
NOTES

THE REPORTORIAL POWER OF THE ALASKA GRAND JURY

*The power of grand juries to investigate and make recommendations concerning the public welfare or safety shall never be suspended.*¹

I. INTRODUCTION

The extent of the power of Alaska grand juries to issue recommendations concerning specific public officials was brought into focus when, on July 1, 1985, a Juneau grand jury issued a report recommending that the Alaska Senate commence impeachment proceedings against Governor William Sheffield.² Although the grand jury elected not to indict the governor formally, it prepared a report alleging that

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1. ALASKA CONST. art. I, § 8. ALASKA STAT. § 12.40.030 (1984) provides in pertinent part: "The grand jury shall have the power to investigate and make recommendations concerning the public welfare or safety."

2. On April 24, 1985, a Juneau grand jury commenced an investigation into circumstances surrounding the state's lease of 32,000 square feet of office space from the Fifth Avenue Center in Fairbanks. Report of the Grand Jury Concerning the Investigation Conducted into the Fairbanks Consolidated State Office Lease with the Fifth Avenue Center at 1 (July 1, 1985) [hereinafter Report of the Grand Jury]. The grand jury directed its attention to the role of Governor Sheffield and some of his staff members in the procurement process for the consolidation of state office space in Fairbanks. *Id.* at 2-3. The governor testified before the grand jury. *Id.* at 14. On July 2, 1985, the grand jury released its findings to the Superior Court of the First Judicial District of Juneau. The grand jury alleged that with the governor's approval certain staff members had pressured the Department of Administration to change bid specification for the office space so that only the Fifth Avenue Center could meet the specifications. *Id.* at 7-10. The grand jury found that the governor intervened for the purpose of doing a favor to a political supporter, who was part owner of the Fifth Avenue Center. *Id.* at 8. The grand jury also implied that the governor had lied in his testimony. *Id.* at 14. The grand jury did not indict the governor or any of his staff, however. Instead, the grand jury chose to issue a report which recommended, *inter alia*, that the senate be called into special session to consider commencing impeachment proceedings against Governor Sheffield. *Id.* at 18. The superior court that impanelled the grand jury accepted the report for public filing after an *ex parte* proceeding with the prosecutors who conducted the grand jury investigation. ALASKA JUDICIAL COUNCIL, THE INVESTIGATIVE GRAND JURY IN ALASKA at 8 (Draft Report, Feb. 1986). Impeachment proceedings ensued. The senate, however, voted not to impeach the governor. N.Y. Times, Aug. 6, 1985, at A11, col. 1.

he had helped to steer the state's lease of office space to a political supporter and that he had lied before the grand jury during its investigation of that transaction.³ In an *ex parte* proceeding with the prosecutors who conducted the grand jury proceedings, the trial court that had impanelled the grand jury accepted the report for public filing.⁴ The trial court stated that its sole function in reviewing the report was "to prevent the grand jury from making an illegal report."⁵ This note examines the propriety of that decision and the scope of the grand jury's power under article I, section 8 of the Alaska Constitution.

The principal issue addressed by this note is whether the grand jury possesses the authority to issue reports critical of identifiable individuals. Such reports have met with a varied reception. Some authorities have denounced reports critical of identifiable individuals as "foul blows" that deny procedural fairness to the criticized individual.⁶ Others have praised such reports as necessary to deter official wrongdoing.⁷ In an attempt to clarify the power of the Alaska grand jury to issue recommendations critical of specific individuals, Part II of this note examines the history of the grand jury in England and the United States with particular reference to Alaska. Part III evaluates the principal policy arguments for and against grand jury reports. Part IV analyzes the pertinent constitutional history of article I, section 8 in order to define the scope of the grand jury's power. This note concludes that the grand jury does have limited power to issue recommendations that criticize public officials. Part V compares the law of other jurisdictions with that of Alaska. Finally, in Part VI, the note analyzes various measures aimed at increasing procedural fairness in grand jury reports and recommends that Alaska adopt certain measures.

3. Report of the Grand Jury, *supra* note 2, at 10, 14.

4. Memorandum from Daniel W. Hickey, Chief Prosecutor, to Harold M. Brown, Attorney General, at 24-25 (Aug. 20, 1985) [hereinafter Memorandum of Chief Prosecutor] (quoting Transcript of the Grand Jury Concerning the Investigation Conducted into the Fairbanks Consolidated State Office Lease with the Fifth Avenue Center).

5. Memorandum of Chief Prosecutor, *supra* note 4, at 51-52 (quoting Transcript of the Grand Jury Concerning the Investigation Conducted into the Fairbanks Consolidated State Office Lease with the Fifth Avenue Center).

6. *E.g.*, *People v. McCabe*, 148 Misc. 330, 333, 266 N.Y.S. 363, 367 (1933).

7. *E.g.*, *In re Presentment by Camden County Grand Jury*, 10 N.J. 23, 66, 89 A.2d 416, 444 (1952). In *In re Presentment by Camden County Grand Jury*, 34 N.J. 378, 169 A.2d 465 (1961), the New Jersey Supreme Court confirmed the basic principles of *In re Presentment by Camden County Grand Jury*, 10 N.J. 23, 89 A.2d 416 (1952), but disapproved of the court's failure to remove certain allegations in the report that were not connected with the detrimental public conditions.

II. THE HISTORY OF THE GRAND JURY'S REPORTING POWER

The principal functions of the grand jury are to serve "as a body of accusers sworn to discover and present for trial persons suspected of wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action."⁸ The *Shenick* case raises the question of the propriety of what may be viewed as a third role — issuing reports, written statements which do not formally charge any individual with the commission of a crime.⁹ An examination of the historical development of the functions of the grand jury is essential to understanding how the grand jury should operate today.

A. England

Historians generally trace the origins of the modern grand jury back to the Assize of Clarendon.¹⁰ The assize established bodies of twelve men in each county to accuse those they believed to have committed crimes.¹¹ In its early stages, the grand jury functioned to strengthen royal power by providing the Crown with additional control over the administration of justice.¹² Acting solely as accuser, the grand jury did little to protect the rights of individuals during the first two centuries of its existence.¹³

8. *United States v. Calandra*, 414 U.S. 338, 342-43 (1974).

9. Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?*, 55 COLUM. L. REV. 1103 (1955). Reports are delivered to the trial court that impanels the grand jury. *Id.* Reports have been directed at community conditions, *see, e.g., In re Monmouth County Grand Jury*, 24 N.J. 318, 321, 131 A.2d 751, 753 (1957), and some reports have criticized specific individuals, *see, e.g., Hayslip v. State*, 193 Tenn. 643, 249 S.W.2d 882 (1952) (report criticized teacher for making false complaint to grand jury), *cert. denied*, 344 U.S. 879 (1952). Reports of the former type often go unchallenged because individuals cannot allege sufficient injury to achieve standing. *See In re United Elec., Radio & Mach. Workers*, 111 F. Supp. 858, 869 (S.D.N.Y. 1953). Specific reports, on the other hand, are frequently challenged.

Reports should be distinguished from indictments and presentments. An indictment is a formal accusation made by a prosecutor that is submitted to the grand jury so that it may determine if there is enough evidence to obtain a conviction. If the grand jury finds sufficient evidence, it endorses "A True Bill" on the indictment. The grand jury simply ignores the accusation if the prosecutor's evidence is insufficient. Comment, *Constitutional Law — Judicial Powers — Legality of the Grand Jury Report*, 52 MICH. L. REV. 711, 714 (1954). Traditionally, a presentment is an accusation of crime made by the grand jury from its own knowledge. The presentment provides a basis upon which the prosecutor frames an indictment. *Id.* Alaska recognizes a special form of presentment by which the grand jury may ask the trial court for instructions on the applicable law. ALASKA R. CRIM. P. 6(o).

10. Kuh, *supra* note 9, at 1106.

11. *Id.*

12. *Id.*

13. *Id.* at 1107.

Gradually, the grand jury's second function — that of protecting citizens from arbitrary government action — developed. Open proceedings had subjected individuals to public opprobrium even when the Crown initiated unfounded prosecutions.¹⁴ Thus, the grand jury began to hear witnesses in private. That practice, in turn, led to the formation of the now firmly established rule regarding the secrecy of grand jury proceedings.¹⁵

Another significant event in the evolution of the second function occurred in 1681 when King Charles II attempted to convict Stephen Colledge and the Earl of Shaftesbury for treason. Both men were adamant Protestant opponents of the King's attempts to reestablish the Catholic Church in England during the aftermath of the Restoration.¹⁶ In each case, the grand jury rebuffed the King's attempts to influence the proceedings and ignored the bills of indictment submitted by the royal prosecutors.¹⁷ The actions of the grand juries in those cases have been hailed as the genesis of the grand jury's role as a buffer between innocent citizens and oppressive prosecution by the government.¹⁸

At the same time that the grand jury was developing as a bulwark against government oppression in England, grand juries were also issuing reports. In seventeenth and eighteenth century England, grand juries inquired into the misconduct of royal officers. In 1678, for example, a Gloucestershire grand jury commented on increasing beggar nuisance and recommended that the constables enforce the law against such conduct.¹⁹ In 1679, a county coroner was criticized for "vexing" a coroner's jury that refused to follow his direction to find a verdict.²⁰ Grand juries issued reports concerning, among other things, the supervision of prisons by the justices, the use of false drink measures by innkeepers, the improper care of county property, and the acceptance by justices of improper fees.²¹

14. See Comment, *supra* note 9, at 716.

15. Note, *Propriety of a Breach of Grand Jury Secrecy When No Indictment Is Returned*, 7 HOUS. L. REV. 341, 343-44 (1970). Under the rule of grand jury secrecy, only the grand jurors, the prosecutor, the witness under examination, and certain court officers are permitted to attend the proceedings. ALASKA R. CRIM. P. 6(k). Only the jurors may be present when the grand jury deliberates. *Id.* Disclosure of matters occurring before the grand jury to outside parties is strictly limited. See ALASKA R. CRIM. P. 6(l).

16. Note, *The Exercise of Supervisory Powers to Dismiss a Grand Jury Indictment — A Basis for Curbing Prosecutorial Misconduct*, 45 OHIO ST. L.J. 1077, 1078 (1984).

17. *Id.*

18. *Id.* at 1108.

19. Kuh, *supra* note 9, at 1110.

20. *Id.*

21. *Id.*

One early decision even suggests that there may have been common law authority for grand jury reports. In 1683, a Chester grand jury informally charged the Earl of Macclesfield with seditious conduct without indicting him.²² The Earl sued a member of the grand jury for libel. The defense argued that it was common practice for grand juries to issue reports on any matters concerning county business.²³ In response, the Earl's counsel asserted that it was illegal for the grand jury to damage an individual's reputation without providing him the opportunity to answer the allegation.²⁴ The court, without opinion, held unanimously for the grand juror.²⁵ While the precedential value of the decision remains open to question,²⁶ it is clear that grand jury reports were a customary practice in England.

B. The United States

With little modification, our founding fathers borrowed the English institution of the grand jury.²⁷ The framers of the United States Constitution included the right to an indictment by a grand jury in the fifth amendment for the same purposes as the grand jury had been used in England — to determine whether there is probable cause to believe a certain person has committed a crime and to protect citizens from unfounded prosecution.²⁸

Additionally, the colonists brought the practice of grand jury reporting on matters of public concern to America. New Jersey grand juries issued reports on public affairs as early as 1680.²⁹ In 1766, an Annapolis grand jury issued a report on the neglect of city officials to account for lottery proceeds and to attend meetings.³⁰ In 1742, a Charleston grand jury noted the failure of constables to regulate markets properly.³¹ During the Revolution, grand juries cited the neglect of duty by public officers and recommended new laws for exigent situations.³² A South Carolina grand jury in 1783 recommended regulation of attorneys' fees.³³ After the ratification of the Constitution,

22. *Earl of Macclesfield v. Starkey*, 10 How. St. Tr. 1330, 1330-33 (1684-1685).

23. *Id.* at 1356.

24. *Id.* at 1345-46.

25. *Id.* at 1414.

26. See Comment, *Grand Jury Reports: An Examination of the Law in Texas and Other Jurisdictions*, 7 ST. MARY'S L.J. 374, 379-80 (1975).

27. *Hurtado v. California*, 110 U.S. 516, 521 (1884).

28. See *United States v. Calandra*, 414 U.S. 338, 343 (1974).

29. See *In re* Presentment by Camden County Grand Jury, 10 N.J. 23, 41, 89 A.2d 416, 427 (1952).

30. R. YOUNGER, *THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES*, 1634-1941, at 18 (1963).

31. *Id.*

32. *Id.* at 36-37.

33. *Id.* at 42.

grand juries continued to reprimand local officials and to suggest change in local government.³⁴ Although courts disagree over whether the grand jury had common law *authority* to issue reports,³⁵ the practice itself was prevalent, as these examples illustrate.

C. Alaska

Prior to Alaska's statehood, the territorial legislature adopted a statute that required grand juries to investigate the conditions and management of prisons and judicial offices.³⁶ The statute did not explicitly mention reporting the results of these inquiries. Nevertheless, grand juries normally made an annual inspection of the jails and reported their findings and recommendations to the court.³⁷ These reports were typically based on simple observation rather than formal investigation.³⁸ Records of territorial grand juries do, however, reveal at least one investigative report. In 1954, a Ketchikan grand jury investigated police corruption in connection with prostitution and returned a famous report that led to the indictments of the chief of police and the United States Attorney in Ketchikan.³⁹

After statehood, article I, section 8 of the Alaska Constitution granted grand juries the power to "investigate and make recommendations concerning the public welfare or safety."⁴⁰ Since the enactment of the constitution, grand juries have continued to report on jail conditions, courthouse facilities, criminal justice procedures, and general crime conditions in the community.⁴¹ Grand juries have also issued reports critical of specific individuals. For example, in 1967, a Fairbanks grand jury investigated jail conditions and returned a report criticizing management of the jail generally and holding the named superintendent responsible. The grand jury also recommended changes in policy, personnel, and supervision at the jail.⁴² In 1974, an Anchorage grand jury report criticized the Director of the Division of Corrections and the Commissioner of Health and Social Services.⁴³

34. *Id.* at 47.

35. *Compare In re Grand Jury* January, 1969, 315 F. Supp. 662, 675 (D. Md. 1970) (finding common law authority to issue reports critical of public official) *with In re Report of Grand Jury of Baltimore City*, 152 Md. 616, 623, 137 A. 370, 372 (1927) (finding no common law power to criticize individuals in grand jury reports).

36. ALASKA COMPILED LAWS ANN. § 66-8-29 (1949).

37. ALASKA JUDICIAL COUNCIL, *supra* note 2, at 44-45.

38. *Id.* at 45.

39. *Id.*

40. ALASKA CONST. art. I, § 8.

41. ALASKA JUDICIAL COUNCIL, *supra* note 2, at 45.

42. *Id.* at 48.

43. Memorandum of Chief Prosecutor, *supra* note 4, at 27 (quoting Report of the Grand Jury, Third Judicial District, at 2, 6 (November 8, 1974)).

And in 1975, an Anchorage grand jury investigated the criminal justice system and made recommendations concerning a correctional officer, the public defender's office, and the district attorney's office.⁴⁴

III. THE PRINCIPAL ARGUMENTS FOR AND AGAINST GRAND JURY REPORTS CRITICAL OF SPECIFIC INDIVIDUALS

There is significant debate over the propriety of grand jury reports, particularly those that criticize individuals. Analysis of the policy arguments underlying each side of the debate will facilitate understanding of the concerns of the framers of the Alaska Constitution when they discussed article I, section 8. Furthermore, this analysis will help in evaluating whether reform of this power is necessary, and, if so, which methods will be effective.

A. Arguments Opposing Grand Jury Reports

The principal argument against reports that criticize individuals proceeds from the concept of fundamental fairness. Essentially, the argument is that a critical report subjects the person named therein to a quasi-official accusation of misconduct that he cannot answer in an authoritative forum.⁴⁵ By criticizing a public official for negligence or incompetence in administering his office, the grand jury imposes upon that official the punishment of public reprimand. This punishment is based upon *ex parte* proceedings conducted in secret.⁴⁶ Typically, one being investigated has no right to know of the grand jury's inquiry or to confront his accusers.⁴⁷ Although an individual indicted by a grand jury faces the same rules, that person is furnished at trial with an official forum in which to rebut the charges against him. A report, on the other hand, does not normally lead to further judicial proceedings and is, in that sense, final.⁴⁸ In most instances, the criticized individual is not provided with an official opportunity to answer the allegations of the report.

The fact that the grand jury is generally well respected heightens these concerns. The public properly considers the grand jury as an arm of the impanelling court.⁴⁹ Thus, unlike newspaper reports or reports of other investigative bodies, grand jury statements carry an

44. *Id.* at 28-30 (quoting 1975 Special Investigation Grand Jury Report, Third Judicial District, at 2-3 (November 5, 1975)).

45. *In re* United Elec., Radio & Mach. Workers, 111 F. Supp. 858, 867 (S.D.N.Y. 1953).

46. *Id.*

47. *Simpson v. Langston*, 281 Ark. 458, 460, 664 S.W.2d 872, 873 (1984).

48. *Wood v. Hughes*, 9 N.Y.2d 144, 154, 173 N.E.2d 21, 26, 212 N.Y.S.2d 33, 39-40 (1961).

49. Comment, *supra* note 9, at 717.

aura of judicial approval.⁵⁰ The community often does not question the accuracy of the pronouncements of the grand jury.⁵¹ And even if the public or the press desires to scrutinize the basis of a report, the rule requiring secrecy of grand jury minutes thwarts their efforts to look behind the report and assess its reliability.⁵² For these reasons, in most jurisdictions where there is no prepublication review of the evidence underlying the report by the trial court, even a litigant who succeeds in having the court remove a published report from the record has won a "hollow victory." The grand jury had already made its official impression on the public.⁵³

Other arguments against the grand jury report are less compelling. Some courts have indicated that reports contravene the rule of grand jury secrecy.⁵⁴ As noted earlier, grand jury reports were customarily issued at common law at the same time as the secrecy requirement developed.⁵⁵ It therefore appears inconsistent to suggest that this secrecy rule was intended to nullify the historical reporting function of grand juries by preventing any disclosure of a report. More importantly, most of the articulated policy reasons for grand jury secrecy are not implicated after the grand jury has completed its investigation and returned its report to the trial court.

The policy concerns underlying the grand jury secrecy rule have been expressed as follows:

(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (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.⁵⁶

After the grand jury has returned its report, escape is irrelevant because the report does not indict the person mentioned. Nor is there call for concern over subornation of witnesses or restraints on grand

50. *In re Osborne*, 68 Misc. 597, 604, 125 N.Y.S. 313, 318 (1910).

51. Comment, *supra* note 9, at 717.

52. *Id.* at 717-18.

53. See *In re Presentment by Camden County Grand Jury*, 34 N.J. 378, 392, 169 A.2d 465, 472 (1961).

54. *In re United Elec., Radio & Mach. Workers*, 111 F. Supp. 858, 865-66 (S.D.N.Y. 1953).

55. See *supra* text accompanying notes 19-26 and 29-35.

56. *United States v. Amazon Indus. Chem. Corp.*, 55 F.2d 254, 261 (D. Md. 1931).

jury deliberations. The investigation is complete, the grand jury has reached its decision, and no trial follows. Grand jury proceedings do not implicate the final policy reason for grand jury secrecy because a public official who is criticized in a report is not "innocent." The grand jury has found misconduct or negligence in office on the part of this official. On the other hand, there should be some concern over the fullness and candor of the testimony of witnesses. The possibility of future disclosure of the witnesses' testimony to outside parties may influence some witnesses.⁵⁷

The fact that grand jury reports implicate a few of the policy reasons for grand jury secrecy should not, by itself, preclude public filing of such reports. In some situations, other legitimate interests may outweigh the need for grand jury secrecy. For example, the United States Supreme Court has recognized the right of civil litigants to obtain federal grand jury transcripts in appropriate circumstances.⁵⁸ In such cases, courts weigh the need for disclosure against the need for continued secrecy.⁵⁹ Should courts apply this balancing test when confronted with grand jury reports, the need for disclosure will frequently outweigh any remaining interests in secrecy — at least in those jurisdictions that acknowledge the importance of exposing the noncriminal misconduct of public officials.⁶⁰

Critics of grand jury reports also argue that the grand jury lacks objective standards to evaluate noncriminal misconduct.⁶¹ When the grand jury considers an indictment, it analyzes the alleged conduct under standards defined by the legislature in the criminal statutes. When the grand jury issues a report on conduct not constituting a crime, it ordinarily must rely on the jurors' own subjective criteria of public morals. Actually, however, this may represent a significant advantage of reports: reports allow grand juries to express the conscience of the community and to require conduct that meets a standard higher than the standard set by the criminal laws.⁶² If the report concerns conduct that does not contravene the community's standards, the public may well disregard the report.⁶³

57. *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979).

58. *Id.*

59. *Id.*

60. See *In re Report and Recommendation of June 5, 1972 Grand Jury*, 370 F. Supp. 1219, 1229-30 (D.D.C. 1974); BEALE & BRYSON, *GRAND JURY LAW AND PRACTICE*, § 3.03 n.3 (1986).

61. See, e.g., *Wood v. Hughes*, 9 N.Y.2d 144, 154, 173 N.E.2d 21, 26, 212 N.Y.S.2d 33, 39-40 (1961).

62. BEALE & BRYSON, *supra* note 60, § 3.03 n.3.

63. See *Monroe v. Garrett*, 17 Cal. App. 3d 280, 284, 94 Cal. Rptr. 531, 533-34 (1971).

Opponents also contend that the grand jury's reporting power is not consistent with the grand jury's historical role as a protector of the individual.⁶⁴ When the grand jury merely considers a request for an indictment it does nothing affirmatively to assist the state. The accusation is formed by the prosecutor, and an indictment is merely an acquiescence in this accusation. In the indictment situation, therefore, the grand jury's role is inherently that of a buffer between the state and the individual. Opponents argue that when the grand jury participates in the initial investigation and issues a report, the grand jury goes beyond evaluating the accusation and in fact accuses the individual.⁶⁵

The historical development of the grand jury weakens the force of this argument. First, the grand jury has an accusatory purpose, which was its original role.⁶⁶ The grand jury did not begin to serve as a buffer against arbitrary prosecution until centuries after its inception. Second, the grand jury has had a reporting function in addition to its indicting function for the past several centuries.⁶⁷ This long history suggests that the reporting function is not inconsistent with the grand jury's role as a protector against arbitrary prosecution.

B. Arguments Favoring Reports

The principal argument in favor of the grand jury's reporting power is that there are many official acts that do not constitute indictable conduct but are nonetheless against the public interest and warrant exposure. Since the people must be informed if democratic government is to function effectively, it is essential that such misconduct be revealed in an effective, official manner.⁶⁸ In affirming the publication of a grand jury report critical of prison officials, the New Jersey Supreme Court stated:

No community desires to live a hairbreadth above the criminal level, which might be the case if there were no official organ of public protest. Such [reports] are a great deterrent to official wrongdoing. By exposing wrongdoing, moreover, such [reports] inspire public confidence in the capacity of the body politic to purge itself of untoward conditions.⁶⁹

64. See, e.g., *In re Jones*, 101 A.D. 55, 61, 92 N.Y.S. 275, 279 (1905) (Woodward, J., dissenting).

65. Note, *The Grand Jury as an Investigatory Body*, 74 HARV. L. REV. 590, 594 (1961).

66. See Kuh, *supra* note 9, at 1105; see also *supra* text accompanying notes 11-13.

67. See Kuh, *supra* note 9, at 1105-06; see also *supra* text accompanying notes 19-26 & 29-35.

68. See *In re Presentment by Camden County Grand Jury*, 10 N.J. 23, 65-66, 89 A.2d 416, 443-44 (1952).

69. *Id.* at 66, 89 A.2d at 444.

Courts in jurisdictions favoring reports have emphasized the growing complexity of modern government "that defies the best intentions of the citizen to know and understand it."⁷⁰ With an ever-expanding government bureaucracy, public employees become further removed from those officials directly answerable to the voters, while the public's awareness of the activities even of elected officials lessens.⁷¹ If the people are to remain confident in this type of government, there should be a body of citizens capable of monitoring official wrongdoing.⁷² Proponents of the grand jury's reportorial power maintain that the grand jury is the appropriate body to accomplish this important purpose.⁷³

Increasing government complexity has spurred the adoption of other investigatory bodies. These include legislative and executive bodies as well as private organizations, most notably the news media. These bodies may lead to greater accountability among public officials, but they are unlikely to be as effective as the grand jury in achieving impartial disclosure of official misconduct. A comparison of the grand jury with these groups suggests that the grand jury should continue as an investigatory body.

One significant problem with legislative and executive committees is that political concerns often influence their investigations.⁷⁴ These concerns can make such committees insensitive to the means used to investigate. For example, in contrast to the grand jury practice of conducting secret deliberations, these bodies often open their investigations to the public and thereby increase the risk that individual desires for career-enhancing publicity will determine the tenor of their investigation.⁷⁵ Furthermore, even an unfounded investigation can seriously stigmatize an individual in the eyes of the community.⁷⁶ Finally, since the outcome is often politically influenced, there may be an intentional lack of thoroughness in legislative and executive investigations.⁷⁷

Weaknesses also plague private investigations. First, editorial policies and profit motives may influence investigations by the news

70. *Id.* at 65, 89 A.2d at 443.

71. Kuh, *supra* note 9, at 1118.

72. Miami Herald Publishing Co. v. Marko, 352 So. 2d 518, 523 (Fla. 1977).

73. *Id.*

74. *See Note, supra* note 65, at 602.

75. *See id.*

76. *See In re Presentment by Camden County Grand Jury*, 10 N.J. 23, 67, 89 A.2d 416, 444 (1952). On the other hand, when the grand jury determines that there has been no misconduct, the public does not learn of the investigation since the investigation was conducted in secret. *See supra* note 15.

77. Kuh, *supra* note 9, at 1118.

media.⁷⁸ Second, private investigations cannot compel persons to supply necessary information.⁷⁹ Finally, no overseeing body exists to monitor the conduct of these investigatory bodies.⁸⁰

Although some authorities suggest that grand juries are not completely free from political motivations,⁸¹ most agree that jurors do not have the same sensitivity to political considerations as legislative or executive committees.⁸² Because grand jury proceedings are conducted in secret, a grand juror has no real incentive to advance his ambitions through his role as a grand juror. The subpoena power possessed by grand juries facilitates complete investigations.⁸³ Furthermore, the secrecy requirement minimizes the risk of reprisal against witnesses.⁸⁴

The grand jury is not without shortcomings as an investigatory body. Jurors are not professional investigators. Because grand juries have limited budgets, they seldom hire their own counsel or detectives. This increases the grand jury's dependence on the prosecutor to perform the investigation and to conduct the proceedings.⁸⁵ If the prosecutor is able to dominate the proceedings, he may interject his own political ambitions into the investigation.⁸⁶ The potential for difficulty may, however, be reduced. First, the local government can increase the grand jury's budget in order to allow it to hire its own investigator and counsel in cases where the prosecutor's interests might influence the proceedings.⁸⁷ Second, blue ribbon grand juries composed of the better educated citizens might be used. "Blue ribbon" jurors are more likely to question witnesses and assume an active role in the investigation, thereby assuring more informed conclusions.⁸⁸

In response to fundamental fairness concerns, supporters of grand jury reports argue that justifiable reports on public officials outweigh whatever harm might befall such individuals.⁸⁹ Proponents of the reporting power note that public office is a "trust" that the citizenry may

78. *Id.*

79. *Id.* at 1119.

80. *Id.* at 1118.

81. See Tennant, *Grand Juries in the Metropolitan Counties of New Jersey — Do They Function in the Public Interest?*, 12 THE PANEL 21 (1934).

82. *E.g.*, Note, *supra* note 65, at 602.

83. See Kuh, *supra* note 9, at 1119.

84. *Id.*

85. Dession & Cohen, *The Inquisitorial Functions of Grand Juries*, 41 YALE L.J. 687, 697 (1932).

86. Note, *supra* note 65, at 602-03.

87. *Id.* at 597.

88. *Id.* at 603.

89. See, *e.g.*, *In re Report of Grand Jury*, 152 Fla. 154, 159-61, 11 So. 2d 316, 319 (1943).

withdraw if the holder abuses the office.⁹⁰ Thus, an official assumes some risk of criticism when he voluntarily enters office.⁹¹ Furthermore, the mere possibility that the grand jury may issue reports may cause officials to regard their offices as trusts and thus deter corrupt and incompetent government.⁹²

IV. THE LAW IN ALASKA

Alaska Constitution, article I, section 8 provides in pertinent part: "The power of grand juries to investigate and make recommendations concerning the public welfare or safety shall never be suspended."⁹³ No Alaska appellate court has addressed the meaning of this sentence. Alaska grand juries have, however, issued reports, some of which have criticized specific officials.⁹⁴ The trial court that accepted for public filing the report on Governor Sheffield stated that its authority to review the contents of the report was narrow:

The Court's sole function is its power to prevent the grand jury from making an illegal report. That is, a report beyond its jurisdiction; a report that's not the result of its investigation. The report here, which I read through last night, clearly is neither. It is on the subject of the investigation and it is a result of the investigation.⁹⁵

To determine if the trial court's conclusion comports with the intention of the framers of the Alaska Constitution, it is appropriate to analyze the constitutional history pertaining to the grand jury's power under article I, section 8.⁹⁶

A. The Constitutional History

On December 15, 1955, the Alaska Constitutional Committee on the Preamble and the Bill of Rights submitted Committee Proposal Seven, which included the section on grand jury authority. Proposal Seven initially provided in pertinent part: "[T]he power of grand juries to inquire into the willful misconduct in office of public officers,

90. *Id.*

91. *Id.*

92. See *In re* Presentment by Camden Grand Jury, 10 N.J. 23, 66, 89 A.2d 416, 444 (1952).

93. ALASKA CONST. art. I, § 8.

94. See *supra* text accompanying notes 42-44.

95. Memorandum of Chief Prosecutor, *supra* note 4, at 51-52 (quoting Transcript of Grand Jury Concerning the Investigation Conducted into the Fairbanks Consolidated State Office Lease with the Fifth Avenue Center).

96. The pertinent portions of the constitutional history are set out in the Appendix to this note.

and to find indictments in connection therewith shall never be suspended."⁹⁷ Delegate Buckalew, who was a member of the committee that drafted the proposal, understood the proposal to grant the grand jury power to investigate and return *indictments*. Buckalew, however, did not view the proposal as authorizing grand jury reports.⁹⁸ Subsequent judicial interpretations of similar language in the grand jury provisions of the constitutions of New York⁹⁹ and Missouri¹⁰⁰ support Buckalew's interpretation. Courts in those states have concluded that their constitutional provisions cannot be construed as authorizing grand jury reports.¹⁰¹ These courts viewed the language as inseparably linking the grand jury's power to inquire into the misconduct of public officers with its power to indict.¹⁰² Only an explicit grant of legislative authority could empower grand juries in those states to issue reports critical of individuals.¹⁰³ Thus, if the framers had adopted Proposal Seven, it appears unlikely that there would be constitutional authority for grand jury reports in Alaska.

The Convention, however, did not adopt the Proposal. Instead, the framers approved a slightly altered version of an amendment to Proposal Seven offered by Delegate Barr. On January 6, 1956, Delegate Barr proffered the following amendment: "The power of grand juries to investigate and make recommendations concerning conditions detrimental to the public welfare shall never be suspended."¹⁰⁴ This provision grants broad investigatory powers to the grand jury. Although courts in other jurisdictions disagree as to whether the power to investigate, standing alone, implies the power to report the

97. MINUTES OF THE DAILY PROCEEDINGS, ALASKA CONSTITUTIONAL CONVENTION, app. V, at 64 (1956) [hereinafter PROCEEDINGS OF THE ALASKA CONSTITUTIONAL CONVENTION].

98. PROCEEDINGS OF THE ALASKA CONSTITUTIONAL CONVENTION 1405.

99. N.Y. CONST. art. I, § 6 provides in pertinent part: "The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law."

100. MO. CONST. art. I, § 16 provides in pertinent part: "[T]he 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."

101. *In re* Interim Report of Grand Jury, 553 S.W.2d 479 (Mo. 1977); *Wood v. Hughes*, 9 N.Y.2d 144, 173 N.E.2d 21, 212 N.Y.S.2d 33 (1961).

102. *In re* Interim Report of Grand Jury, 553 S.W.2d at 481; *Wood*, 9 N.Y.2d at 151, 173 N.E.2d at 24, 212 N.Y.S.2d at 37.

103. *In re* Interim Report of Grand Jury, 553 S.W.2d at 482; *Wood*, 9 N.Y.2d at 156, 173 N.E.2d at 27, 212 N.Y.S.2d at 41. The New York State Legislature responded to the *Hughes* decision by enacting section 253-a of the Code of Criminal Procedure, which authorizes grand juries to issue reports critical of individuals. This rule is currently codified in section 190.85 of the New York Criminal Procedure Law.

104. PROCEEDINGS OF THE ALASKA CONSTITUTIONAL CONVENTION 1404.

results of such inquiry,¹⁰⁵ the Convention expressly granted Alaska grand juries the power to make recommendations in connection with its investigations. Thus, the framers contemplated a power to issue statements other than indictments.

Conversations between the delegates also shed light on the proper subject matter of these recommendations. During the debates over article I, section 8, Delegate Rivers explained that the grand jury's authority at the time of the Convention extended to the investigation of public officers and institutions.¹⁰⁶ Rivers then asked Delegate Barr if he would agree to express the grand jury's authority as the power to "investigate public offices and institutions and make recommendations."¹⁰⁷ Barr would not so consent. He stated that his amendment would grant a broader power than Rivers suggested.¹⁰⁸ Barr's amendment would allow the grand jury to "make recommendations concerning other things than public offices and officers."¹⁰⁹ By implication, the framers intended, at the least, to grant the grand jury the power to issue recommendations concerning public offices and officers, something which Barr maintained was the duty of the grand jury.¹¹⁰

Courts in many jurisdictions where grand juries investigate public institutions attempt to make a distinction between reports on general conditions that do not name individuals and reports that criticize specific individuals.¹¹¹ Several jurisdictions permit publication of the former type of report while holding that the grand jury is powerless to issue reports of the latter type.¹¹² Thus, the final issue in the analysis of the constitutional history of the Alaska reportorial provision is whether the grand jury may mention public officers in its recommendations or whether it must confine itself to recommending general changes in administrative procedures without naming public officials. The fact that the framers granted the grand jury the power to issue recommendations concerning public officers supports the argument that they intended that the grand jury have the power to name those officers in at least some circumstances. The framers addressed this issue even more specifically. Responding to Delegate Buckalew's

105. *Compare In re* Interim Report of Grand Jury, 553 S.W.2d at 482 (reporting power must be expressed) *with In re* Report of Ormsby County Grand Jury, 74 Nev. 80, 85, 322 P.2d 1099, 1101-02 (1958) (reporting power implicit in power to investigate).

106. PROCEEDINGS OF THE ALASKA CONSTITUTIONAL CONVENTION 1405.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 1406.

111. *See, e.g., In re* Report of Grand Jury of Baltimore City, 152 Md. 616, 631-32, 137 A. 370, 376 (1927).

112. *Id.*

strenuous objections to Delegate Barr's proposed amendment, Delegate Barr explained:

[The grand jury does] 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.¹¹³

Delegate Barr's statement is equivocal, but appears to leave open the possibility that a grand jury can mention a public officer by name in its recommendation. That the framers intended to grant such authority to the grand jury is supported by Delegate Buckalew's vote against Barr's proposal. Buckalew perceived significant differences between the authority granted the grand jury under Barr's proposal and that granted by the committee's Proposal Seven. Buckalew objected vigorously to the amendment:

[m]y 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 to then come in and ask the court to strike portions of it. For that reason I would object to it.¹¹⁴

Delegate Buckalew apparently believed that his concerns about the amendment were not abrogated because he was one of the eight delegates who voted against the amendment.¹¹⁵

Delegate Barr's statement, however, implies some limit on the grand jury's power to name public officials in its recommendations. Unfortunately, the statement does not explain when it would be appropriate to name a public official in a recommendation. Alaska should adopt an express standard that allows naming public officials in limited circumstances. The New Jersey Supreme Court articulated

113. PROCEEDINGS OF THE ALASKA CONSTITUTIONAL CONVENTION 1405-06 (emphasis added).

114. *Id.* at 1405.

115. *Id.* at 1407-08.

such an intermediate standard in *In re Presentment by Camden County Grand Jury*:¹¹⁶

[T]he subject must be a matter of general public interest, or relate to some aspect of public affairs, or to some public evil or condition to which, in the discretion of the jury, the attention of the community should be directed. And censure of a public official is permissible only where it may be said with absolute certainty that his connection with the condemned matter is such that its existence is inextricably related to non-criminal failure to discharge his public duty. . . . The [report] cannot be used to single out persons in private or official positions and impugn their motives, or by word or innuendo hold them to scorn or to censure.¹¹⁷

The example Delegate Barr provided concerning the tax collector may be used to illustrate the operation of this standard. The example lacks clarity, but Barr may be hypothesizing that there is a poor tax collection scheme and that the legislature should change the system. In that case, the intolerable conditions in the community — for example, excessive audits or wealthy persons not paying their appropriate share — would not be inextricably related to the tax collector's negligence but instead to the legislature's failure to adopt an acceptable scheme. In short, the tax collector is not responsible for the depreciated conditions and therefore should not be named in the report.

Suppose, however, that the legislature changed the tax collection procedures as recommended, but that a subsequent grand jury investigation revealed that the tax collector had implemented a perfectly acceptable taxation scheme in an incompetent or negligent manner and the same intolerable conditions prevailed. In such instance, the tax collector's failure to discharge his duty would be inextricably related to the deteriorated public conditions. This situation would appear to be as much a matter of public welfare as the situation in Barr's hypothetical. Because the same conditions prevail, it would be as much in the public interest to have this official misconduct corrected by having the tax collector more closely supervised, or perhaps even removed from office, as it would be to have the legislature change the system in Barr's hypothetical. To do this, of course, would necessitate naming the official in a recommendation.

In light of the fact that the framers granted the grand jury such broad power to investigate and to make recommendations, policy considerations also support an interpretation allowing this incidental criticism of public officials. First, a report on general conditions that makes a broad recommendation for administrative changes in a large public agency will generally be understood as implicitly criticizing all

116. 34 N.J. 378, 169 A.2d 465 (1961).

117. *Id.* at 391, 169 A.2d at 472.

of those in charge.¹¹⁸ The grand jury, however, may have determined that only a few individuals are at fault. In the second tax collection hypothetical, for example, perhaps only some of the auditors were responsible for incompetent administration. Given the potential for harm from reports, only those persons responsible for the detrimental conditions should be criticized. Second, specific criticism may render the recommendations more useful. If the report is specific, those to whom the recommendation is addressed will not have to conduct another investigation to determine which individuals are responsible.¹¹⁹ In addition, remedies can be more carefully tailored if the problem is specifically identified.¹²⁰ Third, an inability to issue reports with incidental criticism of those responsible might actually prohibit certain reports entirely. In a small agency with few officials, a report will inherently criticize specific individuals even though they are not mentioned by name.¹²¹ The framers did not indicate that such a report should be disallowed if it concerns a legitimate subject of public welfare.

The constitutional history indicates that the Alaska Constitution authorizes grand juries to make recommendations about conditions concerning the public welfare or safety and to mention public officials in limited circumstances. As the foregoing discussion suggests, incidental criticism of public officials is appropriate when the official's noncriminal failure to discharge his duty is inextricably related to the deteriorated public conditions.

B. The Proper Scope of the Grand Jury's Power to Make Recommendations

1. *Factual Findings.* Although article I, section 8 mentions only recommendations, the framers must have contemplated that the grand jury's report include factual findings in support of its recommendations. Otherwise, the institution to which the grand jury addresses the recommendation cannot comprehend the need for the suggested change. The grand jury merely recommends; it has no power to enforce its suggestions.¹²² The institutions responsible for effecting change must determine if change is needed. If the institutions have no factual findings on which to base their decisions, they might simply ignore the recommendation or implement an unnecessary change.

118. BEALE & BRYSON, *supra* note 60, § 3.03.

119. Kuh, *supra* note 9, at 1130.

120. *Id.*

121. See *In re Grand Jury of Wabasha County*, 309 Minn. 148, 155, 244 N.W.2d 253, 257 (1976) (Scott, J., concurring).

122. See *In re Report of Ormsby County Grand Jury*, 74 Nev. 80, 86, 322 P.2d 1099, 1102 (1958).

Thus, factual findings seem to be implicit in the reporting of effective recommendations.¹²³

2. *Recommendations Concerning Indictable Conduct.* Many jurisdictions that allow grand jury reports justify reports on the ground that the grand jury report is the only effective, official method for exposing *noncriminal* official misconduct.¹²⁴ There already exists an effective mode of determining whether there has been criminal conduct: indictment followed by a jury trial. This procedure ensures the individual full due process protections and, hence, is not subject to the same fairness concerns as are reports.¹²⁵ Consequently, a grand jury report should not imply that any named or identifiable person has committed a criminal offense. The majority of jurisdictions permitting grand jury reports agree that, if the grand jury finds probable cause to believe a crime has been committed, its only course is to indict that individual.¹²⁶

In this respect, the trial court in the Sheffield case may have erred in accepting the report. The report's allegations concerning the governor's involvement in the lease of the office buildings appear to indicate a violation of Alaska's official misconduct statute.¹²⁷ To contravene that statute, a public official must, with intent to benefit himself, knowingly make an unauthorized exercise of his official power or knowingly refrain from performing a required official duty.¹²⁸ The grand jury expressly found that the governor acted with intent to obtain a benefit for himself by steering the lease of office space by the state to a campaign contributor.¹²⁹ Furthermore, the governor was

123. See *Miami Herald Publishing Co. v. Marko*, 352 So. 2d 518, 521 (Fla. 1977) (a recommendation is "proper" under the Florida reporting statute only if supported by a factual foundation).

124. *E.g.*, *In re Presentment by Camden County Grand Jury*, 10 N.J. 23, 66, 89 A.2d 416, 443-44 (1952).

125. See *Wood v. Hughes*, 9 N.Y.2d 144, 154, 173 N.E.2d 21, 26, 212 N.Y.S.2d 33, 39-40 (1961).

126. See *Biglieri v. Washoe County Grand Jury Report*, 95 Nev. 696, 700, 601 P.2d 703, 704 (1979); *Appeal of Messano*, 16 N.J. 142, 147, 106 A.2d 537, 539 (1954); *State v. Bramlett*, 166 S.C. 323, 329, 164 S.E. 873, 877 (1932).

127. ALASKA STAT. § 11.56.850 (1983). This section provides in part:

Official misconduct. (a) A public servant commits the crime of official misconduct if, with intent to obtain a benefit or to injure or deprive another person of a benefit, the public servant

(1) performs an act relating to the public servant's office but constituting an unauthorized exercise of the public servant's official functions, knowing that the act is unauthorized; or

(2) knowingly refrains from performing a duty which is imposed upon the public servant by law or is clearly inherent in the nature of the public servant's office.

128. *Id.*

129. Report of the Grand Jury, *supra* note 2, at 10.

not authorized to direct changes in the specifications of a bid proposal for office space at the behest of a political supporter. The grand jury stated that it chose not to issue an indictment because it would be difficult to prove that the governor knew his actions were unauthorized.¹³⁰ If the alleged conduct falls within the parameters of a criminal statute, however, the grand jury should indict such person or ignore the allegations.¹³¹ The grand jury also strongly implied that the governor perjured himself before the grand jury.¹³² Such conduct is, of course, criminal.¹³³ The grand jury's actions might be viewed as harmless error in light of the fact that the governor was able to answer the allegations against him before the house of representatives. The legislature could have, however, ignored the grand jury's recommendation to institute impeachment proceedings, thus denying the governor an opportunity to answer. In any event, many persons mentioned in grand jury reports will not have this opportunity to rebut allegations in an official forum.

3. *Subjects of Reports.* Most jurisdictions permitting reports condemn reports reflecting on private individuals as opposed to public officials.¹³⁴ This distinction makes sense. A public official assumes some risk of criticism upon entering office, and, when an official becomes derelict in his duties, a report should reveal this breach of trust.¹³⁵ Courts in jurisdictions allowing reports hold that the community benefits derived from a justifiable report on official misconduct outweigh any resulting personal hardship.¹³⁶ When private individuals are involved, however, the balance of public benefits against protection of the individual tips in favor of disallowing reports.¹³⁷ Private individuals do not possess the semi-fiduciary capacity of public officers. Additionally, private persons do not have the same access to the news media as do public officials to rebut allegations.¹³⁸ The Alaska Constitution does not appear to sanction such reports because the private actions of individuals do not concern the "public welfare."

130. *Id.* at 9.

131. *See* cases cited *supra* note 126.

132. Report of the Grand Jury, *supra* note 2, at 14 ("Governor Sheffield's testimony reflects a lack of candor and a disrespect for the laws of this state.")

133. *See* ALASKA STAT. § 11.56.200 (1983).

134. *See, e.g.,* Kelly v. Sturgis, 453 So. 2d 1179, 1182 (Fla. Dist. Ct. App. 1984).

135. *In re* Report of Grand Jury, 152 Fla. 154, 159, 11 So. 2d 316, 319 (1943).

136. *See, e.g., In re* Presentment by Camden County Grand Jury, 10 N.J. 23, 68, 89 A.2d 416, 444-45 (1952).

137. Comment, *The Propriety of the Grand Jury Report*, 34 TEX. L. REV. 746, 755 (1956).

138. Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974).

V. THE LAW IN OTHER JURISDICTIONS

A. A Survey of Other States

In twenty-seven states, the grand jury has statutory or judicially recognized authority to issue reports. The extent of this authority varies widely.¹³⁹ Some states allow reports critical of individuals.¹⁴⁰ Others authorize reports on a few specific topics such as county jails¹⁴¹ and buildings.¹⁴² In three of the remaining twenty-three states, courts have ruled that the grand jury does not have the power to investigate noncriminal matters or to file reports of its investigations.¹⁴³ In the other states, the grand jury's reporting power is not clear. While courts in these jurisdictions have not ruled upon the propriety of reports on general conditions, many of them have held that the grand jury may not issue reports criticizing specific individuals.¹⁴⁴

Excluding Alaska, twenty-four states have expressly addressed the authority of grand juries to issue reports critical of specific individuals.¹⁴⁵ Grand juries in seventeen of these states do not have the

139. BEALE & BRYSON, *supra* note 60, § 3.02.

140. N.Y. CRIM. PROC. LAW § 190.85(1)(a) (McKinney 1982).

141. WYO. STAT. § 7-5-216 (1977).

142. GA. CODE ANN. § 15-12-79 (1985).

143. Coons v. State, 191 Ind. 580, 134 N.E. 194 (1922); *In re* Grand Jury of Hennepin County, 271 N.W.2d 817 (Minn. 1978); State *ex rel.* Town of Caledonia v. County Court, 78 Wis. 2d 429, 254 N.W.2d 317 (1977).

144. BEALE & BRYSON, *supra* note 60, § 3.02.

145. The states that have disallowed reports criticizing specific individuals are: Alabama, *Ex parte* Burns, 261 Ala. 217, 73 So. 2d 912 (1954); Arkansas, *Ex parte* Faulkner, 221 Ark. 37, 251 S.W.2d 822 (1952); Georgia, Thompson v. Macon-Bibb County Hosp. Auth., 246 Ga. 777, 273 S.E.2d 19 (1980); Illinois, *In re* Report of Grand Jury of Marshall County, 108 Ill. App. 3d 232, 438 N.E.2d 1316 (1982); Iowa, Rector v. Smith, 11 Iowa 302 (1860); Maryland, *In re* Report of Grand Jury of Carroll County, 39 Md. App. 472, 386 A.2d 1246 (1978); Michigan, Bennett v. Kalamazoo County Circuit Judge, 183 Mich. 200, 150 N.W. 141 (1914); Minnesota, *In re* Grand Jury of Hennepin County, 271 N.W.2d 817 (Minn. 1978); Mississippi, *In re* Davis, 257 So. 2d 884 (Miss. 1972); Missouri, *In re* Interim Report of Grand Jury, 553 S.W.2d 479 (Mo. 1977); Ohio, Simington v. Shimp, 60 Ohio App. 2d 402, 398 N.E.2d 812 (1978); Oklahoma, OKLA. STAT. ANN. tit. 22, § 346 (1969); Tennessee, Hayslip v. State, 193 Tenn. 643, 249 S.W.2d 882 (1952), *cert. denied*, 344 U.S. 879 (1952); Utah, UTAH CODE ANN. § 77-11-11 (1982); Washington, WASH. REV. CODE ANN. § 10.27.160 (1980); Wisconsin, State *ex rel.* Town of Caledonia v. County Court, 78 Wis. 2d 429, 254 N.W.2d 317 (1977).

The states that have permitted reports critical of specific individuals are: California, People v. Superior Court of Santa Barbara County, 13 Cal. 3d 430, 531 P.2d 761, 119 Cal. Rptr. 193 (1975); Florida, Miami Herald Publishing Co. v. Marko, 352 So. 2d 518 (Fla. 1977); Nevada, Biglieri v. Washoe County Grand Jury Report, 95 Nev. 696, 601 P.2d 703 (1979); New Jersey, *In re* Presentment by Camden County Grand Jury, 10 N.J. 23, 89 A.2d 416 (1952); New York, N.Y. CRIM. PROC. LAW § 190.85(1)(a) (McKinney 1982); South Carolina, State v. Bramlett, 166 S.C. 323, 164 S.E. 873 (1932); Virginia, Cutchin v. Roanoke, 113 Va. 452, 74 S.E. 403 (1912).

power to issue reports criticizing individuals.¹⁴⁶ In seven states, the legislature or the courts have authorized grand jury reports that criticize specific public officials.¹⁴⁷ Of these seven states, California takes an extreme position by granting the grand jury a virtually unrestricted reporting power covering a wide range of areas.¹⁴⁸ This note has suggested that Alaska's reporting power should be similar to that exercised by New Jersey grand juries.¹⁴⁹ This is an intermediate position in that the power to criticize individuals is limited.¹⁵⁰ Indeed, most of the states following the "minority rule" restrict the grand jury's power in some manner to provide protection for individual liberty interests.¹⁵¹

Alaska's statutory and constitutional provisions concerning the grand jury's reporting power differ significantly from those of most states. Nevada, however, has a grand jury statute that is quite similar to the grand jury provision in the Alaska Constitution,¹⁵² and judicial decisions in Nevada have held that the grand jury may issue reports naming specific officials. In *In re Report of Washoe County Grand Jury*,¹⁵³ a grand jury found a chief of police incompetent to administer his office and recommended that he be replaced.¹⁵⁴ The sheriff's counsel argued that a certain part of the Nevada grand jury provision did not authorize a grand jury report where no indictable conduct was

146. See cases cited *supra* note 145.

147. *Id.*

148. *People v. Superior Court of Santa Barbara County*, 13 Cal. 3d 430, 433, 531 P.2d 761, 764-65, 119 Cal. Rptr. 193, 195 (1975).

149. See *supra* text accompanying notes 116-17.

150. BEALE & BRYSON, *supra* note 60, § 3.03.

151. For example, N.Y. CRIM. PROC. LAW sections 190.85 and 190.90 provide several procedural protections including granting the potential subject of a report the opportunity to testify before the grand jury and to append an answer to the report.

152. NEV. REV. STAT. § 172.300 (1957) (current version at NEV. REV. STAT. § 172.175 (1986)) provided:

1. The grand jury must inquire into:

(a) The case of every person imprisoned in the jail of the county, on a criminal charge, and not indicted.

(b) The condition and management of the public prisons within the county.

(c) The willful and corrupt misconduct in office of public officers of every description within the county.

2. The grand jury may inquire into any and all matters affecting the morals, health and general welfare of the inhabitants of the county, or of any administrative division thereof, or of any township, incorporated city, irrigation district or town therein.

WASH. REV. CODE ANN. § 10.27.160 (1980) permits reports on matters "affecting the public interest," but expressly proscribes the identification of any individual in such reports.

153. 77 Nev. 290, 362 P.2d 447 (1961).

154. *Id.* at 291-92, 362 P.2d at 447.

found.¹⁵⁵ Another part of the statute, however, authorized inquiry into "matters affecting the morals, health, and *general welfare* of the inhabitants of the county."¹⁵⁶ The court held that this gave the grand jury a broader power. Nothing in the report indicated anything more than inefficiency and incompetency on the part of the sheriff. Since there was no indication of criminal activity, the grand jury could not have indicted the sheriff. The court held that these remarks in the report were appropriate "as being the result of a legitimate inquiry into the matters affecting the morals, health, and *general welfare of the public*."¹⁵⁷ Thus, judicial interpretation of the grand jury statute most similar to that of Alaska supports the conclusion that the grand jury has some power to issue reports naming public officials.

B. The Federal Cases

Because Alaska was, until relatively recently, a federal territory, analysis of federal court decisions may be helpful in defining the proper scope of the reportorial power of Alaska grand juries. Federal courts have not developed a uniform rule on grand jury reports; instead, most decisions reflect a case-by-case balancing of individual rights against the public's right to be informed.

There were few federal cases dealing specifically with grand jury reports before the Alaska Constitutional Convention met.¹⁵⁸ One of these cases, *In re United Electrical, Radio & Machine Workers*,¹⁵⁹ involved a grand jury investigation of possible violations of perjury and conspiracy laws by union officials in connection with non-Communist affidavits filed with the National Labor Relations Board. Instead of indicting the officials, the grand jury made a report which, in effect, charged the officials with conspiracy and perjury.¹⁶⁰ In deciding to expunge the report, the court expressed strong disapproval of accusatory reports that do not provide their subject a judicial forum in which

155. *Id.* at 294-95, 362 P.2d at 449.

156. NEV. REV. STAT. § 172.300(2) (1957) (emphasis added) (current version at NEV. REV. STAT. § 172.175 (1986)).

157. *In re* Report of Washoe County Grand Jury, 77 Nev. at 295, 362 P.2d at 449.

158. See *In re* United Elec., Radio & Mach. Workers, 111 F. Supp 858 (S.D.N.Y. 1953); *In re* Report of the Grand Jury for the April, 1911 Term, 4 U.S. Dist. Ct. Haw. 780 (1911). In *In re* Report of the Grand Jury for the April, 1911 Term, upon completing an investigation of a high school, the grand jury issued a report stating that a named teacher had "conducted himself in a very questionable and immoral manner, which renders him, in our opinion, unfit to act as a teacher of children." *Id.* at 781. The grand jury eventually withdrew the report. Although the court did not rule on the teacher's motion to expunge the report, it indicated that reports were not within the authority of federal grand juries. *Id.* at 787.

159. 111 F. Supp. 858.

160. *Id.* at 861.

to respond.¹⁶¹ The court also held that the report breached grand jury secrecy.¹⁶² The court, however, refrained from disapproving all reporting powers. It approved reports on general community conditions and emphasized that the report before the court essentially charged the officials with criminal activity.¹⁶³ The court also noted that the grand jury issued the report while it was still investigating the matter. Because the grand jury might later indict some of the individuals, the court was concerned that the report could prejudice their trials.¹⁶⁴

Other federal decisions have allowed grand jury reports critical of specific persons. *In re Johnson*¹⁶⁵ involved a grand jury report arising out of an investigation of a confrontation between Chicago policemen and members of the Black Panther Party. Fifteen months after the release of the report, persons named in the report filed a motion to expunge the report.¹⁶⁶ In affirming the denial of the motion, the Seventh Circuit concluded that any harm was an accomplished fact and, more importantly, emphasized that the report did not charge the appellants with criminal activity.¹⁶⁷ The court held that the grand jury had authority to make the report and that its release would be in the public interest.¹⁶⁸

In *In re Report and Recommendation of June 5, 1972 Grand Jury*,¹⁶⁹ a grand jury delivered to the court a report of the factual findings of its investigation of the Nixon Administration. The report recommended that the court forward these findings to the Committee on the Judiciary of the House of Representatives, which was conducting its impeachment investigation.¹⁷⁰ The court held that the grand jury had authority to make the report, noting that the report drew no accusatory conclusions and deprived no one of an official forum in which to respond.¹⁷¹ The court also emphasized that the report was not a substitute for an indictment.¹⁷² Citing the significant public interest involved, the court released the report to the Committee.¹⁷³

In sum, federal court decisions concerning grand jury reports reflect a concern for individual rights by balancing these rights against the public's need to be informed of official misconduct. Additionally,

161. *Id.* at 867.

162. *Id.* at 866.

163. *Id.* at 869.

164. *Id.*

165. 484 F.2d 791 (7th Cir. 1973).

166. *Id.* at 793-94.

167. *Id.* at 796-97.

168. *Id.* at 797.

169. 370 F. Supp. 1219 (D.D.C. 1974).

170. *Id.* at 1221.

171. *Id.* at 1226.

172. *Id.*

173. *Id.* at 1230.

most states permitting reports critical of identifiable individuals have adopted specific measures designed to protect the rights of individuals who may be the subject of those reports.

VI. RECOMMENDATIONS FOR ALASKA

A. Potential Problems with Alaska's System

As noted above, a true report on conditions concerning public welfare can be beneficial in ensuring an effective government, even if it contains incidental criticism of a public official responsible for the conditions. Indeed, the framers of the Alaska Constitution considered this power sufficiently important to preserve it in the constitution. They viewed this power as necessary "to protect the rights of . . . citizens"¹⁷⁴ Nevertheless, problems may arise in the future implementation of this power.

In its *ex parte* review of the proposed report in the Sheffield case, the trial court stated that its "sole function [in reviewing the report] is its power to prevent the grand jury from making an illegal report."¹⁷⁵ The court defined "illegal reports" as those concerning matters outside of the geographical jurisdiction of the grand jury or matters that the grand jury has not investigated.¹⁷⁶ California is one of the few states allowing reports on specific individuals that has such limited protections for individuals criticized in reports. If the report is not illegal, a California trial court must publish the report even if "it considers it ill-advised, insufficiently documented, or even libelous."¹⁷⁷

It is submitted that this standard of review provides insufficient protection for an individual named in a recommendation of an Alaska grand jury and that Alaska should make certain reforms. This standard is insufficient for several reasons. First, a court could publish a false report, which might unjustifiably harm public officials who have performed no misdeeds. Second, concern for individual liberty interests suggests that criticism should be limited to what is necessary to effectuate the recommendation. Finally, there exist possible fourteenth amendment due process objections to reports critical of individuals.

1. *Publication of Reports Based upon False Factual Findings.* A report based on false factual findings may unjustifiably harm a public

174. PROCEEDINGS OF THE ALASKA CONSTITUTIONAL CONVENTION 1405.

175. Memorandum of Chief Prosecutor, *supra* note 4, at 51 (quoting Transcript of the Grand Jury Concerning the Investigation Conducted into the Fairbanks Consolidated State Office Lease with the Fifth Avenue Center).

176. *Id.* at 51-52.

177. *People v. Superior Court of Santa Barbara County*, 13 Cal. 3d 430, 439, 531 P.2d 761, 766, 119 Cal. Rptr. 193, 198 (1975).

official. This not only injures the official, but it may also harm the public, which may lose a good public servant. Perhaps, the official could subsequently have an appellate court remove the false report from the record. Under the trial court's standard, however, this would not occur until after the report was published because there is no pre-publication factual review. The harm to the official would already be done and his reputation perhaps irreparably damaged in the minds of the public.¹⁷⁸ For example, a grand jury in Kansas City, Missouri issued a heavily publicized report calling Mafia operations there a "criminal playground" and alleging police acquiescence in these activities.¹⁷⁹ Four police officers including the chief of police were indicted. But the indictments against the chief were dropped for failure to allege the commission of any crime.¹⁸⁰ Essentially, this "indictment" was a report since it did not charge any individual with committing a crime.¹⁸¹ The new police chief publicly stated that there were no Mafia operations in Kansas City, and the city council expressed "its sincere regret for the humiliation and public distress suffered by [the former chief of police] as the result of these unjust charges, and our apologies for the misguided zeal of the officials responsible therefor."¹⁸² United States District Judge John W. Oliver, who related the facts of this report in an address, suggested that it was doubtful that the public paid much attention to the apologies.¹⁸³

2. *Unfairness to the Potential Subject of the Report.* The second concern with the trial court's standard involves fairness to the individual. As discussed above, federal courts weigh the interests on both sides in determining whether a report is lawful. The standard employed by the trial court in the Sheffield case does not allow for this balancing. Additionally, the trial court apparently failed to analyze the procedures used in producing the report. Without judicial monitoring, the prosecutor may dominate the grand jury proceedings. In such a case, the resulting report might not be based upon an independent investigation and evaluation but upon the political aspirations of the prosecutor.¹⁸⁴ Although the trial court found the report was based upon an investigation, it did not inquire into whether there was an independent investigation of a legitimate subject of public welfare as

178. Comment, *supra* note 9, at 717.

179. Oliver, *The Grand Jury: An Effort to Get a Dragon Out of His Cave*, 1962 WASH. U.L.Q. 166, 167.

180. *Id.* at 171-72.

181. *See supra* text accompanying note 9.

182. Oliver, *supra* note 179, at 172.

183. *Id.*

184. *See supra* text accompanying notes 85-86.

opposed to an attempt to single out a public official for improper purposes.

3. *Due Process Objections to Reports.* Finally, in deciding how to implement the grand jury's authority, Alaska should also consider possible fourteenth amendment due process challenges to reports. Several United States Supreme Court decisions provide support for the argument that reports that criticize an individual violate procedural due process if that individual is not given notice and an opportunity to be heard.¹⁸⁵ Although not involving grand juries, a series of Supreme Court decisions recognized an individual's interest in his reputation and held that the government must provide due process before it takes action that injures that reputation.¹⁸⁶ In *Wisconsin v. Constantineau*,¹⁸⁷ for example, a state law prohibited the sale of liquor to a person whose excessive drinking exposed her family "to want" or created a danger to the public. Without giving Constantineau notice and an opportunity to be heard, the police posted a notice on all liquor stores forbidding sale of liquor to her. The Supreme Court held that this "posting" by the government placed Constantineau's reputation at risk and thus caused the type of "grievous loss" that triggers due process protection.¹⁸⁸

In *Paul v. Davis*,¹⁸⁹ the Court, however, narrowed its holding in *Constantineau*, apparently foreclosing due process attacks based on reputation alone. In *Davis*, the police had distributed to local merchants a flyer describing Davis as an "active shoplifter."¹⁹⁰ The Court held that the state need not afford Davis notice or an opportunity to be heard before distributing the flyer, even though this action damaged his reputation.¹⁹¹ The majority stated:

While we have in a number of our prior cases pointed out the frequently drastic effect of the "stigma" which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either "liberty" or "property" by itself sufficient to invoke the procedural protection of the Due Process clause.¹⁹²

185. See BEALE & BRYSON, *supra* note 60, § 3.04.

186. See, e.g., *Jenkins v. McKeithan*, 395 U.S. 411, *reh'g denied*, 396 U.S. 869 (1969); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951).

187. 400 U.S. 433 (1971).

188. *Id.* at 437.

189. 424 U.S. 693, *reh'g denied*, 425 U.S. 985 (1976).

190. *Id.* at 695.

191. *Id.* at 712.

192. *Id.* at 701.

The Court's decision leaves open, however, the possibility of a successful due process argument based on narrower grounds. The Court recognized that an injury to one's reputation coupled with a more tangible interest, such as employment, will trigger due process protection. For example, if a state declined to rehire a nontenured university professor and in so doing made charges against him that might seriously damage his reputation, such actions would invoke due process protection.¹⁹³

There remains the question of whether this analysis applies to grand jury reports. Due process protection varies according to many factors including the nature of the proceeding. The Court has not required grand juries to observe all of the procedural requirements imposed on other investigative bodies. In so doing, the Court has emphasized that the grand jury does not adjudicate guilt or innocence; it "merely investigates and reports. It does not try."¹⁹⁴ This reasoning, however, arguably does not apply when the grand jury issues a report, as opposed to an indictment which leads to a trial. Normally, a grand jury report does not initiate further proceedings. Thus, in a sense, a reporting grand jury does make a final determination of "guilt or innocence" of noncriminal misconduct.¹⁹⁵ Therefore, a grand jury report that results in injury to reputation and some tangible interest such as employment may be subject to due process challenges unless the criticized individual is given notice and an opportunity to be heard.

B. Potential Reform Measures

There exist several measures that may help to curb possible abuses of the grand jury's reportorial power and to preserve its effective use. The Alaska Constitution, however, states that the grand jury's power "to investigate and make recommendations concerning the public welfare or safety *shall never be suspended*."¹⁹⁶ Thus, any reform measures adopted must not "suspend" the reporting power. The United States Constitution and several state constitutions mandate that the writ of habeas corpus shall not be "suspended" and hence provide a helpful analogue to the language in article I, section 8.¹⁹⁷ In analyzing the constitutionality of potential reform measures for the grand jury, it may be useful to consider judicial interpretations of the suspension clauses of the habeas corpus provisions of the federal and state constitutions.

193. See *Board of Regents v. Roth*, 408 U.S. 564 (1972).

194. *Hannah v. Larche*, 363 U.S. 420, 449, *reh'g denied*, 364 U.S. 855 (1960).

195. See BEALE & BRYSON, *supra* note 60, § 3.04.

196. ALASKA CONST. art. I, § 8 (emphasis added).

197. *E.g.*, U.S. CONST. art. I, § 9, cl. 2.

Generally, courts have held that legislatures may regulate procedure with respect to habeas corpus and, to some extent, the purposes for which it may be used.¹⁹⁸ The suspension which is prohibited relates to a denial of the *substantive* right to have judicial inquiry into the cause of the allegedly illegal detention.¹⁹⁹

1. *Independence of the Grand Jury From the Prosecutor.* One concern expressed by those courts which have disallowed reports involves prosecutorial overzealousness.²⁰⁰ If the prosecutor dominates the investigation, his own ambitions can lead to a one-sided investigation and presentation of evidence. The prosecutor may initiate investigations into areas where there is no apparent corruption merely to harass certain officials or to guide the grand jury to a result he desires. In fact, Alaska state senators who expressed dissatisfaction with the report on the governor did not question the grand jury's power but instead criticized the manner in which the prosecutors influenced the proceedings.²⁰¹

To curb this abuse, the grand jury should become less dependent upon the prosecutor. Currently, because of his access to information and investigative tools, the prosecutor directs the grand jury's operations.²⁰² Alaska could reduce this dependence by allowing the grand jury to conduct investigations on its own in certain situations. At least in those areas in which the prosecutor might have a special interest, Alaska could permit the grand jury to retain its own investigators and counsel. This procedure would help to insure a disinterested presentation of the evidence and a thorough investigation, which would in turn protect against the publication of false or misleading reports. These actions would not impinge the suspension clause. These are merely procedural steps designed to make the grand jury's power more effective. Furthermore, these steps would precede any investigation and thus could not constitute a substantive denial of the power to issue recommendations.

2. *Notice and Opportunity to Be Heard.* The grand jury conducts its proceedings in secret and need not provide any person being investigated notice of the grand jury's inquiry or an opportunity to present

198. 39 AM. JUR. 2D *Habeas Corpus* § 5 (1968).

199. *Wiglesworth v. Wyrick*, 531 S.W.2d 713, 717 (Mo. 1976).

200. *E.g.*, *Simington v. Shimp*, 60 Ohio App. 2d 402, 408, 398 N.E.2d 812, 817 (1978).

201. *See* Memorandum of Chief Prosecutor, *supra* note 4, at 4-5; N.Y. Times, Aug. 6, 1985, at A11, col. 1.

202. *Dession & Cohen*, *supra* note 85, at 697.

his version of the situation.²⁰³ The most significant objection to reports involves the lack of fairness to those criticized in reports. Opponents of grand jury reports note that the person criticized in a report often does not learn of the report until after its publication and does not have an opportunity to rebut its allegations in an official forum.²⁰⁴

Alaska could mitigate these concerns by requiring that, when the grand jury contemplates issuing a recommendation critical of a public official, the grand jury provide the official and a limited number of witnesses in his behalf the opportunity to testify before the grand jury prior to the issuance of the report. When the grand jury indicts someone, grand jury proceedings are not a trial; the adjudication of guilt or innocence will follow. The publication of a recommendation, however, generally represents the last step in the judicial process, and the grand jury does, in a sense, "try" officials who are criticized in recommendations.²⁰⁵ Allowing the official to testify before the grand jury would increase the fairness of the proceedings by permitting the official to present his side of the story. This measure might also help to eliminate unnecessary reports when, for example, the grand jury realized that the official's actions were not negligent or incompetent but rather were reasonable exercises of discretion.

This measure would not contravene the suspension clause of article I, section 8. The requirement would be procedural and would not decrease the grand jury's power. The measure might prolong the proceeding by the amount of time necessary to hear the official's testimony, but it would in no way deny the grand jury the power to issue its recommendations. Furthermore, as discussed above, due process might require that Alaska adopt such a measure in order to provide the official an opportunity to be heard.²⁰⁶

3. *Opportunity to Append an Answer to the Report.* Providing the official an opportunity to append an answer to the report constitutes another measure that would permit the official to explain the allegations of the recommendations. This measure presents no constitutional problems as long as the filing of the answer does not unreasonably delay the publication of the report. However, if the answer is filed after the publication of the recommendation, the answer may have little value because the grand jury report will already have had its damaging effect.²⁰⁷ For the measure to be effective, the answer

203. See ALASKA R. CRIM. P. 6(l), (o).

204. See *People v. McCabe*, 148 Misc. 330, 333, 266 N.Y.S. 363, 367 (1933).

205. See, e.g., *Wood v. Hughes*, 9 N.Y.2d 144, 154, 173 N.E.2d 21, 26, 212 N.Y.S.2d 33, 40 (1961).

206. See *Thompson v. Macon-Bibb County Hosp. Auth.*, 246 Ga. 777, 780, 273 S.E.2d 19, 21 (1980) (Hill, J., concurring).

207. Cf. Comment, *supra* note 9, at 717.

would have to be attached to the report before its publication. To prepare such an answer, however, takes time. New York allows the public official twenty days to prepare an answer.²⁰⁸ There is a strong argument that a delay of this length "suspends" the grand jury's power by reducing the effectiveness of the recommendation. The framers intended that this power be used to protect Alaska's citizens.²⁰⁹ Grand jury reports concern conditions inimical to the public welfare. Where such conditions exist, a lengthy delay to allow a criticized official to answer the allegations may further harm the public interest by delaying corrective action.

4. *Pre-publication Factual Review by the Trial Court.* Some states use pre-publication factual review of a report by the court impanelling the grand jury to ensure that false reports are not publicized. New York requires that the trial court suppress a report critical of an individual unless the court finds that the report is supported by a preponderance of the evidence.²¹⁰ New Jersey requires "conclusive" proof of allegations in a report criticizing a public official.²¹¹ Adopting one of these standards in Alaska would raise significant constitutional questions. Of course, the framers of the Alaska Constitution did not intend that there be false or misleading recommendations. However, granting the grand jury the power to investigate and make recommendations implies that the *grand jury* should be the body that evaluates the evidence disclosed by the investigation. Allowing a trial judge to reweigh that evidence and perhaps to suppress the recommendation would usurp the grand jury's power. It would appear that such a level of review would contravene the suspension clause.

A somewhat lesser standard of review, however, should pass constitutional muster. Florida allows its courts to suppress reports that lack a factual basis in the record of the grand jury proceeding.²¹² This standard does not require reweighing the evidence but merely involves determining whether the facts in the record support the grand jury's conclusions and recommendations.²¹³ The wording of article I, section 8 in fact suggests such a standard. The section links the grand jury's investigating and reporting powers. It does not empower the grand jury to make recommendations in the abstract or based upon speculation. The grand jury must base its recommendation upon the

208. N.Y. CRIM. PROC. LAW § 190.85(3) (McKinney 1982).

209. PROCEEDINGS OF THE ALASKA CONSTITUTIONAL CONVENTION 1405.

210. N.Y. CRIM. PROC. LAW § 190.85(2)(a) (McKinney 1982).

211. N.J. R. CRIM. P. 3: 6-9(c) (1986).

212. Miami Herald Publishing Co. v. Marko, 352 So. 2d 518, 521 (Fla. 1977).

213. See Appeal of Untreiner, 391 So. 2d 272, 274-75 (Fla. Dist. Ct. App. 1980).

results of its investigation. If the investigation does not disclose evidence sufficient to support the conclusions and recommendations, the court should not publish the report.

VII. CONCLUSION

The framers of the Alaska Constitution intended that the grand jury have the power to investigate and make recommendations on matters that concern the public welfare. They contemplated that such recommendations would contain criticism of public officials in limited circumstances. This note has suggested that grand jury reports should contain criticism of public officials only if the public conditions at issue are inescapably connected with the official's noncriminal failure to discharge his duty.

To help prevent false reports, to ensure fairness to the individual, and to withstand possible due process challenges, this note recommends that the Alaska legislature adopt the following provisions concerning grand jury procedures in issuing recommendations:

- (1) No recommendations may criticize an official for conduct coming within the parameters of a criminal statute.
- (2) In investigations in which the prosecutor may have an interest, the trial court shall permit the grand jury to hire its own investigators and counsel.
- (3) When the grand jury contemplates issuing a recommendation that may criticize an identifiable official, it shall provide that official and a limited number of witnesses in his behalf the opportunity to testify before the grand jury.
- (4) The trial court shall not accept for public filing any recommendation that lacks a factual foundation.

These measures will not only increase the efficacy of the reporting power but will also accord fairness to the subject of a report, thus meeting the objections that many jurisdictions have toward reports critical of specific individuals. This will permit the grand jury to serve better its purpose of "protect[ing] the rights of [Alaska] citizens."

Frank W. Cureton

APPENDIX: MINUTES OF THE PROCEEDINGS OF THE ALASKA
CONSTITUTIONAL CONVENTION CONCERNING
ARTICLE I, SECTION 8.

PRESIDENT EGAN: If there is no further discussion — Mr. Løndborg.

LONDBORG: I believe if Mr. Barr would offer his amendment as an amendment to this amendment, it would be in order, and I think that whether that is included or not that will have a bearing on whether I vote for the amendment to Committee Proposal No. 7 or whether I vote to retain Committee Proposal No. 7.

PRESIDENT EGAN: Was it your desire to offer your proposed amendment as an amendment to the amendment, Mr. Barr?

BARR: It wasn't because I hesitate to interfere with anybody's amendment. I would like to offer it if this amendment we're reconsidering now, is adopted. However, I can see that there might be opposition to the amendment under consideration unless mine is also included. I feel that way.

PRESIDENT EGAN: You are free to offer your amendment as an amendment to this amendment if you so desire.

BARR: I might ask if any of the authors of this amendment would object to adding mine.

PRESIDENT EGAN: If they would object to your asking that it be added? Would you please read Mr. Barr's proposed amendment?

CHIEF CLERK: "At the end of Section 7, as amended, add the following paragraph: 'The power of grand juries to investigate and make recommendations concerning conditions detrimental to the public welfare or safety shall never be suspended.'"

BARR: That is an additional paragraph. If none of the authors of this amendment object, I would like to offer this as an amendment to the amendment. I so move.

PRESIDENT EGAN: Mr. Barr so moves.

BARR: I ask unanimous consent.

PRESIDENT EGAN: Mr. Barr asks unanimous consent. Is there objection?

BUCKALEW: I object.

JOHNSON: I second the motion.

R. RIVERS: Point of clarification. Does he intend to have it added onto what we already have?

PRESIDENT EGAN: That is right, added onto what we already have as the proposed amendment before us. Mr. Buckalew.

BUCKALEW: 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 to then come in and ask the court to strike portions of it. For that reason I would object to it.

R. RIVERS: The present province of our grand jury is to investigate public offices and institutions, not just to investigate anything involving the public welfare. I wonder if Mr. Barr is intending to try to preserve what we already have now, as the province of the grand jury. Would you consent to having it worded as "investigate public offices and institutions and make recommendations"?

BARR: No. I think that their power should be a little broader than that. I don't know what the powers are right now exactly, but I do know that they make recommendations concerning other things than public offices and officers, and under this provision it would only investigate and make recommendations concerning things that endangered public welfare's safety, and I believe that is what the grand jury is for is to protect the rights of its citizens. They do not necessarily have to defame any person or mention him by name. If the tax collector was using methods not acceptable to the public, they might make a recommendation for a change in the system of tax collection, etc., and I think it would be their duty to do so.

PRESIDENT EGAN: Is there further discussion of the proposed amendment to the amendment? Mr. Hellenthal.

HELLENTHAL: 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.

PRESIDENT EGAN: Mr. Sundborg.

SUNDBORG: Mr. President, I move and ask unanimous consent that the amendment to the amendment offered by Mr. Barr be amended by striking the words "detrimental to" in the second line and substituting therefore the word "involving."

RILEY: Mr. President, point of order. I believe I think Mr. Barr's submission on this was contingent upon no objection. There was objection raised, so it is not before us yet.

PRESIDENT EGAN: It is before us, it was moved and seconded, but the Chair was wondering if Mr. Barr was acceptable to that proposed amendment as suggested by Mr. Hellenthal. Are you, Mr. Barr?

BARR: Yes, Mr. President.

PRESIDENT EGAN: I was wondering if you might ask to withdraw it and have it inserted with the proposed words in it, if that is your wish. Then we will get around to this amendment for the third or fourth time.

BARR: I ask permission to withdraw my amendment and submit another amendment in lieu thereof.

PRESIDENT EGAN: If there is no objection, the proposed amendment is ordered withdrawn.

BARR: I would like to submit the same amendment but using the word "involving" instead of "detrimental to" and I ask unanimous consent for its adoption.

BUCKALEW: I object.

BARR: I so move.

JOHNSON: I second the motion.

PRESIDENT EGAN: Mr. Barr moves and Mr. Johnson seconds the motion. If there is no further discussion, the question is, "Shall the proposed amendment as offered by Mr. Barr to the amendment as amended be adopted by the Convention?" All those in favor of the adoption of the proposed amendment to the amendment as amended will signify by saying "aye," all opposed by saying "no." The "ayes" have it and the proposed amendment is ordered adopted

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Yeas: 44 - Armstrong, Awes, Barr, Boswell, Coghill, Cross, Davis, Emberg, V. Fischer, Gray, Harris, Hellenthal, Hermann, Hinckel, Hurley, Johnson, Kilcher, King, Knight, Lee, Londborg, McCutcheon, McLaughlin, McNealy, McNees, Marston, Metcalf, Nerland, Nolan, Nordale, Peratrovich, Poulsen, Reader, R. Rivers, Robertson, Rosswog, Stewart, Sundborg, Sweeney, Taylor, VanderLeest, Walsh, White, Wien.

Nays: 8 - Buckalew, Doogan, H. Fischer, Laws, Riley, V. Rivers, Smith, Mr. President.

Absent: 3 - Collins, Cooper, Hilscher.

