ALASKA JUDICIAL COUNCIL

ALASKA STATE LEGISLATURE
SENATE JUDICIARY COMMITTEE

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March 18, 1986

Mr. Frances L. Bremson
Executive Director
Alaska Judicial Council
1031 W. 4th Ave., Suite 301
Anchorage, AK 99501

RE: Judicial Council Grand Jury Report

Dear Mr. Bremson:

The Senate Judiciary Committee has reviewed and discussed the Judicial Council's draft report on grand jury reform and concluded that at this time no further work on the study is necessary. Given that the current legislative session is halfway concluded and we are in an election year, it does not appear prudent for the legislature to request the Judicial Council to undertake any further work on the study. Perhaps next session's legislature will seek to complete the work you have initiated.

Thank you for your time and attention to this project.

Very truly yours,

Patrick M. Rodey, Chairman
Senate Judiciary Committee

February 25, 1986

Mr. Frances Bremson
Executive Director
Alaska Judicial Council
1041 Wl 4th Avenue, Suite 301
Anchorage, Alaska 99501

Re: Judicial Council Study of the Investigative Grand Jury in Alaska.

Dear Mr. Bremson:

As expressed in comments of several legislators attending the Judicial Council's February 13, 1986, presentation of its draft study on the "Investigative Grand Jury in Alaska," the Senate Judiciary Committee believes the draft report is excessively narrow in its focus and conclusory in its evaluation. The Committee would like the final report to encompass significantly more than just the reporting function of an investigative grand jury. Greater emphasis on the true investigative and charging functions of that body is appropriate. Rather than a survey of the law and procedures of other jurisdictions, we envision an

evaluation of potential alternatives and specific recommendations for adoption in Alaska.

In that regard, I refer you to the substance of Senate Resolution 5 amended, which requested the Judicial Council to provide recommendations to assure the effective and proper use of the grand jury investigative power with sufficient safeguards to prevent abuse and assure basic fairness. The Resolution further requested the Judicial Council to consider a possible constitutional amendment to strengthen the grand jury system consistent with due process and standards established through publications such as the National Institute of Justice's Grand Jury Reform: A Review of Key Issues, 1983.

I further refer you to my letter of August 27, 1985, in which I transmitted the Senate's unanimous desire to have the Judicial Council study both substantive and procedural reform of the Alaska grand jury system. In that letter, I delineated a number of potential areas for the Judicial Council's investigation, which areas I would like to review at this time.

Specifically, I suggested that the Judicial Council examine the scope of prosecutorial discretion in presenting evidence to the grand jury, as well as the treatment and presentation of exculpatory evidence available to the

prosecutor. In the aftermath of the Sheffield grand jury proceedings, the Senate was also concerned about the unauthorized disclosure of grand jury deliberations prior to a final decision by that body. I thus requested the Council to provide specific recommendations on that issue.

The Senate Judiciary Committee is also extremely concerned about basic due process rights for all grand jury witnesses, and requests your views on reforming the grand jury process to provide for notice of the right to counsel, the privilege against self-incrimination, the risks of perjury and status as a target witness. Additional due process concerns center on the appropriate use of grand jury reports or presentments and call for an analysis of the right of a witness to review and challenge the content of this report in a judicial forum prior to public dissemination.

At this time, we would also like to suggest that you consider formulating a set of instructions for grand juries to use in determining whether to issue an indictment. Conformity and consistency in these rules for all Alaska grand juries appears to be a laudable goal.

In addition, and as expressly stated in Senate Resolution 5 amended, we believe that the National Institute of Justice's 1983 Grand Jury Study provides a comprehensive

overview of many of the issues of greatest concern to the Senate. We therefore urge you to consult this study and evaluate the proposals set forth therein for possible use in Alaska.

Comments by attendees at the February 13 presentation highlighted additional areas of investigation by the Judicial Council. The balance of power among the judge, prosecutor and grand jury comes immediately to mind, as does the possible shift to indictment by information rather than through the grand jury process, or use of a probable cause hearing. The issues addressed in Appendix B of the draft report also might more appropriately be considered in the body of the final report.

In conclusion, let me reiterate that we seek specific recommendations from the Judicial Council addressing our concerns. These recommendations may take the form of possible statutory changes or constitutional amendments.

Of course, if you have any questions or would like to discuss these proposed areas of investigation in further detail, please do not hesitate to call upon us.

Very truly yours,

Patrick M. Rodey, Chairman

Senate Judiciary Committee

Introduced: 8/5/85

IN THE SENATE BY V.FISCHER

SENATE RESOLUTION NO. 5 am

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SPECIAL SESSION

Requesting Judicial Council recommendations on grand jury investigative procedures.

BE IT RESOLVED BY THE SENATE:

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

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

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

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

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

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

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

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procedures involved in use of that power;

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

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

Judicial Panel Reports Flaws In Alaska's Grand Jury System

by Joe LaRocca

"That which we call a rose,
By any other name would smell as sweet."

Shakespeare
Romeo and Juliet

Contrary to assertions by its critics and the Alaska news media, the draft report issued last week by the Alaska Judicial Council clearly indicted Alaska's grand jury system and process and, by implication, the state grand jury which recommended impeachment proceedings last summer against Gov. Bill Sheffield for his and an aide's role in the awarding of a $9 million sole source lease contract for a state office building in Fairbanks to a Fairbanks firm with political ties to the governor.

During last week's meeting between the Judicial Council and the legislature's joint judiciary committees, at which the draft report was released, and afterwards, several legislators scolded the council and its ex officio chairman, State Supreme Court Justice Jay Rabinowitz, for its failure to include specific recommendations pinpointing the blame for what some believe to be misguided actions by the state prosecutor and the grand jury which precipitated the unwarranted and costly impeachment proceedings.

At the conclusion of the sensational impeachment hearings, which were televised live, statewide, and received widespread coverage by the national news media, the state Senate fully exonerated the governor of any wrongdoing, but asked the Judicial Council "to study the use of the power of the grand jury to investigate, and 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."

The legislature also asked the Judicial Council – which is charged by the state constitution with conducting studies "for the improvement of the administration of justice" – to consider "possible amendment to the State Constitution...concerning the need to strengthen the grand jury process..."

And while several legislators castigated the council for failing to fulfill their expectations, the conspicuous absence of explicit verbiage overtly labeled "recommendations" fails to disguise the fact that the council's draft report fairly bristles with implicit recommendations under other names which betray sweeping deficiencies in the state's grand jury process, susceptible to remedy by apt legislation without impinging upon the grand jury's constitutional power in Alaska "to investigate and make recommendations concerning the public welfare or safety..."

DUE PROCESS

The council's draft report says, for example, that "Even without constitutional amendment...a number of procedures could be adopted that could provide for:

– greater due process protection of individuals named or referred to in reports;

– judicial review of reports, and

– standards for publication and dissemination" of reports.

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

While the council's report does not specifically identify Gov. Sheffield's case as one of the three, there can be little question that he was an "unindicted individual" who "lacked a forum or mechanism through which to respond" (short of impeachment proceedings), and that he was thereby deprived of "basic fairness and constitutional due process."

The report points out that in many other jurisdictions, the governor would have been afforded, prior to publication, the right to:

– review the report;

– present further testimony to the grand jury;

– move to expunge certain portions of the report;

– a closed hearing on appeal;

– a fair trial (as opposd to a politically-charged impeachment not subject to the rules of evidence), and

– review the grand jury transcript.

JUDICIAL REVIEW

The Judicial Council's draft report also points out that while no guidelines or statutes exist in Alaska providing standards for judicial review of grand jury reports, guidelines for such review in other jurisdictions have been routinely developed which are designed to protect the due process rights of persons identified in grand jury reports.

For example, the draft report says, after reviewing a grand jury's report, courts in other jurisdictions have the authority to call for further testimony, refer the report back to the grand jury for amendment consistent with the court's findings, to expunge certain portions – or all – of the report, or to hold closed hearings.

The Judicial Council's report also asserts that "Policy decisions need to be made regarding publication and dissemination of reports and access to grand jury records on which reports are based." And its wide-ranging study of practices in other jurisdictions led to its conclusion that, as a general rule, and in the absence of statutes, "a grand jury has no right to file a report reflecting on the character or conduct of public officers or citizens unless the report is accompanied or followed by an indictment."

It also found that when the grand jury does not find evidence to warrant an indictment (as in the governor's case) "the practice...has been to issue a report to the court summarizing the findings and conclusions of the investigation." Says the council's draft report: "It has been held in most jurisdictions that the power to report is not co-extensive with the power to investigate. The chief criticism of grand jury reports," it says, "is the potential violation of an individual's right not to be publicly condemned for wrongdoing without the due process established by law, including the right to be heard. When an individual indictment is issued," it adds, "an individual has the opportunity to present his or her case at trial. When a grand jury issues a report accusing an individual of wrongdoing, that individual has no guaranteed means for reponse."

The report quotes copiously from the minutes of the first state constitutional convention in 1956 pertaining to the drafting of the section on grand juries. One extensive quotation attributed to Delegate Seaborn J. Buckalew, Jr. fastens with uncanny accuracy and prophetic foresight upon the precise issues which were raised 30 years later in conjunction with the state grand jury's damning report on Gov. Sheffield.

It came during the discussion of a proposed amendment which would give grand juries sweeping powers to investigate and "make recommendations concerning ... public health and welfare." In that context, Buckalew's comments deserve unabridged recitation. He said:

"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 investgation 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 more or less to defame somebody if they did not have quite enough action for a (true) 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 be done.
I think it is extremely dangerous because a citizen would not have any protection. Once it was published, the only thing he could do would be then

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State Senator John Sackett criticizes the Judicial Council's report on the grand jury system for its failure to pinpoint blame in last year's impeachment proceedings.

Highway 'Slush Fund'

(Continued from page 6)

seems to stem from the lack of an updated HEWCF policies and procedures manual."

The audit report notes that as part of its operating function, the capital working fund has 38 maintenance shops and more than 60 fuel depots statewide to service the state fleet, which are regionalized.

Under the program, the working capital fund managers procure fleet vehicles for the state and charge the various agencies for their use, maintenance and eventual replacement. The legislature annually appropriates to the agencies monies they request in their budgets to pay the charges assessed by the capital working fund.

According to the audit report, "charges to other departments and agencies for services provided by such a Fund are normally intended to recoup the cost of services and are not generally designed to produce any significant profits or cash balances."

In their report, the auditors recommended that starting this fiscal year:

- the working capital fund's vehicle replacement function should be scrapped and all state agencies required to budget for their replacement vehicles as they would for any other needed item;

- state fleet maintenance would remain with the DOT-PF, but use of its maintenance shops would be at the option of the agency users, and

- the current cash balance of some $40 million should be transferred to the general fund where it would be available for appropriation for other essential purposes.

While Rep. Pignalberi, who has taken the lead in trying to reform the working capital fund, generally agrees with the auditors' findings, he thinks their recommendations go too far. So he is drafting proposed amendments to the two bills introduced by the Legislative Budget and Audit Committee which together would abolish the fund, and transfer the balance to the general fund.

He fears that requiring the agencies to fight for vehicular and equipment replacement in competition with other state programs and projects in the highly-charged political arena of the legislature could lead to political decisions that would gut those agencies or regions without political clout.

Pignalberi's amendments would shift the vehicle replacement function to the Department of Administration's Division of General Services and Supply, which he feels has the administrative expertise needed to handle it, at the same time stripping DOT-PF of its cumbersome new and spare parts inventory, and encouraging agencies to privatize vehicle repairs by using services which are commercially available, as many of them are already doing.

What, one might ask, does DOT-PF think of all this? Not much. While Commissioner Knapp concurs with some of the auditors' findings and conclusions, he takes strong exception to their recommendations, which he says are ill-advised. Knapp said in a letter responding to the audit report: "We strongly disagree with your main recommendation and, if implemented, we feel it will move this State backwards many years in the equipment field."

Knapp said his partment has already made a number of improvements in the operation of the working capital fund, with others soon forthcoming. As for the fund's unseemly cash surplus, Knapp pointed out that the legislature has the power at any time to transfer any or all of it into the general fund for other uses, and has in the past done so.

But Pignalberi is not persuaded. While he concedes that Knapp has made some needed improvements, he's convinced that the capital working fund is beyond redemption in DOT-PF's hands, and needs a major overhaul.

Grand Jury Illegally Granted Immunity to Impeachment Witness

The Judicial Council report on The Investigative Grand Jury in Alaska reveals in an obscure footnote that the grand jury which recommended impeachment proceedings against Gov. Bill Sheffield last year illegally granted what is known as "transactional immunity" to one of the key witnesses in the investigation, his chief of staff, John Shively.

Transactional immunity protects the immunized witness against prosecution for any of the transactions or occurences that are the subject of the compelled testimony. Alaska law, the report says, offers only what is known as "use immunity," which forbids later use against the witness of either the evidence he or she has been forced to give, or new evidence derived from it.

Under the grant of transactional immunity, Shively told the grand jury that he had destroyed a copy of lease documents bearing the governor's initials (thus suggesting that Sheffield had seen and would have been aware of them), and that he (Shively) had lied to investigators about his own knowledge of them.

According to the council report, use immunity is not as broad as transactional immunity, which is "argued by some to be the only workable approach. In practice," the report says, "transactional immunity has been granted to some witnesses in Alaska."

Flaws in Grand Jury System

(Continued from page 3)

Justice Jay Rabinowitz, ex officio chairman of the Alaska Judicial Council

come in and ask the court to strike portions of it. For that reason, I would object to it."

But Buckalew's objection was overridden in favor of the view of another delegate lacking his vision, who responded: "They do not necessarily have to defame any individual or mention him by name."

FEDERAL LAW

The council's report points out that even the federal Organized Crime Act of 1970 "provides an opportunity for named individuals to respond (to grand jury reports), requires that a report be served upon each person named in it and given 20 days to file and answer, and that the response shall become an appendix to the report.

Says the draft report: "Federal courts have carved out and continue to carve out exceptions to the grand jury's reporting power to protect basic fairness and the rights of individuals. Most federal courts have held that a grand jury has no authority to issue a report that accuses an unindicted individual of an indictable offense, with some exceptions made for reports criticizing federal public officials."

Here are more of the relevant findings contained in the Judicial Council's draft report which reflect due process protections found elsewhere, but not in Alaska's grand jury process:

- In California, a comment in a grand jury report which refers to an unindicted individual is not privileged, and such individuals have the right to sue grand juries for libel;

- In Georgia, an accused public official has the right to testify before the grand jury at the conclusion of the state's evidence, and is not subject to cross-examination. The accused and his or her counsel have the right to be present during the presentation of all evidence;

- A California court has held that although no state law specifically authorizes judicial review of grand jury reports, a limited review is implicit in the enactment of statutory limits on investigatory and reporting authority, and confirmed by a common law decision which recognizes the propriety of court review. It added that the court's "sole function in this realm lies in its power to prevent the filing of an illegal report."

At last Friday's Judicial Council meeting with the joint Judiciary Committees, State Sen. John Sackett, R-Ruby, asked members of the council and its staff why they had narrowed the scope of the study to cover only the grand jury's investigative and reporting functions, failed to examine the topic more broadly, and ignored the Senate's request for specific recommendations.

Francis Bremson, the council's executive director replied that time and budget constraints, along with the council's effort to submit it's report to the legislature during the current legislative session, led to its decision to issue a draft report as soon as possible. He said the council plans to circulate the draft report for comment before finalizing it.

Sackett said that the Senate had placed neither time nor budgetary restrictions on its request for the grand jury study, and he and other legislators asked whether specific recommendations would be forthcoming in the final report. Sackett was one of the senators who, during the special impeachment session last summer, were highly critical of the chief prosecutor's office, the judicial branch and the grand jury for their roles in recommending impeachment proceedings against the governor.

Both Bremson and Justice Rabinowitz, the council's ex officio chairman, said they felt the group might agree to expand the report and include specific recommendations in the final version, but that could take more time and money. Rabinowitz told Sackett, however, that he did not feel it was appropriate for the council to review and judge the prosecutor's and grand jury's performance in the governor's case.

The veteran justice later told the Capital Reporter that he met with Senate Judiciary Committee Chairman Pat Rodey, D- Anchorage, after the council meeting, and they agreed to ask the Senate for additional funds to complete the report -- including concrete recommendations -- before the end of the session in mid-May, and to expand it to include a study of the grand jury's important "charging" function, as well as the role of the state prosecutor and judges in the grand jury system. The second phase of the report, Rabinowitz said, would be completed and submitted to the legislature next year.

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
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May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

SJ 2-13-86

DRAFT

THE INVESTIGATIVE GRAND JURY IN ALASKA

EXECUTIVE SUMMARY

Alaska Judicial Council

February, 1986

EXECUTIVE SUMMARY

THE INVESTIGATIVE GRAND JURY IN ALASKA

Introduction

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

During the course of the study, the possible need for additional due process protections, including right to counsel and right to notice, was suggested. However, Alaska judges and attorneys interviewed during this study cited the the grand jury's reporting function as the area most in need of attention. Thus, the report that follows focuses upon the reporting power of the investigative grand jury, including the due process, judicial review, and report publication implications of the exercise of this power.

I. The Constitutional Power to Investigate and Make Recommendations.

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

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

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

[illegible] reporting power

Because grand jury recommendations are limited only by the requirement that they concern "public safety and welfare", grand jury reports in Alaska may in some cases recommend referral to governmental or non-governmental bodies, allege undesirable conduct and be published whether or not accompanied by indictments. The limitations on report content that exist in other states and the federal system are based on far more restrictive grants of constitutional grand jury authority. The adoption of comparable limitations in Alaska would require constitutional amendment to restrict the subject matter of investigations, to limit the purposes of reports, or to otherwise effectively suspend the recommendation power of the grand jury.

Even without constitutional amendment, however, a number of procedures could be adopted that would provide for: greater due process protection of individuals named or referred to in reports; judicial review of reports; and standards for publication and dissemination of reports.

A. Due Process: Protection of Individuals Named or Referred to in Reports. Basic fairness and constitutional due process may require that unindicted individuals named in grand jury reports be provided with certain protections not currently required by Alaska law. Unindicted individuals named in at least three Alaska grand jury investigative reports lacked a forum or mechanism through which to respond to such criticisms.

In other jurisdictions, the following rights have been recognized to be part of due process:

1. The right to review the report prior to publication (Florida, New York, New Jersey);

2. The right to present further testimony to the [illegible] of the grand jury (U.S., New York, New Jersey);

3. The right to submit a written response (U.S., New York, New Jersey);

4. The right to move to expunge certain portions of reports (Florida, ABA);

5. The right to an in camera hearing and/or appeal (New York, New Jersey);

6. The right to sue grand jury for libel (California);

7. The right to a fair trial or hearing (U.S., New York); and

8. The right to review the grand jury transcript (New Jersey).

B. Judicial Review

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

In other jurisdictions, guidelines for judicial review have been developed. Typically, such guidelines provide that the judge must prior to publication for compliance with one or [illegible] of the following criteria:

1. The purpose or subject matter is within the [illegible] constitutional scope (U.S., New York, Florida, California, Washington, Colorado, ABA);

2. [illegible] reasons identified in support of the need detected (U.S., New York, New Jersey, Florida, Colorado, ABA);

3. The findings of the report are based upon facts developed during the course of the investigation (U.S., New Jersey, Florida, California);

4. Findings are supported by evidence presented during the investigation (U.S., New York),

5. Release of the report will not prejudice pending trials (U.S., New York, Washington);

6. Release of the report will not compromise the grand jury's assurance of confidentiality to witnesses (California); and

7. Release of the report would be consistent with the public interest (New York, Washington, ABA).

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

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

2. Seal the report (U.S., New York, Florida, California);

3. Return the report back to the grand jury for amendment consistent with the court's findings (U.S., New Jersey);

4. Expunge certain portions or all of the report (New Jersey, Florida, Missouri, Iowa);

5. Review any reply submitted and possibly expunge portions (U.S., ABA); and

6. Hold _in camera_ hearings (U.S., New Jersey, ABA).

C. Publication and Dissemination of Reports

Policy decisions also need to be made regarding publication and dissemination of reports and access to the grand jury record on which reports are based. Should all grand jury reports be made

public and filed as public records, or should the decision to publish depend upon whether or not a report is accompanied by an indictment, or a named party has been held to answer? If a report critical of an individual can be published unaccompanied by an indictment, should the record be destroyed, sealed or preserved? Should the grand jury or the court or both have the authority to determine to whom and for what purposes reports may be issued? Should a report be issued for purposes of exoneration?

Solutions to some of these problems have been developed in other jurisdictions: New York and New Jersey authorize transmittal reports critical of public officials to appropriate disciplinary [illegible] and California permit publication of reports to [illegible] indicted. The federal courts in the watergate [illegible] examination of a grand jury investigative report [illegible] the receiving agency guaranteed that the report would remain confidential and where the report:

1. [illegible] recommendatory conclusions;

2. [illegible] named individual in [illegible] forum in which to respond;

3. was not a substitute for indictments where indictments might properly have issued;

4. contained no recommendations, advice or statements that infringed on the prerogatives of other branches of government; and

5. rendered no moral or social judgments.

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

alaska judicial council

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D R A F T

THE INVESTIGATIVE GRAND JURY IN ALASKA

FINAL REPORT

Alaska Judicial Council

February, 1986

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THE INVESTIGATIVE GRAND JURY IN ALASKA

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Alaska Judicial Council

February, 1986

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THE INVESTIGATIVE GRAND JURY IN ALASKA

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During the course of the study, the possible need for additional due process protections, including right to counsel and right to notice, was suggested. However, Alaska judges and attorneys interviewed during this study cited the the grand jury's reporting function as the area most in need of attention. Thus, the report that follows focuses upon the reporting power of the investigative grand jury, including the due process, judicial review, and report publication implications of the exercise of this power.

I. The Constitutional Power to Investigate and Make Recommendations.

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

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

II. The Reporting Power

Because grand jury recommendations are limited only by the requirement that they concern "public safety and welfare", grand jury reports in Alaska may name names, recommend referral to governmental or non-governmental bodies, allege indictable conduct and be published whether or not accompanied by indictments. The limitations on report content that exist in other states and the federal system are based on far more restrictive grants of constitutional and statutory authority. The adoption of comparable limitations in Alaska would require constitutional amendment to restrict the subject matter of investigations, to limit the purposes of reports, or to otherwise effectively suspend the recommendation power of the grand jury.

Even without constitutional amendment, however, a number of procedures could be adopted that could provide for: greater due process protection of individuals named or referred to in reports; judicial review of reports; and standards for publication and dissemination of reports.

A. Due Process: Protection of Individuals Named or Referred to in Reports. Basic fairness and constitutional due process may require that unindicted individuals named in grand jury reports be provided with certain protections not currently required by Alaska law. Unindicted individuals named in at least three Alaska grand jury investigative reports lacked a forum or mechanism through which to respond to such criticisms.

In other jurisdictions, the following rights have been recognized to be part of due process:

1. The right to review the report prior to publication (Florida, New York, New Jersey);

2. The right to present further testimony to the judge or the grand jury (U.S., New York, New Jersey);

3. The right to submit a written response (U.S., New York, New Jersey);

4. The right to move to expunge certain portions of reports (Florida, ABA);

5. The right to in camera hearing and/or appeal (New York, New Jersey);

6. The right to sue grand jury for libel (California);

7. The right to a fair trial or hearing (U.S., New York); and

8. The right to review the grand jury transcript (New Jersey).

B. Judicial Review

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

In other jurisdictions, guidelines for judicial review have been developed. Typically, such guidelines provide that the judge review reports prior to publication for compliance with one or a combination of the following criteria:

1. The purpose or subject matter is within the statutory or constitutional scope (U.S., New York, Florida, California, Washington, Missouri, Colorado);

2. The rights of persons identified in such reports have been protected (U.S., New York, New Jersey, Florida, Colorado, ABA);

3. The findings of the report are based upon facts revealed during the course of the investigation (U.S., New Jersey, Florida, California);

4. Findings are supported by evidence presented during the investigation (U.S., New York);

5. Release of the report will not prejudice pending trials (U.S., New York, Washington);

6. Release of the report will not compromise the grand jury's assurance of confidentiality to witnesses (California); and

7. Release of the report would be consistent with the public interest (New York, Washington, ABA).

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

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

2. Seal the report (U.S., New York, Florida, California);

3. Refer the report back to the grand jury for amendment consistent with the court's findings (U.S., New Jersey);

4. Expunge certain portions or all of the report (New Jersey, Florida, Missouri, ABA);

5. Review any reply submitted and possibly expunge portions (U.S., ABA); and

6. Hold <u>in camera</u> hearings (U.S., New Jersey, ABA).

C. <u>Publication and Dissemination of Reports</u>

Policy decisions also need to be made regarding publication and dissemination of reports and access to the grand jury record on which reports are based. Should all grand jury reports be made

public and filed as public records, or should the decision to publish depend upon whether or not a report is accompanied by an indictment, or a named party has been held to answer? If a report critical of an individual can be published unaccompanied by an indictment, should the record be destroyed, sealed or preserved? Should the grand jury or the court or both have the authority to determine to whom and for what purposes reports may be issued? Should a report be issued for purposes of exoneration?

Solutions to some of these problems have been developed in other jurisdictions: New York and New Jersey authorize transmittal of reports critical of public officials to appropriate disciplinary bodies. Colorado and California permit publication of reports to exonerate persons investigated. The federal courts in the Watergate case found limited dissemination of a grand jury investigative report appropriate where the receiving agency guaranteed that the report would remain confidential and where the report:

1. drew no accusatory conclusions;

2. deprived no named individual of an official forum in which to respond;

3. was not a substitute for indictments where indictments might properly have issued;

4. contained no recommendations, advice or statements that infringed on the prerogatives of other branches of government; and

5. rendered no moral or social judgments.

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

CHAPTER 1

INTRODUCTION

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INTRODUCTION

1.1 Background

This study has been prompted by questions arising from a recent Juneau grand jury's investigation of alleged improprieties in the state's leasing procedures in Fairbanks. The investigation, initiated by the Criminal Division of the Department of Law, focused on the alleged involvement of the Governor's Chief of Staff and the Governor himself in the award of a state office lease by the Department of Administration. During the course of the investigation, the chief prosecutor hired as outside counsel a Washington, D.C. attorney who had once served as an assistant U.S. Attorney during the Watergate investigation. Prior to the conclusion of the grand jury's deliberations, information based on confidential grand jury log notes was reported in the media.

After considering the variety of choices of actions which the chief prosecutor and outside counsel explained were available to them, the grand jury opted to issue a report and not to issue indictments. The report criticized both the Governor's job performance and the "candor" of his testimony before the grand jury. The report recommended, among other measures, that the Alaska Senate consider impeachment proceedings. The report included verbatim testimony of the Governor's Chief of Staff, who had been granted transactional immunity. The report also quoted extensively from the testimony of the Governor to establish his "lack of candor." The report was submitted to the court with the request that it be made public, along with a brief prepared by the prosecutors to support that request. No other parties participated in the hearing on this request. The court granted the grand jury's request and the report, calling for the Senate to initiate impeachment proceedings, was made public.

During the course of the Senate Rules Committee's deliberation, a number of questions arose regarding the appropriate role and function of investigative grand juries. As a result of these questions, the Alaska Senate requested that the Alaska Judicial Council study the "use of the power of the grand jury to investigate and make recommendations," and "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."[1] Because the Alaska Constitution states: "The power of grand juries to investigate and make recommendations concerning the public welfare or safety shall never be suspended,"[2] the Senate also asked the Judicial Council "to consider a possible amendment to the State Constitution concerning the need to strengthen the grand jury system consistent with due process and standards" such as those being developed nationally.[3]

1.2 Scope and Methodology.

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

Once the scope had been defined, the Council identified the following key issues to address during the course of the study:

1. What subjects may be investigated?

2. How are investigations initiated?

3. Can grand juries issue reports?
   A. Under what circumstances?
   B. What can be included or precluded?
   C. What protections are and can be provided for persons or institutions named in reports?
   D. Are reports public?
   E. What guidelines are needed for judicial review of grand jury reports and reporting procedures?

The Council then:

1. Documented law and practice in Alaska;

2. Identified potential problems and abuses through:
   A. Interviews with judges, attorneys and former grand jurors;
   B. Analysis of grand jury investigative reports, transcripts and case law; and
   C. Review of grand jury reform literature;

3. Reviewed approaches to such problems developed in other jurisdictions or recommended by national grand jury reform organizations, to identify appropriate solutions.

These findings are presented as follows:

Ch. 2 History of the Grand Jury and the grand jury reform movement;

Ch. 3 The Investigative Power and the Reporting Power in Alaska, in the federal courts, and in other states; and

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

Additional issues, not exclusively part of the investigative and reporting functions, including the relation between the prosecutor, judge and grand jury; due process considerations; and confidentiality concerns; are treated in Appendix B.

CHAPTER 2

HISTORY OF THE GRAND JURY AND ITS INVESTIGATIVE AND REPORTING POWERS

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2.1 History of Investigative Grand Jury

2.1.1 Pre-Revolution

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

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

The character of the grand jury, like the character of the trial, has evolved and changed over the centuries. In the days of the Grand Assize, accusation by that body was followed by trial by the ordeal chosen by the accuser. The Lateran Council abolished trial by ordeal in 1215, in favor of having the accused tried by the jury that indicted him or her. It was at the same time the practice

of royal judges to fine and imprison jurors who found a defendant not guilty.[9] By the middle of the fourteenth century the accused could strike from the trial jury any member of the indicting grand jury. About this time the idea of grand jury secrecy was born: The grand jury began to hear testimony in private to resist pressure from the crown. It wasn't until the next century however, that judges discontinued the practice of cross-examining grand jurors about their findings.[10]

In 1681 King Charles II and his royal prosecutors sought to have a grand jury indict for treason two outspoken protestant opponents of the King's attempt to re-establish the Catholic Church in England.[11] The King demanded that grand jury proceedings in this case be held in public. The Grand Assize resi asserting under pressure the power to question witnesses in pr' e, which meant most especially without the presence of the royal prosecutors.[12] After hearing the evidence, the Grand Assize refused to indict. This instance is credited as the initial exercise of the grand jury's power to shield accused persons against prosecution,[13] but the king in that case simply resubmitted the charge to another assize in a different town, and the second assize obliged him by indicting both men.[14]

The practice of grand juries commenting on their findings outside an indictment or no-true-bill also has early roots. In 1683 an English grand jury without returning a formal indictment charged certain Whigs, including the Earl of Macclesfield, with disloyal and seditious conduct. The Earl sued the members of the grand jury for libel. The defense urged that "it is the constant universal practice" of grand juries to present to court any matters concerning the business of the county, and that this was commonly done in "every assizes and sessions." The plaintiff argued that "the law never did empower a jury or any other, to blast any man's reputation without possibility to clear it," and that grand juries may louge

only specific charges of crime. The court without opinion unanimously found for the defendants.[15] Legal historians have documented numerous reports issued in England in the 17th and 18th centuries, criticizing abusive market practices, reporting on horseracing and cockfighting, on the supervision by the justices of houses of correction, on the use by innkeepers and vendors of false drink measures, and on the improper care of bridges, highways and other county property.[16]

During the mid- and late 17th century and the years following, the populations of the newly established English colonies in America took up the transplanted grand jury power. Initially the bodies were simply extensions of the English Grand Assize. For example, a 1642 royal decree ordered Virginia churchwardens to aid in local law enforcement by delivering "presentments of the misdemeanors of swearing and violating the Sabbath that to their knowledge had been committed during the preceeding year."[17] All of the American colonies had some type of grand jury system in place by 1683.[18]

As the Revolution approached, grand juries became less responsive to the wishes of the loyalists and more sympathetic to those resisting British rule. The first clear assertion of the shield function is said to have occurred in 1743, in the case of a newspaper publisher who had criticized the colony's governor. The governor sought to have the newspaper publisher indicted for libel. Two grand juries refused to indict.

In 1765 a Boston grand jury refused to indict the leaders of riots against the Stamp Act. It was during this time that the grand jury gained its reputation as a shield against unwarranted prosecution and governmental oppression.

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

> Grand jurors in the colonies inspected and reported on the conditions of public roads, the performance of public officials, and the expenditure of public funds. In New York, the grand jury successfully petitioned the Duke of York to grant the colony an elected assembly. Subsequently, the crown abolished this newly created assembly and the grand jury expanded its power accordingly. Colonial New York grand juries engaged in such legislative functions as ordering dispensers of alcoholic beverages to provide lodging for their patrons.
>
> In Boston, grand juries mobilized public opinion behind movements for improved public administration. When a grand jury threatened to indict the city of Boston for not keeping the streets in safe condition, the Town Meeting reacted by repairing the streets rather than hiring a lawyer to defend it in criminal prosecution. In Annapolis, grand jury protests against corruption and incompetence forced the city council to meet regularly and to be more responsive to the people's needs.
>
> ***
>
> . . . In Philadelphia, a grand jury initiated a program of resistance to British rule; it denounced

the use of the tea tax to pay the salaries of British officials, promoted a boycott of British goods, and called for collective action with the other colonies for redress of grievances.[20]

2.1.2 Federal Grand Juries

In 1791, the fifth amendment to the U.S. Constitution was adopted. It provides as part of due process: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury..."[21]

Federal Investigative Power

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

Federal Reporting Power

Under the Federal Rules of Criminal Procedure a grand jury has only two explicit products--a grand jury can issue either an indictment or a no-true-bill.[26] Federal grand juries, while acknowledged to have the power to investigate widely, had not been thought to be empowered to issue reports, that is, written criticisms of people or organizations, in situations where an indictment is not permitted or justified.[27] The authority of federal grand juries to issue reports is neither expressly granted nor denied in the Constitution, Federal Code or Rules of Criminal

Procedure (before 1970).[28] In a 1953 case a federal district court judge ordered a report expunged from the records of the court saying that "the great weight of authority is that such reports exceed the powers of the Grand Jury and may be expunged."[29] Reports were nevertheless issued, and acknowledged as traditional.[30] The law and practice with respect to the legality and appropriateness of grand jury reports has remained confused.[31]

In 1970 The Organized Crime Control Act provided that special organized-crime grand juries would have the specified power to publish reports at the completion of their terms on certain kinds of noncriminal conduct by appointed public officials or employees.[32] Numerous safeguards were built into this legislation.[33] A number of federal court judges in recent years have ruled that grand jury reports are permissible under certain circumstances.[34] In 1974, Judge John J. Sirica upheld the power of the Watergate grand jury to issue a report as well as a recommendation that it be forwarded to the House Judiciary Committee for use in the impeachment inquiry.[35]

2.1.3 State Grand Juries

The Fifth Amendment to the U.S. Constitution's mandate of an accused's right to indictment by grand jury has been held not to be applicable to the individual states. In 1884 the U.S. Supreme Court ruled that for the states the filing of an information by a prosecutor was a constitutionally permissible alternative to prosecution by indictment.[36] The authority of states to choose whether or not to use the grand jury has been upheld.[37] As a result, while a number of state constitutions require a grand jury indictment for certain categories of crime, other state constitutions leave it to the legislature to specify the rules governing the initiation of prosecution. The legislatures generally allow prosecutors the discretionary power to choose between the use

of grand jury indictment or the filing of an information, the latter usually in conjunction with some sort of probable cause hearing. Today grand jury indictment is required for all crimes in four states;[38] for all felonies in fourteen states;[39] for only capital crimes in six states.[40] Grand jury indictment is optional in twenty-six states.[41]

State Grand Jury Investigatory Powers

With respect to the exercise of investigative powers, state grand juries have long taken the lead in battling political corruption, often acting on their own initiative in the face of opposition from a district attorney:

> In New York City, in 1872, an extensive grand jury probe toppled the notorious Boss Tweed and his cronies. Since the district attorney was closely associated with Tweed, the panel acted independently of him, conducting its own investigation and interviewing witnesses without the prosecutor's help.
>
> In Minneapolis, in 1902, a grand jury hired its own private detectives and amassed evidence sufficient to indict the mayor and cause the chief of police to resign. After removing these officials, the grand jury acted as a committee of public safety and effectively governed the city. Five years later, in San Francisco, a grand jury indicted the mayor and named a new reform mayor to run the city[42].

State grand juries have also traditionally investigated non-criminal matters concerning public welfare or safety. Recently some states have passed legislation attempting to define the areas grand juries may investigate for other than evidence of specific criminal activity.[43]

State Grand Jury Reporting Powers

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

Some states prohibit grand jury reports where there is not sufficient grounds for indictment.[44] Those that permit them usually limit the reporting powers, such as the apparently universal prohibition against commenting on purely private activity.[45] Reports criticizing elected officials tend to be allowed only where there is statutory authority,[46] and there is authority that a statute requiring the grand jury to inquire into misconduct in public office does not imply a power to report the result of the inquiry where no crime is charged.[47] A general rule appears to be that in the absence of statutes a grand jury has no right to file a report reflecting on the character or conduct of public officers or citizens, unless the report is accompanied or followed by an indictment.[48] The power to report on general conditions in the community, even though a public official's name may be referred to, has been held to be broader.[49] States subject grand jury reports to varying degrees of judicial review.[50]

2.2 History of Grand Jury Reform

The grand jury has long been the subject of intense controversy and the object of reform efforts nationally and throughout the states. For more than sixty years reformers have

questioned the continuance of the grand jury system, at least with respect to the screening function.[51] About half the states have eliminated or strictly limited this function.[52] The Alaska Judicial Council addressed the screening function of the grand jury in Alaska ten years ago, and recommended that the individual be given the right to waive grand jury proceedings in favor of a preliminary hearing.[53]

Reform efforts nationally and in the states today focus on abuses of the grand jury's investigative powers. The recent call for grand jury reform was originally addressed towards federal procedures. Perceptions of abuse arose in the grand jury investigations of the Justice Department's Internal Security Division in the 1960s and 1970s into the activities of public dissidents. In addition, the use of the federal grand jury was steadily increasing, especially for investigating complex white collar crime, organized crime, and public corruption. Charges of abuse began to be made by business leaders and civil attorneys whose clients were being investigated for tax fraud and violations of anti-trust laws.

The recent focus on the investigative function of grand juries resulted in the establishment of a Grand Jury Committee by the American Bar Association's Section of Criminal Justice in 1974. After seven years' work the committee proposed 30 legislative principles for grand jury reform.[54] Many of these have been accepted through Department of Justice policy statements or by adoption into the U.S. Attorney Manual, but these are practical guides without the force of law.

Grand jury reform in the states does not seem to have been prompted by claims of major abuse at the state level similar to those alleged at the federal level.[55] State grand jury reform proposals appear to be adopted, at least sometimes, as part of

larger reform movements where, for instance, an entire criminal code including the sections governing the grand jury would be revised.[56] As one recent commentator indicates: "For the most part the changes which have been proposed are designed to reform the grand jury by implementing a number of due process protections with respect to the operations of the grand jury and have principally been directed at its investigatory role."[57]

CHAPTER 3

THE INVESTIGATIVE POWERS AND THE REPORTING POWER

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

In the second more rarely exercised function,[58] the grand jury itself serves as an investigative body. In response to instructions from the court or the district attorney, or in response to petitions or requests from the public, or on the initiative of a majority of the members of the grand jury, the grand jury investigates concerns affecting the public welfare or safety. These public welfare or safety concerns may arise from criminal or potentially criminal activity, or they may involve non-criminal public welfare or safety matters. After completing its investigation, if the grand jury has found sufficient evidence to charge an individual or individuals with crime, the grand jury may ask the district attorney to prepare an indictment or indictments. The foreperson of the grand jury then signs such indictment or indictments, confirming the indictment or indictments as true bills.

The law is unclear as to whether or under what circumstances the grand jury may also file a report, or may file a report in the alternative. When the grand jury does not find evidence to warrant indictment, the practice of grand juries has been to issue a report to the court summarizing the findings and conclusions of the investigation. Grand jurors are authorized by law to make recommendations.[59] The nature and scope of these recommendations is not defined.

The grand juries of England and of the colonies, in addition to filing charges, conducted investigations of criminal activity and generally acted as "spokesmen for the people, sounding boards for their leaders, and vehicles for complaints against officialdom."[60] The tradition has continued both on the federal level and in the states, amidst an accompanying continuing controversey about the bounds of this power. The importance of the investigative function, however, is not questioned. Although not explicitly set out in the U.S. Constitution, the grand jury investigative power continues to be exercised on the federal level. Although half the states have abolished or severly restricted the grand jury's screening function,[61] all states have retained the investigative function of the grand jury.[62]

3.1 Investigative Power

3.1.1 Source of Investigative Power in Alaska

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

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the armed forces in time of war or

> public danger. Indictment may be waived by the accused. In that case the prosecution shall be by information. The grand jury shall consist of at least 12 citizens, a majority of whom concurring may return an indictment. The power of grand juries to investigate and make recommendations concerning the public welfare or safety shall never be suspended. (Emphasis added.)

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

Constitutional Convention

During the Alaska constitutional convention the Committee on the Preamble and Bill of Rights submitted a proposal whose Section 7 was entitled "Grand Juries, Indictments and Information." The clause in that proposal which addressed the investigative function read:

> ...the power of grand juries to inquire into the willful misconduct in office of public officers, and to find indictments in connection therewith, shall never be suspended.[63]

The commentary on the section includes the statement: "The grand jury is preserved, for all purposes, particularly for investigation of public officals."[64] The proposal's additional language allowed for prosecution by either indictment or information, and gave the judge power to call a grand jury at

his/her discretion. The nature of the Committee's thinking with regard to the investigative function of the grand jury is demonstrated by the following explanation given by one of the Committee members:

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

The Committee member says, "And that is why the Committee chose the Missouri form." (1325).

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

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* Testimony is quoted from the record of the Constitutional Convention contained in Alaska Constitutional Convention Proceedings (Juneau, Alaska Legislative Council, March 1965), and will be referenced in the text by speaker and page number.

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

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

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

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

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

> ...[I]t is true that the investigative grand jury has been preserved in the bill as set forth here. However, an investigative grand jury will only be called under certain specific circumstances, and somebody is going to have to find conditions pretty bad before an investigative grand jury will

> be called. Whereas a grand jury which is empaneled regularly, once or twice a year in our division, has full investigative power as well as the power to consider indictments. The grand jury is there and may take any steps that it feels may be necessary towards investigation. (Davis, 1326).
>
> ...The grand jury in its investigative power as well as for the fact that it is sitting there as a panel sometimes is the only recourse for a citizen to get justice...(Kilcher, 1328).

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

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

The delegate speaking suggests returning to the language in the initial Committee proposal which refers to the grand jury's investigative powers:

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

When the subject of investigative powers arises again, the language proposed is somewhat different. The new suggested language reads:

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

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

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

The delegate proposing the language answered:

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

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

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

This suggestion is adopted, and this is the way the final adopted amendment reads:

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

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

Alaska Statutes

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

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

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

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

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

The language of the first section above suggests that in addition to reviewing the cases presented by a prosecutor the grand jury is empowered to investigate all criminal or potentially criminal activity which comes to the attention of one or more of its members. This is essentially the language of the original territorial law statue as found in Carter's 1900 compilation,[65] and as preserved throughout the following years. This power is

reinforced by the section which follows it in the code, Section 12.40.050., which says that, "The grand jury may indict or present a person for a crime...". The use of the word "present" here refers to the informal writing of charges by a grand jury.*

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

There are three provisions in Alaska's Criminal Rules which provide a few hints about the potential investigative, recommending and reporting powers of the grand jury. Rule 6(e) mandates the oath which is to be administered to grand jurors. It is essentially the oath of the territorial years, as noted in the 1933 compilation of territorial laws.[66] The current oath reads:

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* This use of the word presentment originated in the days of the Grand Assize in England. The members of the Grand Assize routinely "presented" charges to the king. The word presentment is used with a different meaning in Rule 6(o) of the Alaska Criminal Rules of Procedure. There it is used to mean a statement of the facts of an ongoing case which is presented by the grand jury with questions to the court, for instructions on the law.

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

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

3.1.2 Scope of Investigative Power as Exercised in Alaska

Clearly the intent of the drafters of the state constitution was to provide the grand jury with broad investigative powers; the language of state statutes is equally broad. No cases in Alaska specifically address the appropriate subject matter or scope of grand jury investigations. In practice, grand juries have investigated a broad spectrum of subjects.

To document the scope of investigations conducted by grand juries in Alaska, judges and attorneys were asked to name and describe all grand jury investigations of their recollection. In addition, state court grand jury records were examined for the years 1961-1984; and further, library archive records of grand jury proceedings were examined for the years 1884-1960. For the purposes of this report an investigative grand jury is being defined as one considering a case for which no indictment has been prepared in advance.

(1) Complex criminal cases.

Interviewees noted that the grand jury's investigative powers were extremely helpful for certain complex criminal cases. Examples of such cases include the 1974 Fairbanks grand jury investigation of a mob incident at the Tanana Valley Fairgrounds which resulted in injury to several persons; the 1970 Anchorage grand jury investigation of the Cordova fire; the investigation by an Anchorage grand jury in 1970 of the slaying by a police officer of two persons who were engaged in the commission of a felony; and complicated murder cases such as the Investor murder case recently considered by a grand jury in Ketchikan.

(2) Patterns of crime.

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

(3) Alleged misconduct in state government

Five investigations have been conducted into alleged misconduct in state government. A 1974 Fairbanks grand jury investigated alleged conflicts of interest by public officials in

appropriating funds for the Fairbanks flood control project. In 1981 and 1982 separate grand juries in Juneau conducted investigations of alleged misconduct by two state senators. In 1984, an Anchorage grand jury investigated potentially criminal practices related to property and inventory maintained by the Alaska Division of Fish and Wildlife Protection's Aircraft Section. And in 1985, a Juneau grand jury conducted an investigation into the Governor's role in state office leasing practices.

(4) Alleged misconduct in local government

At least two grand jury investigations into alleged misconduct in local government were reported. In 1953, a Ketchikan grand jury conducted an investigation into alleged corruption in the Ketchikan police department. A Kenai grand jury in 1973-74 considered allegations of improper conduct by municipal officials including allegedly inappropriate conduct of a judge.

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

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

(6) Non-criminal (civil) investigation of criminal justice system.

Grand juries have investigated the effectiveness of police operations in Bethel in 1977 and 1983; and the operation of the jail in Barrow in 1983, following an escape. In Fairbanks and in

Anchorage grand juries routinely investigated the condition of the jails and related institutions virtually every year until the early 1970's.

(7) Non-criminal (Civil) investigation of conditions affecting public welfare or safety.

At least a few investigations have arisen in totally civil contexts (in addition to the non-criminal evaluations of the criminal justice system's policies, practices, and facilities, above, #6). In 1962 and 1964 Anchorage grand juries investigated traffic safety and road signs; in 1964, city zoning; and in 1965, water and sewer service.

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

Federal Level

Federal grand juries have the duty to inquire into violations of the criminal laws of the United States. Broader investigative powers are not statutorily defined, but appear from examples in case law to arise in the context of such criminal inquiry.[67] In 1970 the Organized Crime Control Act specifically provided that special grand juries could be called to investigate organized crime.[68]

Other States

States use a variety of approaches when defining appropriate subjects for grand jury investigation. In many states, the subjects of permissible investigation are not anywhere clearly stated; however, initiation of investigations is restricted; judicial

review procedures of grand jury investigative reports exist; and/or various protective procedures have been legislated to protect individual rights. These approaches will be considered in the next section of this report.

California

In California, the grand jury is a creature of county government, and has been specifically granted, in addition to its role of inquiring into crimes, a gradually increasing "watchdog" role over a variety of county government activities.

In 1851 the California state legislature directed the grand jury to investigate "the condition and management of the public prisons." (Stats. 1851, ch 29, p. 235, 214; see Pen. Code 919.) In 1880 the California state legislature gave the grand jury the responsibility of making "a careful and complete examination of the books, records and accounts of all officers of the county..." (Pen. Code Ann. 1880, ch. 109, p. 43; see Pen. Code, 925.) In the following years the state legislature continued to expand the boundaries of the grand jury's investigative domain, including authorization to make inquiry into and report on the "needs of all county officers" including the desirability of abolishing or creating county offices and the adequacy of the existing "method or system of performing" county duties (Stats. 1911, ch. 200, p. 373, 1; Pen Code, 928); the propriety of the salaries paid to various public officials (Stats. 1943, ch. 93, p. 798, 1; Pen Code, 927); the operation of special-purpose assessing or taxing districts located wholly or in part within the county (Stats. 1961, ch. 1461, p. 3313, 2; Stats. 1969, ch. 931, p. 1870, 1; Pen. Code, 933.5), and the state of the fiscal affairs of any incorporated city within the county (Stats. 1973, ch. 1036, p. 2055, 3; Pen. Code 925a.).

In a 1975 California Supreme Court case the court clearly states that the statutory provisions noted here limit the grand jury's investigating authority "to the specifically enumerated fields."[69]

Missouri

The Missouri Constitution (Art. I, Section 16) provides that in that state the grand jury shall have the power to:

(1) investigate all characters and grades of crime;

(2 inquire into the willful misconduct in office of public officers.

The relevant Missouri statute (1540.020) provides that the grand jury shall have the power to:

(1) examine public buildings;

(2) inquire into violations of the game and fish law, the election laws, the various liquor laws, and such other violations as the court may direct;

(3) inquire into the failure or refusal of county and municipal officers to do their duty, as provided by law;

(4) make inquiry into any violations by county officers of laws relating to the finances or financial administration of the county.

Pennsylvania

The courts in Pennsylvania recognize two types of grand juries. The legislatively-authorized "charging" grand jury may also conduct investigations, and is referred to as an "investigating grand jury." Initiation of an investigation by this type of grand jury must be "necessary because of the existence of criminal activity within the county which can best be fully investigated through the use of the resources available to the grand jury." [PA. Stat. Ann. Tit. 19, 267(b) (Purdon Supp. 1979)]. A grand jury may also be empaneled by the court solely for performing investigatory duties, and is referred to as a "special grand jury."

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

(1) the subject matter of the investigation must affect the community as a whole rather than as individuals;

(2) the investigation must be aimed at conditions as opposed to individuals;

(3) the ordinary processes of law enforcement must be inadequate to deal with the alleged crimes;

(4) the investigation must have a defined scope, directed at crimes, and supported by information indicating the existence of systematic crime or widespread conspiracy; and

(5) the information must come from direct knowledge or a trustworthy source.[70]

Pennsylvania's judicial system does not allow for civil investigation by grand juries. Pennsylvania courts have held that although a grand jury investigation can be directed at alleged illegalities in a state agency or local government; it cannot be directed to review the quality of administration in government agencies.[71]

3.1.4 Initiation of Investigation

Once appropriate subjects for investigation have been defined (or perhaps, as in some states, in the alternative), methods for initiating investigations may be set forth.

Initiation: Law and Practice in Alaska

In Alaska there are statutory procedures to distinguish the initiation of an investigation from the exercise of the grand jury's usual charging duties. (AS. 12.40.030 In general, investigations are initiated by the district attorney. In the case of major investigations, the district attorney may request that a grand jury be empaneled to investigate that case alone. On occasion investigations have been called sua sponte by the judge sitting in the jurisdiction.

Alaska does have a statute which provides, "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." (AS 12.40.040.). This provision suggests that an investigation may be initiated upon the request of an individual grand juror. Such a circumstance is questioned by legal commentators Frankel and Naftalis. Speaking of the earliest grand juries, they remind that, "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 go on to say "Today, in the swirling annonymities of the great cities where grand juries mostly sit, it would be the rare (and indeed somewhat questionable) case where a grand juror acted on anything within his or her personal ken, rather than knowledge acquired for the first time from testimony and exhibits 'presented' by a government lawyer in the grand jury room."[72] Safeguards are in practice routinely exercise in Alaska. Judges and prosecutors state that the majority of grand jurors, not counting the juror requesting the investigation, have had to vote to undertake any such investigation. If the investigation is taken up, the grand juror requesting it is excused from grand jury duty and called as a witness in the ensuing investigation.

Prosecutors interviewed in the course of this study stated that they sometimes receive letters from the public, addressed to the grand jury, requesting investigations. The practice in one prosecutor's office is to conduct a preliminary check on the matter raised in such a letter, and to bring the letter before the grand jury with a recommendation for action or nonaction. The grand jury then makes its decision upon majority vote.[73]

Initiation: Law and Practice Outside

Federal

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

Pennsylvania

Under Pennsylvania's judicial scheme for grand juries, a court can charge a grand jury to conduct a special investigation, or an investigative grand jury can be initiated by either a "petition" or a "memorial." A petition is a request filed by the district attorney or attorney general. A memorial is a request filed by a private citizen. Petitions and memorials must meet the subject test for investigative grand juries, as set out earlier in this chapter. In Pennsylvania a grand jury cannot initiate an investigation on its own motion. Under Pennsylvania's legislative scheme for investigative grand juries, which apparently operates parallel to the judicial scheme, no memorials are provided for. The statute requires that the petitions of the district attorney must state that the convening of the grand jury is necessary because of the existence of criminal activity within the county which can best be fully investigated through the use of the resources available to the grand jury. [PA. State. Ann. Tit. 19, 267(b) (Purdon Supp. 1979)].

Other States

The legal tests in most states are not nearly so clearly defined as in Pennsylvania. The courts in all states surveyed have the power to call the grand jury. The district attorneys in all states have the power to request a grand jury. Beyond these generalizations procedures vary.

For example, five states allow grand juries to be called by public petition: Nebraska, Nevada, New Mexico, North Dakota, and Oklahoma. The relevant provision in each of these states specifies a mandatory process operating at the county level which can be set into force by a modest number of persons.

3.2 Grand Jury Power to Issue Reports

The practice of grand juries to comment or report on their investigative findings outside of endorsing bills as true and not true has early roots. Records of such "reports" exist from at least the 1600s in England and in the American colonies, and criticisms of such reports have been made for just as long.

It as been held in most jurisdictions that the power to report is not co-extensive with the power to investigate. The chief criticism of grand jury reports is the potential violation of an individual's right not to be publicly condemned for wrongdoing without the due process established by law, including the right to be heard. When an indictment is issued, an individual has the opportunity to present his or her case at trial. When a grand jury issues a report accusing an individual of wrongdoing, that individual has no guaranteed means for response.

3.2.1 Source of Reporting Powers in Alaska

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

During the discussion regarding the "make recommendations" section during the Constitutional Convention, one delegate expressed concern about the power to issue reports:

> From my first impression and my prime objection to this particular amendment is that I think and feel certain it will open the door, for example, the grand jury might have under investigation the conduct of some particular public office, for

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

Delegate Barr responded to these concerns:

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

The grand jury's recommending and/or reporting powers were not further addressed by the delegates. Although a number of important issues were raised in this exchange, including whether

reports should issue; what reports should contain; under what circumstances reports could issue; and rights of persons criticized in reports; none was specifically resolved.

The grand jury reporting power is not further addressed by any other statute or rule, nor do the written charges and instructions authorized under Rule 6(h) address this power. The only Alaska-related reference to this subject can be found in "The Alaska Grand Jury Handbook", an undated monograph "distributed by the Supreme Court of Alaska", "based on the Original Draft Prepared by the Section of Judicial Administration of the American Bar Association." (This handbook which has apparently been distributed on an inconsistent basis only in Anchorage, presumably has no official basis as the source of Alaska law or practice.) In Section III(b) Grand Jury as Investigative Body, the pamphlet states that a grand jury cannot "specify individuals as being personally responsible for the conditions which it criticizes." The pamphlet goes on to explain, "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."

3.2.2 Scope of Reporting Power as Exercised in Alaska

The exchange between delegates at the constitutional convention should be considered in the context of territorial practices. During territorial days grand juries in Alaska were governed by the general laws of Oregon. Those laws mandated that grand juries inquire into the condition and management of every prison in its judicial district and into the condition and management of the offices pertaining to the courts of justice in the district. No language in those laws specifically addressed any reporting powers or duties of grand juries.[74] It was the practice in those days for the grand juries, which at that time were convened once a year in each of the four districts into which the state was divided, to make

an annual inspection of the jails and to report their findings and recommendations to the court along with their summaries of indictments and not true bills issued during the term. These reports generally included additional comments and recommendations, based on simple observation rather than formal investigation, relating to the general administration of criminal justice and to conditions related to crime in the community.

Records of territorial grand juries show only one fully-developed investigative report, the Final Report of the Grand Jury for the Special October 1953 Term, In the District Court for the Territory of Alaska, Division Number One at Ketchikan. This report is referred to as the infamous "Creek Street Report," Creek Street being the street along which the Ketchikan houses of prostitution stood.

Grand jury records for the years after statehood show that the practice of inspecting jails and commenting on jail conditions, on courthouse facilities, on criminal justice procedures, and on general crime conditions in the community, continued for the first few years. In Anchorage and Fairbanks grand jury records, comments appeared on almost every grand jury report until the early 1970's. About this time a greater number of grand juries began to be empaneled at these court sites, and to have shorter terms. With this development less attention is diverted from the charging function to conduct such investigations.

Case-specific reports resulting from full investigations are much rarer. The report of the Sheffield case is by far the most lengthy report ever issued in the state. It is one of the few reports since statehood to criticize named individuals in the context of alleged criminal activity, and the only report to have included portions of the transcript of grand jury proceedings. The typical report in this state has been two to three pages, including a brief summary of findings and a list of recommendations.

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

At the close of the Kenai investigation in 1974 no public report issued, although the grand jury did send a letter to the Commission on Judicial Qualifications calling attention to purportedly improper conduct on the part of a Kenai judge. Such an action was also taken at least once by a Fairbanks grand jury, which noted in its report that it had provided a confidential recommendation to the Judicial Qualifications Committee.

The Fairbanks grand jury which investigated the patterns of felony indictments it observed being returned against Checker Cab personnel, stated (1) its observation of the pattern of felony indictments; (2) that the grand jury further found that many Checker Cabs were operating with defects that endangered occupants and other vehicles; (3) that the grand jury heard conflicting testimony from the Chief of Police, City Manager, and the Cab Company concerning the existence and enforcement of mandatory periodic safety checks on the cabs; (4) made a number of recommendations including review of personnel records; (5) requested that the police chief and the city manager establish a method of inspection and enforcement of safety standards for cabs and report back to the grand jury with their plan in 30 days; (6) requested specifically that copies of the report be distributed to all five local radio stations, both local newspapers,

the city council, city manager, mayor, and owners of local cab companies. A 1972 Fairbanks grand jury which investigated campus security, after noting the high incidence of crime on campus, made detailed recommendations for the protection of students, faculty, and employees. Another Fairbanks grand jury which investigated drug abuse in high schools described its findings and made recommendations for improved criminal justice procedures.

Investigations into problems in the criminal justice system have resulted in a small number of case-specific reports in addition to the comments made as part of the grand jury's summary report. The 1977 Bethel grand jury investigating the effectiveness of police investigations stated its purpose in its report to be "to evaluate some of the problems confronting those responsible for this most important area of our criminal justice system, and to offer recommendations as to how it may be improved." The report summarized the testimony of witnesses regarding police department efficiency. The last witness was the Chief of Police, who was given a summary of the testimony of previous witnesses and the opportunity to present his specific concerns. The grand jury then made several recommendations towards establishing better training, reporting, investigating and following through of investigations, and monitoring of these procedures. The grand jury requested that its report be made a matter of public record. The 1983 Bethel grand jury investigating "problems with the handling of criminal investigations in Bethel" found that "[t]he Bethel Police Department has repeatedly failed to follow basic minimum legal requirements which has made the prosecution of many cases difficult or impossible." Its primary recommendation was "that a policy be jointly established by the Bethel Police Department and the District Attorney's office that would formally outline the procedures to be followed by Bethel Police Officers in their relationships with the District Attorney's office." The 1983 Barrow grand jury investigating policies and procedures at the Barrow jail following

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

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

3.2.3 Reporting Powers of the Federal Government and Other States

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

> The grand jury are a great channel of communication, between those who make and administer the laws, and for whom the laws are made and administered. All the operations of government, and of its ministers and officers, are within the compass of their view and research. They may suggest publick improvement, and the modes of removing publick inconveniences: they may expose to publick inspection, or to publick punishment, publick bad men, and publick bad measures.[75]

In a 1965 Fifth Circuit case the judge wrote, without challenge from his fellow judge, that:

> To me the thing [is] this simple: the Grand Jury is charged to report. It determines what it is to report.[76]

In 1970, at Congressional hearings regarding the Organized Crime Act and the grand juries to be specially charged under it, a sponsor of the bill stated:

> ...the precise boundaries of the reporting power have not been judicially delineated...the authority to issue reports relevant to organized crime investigations has been specifically conferred upon the special grand juries created by this title. The committee does not thereby intend to restrict or in any way interfere with the right of regular grand juries to issue reports as recognized by judicial custom and tradition.[77]

Despite the expressed intention not to restrict the rights of regular federal grand juries, the statute may well serve as a model in both federal and state courts, for striking a fair balance between protection of the public and protection of the individual. The act addresses proper subjects for reports, provides guidelines for judicial review, and also provides an opportunity for named individuals to respond.

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

> (1) concerning noncriminal misconduct, malfeasance, or misfeasance in office involving organized criminal activity by an

appointed public officer or employee as the basis for a recommendation of removal or disciplinary action; or

(2) regarding organized crime conditions in the district.

California

The California Penal Code specifies a long list of local government activities which the grand jury is to address and specifically calls for these subjects to be reported upon. The California courts have held that this enumeration also limits the grand jury's investigation and reporting authority to the specifically enumerated fields. Beyond the prescribed subject limitations, the only statutory limitation on the reports of California grand juries is that "[a] grand jury shall make no report, declaration, or recommendation on any matter except on the basis of its own investigation of the matter..." [Penal Code Sec. 939.9]

Missouri

Under the 1875 Missouri Constitution, the Missouri grand jury had the stated duty and authority to report the results of its investigation of the official acts of officers having charge of public funds. This provision was dropped from Missouri's present constitution, which limits the power of a grand jury to "investigate and return indictments for all character and grades of crimes" and the power "to inquire into the willful misconduct of public officers and to find indictments in connection therewith." [Missouri Constitution, Article I, Sec. 16] The Missouri Supreme Court subsequently confirmed the limiting nature of the language of both constitution and statutes.[78]

The key Missouri statute lists several specific areas for grand jury inquiry and investigation. This statute explicitly directs that the grand jury "examine public buildings and report on their conditions."[79] The Missouri Supreme Court noted that "reporting power is not expressed in connection with the other specified areas or in connection with the general areas of law violations which the trial court may direct the grand jury to investigate.[80]

New Jersey

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

(1) refers to public affairs or conditions,

(2) censures a public official only where his association with the criticized public affairs or conditions is "intimately and inescapably a part of them." [R. 3:6-9(a)]

New York

A New York statute enacted in 1964 appears to have provided the model for the federal Organized Crime Act of 1970; including restrictions on the subject matter of reports, guidelines for judicial review, and an opportunity for named individuals to respond. The New York statute [N.Y. Crim. Proc. Law Section 190.85(3)] allows grand jury reports on the following subjects:

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

(b) stating that after investigation of a public servant it finds no misconduct, nonfeasance or neglect in office by him provided that such public servant has requested the submission of such report; or

(c) proposing recommendations for legislative, executive or administrative action in the public interest based upon stated findings.

Pennsylvania

Pennsylvania's statutes [PA. Stat. Ann. Tit. 19, Sec. 5 266 & 271] define a grand jury report as a document

(1) regarding conditions relating to organized crime or public corruption; or

(2) proposing recommendations for legislative, executive, or administrative action.

Washington

A Washington statute provides that, "The grand jury may prepare its conclusions, recommendations and suggestions in the form of a grand jury report." [Wash. Code of Criminal Proc., Sec. 10.27.160]

ABA Principles, Model Act, and Commentary

The commentary accompanying the ABA Model Grand Jury Act states that the purpose of grand jury reports is "to inform the public of situations requiring administrative, judicial, or

legislative corrective action--not the castigation of individuals," and goes on to say that a report may comment on "the job that an office holder is performing; but such reports should not condemn character alone."

CHAPTER 4

THE REPORTING POWER: PROCEDURAL LIMITATIONS

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Because grand jury recommendations are limited only by the requirement that they concern "public safety and welfare", grand jury reports in Alaska may name names, recommend referral to governmental or non-governmental bodies, allege indictable conduct and be published whether or not accompanied by indictments. The limitations on report content that exist in other states and the federal system are based on far more restrictive grants of constitutional and statutory authority. The adoption of comparable limitations in Alaska would require constitutional amendment to restrict the subject matter of investigations, to limit the purposes of reports, or to otherwise effectively suspend the recommendation power of the grand jury.

Even without constitutional amendment, however, a number of procedures could be adopted that could provide for: greater due process protection of individuals named or referred to in reports; judicial review of reports; and standards for publication and dissemination of reports.

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

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

In other jurisdictions, the following rights have been recognized to be part of due process:

1. The right to review the report prior to publication (Florida, New York, New Jersey);

2. The right to present further testimony to the judge or the grand jury (U.S., New York, New Jersey);

3. The right to submit a written response (U.S., New York, New Jersey);

4. The right to move to expunge certain portions of reports (Florida, ABA);

5. The right to in camera hearing and/or appeal (New York, New Jersey);

6. The right to sue grand jury for libel (California);

7. The right to a fair trial or hearing (U.S., New York); and

8. The right to review the grand jury transcript (New Jersey).

Federal

The Organized Crime Act of 1970 provides an opportunity for named individuals to respond. The act provides that the report be served upon each public officer or employee named in the report, and that the individual has twenty days to file an answer. The answer must "state the facts and law constituting the defense of the public officer or employee to the charges in said report." The act provides that the reply shall become an appendix to the report,

"except for those parts thereof which the court determines to have been inserted scandalously, prejudiciously, or unnecessarily." Under the act the report remains sealed for at least 31 days after the answer has been filed or the time for filing has expired, or if an appeal is taken, until all rights of review have expired or terminated. The U.S. Attorney is then charged with delivering a copy of the report, and appendix, if any, "to each public officer or body having jurisdiction, responsibility, or authority over each public officer or employee named in the report."

Federal courts have carved out and continue to carve out exceptions to the grand jury's reporting power to protect basic fairness and the rights of individuals. Most federal courts have held that a grand jury has no authority to issue a report that accuses an unindicted individual of an indictable offense, with some exceptions made for reports criticizing federal public officials.[81]

California

In California, individuals named in reports have no right to reply or expunge, or for appeal or review, however a comment in a grand jury report which refers to an unindicted individual is not privileged. Unindicted individuals have the right to sue grand juries for libel. [Cal. Penal Code, Sec.. 930]

Florida

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

Georgia

In Georgia, an indictment of a public official [Ga. Stat. Sec. 89-9907-8] must include a statement of "the merits of the complaint," and a copy must be served on the accused before it is presented to the grand jury. The accused public official or public servant (defined in Georgia to be any judge of the probate court, member of any board of commissioners, county judge, or justice of the peace) has the right to testify before the grand jury at the conclusion of the state's evidence. The accused is not subject to cross-examination. The accused and counsel for the accused have the right to be present during the presentation of all evidence, but may not examine witnesses.

New Jersey

New Jersey's statutes provide additional protections for the public official censured in a report which a judge determines to be proper. If the report censures a public official and the judge decides not to strike it, the statute provides for a copy to be served on the named individual who then has ten days to move for an in camera hearing. The individual is granted (1) the right to examine the grand jury minutes, and (2) the right to introduce additional evidence. [R. 3:6-9(c)]

New York

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

ABA

The ABA Model Grand Jury Act provides:

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

4.2 Judicial Review

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

In other jurisdictions, guidelines for judicial review have been developed. Typically, such guidelines provide that the judge review reports prior to publication for compliance with one or a combination of the following criteria:

1. The purpose or subject matter is within the statutory or constitutional scope (U.S., New

York, Florida, California, Washington, Missouri, Colorado);

2. The rights of persons identified in such reports have been protected (U.S., New York, New Jersey, Florida, Colorado, ABA);

3. The findings of the report are based upon facts revealed during the course of the investigation (U.S., New Jersey, Florida, California);

4. Findings are supported by evidence presented during the investigation (U.S., New York);

5. Release of the report will not prejudice pending trials (U.S., New York, Washington);

6. Release of the report will not compromise the grand jury's assurance of confidentiality to witnesses (California); and

7. Release of the report would be consistent with the public interest (New York, Washington, ABA).

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

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

2. Seal the report (U.S., New York, Florida, California);

3. Refer the report back to the grand jury for amendment consistent with the court's findings (U.S., New Jersey);

4. Expunge certain portions or all of the report (New Jersey, Florida, Missouri, ABA);

5. Review any reply submitted and possibly expunge portions (U.S., ABA); and

6. Hold in camera hearings (U.S., New Jersey, ABA).

Federal

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

(1) the report must address one of the statutorily authorized subjects;

(2) the report must be based upon facts revealed during the course of investigation and be supported by the preponderance of the evidence;

(3) each person named in the report and any reasonable number of witnesses on the person's behalf as designated by that person to the grand jury foreperson were afforded an opportunity to testify;

(4) that a report addressing the subject of organized crime conditions not criticize identified persons;

(5) that the report not prejudice fair consideration of a pending criminal matter.

If the judge deems that the report does not meet these guidelines, the judge may direct that additional testimony be taken, or shall order the report sealed until the provisions are met.

California

A 1975 California Superior Court case held that although no California statute specifically authorizes judicial review of reports, a limited review is implicit in the enactment of statutory limits on investigatory and reporting authority, and confirmed by the common law decision which recognize the propriety of court review of grand jury reports. The court emphasized that "the scope of the superior court's reviewing role is strictly confined to ensuring that reports do not extend beyond the legal boundaries of the grand jury's broad reportorial power."[82] The court further defined its role by saying, "The court's sole function in this realm lies in its power to prevent the official filing of an illegal report: for example, a report on matters which the grand jury has not itself investigated or a report concerning activities of a distant municipality not lying within the grand jury's province."[83] The court in this case specifically noted that, "The superior court posesses no authority to edit or seal a report simply because the court disagrees with the report's conclusions, or believes that its recommendations were hastily reached or were not 'justified.'"[84]

Florida

In Florida, the judge determines:

(1) whether a grand jury's report deals with a subject matter that the grand jury is empowered to investigate; and

(2) whether the grand jury's findings have a reasonable factual foundation in the evidence.

Improper report content has been held to include:

(1) that which is outside grand jury authority;

(2) or has no foundational basis in fact; or

(3) is not germane to the subject matter under investigation.[85]

New Jersey

Judicial review is defined in New Jersey by statute, and the judge's power with respect to disposition is extensive. The statute indicates, however, that the decision of the judge who reviews a report is judicial in nature and subject to review for abuse of discretion, by the state or any appointed person, including any member of the reporting grand jury. [New Jersey Rules Governing Criminal Practice 3:6-9]

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

(1) if it appears that a crime has been committed for which an indictment may be had, shall refer the presentment back to the grand jury with appropriate instructions (i.e., the report must not accuse an unindicted individual of criminal wrongdoing);

(2) if a public official is censured, determine conclusively that the existence of condemned matter is inextricably related to a non-criminal failure on the part of the public official to discharge a public duty;

(3) if it appears that the presentment is false, or is based on partisan motives, or indulges in personalities without basis, or if other good cause appears, shall strike the presentment either in full or in part (emphasis added);

(4) to determine if a substantial foundation exists for the public report. [R. 3:6-9(c)]

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

(1) if it appears that the facts on which the condemnation is based are not true; or

(2) if it appears that the facts on which the condemnation is based are in conflict or productive of diverse inferences; or

(3) if reasonable question is raised as to whether the grand jury would have acted as it did had it had the additional facts.[86]

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

New York

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

(1) addresses the allowed subjects;

(2) is based upon a preponderance of credible and legally admissible evidence;

(3) persons named were given the opportunity to appear before the grand jury;

(4) does not criticize individuals except the public official or servant under investigation; and

(5) does not prejudice fair consideration of a pending criminal matter. [N.Y. Crim. Proc. Law Sec. 190.85(4)]

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

(1) the grand jury was correctly instructed on the law relating to the matters being inquired into, including the standard of proof at grand jury;

(2) the grand jury was informed of the option of issuing a report, and was allowed to decide whether to proceed that way; and

(3) the report is supported by a preponderance of the credible and legally admissible evidence heard by the grand jury.[87]

Washington

The statute provides for review not just by one judge, but by "a majority of the judges of the superior court or the county court." The majority of judges are to determine that

(1) the findings in the report deal with matters of broad public policy affecting the public interest and do not identify or criticize any individual;

(2) the release of the report would be consistent with the public interest and further the ends of justice;

(3) release of the report would not prejudice any pending criminal investigation or trial.

ABA

The ABA Model Act provides that motions to expunge objectionable material from grand jury reports shall be made within 10 days of receipt of notice by persons named in such reports. Hearings on such motions shall be held in camera.

4.3 Publication and Dissemination of Reports

Policy decisions also need to be made regarding publication and dissemination of reports and access to the grand jury record on which reports are based. Should all grand jury reports be made public and filed as public records, or should the decision to publish depend upon whether or not a report is accompanied by an indictment, or a named party has been held to answer? If a report critical of an individual can be published unaccompanied by an indictment, should the record be destroyed, sealed or preserved? Should the grand jury or the court or both have the authority to determine to whom and for what purposes reports may be issued? Should a report be issued for purposes of exoneration?

Solutions to some of these problems have been developed in other jurisdictions: New York and New Jersey authorize transmittal of reports critical of public officials to appropriate disciplinary bodies. Colorado and California permit publication of reports to exonerate persons investigated. The federal courts in the Watergate case found limited dissemination of a grand jury investigative report appropriate where the receiving agency guaranteed that the report would remain confidential and where the report:

1. drew no accusatory conclusions;

2. deprived no named individual of an official forum in which to respond;

3. was not a substitute for indictments where indictments might properly have issued;

4. contained no recommendations, advice or statements that infringed on the prerogatives of other branches of government; and

5. rendered no moral or social judgments.

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

Federal

The most famous federal grand jury investigation has been that referred to as the "Watergate" investigation. The grand jury in that case handed up a report to the court with a two-page letter which gave the purpose of preparing and forwarding the report, its

subject matter, and the recommendation that the report be transmitted to the Judiciary Committee of the House of Representatives, which was considering a motion to impeach the President. The report was handed up at the same time the grand jury returned indictments on seven presidential aides, accusing those aides of various activities in the Watergate cover-up. The Watergate special prosecutors did not seek to indict President Nixon because there was a substantial question as to whether an incumbent President could be prosecuted, or as a policy matter should be. The contents of the report has never been disclosed.[88] Commentators assume that it contained accusations of criminal conduct apparently made by witnesses and merely summarized and forwarded without comment by the grand jury.[89] The President's counsel was allowed to read the two-page letter of transmittal. The President's Counsel informed the court that the President had no recommendation to make on its release. The judge held a hearing to allow all interested parties to state their positions concerning the release of the report, and then ordered the report released to the House Committee as requested by the grand jury. The judge emphasized in support of his decision that the report in this case was not improper in any of the ways which had been noted in federal cases in which the power to report had been denied. The report in this case:

(1) drew no accusatory conclusions;

(2) deprived no one of an official forum in which to respond;

(3) was not a substitute for indictments where indictments might properly issue;

(4) contained no recommendations, advice, or statements that infringed on the prerogatives of other branches of government;

(5) rendered no moral or social judgments.[90]

California

The California statutes do provide for reports of exoneration: "A grand jury which investigates a charge against a person, and as a result thereof cannot find an indictment against such perosn, shall, at the request of such person and upon the approval of the court which empaneled the grand jury, report or declare that a charge against such person was investigated and that the grand jury could not as a result of the evidence presented find an indictment." [Cal. Penal Code, Sec. 939.9(a)]

Colorado

Colorado law [Colo. Rev. Stat. Sec. 16-5-205(4) (1978] provides that a grand jury report or a particular portion of a report may be made public only if the chief judge of the district court finds that the individual or individuals seeking the release of the report will be exonerated. A commentator notes that the use of grand jury reports in Colorado has as a result been "almost completely abandoned."[91]

FOOTNOTES

1. S. RES. 5 am, 14th Leg., 1st Spec. Sess., 1985 Alaska.

2. ALASKA CONST. art I, §8.

3. S. Res. 5am, 14th Leg., 1st Spec. Sess., 1985 Alaska.

4. WEBSTER'S NEW COLLEGIATE DICTIONARY (Springfield 1973).

5. Id.

6. Id.

7. See FRANKEL AND NAFTALIS, THE GRAND JURY: AN INSTITUTION ON TRIAL (New York 1977) [hereinafter cited as FRANKEL]; WHYTE, Is the Grand Jury Necessary?, 45 VA L. REV. 461, 462 (1959) [hereinafter cited as WHYTE]; KUH, The Grand Jury "Presentment": Foul Blow or Fair Play?, 55 COLUM. L. REV. 1103, 1106 (1955) [hereinafter cited as KUH]; Recent Development in the Law of the Federal Grand Jury, UTAH L. REV. 170, 171 (1977); HOLMES, THE COMMON LAW 207 (Boston/Toronto 1963). Some commentators trace grand jury origins to Greek, Roman, and Scandinavian citizen bodies existing prior to the appearance of the assize in England, however, no link has been established, and information about the bodies is so scarce as to make comparisons meaningless. See also, SCHIMIZZI, Investigating Grand Juries: A Comparison of Pennsylvania's Judicially and Legislatively Created Bodies, DUQ. L. REV., 936-7 (1980) [hereinafter cited as SCHIMIZZI]. For a discussion of the history and role of the grand jury, see also, Costello v. United States, 350 U.S. 359, 362 (1956); see also, United States v. Colandra, 414 U.S. 338, 343 (1974).

8. CASSELL'S NEW COMPACT FRENCH DICTIONARY (New York 1971).

9. FRANKEL, supra note 4, at 9.

10. Id.

11. Id.

12. Id. It is interesting to note that in Connecticut, in cases punishable by death or life imprisonment, neither the State's Attorney nor any counsel for the prosecution is allowed to appear before the grand jury. The prosecutor remains outside the grand jury room and sends the State's witnesses in one at a time for examination by the grand jury. Cobbs v. Robinson, 528 F2d 1531, 1338 (2d Cir. 1975), cert. denied, 96 S. Ct. 1419 (1976).

13. See supra note 4.

14. FRANKEL, supra note 4, at 10.

15. KUH, supra note 4, at 1109.

16. Id. at 1110.

17. WHYTE, supra note 4, at 462.

18. EMERSON, GRAND JURY REFORM: A REVIEW OF KEY ISSUES, NIJ 10 (Washington, D.C. 1983) [hereinafter cited as EMERSON].

19. FRANKEL, supra note 4, at 10.

20. Id. at 10-11.

21. U. S. CONST., amend V.

22. FED. R. CRIM. P. 7(a) provides in pertinent part: "An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information."

23. FED. R. CRIM. P. 17.

24. See 18 USC §6001 et seq.

25. The Federal Rules of Evidence are made inapplicable to grand jury proceedings. FED R. EVID. 102; FED. R. EVID. 1101(d) (2).

26. FED R. CRIM. P. 7 (a).

27. FRANKEL, supra note 4, at 31-32. See also, KUH, supra note 4, at 1110.

28. 28 ALR Fed 851, 854. But see ORG. CRIME CON. ACT of 1970, 18 U.S.C.A. §§3331-3334.

29. Application of United Electrical Workers, 111 F. Supp. 858 (S.D.N.Y. 1953).

30. See United States v. Cox (CA 5 Miss 1965) 342 F2d 167, cert. den. 381 U.S. 935, 14 L Ed 2d 700, 85 S. Ct. 1767 ( ) (Wisdom, J., concurring).

31. See Report & Recommendation of June 5, 1972 Grand Jury etc. (D.C., 1974) 370 F. Supp. 1219.

32. 18 U.S.C.A., §§3331-3334. See also, FRANKEL, supra note 4, at 32.

33. Consider that the special grand jury's reporting function is limited to situations involving "organized criminal activity"; before the report can be made public the court must be satisfied that it is supported by a preponderance of the evidence; if the report is critical of an identified person, that person and a number of witnesses chosen by that person, must have an opportunity to testify before the grand jury; the report cannot be made public until each public officer or employee named in it has been served with a copy of it, with the right to appeal before the report is accepted and to file an answer to be appendixed to the report. See also, 1C. WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, §110 (2d ed. 1982).

34. FRANKEL, supra note 4, at 32. See also 28 ALR Fed 851, 854-5.

35. Supra note 37, at 1222-1226.

36. Hurtado v. California, 110 U.S. 516 (1884).

37. See Branzburg v. Hayes, 408 U.S. 665 (1972).

38. New Jersey, South Carolina, Tennessee, Virginia. See EMERSON, supra note 15, at 12.

39. Alabama, Alaska, Delaware, District of Columbia, Georgia, Kentucky, Maine, Mississippi, New Hampshire, New York, North Carolina, Ohio, Texas, West Virginia. Id.

40. Connecticut, Florida, Louisiana, Massachusetts (In Massachusetts felonies punishable by five years or less in state prison may be prosecuted on the basis of a complaint in the District Court. However, if this option is selected instead of prosecuting the case in Superior Court following an

indictment, the defendant may not be sentenced to state prison but only to 2 1/2 years in the House of Corrections. Capital offenses and felonies punishable by more than five years in prison must be prosecuted by indictment.), Minnesota, Rhode Island. Id.

41. Arizona, Arkansas, California, Colorado, Idaho, Hawaii (Hawaii legislated this option after the Emerson report was written), Illinois, Indiana, Iowa, Kansas, Maryland, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Vermont, Washington, Wisconsin, Wyoming. Id.

42. FRANKEL, supra note 4, at 15.

43. EMERSON, supra note 15, at 69.

44. Consider, e.g., Missouri. See also, FRANKEL, supra note 4, at 32 "The majority of courts considering the questions have disallowed reports unaccompanied by indictment". BAUERMEISTER, Criminal Rule 6: Grand Jury Procedure, Alaska Court System (September 30, 1985) (unpublished memorandum) [hereinafter cited as BAUERMEISTER] citing, The Grand Jury as an Investigatory Body, 74 HARV. L. REV. 590, 595 (1961); KUH, supra note 4, at 1110, "Despite the historic foundation for the reporting function a practice apparently almost three centuries old...appears to condemn the use of reports by grand juries."

45. FRANKEL, supra note 4; SEARS, Grand Jury May Not Report on Misconduct of Public Official Without an Indictment, MO. L. REV. 43:350, 354 (1978); EMERSON, supra note 15, at 17.

46. FRANKEL, supra note 4.

47. Interim Report of the Grand Jury convened for the March Term of the Seventh Judicial District of Missouri 1976, 553 S.W. 2d 479 (1977).

48. 38 Am. Jur. 2d., Grand Jury §30 (1968).

49. See Camden County Grand Jury, 10 NJ 23, 89 A2d 416 (1952); Presentment by Camden County Grand Jury, 169 A2d 465, 470 (1961).

50. EMERSON, supra note 15, at 70; BAUERMEISTER, supra note 41, at 19-45.

51. "If the history of the grand jury reveals an institution that all too often has failed to achieve its idealized function of buffering innocents from official misuse of the power to prosecute, and if, worse still, it has become perverted into a weapon for harrassing and silencing the not-so-loyal opposition, questions about its possible abolition squarely confronts us." CLARK, THE GRAND JURY: THE USE AND ABUSE OF POLITICAL POWER (New York 1975); "The most sweeping design for change remains...the still powerful body of opinion that favors abolition of the grand jury. The effort proceeds not only in the states but also in the Congress...." FRANKEL, supra note 4, at 118.

52. More than half of the states have abolished the requirement of an indictment and give the prosecutor the discretion to choose between the prelimary hearing and the grand jury for case screening. FRANKEL, supra note 4, at 16; EMERSON, supra note 15, at 11-13. See also, EMERSON and AMES, The Role of the Grand Jury and the Preliminary Hearing in Pretrial Sentencing, NIJ (1984). The data for these studies was collected before Hawaii became the 26th State to offer the option, in November of 1982. (Telephone conversation with Emerson in Honolulu.)

53. See RUBENSTEIN, The Grand Jury in Alaska: Tentative Recommendations to the Judicial Council, Anchorage: Alaska Judicial Council (February, 1975), and EMERMAN, Report on Preliminary Hearings Experiment, Alaska Judicial Council (May 22, 1979) (unpublished memorandum). After a one year experiment involving the prosecuting of a higher portion of felony cases in Anchorage using prelimary hearings the results were not clear and the experiment was not continued. No further action was taken.

54. ABA MODEL GRAND JURY ACT

55. EMERSON, supra note 15, at 14-15.

56. Id. at 17.

57. "If it is to remain vital and worthy...the grand jury needs improvement...And this is where the main energies of law enforcers, at least on the federal scene, have been bent in recent years." FRANKEL, supra note 4, at 120-121; "In recent years, the major thrust of debate and activity involving grand juries has focused on changing the rules and procedures of the grand jury itself, rather than restructuring the process for case screening...For the most part, the changes proposed are designed to reform the grand jury by implementing a number of due process protections with respect to the operation of the grand jury and have principally been directed at its investigations role." EMERSON, supra note 15, at 13-14. See also, ARAGON, The Federal and California Grand Jury Systems: Historical Function, Procedural Differences and Move to Reform, CRIM. JUST. J., Vol. 5:5 (1981); supra note 61.

58. Precise statistics are not available because formal initiation process do not distinguishes between the screening and investigating activities of grand juries. Judges and prosecutors agree that it is the screening function of the grand jury which is exercised in at least 90% of the cases heard. This conclusion is supported by randomly checked totals in the grand jury files of several jurisdictions.

59. ALASKA CONST., art. I, sec. 8; ALASKA STAT. §12.40.030.

60. FRANKEL, supra note 4, at 10.

61. At least 26 states have made indictment by grand jury optional. See EMERSON, supra note 15.

62. Id. at 13-14.

63. The record of the Constitutional Convention is contained in ALASKA CONST. CONV. PROC. (1965). All discussion concerning grand juries is found in the minutes recorded at 1307-1308, 1322-1344, and 1395-1409. See also, BAUERMEISTER, supra note 41.

64. Id. at 1307.

65. For a general summary of Alaska's pre-statehood history and laws, see ALASKA STAT., V.I, "Preliminary Matter: Constitution, Treaties, etc." (Callaghan, 1900).

66. ALASKA COMP. LAWS.

67. See, e.g. YTREBERG, Validity in Construction of Statute Authorizing Grand Jury to Submit Report Concerning Public Servant's Non-Criminal Misconduct, 63 A.L.R. 3d. 568 (1975);

HASSMAN, Authority of Federal Grand Jury to Issue Indictment or Report Charging Unindicted Person with Crime or Misconduct, 28 A.L.R. Fed. 57 (1976); Recent Developments in the law of the Federal Grand Jury, UTAH L. REV. 170, 171 (1977).

68. 18 U.S.C.A., §§3331-3334.

69. People v. Superior Court of Santa Barbara County, 531 P2d 761, 765 (California 1975).

70. SCHIMIZZI, supra note 4 at 933.

71. See Id. at 934 citing Dauphin County Grand Jury Investigation Proceedings (No. 1), 332 Pa. at 295, 2A.2d at 787; Appeal of Hartranft, 85 Pa. 433 (1878); Commonwealth v. Bestwick, 396 A.2d 1311, 1315 (Pa. Super. Ct. 1978); Grand Jury Investigation of Western State Penitentiary, 173 Pa. Super. Ct. 197, 203-04, 96 A.2d 189, 192 (1953).

72. FRANKEL, supra note 4, at 6.

73. ALASKA R. CRIM. PROC. 8.

74. See ANN. ALASKA CODES (Callagahan and Co. 1900); COMP. LAWS TERR. ALASKA (1913).

75. THE WORKS OF JAMES WILSON, vol. II, 537 (1967), cited in In Re Report and Recommendation of June 5, 1972 Grand Jury, 370 F. Supp. 1219, 1222-3 (1974).

76. U.S. v. Cox, 342 F. 2d 167, 184 (5th Cir) cert. denied 381 US 935, 85 S. Ct. 1767, 14L.Fd. 2d 700 (1965).

77. Congressman Poff, CONG REC Vol 116, part 26, 91st Cong., 2d Sess., October 7, 1970 at 35-291.

78. Interim Report of the Grand Jury Convened for the March Term of the Seventh Judicial District of Missouri 1976, 553 S.W. 2d 479 (1977).

79. MO. REV. STAT. §540.020.

80. Supra note 49.

81. See, e.g. _____.

82. People v. Superior Court of Santa Barbara County, 119 Cal. Rptr. 193, 531 P.2d 761, 763 (1975).

83. Id.

84. Id.

85. Miami Herald Publishing Co. v. Marko, 352 So 2d 518 (1977).

86. Presentment by Camden County Grand Jury, 34 N.J. 378, 169 A.2d 465 (1961), affirmed, Presentment of the Essex County Grand Jury, 46 N.J. 467, 217 A.2d 874 (1966).

87. Matter of Report of Special Grand Jury, Nassau County, 477 NYS 2d 34 (NY Ap 1984); and Matter of April, 1983 Onondoga County Grand Jury, 476 NYS 2d 407 (NY App. 1984).

88. See HASSMAN, supra note 64, at 862-3.

89. Id. at 862.

90. Supra note 28, at 1226.

91. EMERSON, supra note 15, at 72.

APPENDIX A

SENATE RESOLUTION REQUESTING STUDY & RECOMMENDATIONS

Introduced: 8/5/85

IN THE SENATE BY V.FISCHER

SENATE RESOLUTION NO. 5 am

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SPECIAL SESSION

Requesting Judicial Council recommendations on grand jury investigative procedures.

BE IT RESOLVED BY THE SENATE:

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

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

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

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

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

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

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

procedures involved in use of that power;

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

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

APPENDIX B

ADDITIONAL ISSUES

APPENDIX B
ADDITIONAL ISSUES

During the course of the Judicial Council's grand jury study, a series of issues unrelated to the reporting function was identified. These issues are reviewed briefly herein to provide a resource for future research. These issues fall into the following three categories: Roles of judge, prosecutor and grand jury; rights of investigated individuals; and confidentiality of proceedings, returns and records.

ROLE OF THE JUDGE, PROSECUTOR AND GRAND JURY

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

The Judge

Formally and technically the grand jury is an arm of the court. The judge empanels and charges the grand jury. When the grand jury's powers are questioned or resisted, a judge rules on the matter. The judge decides matters submitted on presentment. The judge receives and reviews the grand jury's returns. The judge discharges the grand jury.

The Prosecutor

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

The Grand Jury

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

While grand jurors are empowered to question witnesses, most questioning is ordinarily conducted by the prosecutor. When grand jurors ask their own questions, prejudicial matter can be guarded against by objections from the prosecutor before the witness answers the question. In a 1976 New York case, a judge quashed a grand jury's report because the prosectuor had refused to let the panel question witnesses directly.[1]

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

After the traditional oath is administered to a newly empaneled grand jury, the judge "charges" the grand jury. Today in Alaska, the charge is an introduction to the duties, and a reminder of the responsibilities of the grand jury. The judge's charging instructions vary in style from court to court with minor variations in content. The instructions are brief, cursory and formal. In some courts the relevant statutes are read verbatim. The judge's instructions are read to the grand jurors and provided in written form. In Anchorage an additional unofficial "Grand Jury Handbook" is available but is not consistently distributed. The practice is for each newly charged grand jury to be "oriented" by a state prosecutor who provides grand jurors with an introduction to the criminal justice system. In Anchorage the orientation presentation is currently on videotape.

The ABA states, "It is the duty of the court which empanels a grand jury fully to charge the jurors by means of a written charge completely explaining their duties and limitations." [Principle 22] The ABA Model Grand Jury Act provides guidelines for the contents of the charge to the grand jury:

> Upon empanelment of each grand jury, the court shall properly instruct or charge the grand jury, and shall inform the grand jury inter alia of the following:
>
> (a) its duty to inquire into offenses against the criminal law alleged to have been committed within the jurisdiction;
>
> (b) its independent right to call and interrogate witnesses;
>
> (c) its right to request the production of documents or other evidence; including exculpatory evidence;
>
> (d) the necessity of finding credible evidence of each material element of the crime or crimes charged before returning a true bill;
>
> (e) its right to have the prosecutor present it with draft indictments for less serious charges than those originally requested by the prosecutor;
>
> (f) the obligation of secrecy;

(g) such other duties and rights as the court deems advisable. [Draft Stat. Sec. 204]

RIGHTS OF INVESTIGATED INDIVIDUALS

Grand jury reform nationally is concerned with the due process rights of witnesses and targets.[3] The grand jury confronts the witness in a secret proceeding and is not required to define its purposes to the witness. The witness is not allowed to be accompanied by a lawyer and may not be aware of his/her legal rights. There has, as a result, been a call for a "bill of rights" for witnesses and targets. The rights reformers wish to guarantee and safeguard are:

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

Notice

No Alaska statute or rule addresses witness or target rights to notice of their rights. Prosecutors describe informal policies to provide discretionary oral notice. Some guidance may be found in an unpublished memorandum opinion of the Alaska Court of Appeals.[4]

In that case a prosecutor introduced to the grand jury testimony given by the defendant at a preliminary hearing of another defendant. One relevant question addressed in the opinion was whether the defendant was entitled to suppression of his statements and dismissal of his indictment because the prosecutor did not warn him that he was a target witness before interrogating him at the

preliminary hearing. The court states in the opinion that "This is the first case in which we have been asked to hold that a potential defendant must be given target witness warnings before he testified at an accomplice's grand jury proceeding or preliminary hearing."[5] In a footnote that court defined "target witness" to include: (1) persons whom the state already has probable cause to arrest; (2) persons whom the state is either actively investigating or planning to investigate; and (3) persons who, during examination, clearly become the subjects of future investigation. The court added that "A person who fits within one of these three categories would be a 'target' witness unless the state had made a policy decision not to prosecute the witness prior to the time he or she was subpoenaed to testify."[6] The court concluded that, "such a witness is entitled to be warned that he is a suspect and that he should seek independent legal advice before testifying.."[7] In another footnote the court stated that its conclusion was based on ABA Standards Relating to the Prosecution Function, Section 3-3.6 (Supp. 1982).

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

> While we agree that typical witnesses are not entitled to warnings prior to testifying at civil or criminal proceedings, see 8 J. Wigmore, Evidence Sections 2268-69 (McNaughton rev. ed. 1961), we believe that the target witness is in a substantially different situation from the typical witness in regard to the protection of his privacy. A true target witness is almost certain to incriminate himself if he testifies fully and freely regarding his accomplice's guilt. His exposure is readily foreseen by the

> prosecution. In contrast, a non-target witness is by definition not known to be involved in the defendant's criminality. The prosecutor cannot therefore intentionally use the defendant's preliminary hearing or grand jury proceeding as a means of building a case against the non-target witness. It is only where the prosecutor knows that he will be proceeding against the witness that he has substantial incentive to turn the preliminary hearing into an inquisition.[8]

An article summarizing relevant case law states that most federal courts faced wtih the issue of notice in the context of grand jury proceedings have held that Miranda-type warnings are not required in the grand jury context. Some state courts have approved, but have not mandated witness notice.[9] Actual procedures vary from jurisdiction to jurisdiction "and sometimes from prosecutor to prosecutor."[10] Colorado has outlined the elements of proper notice to witnesses in a 1977 statute, but leaves the application of such notice to the discretion of the prosecutor.[11] Some states restrict the notice requirement to target witnesses. New Mexico law requires that all targets be notified of their status unless the prosecutor determines that notification may result in flight, endanger other persons, obstruct justice, or the prosecutor is unable with reasonable diligence to notify said person.[12] South Dakota law states that targets may be given the opportunity to testify and if the target chooses to take advantage of this opportunity, notice of all rights must be given.[13]

The relevant ABA priniciple [Principle 2] states that every witness, including target witnesses, should be informed of:

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

The Model Act requires that the subpoena inform witnesses of these rights, and also the general subject matter of the investigation and the substantive criminal statute or statutes violation which is under consideration by the grand jury. [Draft Statute Sec. 200]

Counsel

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

The grand jury witness has traditionally been, and generally still is, prohibited from having a lawyer in the grand jury room. At the federal level and in most states, the witness is afforded the right to leave the grand jury room to consult with counsel. Prosecutors assert that this procedure allows sufficient access to counsel, and that counsel in the grand jury room would disrupt proceedings. Proponents of the right to counsel in the grand jury room argue that the present arrangement is awkward and is itself disruptive, and may not adequately protect witness rights. At least sixteen states now allow counsel in the grand jury room.[14] There is some national reform pressure to extend this practice. The Chairman of the Amercian Bar Association's Grand Jury Committee recently testified before Congress that the grand jury is

the only remaining critical stage in the criminal justice process at which a person who desires a lawyer present is denied that constitutional right.

Although provisions for right to counsel in the grand jury room have been aoopted in at least sixteen states, there is considerable variance as to whom this right applies. In Virginia and Pennsylvania this provision only applies to special grand juries which are investigative only. In Washington State, right to counsel is not available to witnesses testifying under a grant of immunity, but is to all others. In Minnesota and New York, right to counsel is available only for those witnesses who have specifically waived their right to immunity. In Michigan the right to counsel is only available to witnesses testifying under a grant of immunity. In Arizona and New Mexico, the right to counsel is available to target witnesses. In Colorado, Illinois, Kansas, Massachusetts, Oklahoma, South Dakota, and Wisconsin, the right to counsel is granted to all witnesses.[15]

The ABA Model Act addresses the issue of counsel in the grand jury room in this way:

> Counsel
>
> (a) A witness before the grand jury shall have the right to be accompanied by counsel in his or her appearance before the grand jury. Such counsel shall not be permitted to address the grand jurors, raise objections, make arguments, or otherwise disrupt proceedings before the grand jury. Such counsel is authorized to disclose matters which occur before the grand jury to the same extent as is permitted to the client.

(b) If the court determines that counsel for a grand jury witness has violated subsection (a), then the court may take such measures as are necessary to ensure compliance with this rule, including exclusion of the offending counsel from the grand jury room. [Draft Stat. Sec. 201(1)]

Against Self-Incrimination

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

(1) Use Immunity: Forbids later use against the witness of either the evidence the witness has been forced to give or evidence derived from his testimony.

(2) Transactional Immunity: Protects against prosecution for any of the transactions or occurrences that are subjects of the compelled testimony.[16]

Transactional immunity is the broader of the two, and argued by some to be the only workable approach. Alaska, by statute, offers use immunity.[17] The statute is modeled after provisions in federal law.[18] In practice, however, transactional immunity has been granted to some witnesses in Alaska. Those who support transactional immunity argue that use immunity leaves the witness exposed to the danger that new evidence might be found and used against him or her as a result of new leads, new witnesses and new information arising from the compelled testimony. The U.S.

Supreme Court addressed this argument by holding that in any later case the burden would be on the prosecutor to prove the absence of such "taint" in the new evidence.

The immunity provisions in other states vary. The broadest right is granted in New York where automatic transactional immunity is granted to all witnesses. Immunity must be specifically waived to allow any prosecution concerning the transactions or occurrences which are the subject of testimony.[19]

To Be Heard

In the context of the investigative grand jury, the right of a target to be heard arises at two stages:

(1) during the proceedings;
(2) upon the issuing of a report.

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

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

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

> Under normal circumstances, where no burden upon the grand jury or delay of its proceedings is involved, reasonable requests by a "subject" or "target" of an investigation...personally to testify before the grand jury ordinarily should be given favorable consideration provided that such witness explicitly waives his privilege against self-incrimination and is represented by counsel or voluntarily and knowlingly appears without counsel and consents to full examination under oath.[Sec. 9-11.252]

The provisions of other states vary. The states that do grant a right to testify to the target characteristically limit that right at least to some extent. New Mexico law requires that a witness be provided an opportunity to testify except when there is reason to believe the target will flee or obstruct justice or when the prosecutor cannot locate the target.[20] New York grants a right to testify, but the witness must waive all rights to immunity.[21] Under Colorado law, a target may request to testify, and a written record must be made and kept of all denials and the reason for each. The law also provides for a petition to the court for a hearing on a denial.[22]

The ABA recommends that a target of a grand jury investigation be granted the right to testify before the grand jury provided that the witness signs a waiver of immunity.[23]

Confidentiality of Proceedings, Returns, & Records

Confidentiality issues include:

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

Classification

The secrecy or public nature of grand jury selection, swearing, and charging procedures is not clear. In Anchorage, proceedings in which grand jurors are selected are recorded in "public" tapes in "open" court. The names of grand jurors are announced on the record in open court. After the hearing, the log notes of the proceedings are kept confidential. The names of grand jurors are kept confidential and only released upon order of the court. The procedure in Nome is the same. The procedure is similar in Fairbanks; no one except grand jurors are allowed in the courtroom. In Ketchikan the names of grand jurors are never announced on the record except for those jurors who are excused or otherwise named in the selection procedure.[24]

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

Procedures

The rule requiring destruction of grand jury returns and records of proceedings in cases when the suspect or target has never been "held to answer" is not enforced because no method of enforcement has been instituted. No time limit for accomplishing the required disposition exists. Because the recording of many proceedings are done one after the other on a reel-to-reel tape, it is a very tricky proposition to erase or splice out only the intended record, and not portions of adjacent proceedings. Recently a court order [Order 3AN-A0-85-10, May 13, 1985] issuing in the Third Judicial District made an attempt to address part of the problem. The relevant part of this order states:

> The court further interprets Criminal Rule 6(n) as requiring the destruction and/or erasure of the indictment, evidence, minutes, notes and record of any (sic) grand jury proceeding in which a "no true bill" has been returned. However, such indictment, evidence, minutes, notes and records shall be maintained, under seal, for 60 days to provide the state or defendant an opportunity to apply to the court or leave to have access to such materials, should good cause for access thereto be shown.

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

Security

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

(1) to prevent the escape of those whose indictment may be contemplated;

(2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors;

(3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it;

(4) to encourage free and untrammeled disclosure by persons who have information with respect to the commission of crime;

(5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.[25]

As noted in the introduction to this report, a breach of security during the grand jury's Fairbanks state office lease investigation led to publication of a court recorder's log notes in the media prior to the conclusion of the grand jury's secret deliberations. In other jurisdictions, breaches of confidentiality have resulted from confusion about proper classifications for records of proceedings. In 1980 the General Accounting Office of the federal government conducted a study of the federal district court system to determine sources of grand jury leaks, and ways to address them. The major source of leaks according to this report was confusion about what information must be kept secret.

Approximately 60% of the leaks were attributable to this confusion. The next most frequent source of leaks was the government attorney or workers in that office. A little less than 20% of the leaks were attributable to this source. The third most frequent source of leaks was inadequate security provisions, at about 5%. A few leaks were noted from court reporters and grand jurors. No leaks were attributed to witnesses. Twenty-percent of the sources for leaks were unknown.[26]

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

(1) Developing rules and laws which clearly define what must be kept secret during the duration of grand jury proceedings, including specific guidelines for handling (1) preindictment proceedings, (2) grand jury subpoenas, (3) evidence developed independently of a grand jury but later introduced to it, (4) duplicates and copies of original documents presented to a grand jury, and (5) internal government memoranda and other documents that tend to disclose what transpires before a grand jury;

(2) Reviewing plans so that courts and government attorneys' offices are in a position to react appropriately whenever situations calling for maintaining the confidentiality of grand juror names arise;

(3) Establishing guidelines setting forth the minimum physical security requirements needed

to protect the secrecy of grand jury materials;

(4) Requiring each custodian of grand jury materials, including court appointed reporters, to establish procedures consistent with the security guidelines and document them in a security plan to be approved by the appropriate court;

(5) Providing for periodic audits by the court administrator's office of all custodians of grand jury materials to determine whether they are complying with appropriate security plans and whether security procedures need to be improved; and

(6) Evaluating the physical security around grand jury rooms and developing an appropriate plan to upgrade and modify deficient facilities to insure that the secrecy of grand jury proceedings will not be compromised.[27]

NOTES

APPENDIX B

1. Matter of Four Reports of the Nassau County Grand Jury Designated as Panel No. 4 for the April 1975 Term of the County Court of Nassau County (Nassau Cty. Ct. April 27, 1976).

2. See FRANKEL AND NAFTALIS, THE GRAND JURY: AN INSTITUTION ON TRIAL (New York 1977) [hereinafter cited as FRANKEL]; EMERSON, GRAND JURY REFORM: A REVIEW OF KEY ISSUES, NIJ (Washington, D.C. 1983) [hereinafter cited as EMERSON]; ABA MODEL GRAND JURY ACT.

3. See FRANKEL, supra note 2, at 4.

4. Cox v. State of Alaska (Unpublished Memorandum Opinion).

5. Id.

6. Id.

7. Id.

8. Id.

9. SCHNEIDER, The Grand Jury: Powers, Procedures, and Problems, 9 COLUM. J. L. and SOC. PROBS. 681, 715 (1973).

10. EMERSON, supra note 2, at 84.

11. COLO. REV. STAT. §16-5-204(4)(a) (1978).

12. N.M. STAT. ANN. §31-6-11 (1979).

13. S.D. COMP. LAWS ANN. §23A-5-13 (1979).

14. See EMERSON, supra note 2, at 90-91.

15. Id.

16. FRANKEL, supra note 2, at 77.

17. ALASKA STAT. §12.50.101.

18. See CRIM. JUST. MAN.

19. N.Y. CRIM. PROC. LAW §190.52.

20. N.M. STAT. ANN. §31-8-11(13) (1979).

21. N.Y. CRIM. PROC. LAW §190.52.

22. COLO. REV. STAT. §16-5-204(4)(1)(1978).

23. ABA Policy on the Grand Jury, Principle 5.

24. BAUERMEISTER, Criminal Rule 6: Grand Jury Procedure, Alaska Court System, (Sept. 30, 1985) (unpublished memorandum).

25. United States v. Proctor & Gamble Co, 35 U.S. 677, 681 n. 6 (1958).

26. GAO, Report to the Congress: More Guidance and Supervision Needed Over Federal Grand Jury Proceedings, GGD-81-18 (Washington, D.C. 1980).

27. Id. at pp. 33-34.