

Ben Carpenter: Alaska's grand jury system has been compromised by the judicial system that controls it.

By REP. BEN CARPENTER

On this day, 246 years ago, the American colonies took the first steps toward self-governance and independence from the British Empire with the signing of the Declaration of Independence.

The justification for upending order in the New World is preserved in the declaration's identification of the British crown's usurpation of natural rights and other grievances, and the British failure to heed past colonial warnings. The declaration boldly concludes by asserting the intention for self-determination as united states as preferable to enduring the continued tyranny of the British monarchy. Acknowledging the need for divine protection, and pledging each other their livelihoods and personal honor, the colonists began a new nation:

"We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these united Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor."

Almost two and a half centuries later, Alaskans are facing off against another King George. State judicial officers, acting as kings and queens of their own court, on numerous occasions have unilaterally disregarded the constitution that enables our self-determination.

Further complicating the matter, officers of the court employed by the executive branch have, until recently, enabled the court to control the grand jury to the extent that its authority to investigate matters concerning public welfare and safety have been effectively suspended – I suspect for nearly 30 years.

Article 1, Section 8 of the Alaska State Constitution reads (emphasis mine):

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

On several occasions since I was first elected, judicial officers and officers of the court have prevented individual members of the grand jury from speaking to the other members of the grand jury about crimes that they would like the grand jury to consider investigating. This accusation was brought to my attention several years ago and my own investigation suggests that this behavior has been happening for many, many years. Current bureaucratic processes in our state's criminal justice system treat the grand jury as a tool of the district attorney's office, without a process to investigate any matter not brought to the grand jury by the prosecuting attorney.

Previous attorneys general were either not in office long enough to work with or were unwilling to address this issue. Attorney General Treg Taylor has demonstrated a willingness to follow the Constitution and state statutes and our discussions resulted in a change of policy from the Department of Law. No longer are prosecuting attorneys to behave as gatekeepers for what grand juries may investigate.

This is a major shift from "business as usual" and bureaucratic processes will take some time to catch up. Not much time though. Events last week demonstrated that the new process within the department of law was followed. But the judiciary is its own branch of government and not responsible for adherence to executive branch policy changes.

We now have a constitutional crisis. On June 29, the majority members of the Kenai Grand Jury voted to initiate an investigation into a matter concerning the public welfare and safety upon request by one of the members of the grand jury.

As the grand jury proceedings are secret, I have no firsthand knowledge of what was discussed. I am told that one of the topics of investigation was to be public corruption within the judiciary. Witnesses, members of the public, were present within the courthouse but separated from the grand jury by locked doors controlled by judiciary staff.

Judge Jennifer Wells of Kenai permanently dismissed the grand jury, thereby preventing members from beginning their investigation. This outcome is a matter of record and is indisputable.

Judge Wells needs to immediately recall the members of the dismissed grand jury and afford them the opportunity to conduct their investigation as they are constitutionally and statutorily empowered to do. Anything less is an injury to justice for Alaskans.

Other Alaskans have been working their own agenda to bring about change. My advice to these Alaskans has remained consistent: Be professional, be patient, and work within our systems to affect change. My response to one constituent's request included my correspondence with the director of the Criminal Division within the Department of Law.

Because my discussions with members of the administration are ongoing regarding improving our grand jury processes, I asked that my private communication not be used for other's agendas. But since parts of my private communication have been published by at least one online media source, I am providing the full email communication for context.

Ms. Kemp,

Thank you for your swift reply. I believe we may have miscommunicated or my question was not clear. I have conducted my own assessment of the statutes and criminal rules and am providing a fairly lengthy response to your answer. I am very committed to finding a resolution to this issue that puts Alaskans first.

I wanted to know if a private citizen can present information about a suspected crime to a grand jury?

Criminal rule 6 describes the grand jury process and rule 6(k) should be interpreted as part of that process. I believe you have taken criminal rule 6(k) out of context with your response to my question. Criminal rule 6(k) provides procedural guidance on who is allowed to be in the room once the grand jury proceedings begin. Criminal rule 6(k) doesn't address the circumstances by which the proceedings are initiated nor who presents information to a grand jury. Furthermore, state statute provides authority for grand jury investigations (AS 12.40.030-040) and for grand juries to act upon indictments presented to the grand jury by the prosecuting attorney (AS 12.40.070(1)). The authority for grand juries to investigate crime is a separate statute than that of the statutory requirement to act upon indictments presented to the grand jury by the prosecuting attorney. State statute doesn't place the grand jury under the authority or jurisdiction of the district attorney. Likewise, neither criminal rule 6 nor 6.1 place the grand jury under the authority or jurisdiction of the prosecuting attorney.

Criminal rule 6 lays out in a general sense, and in logical sequence, how grand jury proceedings are to be conducted. Rule 6(a) directs that the presiding superior court judge shall convene the grand jury. The authority to cause members of the public to come together for the purpose of engaging in grand jury proceedings rests with the presiding superior court judge and logically, that judge must have some cause for convening a grand jury. Criminal rule 6(d) directs that at least once a year the presiding superior court judge (in each district) shall order one or more grand juries to be convened "at such times as the public interest requires" and those jurors may serve no longer than 4 months (unless extended for good cause). The inclusion of a time limit indicates an acknowledgment that a single grand jury investigation could last a long time (and potentially need to be extended), or possibly, the number of expected proceedings are best addressed with a continuity of individual grand juror members. In any event, it is clear that grand jury proceeding occurrences may range from once a year to continuously occurring and that the presiding judge makes a determination of necessity.

Criminal rule 6(d) directs the convening of a grand jury at least once a year – without regard for whether or not a prosecuting attorney has information to present to a grand jury. As criminal rule 6(e)(1) directs jurors to diligently inquire about information that "shall otherwise come to your knowledge," as opposed to matters "given to you for consideration," criminal rule 6(d) allows for the possibility that the public interest is served by convening a grand jury for reasons other than at the request of the prosecuting attorney.

Criminal rule 6(d) indicates that the presiding superior court judge retains the discretion for determining when the public interest requires a grand jury proceedings. The presiding superior court judge is likely to determine a grand jury proceeding is in the public interest when the

prosecuting attorney indicates there is a public need. The presiding superior court judge could also determine a grand jury proceeding is in the public interest when a member of the public raises allegations of criminal wrongdoing of a nature that would best be addressed by a grand jury, such as public corruption. The very next section of criminal rule 6 identifies the behavior expectations of grand jurors that speaks to whether or not prosecutorial necessity is the only reason a grand jury proceeding may be in the public's best interest.

Criminal rule 6(e)(1) directs a specific oath to be administered to grand jurors. That oath requires: jurors to "diligently inquire" and make true presentments of all matters "given to you for consideration" or, "shall otherwise come to your knowledge in connection with your present service" as a grand juror. The oath is written to indicate that matters that require "diligent inquiry" may be presented to the juror (presumably by the presiding judge, prosecuting attorney, or some other person), or may arrive to the juror in some other manner. The end of the oath also has a requirement that jurors act appropriately, however the information is obtained. The oath requires the juror to "present all things truly and impartially" without allowing envy, hatred, or malice to color their deliberation, nor fear (of intimidation? of reprisal?), affection, gain, or reward, or hope thereof as information "shall come to your knowledge...". The juror's oath is clear evidence that matters presented from the usual manner and course of prosecutorial criminal proceedings is not the only matters jurors must be prepared to diligently inquire about.

Criminal rule 6(e)(2) directs the court to "charge the jury" with written instructions regarding their powers and duties. Presumably, these powers and duties support and reinforce the oath that each juror just took. Perhaps the jurors may learn about the matter to be considered at this time? Perhaps the matter will be presented at a later date?

Criminal rule 6(f) informs about procedures for alternate jurors and how to deal with objections to the grand jury or grand jurors.

The substantial authority for the grand jury to investigate "matters given to them" or "matters that come to your knowledge" and generate indictments from those investigations is further defined in Rule 6(g). Even if some members of the grand jury are found to lack "legal qualification", as long as the majority of the jurors do not, an indictment shall not be dismissed nor a report expunged upon the ground that one or more of the jurors were not legally qualified. This rule indicates a high level of importance on the deliberations of the majority members of the grand jury, even when the array of jurors is imperfect. When considering the original question above, there is no higher investigatory body with more authority to which individual citizens can present their evidence of criminal activity. When the usual manner and course of prosecutorial criminal proceedings is not trusted, the grand jury is the only investigatory body to which evidence of public corruption can be presented with confidence.

Rule 6(h) directs the appointment of the foreperson and imbues the individual juror with the power to administer oaths. The power to administer an oath to someone the grand jury demands information from is not at the discretion of the presiding judge nor prosecuting attorney. The power to administer an oath to compel the truth of the matter from any source during an investigation is an indicator that there is no gate keeper to grand jury authority to investigate.

Rule 6(i) directs the prosecuting attorney to prepare all indictments and presentments that the grand jury determines is necessary. The prosecuting attorney shall attend meetings and advise grand jury members and examine witnesses in the presence of the grand jury. AS 12.40.070(1) directs the prosecuting attorney to submit an indictment to the grand jury but rule 6(i) directs the prosecuting attorney to prepare indictments that the grand jury intends to submit to the court. Thus far in Rule 6, no authority has been granted to the prosecuting attorney to determine what matters may come before the grand jury. Rule 6(i) directs the prosecuting attorney to assume a supportive role to the authority of the grand jury. AS 12.40.070(1) authority should not be confused with rule 6(i) authority.

Rule 6(j) directs that all proceedings must be electronically recorded.

Rule 6(k) directs who may be present during the electronically recorded proceedings and restricts who may be present during deliberations and voting. The individuals allowed to be present during proceedings are limited to the prosecuting attorney, a witness (who is likely under oath), a court clerk who is recording the proceedings, an interpreter or person transcribing for the deaf, and any law enforcement officer necessary to maintain custody of the witness. During deliberations and voting, only the jurors and an interpreter are allowed to be present. Rule 6(k) only relates to who can be present in a grand jury proceedings and only in the context of defining meeting procedures. Rule 6(k) is taken out of context if it is used to deny the general public the ability to present information to the grand jury because the rule doesn't allow for a member of the public to attend a grand jury proceeding. Should a member of the public present themselves to the grand jury with information of a crime, the grand jury has a duty to investigate. See AS 12.40.30-40 and Rule 6(e)(1). Should the grand jury decide to investigate, the public member becomes the witness referenced within Rule 6(k).

I believe that it is possible that our grand jury process has become bureaucratically focused on the AS 12.40.70(1) grand jury process as this is the usual manner and course of prosecutorial criminal proceedings, to the exclusion of the AS 12.40.30-40 investigatory grand jury process. It is vitally important to the rule of law in Alaska that the Department of Law acknowledge the statutory authority for grand juries to investigate crime and sever any perceived supervisory relationships that may exist between prosecuting attorneys and the investigatory grand jury.

I believe I have answered my question with the only answer that exists within statute or criminal rule: The grand jury must be afforded the opportunity by our bureaucratic processes to receive complaints of criminal wrongdoing by individual citizens. If prosecuting attorneys or presiding judges believe they can be the gate keepers of the grand jury, then "the power of grand juries to investigate and make recommendations concerning the public welfare or safety is being [SHALL NEVER BE] suspended." -Art. 1, Sec. 8 Alaska State Constitution.

Thank you again for your quick response and I hope that once you've had a chance to digest this lengthy email we can talk through next steps.

Sincerely,

Our form of self-government is messy and frustrating at times. It's also prone to make mistakes because it is made up of fallible humans. It is completely understandable when people walk away in disgust or wash their hands of the burden. But we must never forget that our form of government is better than all other alternatives.

It is of the utmost importance that "we the people" continue to pledge our lives, our fortunes, and our sacred honor. In other words, our attention and resources (time and money) are necessary to maintain this experiment in self-government in good working order. We are currently experiencing dysfunction within our government, and it is a direct result of lack of attention by "we the people." Not everyone, but enough. Voter turnout speaks volumes.

The fact that most Alaskans, myself included, didn't realize that the investigatory grand jury hasn't been conducting investigations for decades is louder still.

The power of the investigatory grand jury is specifically designed to combat public corruption. Judges and lawyers must not control grand jury investigations for obvious reasons. Judges must follow the constitution, the statutes, and their own rules as they pertain to grand jury investigations. The old saying "if you have nothing to hide, you have nothing to fear from an investigation" still holds true. It will take effort by the people to ensure that they do. Call your legislative representative and raise their awareness to this issue. We may need to compel the Judiciary with legislation. Call your local courthouse and ask what their procedure is for public communication with the grand jury? If they don't have a policy, request that they institute one. Be polite, be professional, be patient!

Please take time today to celebrate our nation's independence. It is a gift unlike any other! Tomorrow, nurture your desire for maintaining it.

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