his absence will prevent the Grand Jury from acting at all at the meeting.

(b) Hearing Witnesses

Most of the work of the Grand Jury is concerned with hearing witnesses and determining the sufficiency of the evidence, in order to determine whether, considering that testimony alone without regard to defense testimony, an indictment is justified. When so proceeding, the district attorney will present and explain the charge to the Grand Jury, and advise as to the witnesses to be presented, either voluntarily, or at the request of the district attorney or the Grand Jury, or under order of subpoena from the Grand Jury or the Court. Indeed the Grand Jury itself may insist on the calling of additional witnesses.

These witnesses will be called one by one and sworn to tell the truth by the Foreman in a dignified, deliberate manner, indicative of the solemnity of the occasion. The witness will ordinarily be questioned first by the district attorney, then by the Foreman, and then, if desired, by other members of the Grand Jury, each of whom is free to ask all proper questions of any witness. But as to what is a proper question the advice of the district attorney should be requested, and in the event of doubt, a ruling may be obtained from the Court.

All questioning should be impartial and objective, without indicating any viewpoint on the part of the questioner. A stenographer may be present to take down the proceedings, as may an interpreter, if needed.

Should a witness, when brought before the Grand Jury to testify, refuse to answer questions, this refusal must be carefully recorded. Then accompanied by the district attorney, the Grand Jury may bring the matter before the Court, with a copy of the record, in order to obtain the ruling of the Court as to whether the answer may be compelled or not. This probably involves the technical question of whether the question asked violates the witness' constitutional freedom from self-incrimination. If it does, the witness cannot be compelled to answer. If it does not, the Court will order the witness to answer, and if he fails to do so, will order the witness held, or tried, for contempt of court.

You will note from the above that the defendant named in the criminal charge has not been heard as a witness, nor have any witnesses for him probably been called. This is because, as stated above, the Grand Jury does not try the merits of the case, but only the sufficiency of the evidence supporting the charge. However, the Grand Jury has the right to offer the defendant the opportunity to appear before it. This is not usually done and should not be done unless the Grand Jury really feels that it is desirable. If the defendant is given this opportunity, and appears, he cannot be forced to testify because of the constitutional provisions above alluded to. Indeed, if the Grand Jury attempts to force him to testify, the indictment of the defendant may be nullified. Further, even if the defendent is willing to testify voluntarily, in order that it may be clear that he is testifying voluntarily, he should first be warned of his right not to testify, and should then sign a formal waiver of his constitutional privilege against self-incrimination before he does so testify. This last is his agreement not to rely upon the above constitutional right, and to be prosecuted even though he testifies, and the Grand Jury should be fully satisfied that he understands what he is then doing.

From the above, it is clear that the matter of forcing a witness to testify, or of giving the defendant an opportunity to testify, raises complicated legal questions. The advice of the district attorney and the ruling of the Court thereon should be sought if any such question arises.

Further legal questions may arise as to whether certain evidence is proper. The law of Evidence is technical, and here you must be guided by the district attorney or by the Court.

Finally, bear in mind that neither a defendant nor an ordinary witness, when appearing before a Grand Jury, is entitled to have his counsel present in the Grand Jury Room.

(c) Determination to Indict or Dismiss

When the Grand Jury has heard all necessary or available witnesses, and all persons except the Grand Jury have left the room, the Foreman will ask the Grand Jury to discuss and vote on the question of whether a True Bill should be found on the charge. Every Grand Juror now has the right to

comment on the evidence and his view of the matter. Thereafter, and only after each member has been properly heard, the vote will be taken. No indictment can be found unless a majority of the members present concur.

Similar proceedings are taken when the matter to be discussed is not a formal charge or Indictment, but a Report, as noted above—the result of an investigation into public affairs with which the Grand Jury has concern, but which do not constitute a formal charge of crime.

When the hearing of the witnesses on a certain charge is closed, all persons present, other than the Grand Jury, should leave the room. Only the members of the Grand Jury can be present when the Grand Jury deliberates or votes on a charge. If this is not done, an Indictment may be nullified.

VI. DISTRICT ATTORNEY

The district attorney will be actively engaged before the Grand Jury in presenting one by one the formal charges, and in calling the witnesses to support them. Since he is a public official, usually of experience in this work, and of both intelligence and sincerity, he will naturally be the constant legal advisor to the Grand Jury.

However, the best of advisers sometimes are in error. Thus, if a difference of opinion arises between him and the Grand Jury, the matter should be brought before the presiding Judge for his ruling.

Finally, you will remember that neither the district attorney nor any of his assistants, nor anyone else, may be permitted to be present while the Grand Jury is actually deliberating or voting on an Indictment or Presentment. If this occurs, an Indictment may be nullfied.

VII. SECRECY

Secrecy as to all Grand Jury proceedings, including not only action upon an Indictment or Presentment, but the fact that any such matter was considered or any witnesses called, is of the upmost importance. Thus only can the Grand Jurors

themselves be protected from being subjected to pressure by persons who may be involved in the action of the Grand Jury. Thus only can persons be prevented from escaping while an Indictment against them is under consideration. Thus only can witnesses before the Grand Jury be prevented from being tampered with, or intimidated, before they testify at the trial. Thus only can such witnesses be encouraged to give the Grand Jury information as to the commission of crime. Thus only can an innocent person who has been improperly subjected to a charge, but where the Indictment has been dismissed, be saved the disgrace attendant upon the making of such a charge. Note that to achieve the above protection for the Grand Jury for the individuals involved, including the witnesses, and for the citizens at large, this pledge of secrecy is paramount and permanent.

No more need be said as to the importance of a Grand Juror's not communicating to his family, to his friends, to anyone, that which takes place in the Grand Jury Room. The only time he may do so is when the Court under certain circumstances itself orders such disclosure, in order to do justice.

VIII. PROTECTION OF GRAND JURORS

The secrecy to which Grand Jurors are sworn is of itself one of the major sources of protection of the members of the Grand Jury.

The Grand Jury is further protected by being an independent body answerable to no one except the Court itself. No inquiry may be made to learn what a Grand Juror said or how he voted. The law gives a Grand Juror complete immunity for his official acts within the authority of the Grand Jury regardless, for instance, of the ultimate result on an indictment returned by the Grand Jury. The one apparent exception to this is, if he himself testifies before the Grand Jury to the commission of a crime, and his testimony is perjured. With this complete protection for their official acts, it is obviously vital that our Grand Jurors should be citizens of unquestioned integrity and high character.

IX. PRACTICAL SUGGESTIONS

Attend the sessions of the Grand Jury regularly; not only each of your fellow jurors, but the public, is depending on you to do your job well.

Pay close attention to the testimony given and the evidence presented; the reputation or freedom of someone depends on what is being told.

Be courteous to the witnesses and to your fellow jurors; do not try to monopolize the hearing or the deliberations.

In fixing the time and place of your meeting, consider the convenience of the public and the witnesses, as well as of yourselves and the district attorney.

The oath should be administered to witnesses in an impressive manner, so that they will realize that it is a serious, judicial hearing, and that they must tell the truth.

Wait until the district attorney has finished, ordinarily, before asking questions of a witness. It usually happens that the evidence you are seeking will be brought out.

Listen to the evidence and the opinions of your fellow jurors, but don't be a rubber stamp.

Be independent, but not obstinate.

Be absolutely fair—you are acting as a judge. Because of the secrecy of the hearing, no one else may inquire into what you have done.

All jurors have an equal voice in determining on an indictment. Each juror has the right to state his reasons for his views.

Express your opinion, but don't be dictatorial. Every juror has a right to his own opinion. You may try to persuade another juror, but do not try to force him to change his mind and agree with you. He might be right.

Do not keep silent when the case is under discussion, and begin to talk about it after a vote has been taken.

A reckless Grand Jury can do as much harm to the community and to law enforcement as a weak Grand Jury.

Do not investigate matters out of the province of the Grand Jury, or merely because someone suggested an investigation, without sufficient information, or merely because it would be an interesting matter to investigate.

Do not discuss cases with your fellow jurors outside of the jury room.

It is of great importance that your attendance be regular and on time. If you are unable to attend the session, or desire to be excused, ask permission. The unexpected lack of a quorum causes a great loss of time and money to the individual jurors as well as to the authorities and witnesses.

When considering undertaking any special investigation, it is wise to consult the district attorney beforehand, so that he may arrange routine business accordingly and advise you as to other matters bearing on such an investigation.

Each juror has a duty and responsibility equal to yours. Each juror is entitled to be satisfied with the evidence before being called upon to vote. Although your mind may be made up, if others wish to pursue the matter further, you have no right to dismiss the witness or shut off proper discussion.

Your membership on the Grand Jury is a high honor. You are among a relatively small number of citizens of your community who are chosen to serve on the Grand Jury. This should therefore mean devoted, responsible participation in performing Grand Jury duty.

END