THE ORIGINAL MEANING AND UNDERSTANDING OF THE INVESTIGATIVE POWER OF THE GRAND JURY IN THE CONSTITUTION OF ALASKA

SAVANNAH SHOFFNER* & RICHARD W. GARNETT**

INTRODUCTION

The investigatory, or reporting, power of grand juries refers to the body's ability to issue statements on wide-ranging matters of public policy, generally aimed at exposing "inefficiency, neglect, or criminal or quasi-criminal conduct" by government officials.[1] Grand jurors may propose an investigation themselves or respond to a request from a citizen.[2] The reports produced by these investigations need not be tied to a specific indictment to be released.[3]

Text, history, and tradition reveal that the grand jury has been understood as an intermediary between the government and the people, empowered to make public statements on the people's behalf and entrusted with assisting the government in doing justice. Since the early days of the Common Law, grand juries had the power to make reports on all matters of public policy, even when it reflected poorly on a specific government official.[4] The grand jury provided an organized, official channel for the people to make their voice heard, which also helped their leaders know how to respond. Today, whenever the government breaks the direct connection between the grand jury and the people, it violates the historical understanding of what a grand jury is and how it exercises its reporting power.

I. ORIGINALISM FOR STATE CONSTITUTIONS AND FOR ALASKA'S

Legal commentators have hotly debated how similar originalist constitutional interpretation is, or should be, at the state and federal levels. There are at least three possibilities: (1) correct interpretation is always originalist because originalism is what "interpretation 'just is'";[5] (2) originalist interpretation is always incorrect (or at least incomplete), and so as independent

* J.D. Candidate, Notre Dame Law School, 2026.
** Paul J. Schierl Professor of Law, University of Notre Dame.

[1] Richard H. Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?*, 55 COLUM. L. REV. 1103, 1104 (1955).
[2] 4 WILLIAM BLACKSTONE, COMMENTARIES, *298-300.
[3] George H. Dession & Isadore H. Cohen, *The Inquisitorial Functions of Grand Juries*, 41 YALE L.J. 687, 706 (1932).
[4] *Id.*
[5] *See* Cass R. Sunstein, *There Is Nothing That Interpretation Just Is*, 30 CONST. COMMENT. 193, 193 (2015).

sovereigns, state courts can and should apply some other methodology;[6] or (3) originalism mandates following not only the text, but also the framers' approved methodologies for interpreting that text.[7] William Baude advocates the last approach in his article, *Is Originalism Our Law*?[8] If Baude is correct, then originalism will look different, and proceed differently, from state to state, and between state and federal governments, based on the interpretive methods anticipated and approved by their framers.[9] For present purposes, these possibilities and differences are relevant because the ratification debates suggest that at least some of the Alaska framers did not intend for their constitution to be interpreted according to the rules of modern originalism.[10] They did, however, enact a legal text, and—for originalists, anyway—that text must govern.[11] This paper will apply the ordinary originalist tools of text, history, and tradition, recognizing the written Constitution of Alaska as law, but will also explore state-specific concerns of territorial common law, the quest for statehood, and the particular mischief targeted by Alaska's grand jury provision.

Unlike states along the East Coast, and even in the Midwest and South, Alaska's founding constitutional convention took place within living memory, and even more importantly, within the heyday of living constitutionalism. Alaska ratified its Constitution on April 24, 1956,[12] a time when legal conversations reflected the progressive influence of the Warren Court. Only fourteen of the fifty-five Alaskan framers were lawyers,[13] but those who were spoke in ways that reflected the modernizing impulse of that day.[14] The variety of conceptions held by the founders as to their task and how their work should be interpreted is well demonstrated by the debate over when the constitution should permit the writ of habeas corpus to be suspended. Their debates over how to interpret an earlier legal text reveal divided and different intentions and understandings as to what a single provision would mean and suggest disagreement about how to interpret their own work properly.

The proposed text permitted a suspension in case of "rebellion," "invasion," or "imminent peril," where the latter phrase had been taken from the Supreme Court's 1866 decision in *Ex Parte Milligan* and subsequent federal cases.[15] Representative Hellenthal, a prominent lawyer at the convention, was willing to borrow *Milligan*'s exception, but thought that "imminent peril" should

---

[6] *See* Helen Hershkoff & Adam Littlestone-Luria, *'History and Tradition' in State Courts*, STATE CT. REP. (Sept. 30, 2024), https://statecourtreport.org/our-work/analysis-opinion/history-and-tradition-state-courts [https://perma.cc/E4Y8-2XAR].

[7] *See* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2538 (2015).

[8] *See id.*

[9] *See id.* at 2362 ("Remember, the point in each case is that the choices embodied in the original meaning are authoritative. So to the extent that the original Constitution unambiguously foreclosed the use of precedent or any other source, that choice would be authoritative.") (footnote omitted).

[10] *See, e.g.*, ALASKA LEGIS. COUNCIL, CONSTITUTIONAL CONVENTION PROCEEDINGS PART I 1361 (1955) (statement of Delegate Hellenthal); *id.* at 1358–59 (statement of Delegate Awes).

[11] *See infra* notes 18–23.

[12] *The Constitution of the State of Alaska*, OFF. OF THE LIEUTENANT GOVERNOR, https://ltgov.alaska.gov/information/alaskas-constitution/ [https://perma.cc/ZFL5-XXBL] (last visited Nov. 26, 2025).

[13] John S. Hellenthal, *Alaska's Heralded Constitution: The Forty-Ninth Sets an Example*, UNIV. OF ALASKA, https://www.alaska.edu/uajourney/history-and-trivia/alaska-history/creating-alaska/statehood-files/49th-state-sets-example/ [https://perma.cc/EH4N-TCXT] (last visited Nov. 28, 2025).

[14] *See, e.g.*, ALASKA LEGIS. COUNCIL, *supra* note 10, at 1361 (statement of Delegate Hellenthal).

[15] *See* ALASKA LEGIS. COUNCIL, *supra* note 10, at 1358–59 (statement of Delegate V. Rivers); *id.* (statement of Delegate Awes); Ex Parte Milligan, 71 U.S. (4 Wall.) 2, 125 (1866).

be construed broadly to reflect evolving military tactics. "Let's adapt ourselves to the modern situation," he said.[16] "[W]e are leaving ourselves wide open if we adopt an old-fashioned cave man notion of the suspension of the writ of habeas corpus in this modern age."[17]

Representative Buckalew countered with a more originalist reading. After explaining the factual circumstances of *Ex Parte Milligan*, in which Confederate troops endangered an Indiana courthouse, he interpreted the Court's opinion narrowly: "Now the Supreme Court held that imminent peril is such a situation where that [sic] ground troops . . . of an armed enemy are so close to the court house that it is unsafe for the court and his officials to sit, now that is what they mean by 'imminent peril.'"[18] He continued, "That is what it means and I don't think it means anything like Mr. Hellenthal is talking about, saboteurs, submarines and all this other stuff."[19]

Still others at the Convention simply lacked a specific intention with respect to the provision. For example, Representative Awes, Chair of the Bill of Rights Committee, was asked, "What scope are [the words 'imminent peril'] intended to extend?"[20] She answered, "As I say, the words 'imminent peril' were taken from a Supreme Court decision and in that particular case, I think Mr. Hellenthal is more familiar with the case than I am, so I will let him speak on that."[21] She thought that the interpretation of the language should be tied to what they meant in *Ex Parte Milligan*, but did not appear to personally understand what that case said. Subsequently, she offered her own hypothesis, not drawn from *Ex Parte Milligan*, about how the language might be applied, suggesting that she lacked a fully developed view on the subject.[22] Those who would look to the ratification debates to inform a reading of the habeas corpus provision would be hard-pressed to identify a well-defined intent where one of the primary sponsors of the amendment lacked a specific understanding of what it did.

Given such divergence of views among the framers, original intent or purposive approaches would be as difficult to apply at the state as at the federal level. But given the paucity of public debate on the grand jury provisions, the framers' words at the ratification convention provide some of the best evidence of what the language they used meant at the time and will be discussed below.

One major question unique to state constitutional interpretation, especially in Western states, is the fate of territorial common law. Lawyers, judges, and other interpreters in younger states must consider the role of court decisions made before they achieved statehood. Alaska generally carries over common law from the territorial period, though there are some federalism-related wrinkles. Alaska recognizes its common law as a source of law,[23] and like statutory law, it was carried over into statehood except where superseded by the new State legislature.[24] However,

---

[16] ALASKA LEGIS. COUNCIL, *supra* note 10, at 1361 (statement of Delegate Hellenthal).

[17] *Id.* at 1362 (statement of Delegate Hellenthal).

[18] *Id.* at 1362 (statement of Delegate Buckalew).

[19] *Id.*

[20] *Id.* at 1359 (statement of Delegate V. Rivers).

[21] *Id.* (statement of Delegate Awes).

[22] *Id.*

[23] *Sources of Law*, ALASKA CT. SYS.: SUP. CT. LIVE, https://courts.alaska.gov/media/outreach/docs/scl-i.pdf [https://perma.cc/XQ6S-7P34] (last visited Nov. 29, 2025).

[24] Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339; ALASKA STAT. § 01.10.010 (2025).

this may not have been well understood at the time of the convention. Delegate Taylor confidently stated (and was not contradicted) that "[c]ommon law, unless preserved by statute, is abolished in the Territory of Alaska."[25] This tension likely has to do with the fact that territorial courts were run by the federal government,[26] so the new state courts would have power to interpret matters of *new* (not carried-over) state laws for themselves, independently of federal common law doctrines. This arrangement is intimately tied to historical circumstances—here, federal administration of Alaska as a territory, combined with a specific statute granting statehood—that vary from state to state. For Alaska, the fact that it had once been directly administered by the national government likely contributed to the expectation by some constitutional delegates that the scope of the state grand jury right would match the federal one.[27]

A second distinction from federal interpretation is the presumption of legislative authority. The federal government was intended to be one of enumerated powers, while the Alaska framers were conscious of states' general police power.[28] This awareness served, for some, as a deterrent from constitutionalizing, since most matters "could just as well be handled by the legislature" and "would only cause confusion" if they were put in the constitution.[29] This heightens the importance of state bills of rights relative to the federal one. The Federalists at the American founding argued that a Bill of Rights was unnecessary because it was never to be presumed that the government had any power to infringe those liberties in the first place. But states' bills of rights draw meaningful bounds to the otherwise presumed police power, so special notice should be taken of the rights they protect—including Alaska's protection for a grand jury's reporting function.

Lastly, states may have traditions different from those of the United States as a whole, and each level of generality may cut a different way in text-history-tradition analysis. The perspectives of two delegates expressed this tension in the debate over whether the constitution should permit the imprisonment of debtors. Delegate Barr argued that under the suggested provision, a person "should not be imprisoned for something [other than fraud], and it is *traditional in our country* that he not be imprisoned for debt."[30] But on the other side, Delegate MetCalf was adamant that "[I]f we adopt this amendment . . . you are going to wreck one of the old-time *traditions up here in Alaska*."[31] Perhaps unsurprisingly, the frontier territory had a tradition of stricter punishments for debt than the rest of the United States, and there is no supremacy clause for traditions, so long as they do not contravene federal law. Ultimately, the amendment was passed,[32] but if it had not been, tradition might have created ambiguity rather than resolving it.

---

[25] ALASKA LEGIS. COUNCIL, *supra* note 10, at 1351 (statement of Delegate Taylor).

[26] *The Alaska Court System: Celebrating 50 Years*, ALASKA CT. SYS., https://courts.alaska.gov/media/outreach/docs/50yrs-exhibit.pdf, [https://perma.cc/T46Z-H9ZE] (last visited Nov. 29, 2025).

[27] *See infra* note 76 and accompanying text.

[28] ALASKA LEGIS. COUNCIL, *supra* note 10, at 1346-47 (statement of Delegate Johnson).

[29] *Id.* at 1347.

[30] *Id.* at 1374 (statement of Delegate Barr) (emphasis added).

[31] *Id.* at 1375 (statement of Delegate Metcalf) (emphasis added).

[32] *Id.* at 1379 (statement of President Egan).

II. HISTORY OF THE GRAND JURY AND THE INVESTIGATORY FUNCTION

Applying these tools to Alaska's protection for the investigatory grand jury function, it may be useful to restate the text of the provision: "The power of grand juries to investigate and make recommendations concerning the public welfare or safety shall never be suspended."[33] History provides context as to what "the power" recognized here is.

The grand jury has its roots in the early medieval period, and its earliest functions were more investigative than indictment-driven.[34] The Carolingian kings used to summon bodies of citizens to swear to the truth of a statement.[35] Their sworn attestations served as a basis for the government to administer a sentence or take legislative action.[36] The affirmations were not necessarily tied to specific, ongoing prosecutions.

The general scholarly consensus is that juries were introduced to England during the Norman Conquest and thereafter became an integral part of the developing common law.[37] William the Conqueror relied heavily on juries to determine land ownership throughout Britain during his extensive Domesday Inquests.[38] The Domesday juries consisted of respected men from the community who conducted in-depth hearings on property disputes.[39] Juries took an even more central role in day-to-day governance during the reign of Henry II, William the Conqueror's great-grandson. Henry took an active approach to systematizing and centralizing courts across England.[40] Through a series of assizes throughout his reign, he made grand juries a central part of criminal proceedings in county courts.[41] The bodies looked different in different contexts, but the throughline remained the same from the days of the Carolingians: "a group of neighbors who were called upon by a public officer to answer, on oath, some question."[42]

Grand juries remained a distinctive aspect of the English common law system until the time of Blackstone. The legal system in his day relied heavily on the grand jury, which could act through presentment, indictment, or information.[43] The institution was treated with great respect by both the executive and the judiciary (though it should be noted that the separation of powers was murkier in that period than in the American context). The king's courts lacked power to convict before an indictment or information had been passed.[44] Blackstone identified a threefold commission for the courts: "to enquire, hear, and determine."[45] For the fulfillment of this commission, courts depended on the grand jury: "[B]y virtue of this commission they can only

---

[33] ALASKA CONST. art. I, § 8.

[34] *See* Wayne L. Morse, *A Survey of the Grand Jury System – Part I*, 10 OR. L. REV. 101, 103–04 (1931).

[35] *Id.*

[36] *Id.*

[37] *Id.* at 104; Kuh, *supra* note 1, at 1106–07.

[38] Morse, *supra* note 34, at 106–07.

[39] *Id.* at 107 n.26.

[40] *Id.* at 107–08; Kuh, *supra* note 1, at 1106.

[41] Morse, *supra* note 34, at 108.

[42] *Id.* at 116.

[43] 4 BLACKSTONE, *supra* note 2, at *301, *307.

[44] *Id.* at *307. Note that "presentment" functioned in the same manner as an indictment, so it is treated as a subset of indictment here. The difference is that the grand jury itself initiated a presentment, and a bill for indictment was brought before the grand jury by an officer of the king.

[45] 4 BLACKSTONE, *supra* note 2, at *270.

proceed upon an indictment found at the same assizes; for they must first enquire, by means of the grand jury or inquest, *before they are empowered* to hear and determine by the help of the petit jury."[46] And once the grand jury "informed him upon their oaths that there was a sufficient ground for instituting a criminal suit," then "the king was bound to prosecute, or at least to lend the sanction of his name to a prosecutor."[47] There was no prosecutorial discretion once the bill had been returned.

In addition to this function, juries also served more broadly as the voice of the community. From at least the time of Richard I, grand jury membership was restricted to knights and freeholders—men with significant local power.[48] Blackstone observed that grand jurors were "usually gentlemen of the best figure in the county."[49] Their opinion was valued, and not only when a specific charge was at issue. Grand juries could act as a sort of intermediary between the people and their government. In Blackstone's time, "tumultuous petitioning" (bringing a petition for a change in law that has been signed by more than twenty people before the king or parliament) was outlawed, but if a county's grand jury approved the petition, it could be brought.[50] This was seen as a way to prevent the violence that once accompanied popular petitions to the crown.[51] If a petition had to pass through a deliberative body of citizens (specifically a body of higher-class citizens), cooler heads might prevail.

Whether as an outgrowth of this practice or simply because of the stature of the jury members, seventeenth-century grand juries regularly gave statements of opinion on policy.[52] This was useful to both the community and to Parliament. The reports "concerning some condition in the county" were "taken . . . seriously."[53] They provided a straightforward, filtered avenue for Parliament to hear the concerns of the counties; "Considered the official exponent of county opinion, 'the "Gentlemen of the Grand Jury" usually figured first' in petitions to Parliament."[54]

In all these accounts, it has been observed that the grand jurors represented the *county*. There was a hard-and-fast rule that crimes could be brought before the grand jury only in the county where the crime occurred.[55] This accords well with the repeated characterization of grand juror as neighbor. As Blackstone writes, "so tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the king of any capital offence, unless by the unanimous voice of twenty four [sic] of his equals and *neighbours*."[56] The government could not get at the English citizen without going through his neighbor-intermediaries, and of course, neither could he get at his government without first going through them.

---

[46] *Id.* (emphasis added).

[47] *Id.* at *309.

[48] *Id.* at *302–03.

[49] *Id.* at *302.

[50] *Id.* at *147–48.

[51] *See id.* at *147 ("Nearly related to this head of riots is the offence of *tumultuous petitioning*; which was carried to an enormous height in the times preceding the grand rebellion.").

[52] Dession & Cohen, *supra* note 3, at 706.

[53] *Id.*

[54] *Id.* (quoting SIDNEY WEBB & BEATRICE WEBB, ENGLISH LOCAL GOVERNMENT FROM THE REVOLUTION TO THE MUNICIPAL CORPORATIONS ACT: THE PARISH AND THE COUNTY 455 (1906)).

[55] 4 BLACKSTONE, *supra* note 2, at *303–04.

[56] *Id.* at *305 (emphasis added).

This common law understanding of the grand jury contemplates a broader role than merely "rubber-stamping" the indictments presented by the prosecutor.[57] It is this robust conception of the grand juror that was imported into the colonies, and later constitutionally preserved in the Fifth Amendment.[58] The American colonists continued the practice of petitioning the government through the grand jurors. For example, in the colony of Virginia, "[i]t appears to have been a common practice for grand juries gathered at the capital to express their opinions on things in general, and on the administration of the royal governor in particular."[59] The grand jurors spoke "as a respectable collection of the people of the county,"[60] whose "authority is founded . . . on use and . . . public convenience."[61]

Aside from this reporting function, colonial grand juries issued indictments for serious (but not all) crimes.[62] The earliest state constitutions required a grand jury indictment for all felonies.[63] Later ones permitted indictment by information in some or all felony cases.[64] As time passed, the grand jury's function in issuing indictments became by far its dominant role. The young states were worried about reports that "point[ed] out individuals as subjects of public criticism and opprobrium" without indicting them.[65] Grand jury reports about public officials could appear political rather than judicial. And the political process in nineteenth-century America was a far cry from Blackstone's England. There were other channels for Americans to express their concerns about policies and public officials—channels that did not feel quite so close to the judicial process.[66]

As a matter of originalism at the federal level, it does not matter whether the public eventually became uncomfortable with the investigatory function of the grand jury. It is constitutionalized in the Fifth Amendment.[67] But state constitutions began to reflect the shift. More and more states relied primarily on information instead of indictment, and few made constitutional provision for the investigative power of the grand jury. But Alaska did make such provision: "The power of grand juries to investigate and make recommendations concerning the public welfare or safety shall never be suspended."[68] With this text, Alaska hearkened back to the fuller understanding of grand juror as neighbor-intermediary—not merely a rubber stamp or a tool in the political process, but a representative of the community with a unique power to petition for change.

---

[57] Dession & Cohen, *supra* note 3, at 688.

[58] *See* Blair v. United States, 250 U.S. 273, 282 (1919) ("The Fifth Amendment and the statutes relative to the organization of grand juries recognize such a jury as being possessed of the same powers that pertained to its British prototype . . . .").

[59] Dession & Cohen, *supra* note 3, at 706 (quoting ARTHUR P. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 70 (1930)).

[60] *Id.*

[61] *Id.* (quoting Alexander Addison, *Observations on the Duty of a Grand Jury (1793), in* REPORTS OF CASES IN THE COUNTY COURTS OF THE FIFTH CIRCUIT, AND IN THE HIGH COURTS OF ERRORS AND APPEALS, OF THE STATE OF PENNSYLVANIA, AND CHARGES TO GRAND JURIES, ETC. 70, 73 (2d ed. 1883) 70, 73).

[62] Morse, *supra* note 34, at 120–21.

[63] *See id.* at 121–22.

[64] *See id.*

[65] Dession & Cohen, *supra* note 3, at 709 (quoting *In re* Report of Grand Jury of Baltimore City, 137 A. 370, 373 (Md. 1927)).

[66] *See id.* at 707 ("Partaking in the public eye, as such reports well might, of the sanction and authority associated with grand jury accusation in the form of indictment, they would carry a quite disproportionate weight.").

[67] *See* Blair v. United States, 250 U.S. 273, 282 (1919) ("The Fifth Amendment and the statutes relative to the organization of grand juries recognize such a jury as being possessed of the same powers that pertained to its British prototype, and in our system examination of witnesses by a grand jury need not be preceded by a formal charge against a particular individual.").

[68] ALASKA CONST. art. 1, § 8.

III. ALASKA'S CONSTITUTIONAL CONVENTION AND OUTSIDE INFLUENCES

At the Alaska constitutional convention, the provision about the investigative function of the grand jury was suggested by Delegate Barr:

> The new amendment does not make any mention of the investigating powers of the grand jury, and I have been told they would still have those powers under the Federal Constitution, but I believe it should be mentioned in our constitution because I think that is one of the most important duties of the grand jury.[69]

As explained above, Delegate Barr was correct in his belief that the United States Constitution reserved an investigative role for grand juries, and it appears that he wanted to enshrine a right with the same scope as the federal right in the state constitution.

Delegate Buckalew, somewhat brusquely, responded by sharing a common concern that had led legislators in other states to undermine the grand jury's investigative powers. He worried that when a grand jury was investigating a public official, they might not "have enough evidence to return an indictment but this would give them the power to blast him good and hard."[70] Even without an indictment, the political consequences of a negative grand jury report could be severe, and the grand jury could "more or less defame somebody if they did not have quite enough action for a bill."[71]

Delegate Ralph Rivers tried to explain away the concern by saying that the investigative function's goal is only to "investigate public offices and institutions, not just to investigate anything involving the public welfare" (which he thought was the status quo in the territory).[72] But Delegate Barr doubled down. The grand jury would "investigate and make recommendations concerning things that endangered [the] public welfare's safety, and . . . that is what the grand jury is for[:] to protect the rights of its citizens."[73]

Delegate Hellenthal came to his aid, embracing an "extremely broad" investigatory power for the grand jury.[74] In fact, federal grand juries seated in Alaska issued "extremely broad" reports during the very same period that the convention was taking place. On December 19, 1995, the *Fairbanks Daily News-Miner* reported that, "'Deplorable' conditions in the federal jail have been blasted by a federal grand jury in Fairbanks."[75] The context was a broad report rather than a by-the-wayside remark in an indictment. Like the English and colonial grand juries, the federal grand jury in Alaska was reporting "on things in general."[76] The grand jury in Alaska threw in recommendations that the "United States commissioners' salaries be increased; that the district attorney's office be accorded overtime pay; and that [C]ongress pass the Alaska mental health

---

[69] ALASKA LEGIS. COUNCIL, *supra* note 10, at 1344 (statement of Delegate Barr).

[70] *Id.* at 1405 (statement of Delegate Buckalew).

[71] *Id.*

[72] *Id.* (statement of Delegate Ralph Rivers).

[73] *Id.* at 1405–06 (statement of Delegate Barr).

[74] *Id.* at 1406 (statement of Delegate Hellenthal).

[75] *On the Inside*, FAIRBANKS DAILY NEWS-MINER (Alaska) (Dec. 19, 1955) at 4, https://www.newspapers.com/image/18237603/ [https://perma.cc/6GZD-ZSHC].

[76] Dession & Cohen, *supra* note 3, at 706 (quoting ARTHUR P. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 70 (1930)).

bill."[77] Delegate Hellenthal seems to have been correct about the scope of the federal right when he said, "I think a grand jury can investigate anything."[78] And not only did they have a right, but according to the territorial law, it was their *duty* to investigate and report.[79] These reports were usually made public, including in a high-profile incident involving the Ketchikan Police Department only two years before the constitutional convention.[80]

Other states at the time appeared to assume the scope of a grand jury's power, rather than define it. For context, the Alaska framers were provided with a handbook that contained the constitutions of the states then in existence, along with Hawaii.[81] Delegates took inspiration from other constitutions.[82] None of these states uses language as clear as Alaska's, and an argument from silence might be made against the investigative function of the grand jury. But as will be demonstrated, the contrary is true—the power so inundated historical and contemporary practice that the ordinary meaning of the grand jury power already included the investigative function.

Missouri's grand jury provision is most like the one Alaska adopted during the convention. It states that a "grand jury shall have power to investigate and return indictments for all character and grades of crime; and that the power of grand juries to inquire into the willful misconduct in office of public officers, and to find indictments in connection therewith, shall never be suspended."[83] This text is not as clear as Alaska's own, and on its face, it leaves somewhat ambiguous whether grand jury reports can be issued without accompanying an indictment. History provides more insight. The final phrase, about "the power of grand juries to inquire into the willful misconduct in office of public officers," was introduced for the first time in Missouri's 1945 constitution.[84] Scholars Noah Weinstein and William J. Shaw argue that, given how well-established the jury's indicting power was, context would suggest that it was the reporting function that this provision had in view.[85] The anti-surplusage canon further supports this hypothesis, since the right to come before a grand jury for indictment or information was already protected by the state and federal bills of rights and due process clauses.[86] Still further support is found in the debates over ratifying the Missouri amendment. One of the delegates, Judge Stevens, articulated a very specific mischief to be cured by the provision: "You don't particularly need a grand jury to file information or indictments anymore against individuals who commit crimes, because the . . . Attorney General[] can do that, but you need to maintain the

[77] FAIRBANKS DAILY NEWS-MINER, *supra* note 77.

[78] ALASKA LEGIS. COUNCIL, *supra* note 10, at 1406 (statement of Delegate Hellenthal).

[79] ALASKA PENAL CODE, 30 Stat. 1253, Title II, Ch. 5, §§ 20–22 (March 3, 1899).

[80] PAMELA CRAVEZ, THE BIGGEST DAMN HAT: TALES FROM ALASKA'S TERRITORIAL LAWYERS AND JUDGES, 123 (Alaska Univ. Press 2017)

[81] *See* Hellenthal, *supra* note 13.

[82] *See generally* G. Alan Tarr, *Of Time, Place, and the Alaska Constitution*, 35 ALASKA L. REV. 155 (2018).

[83] MO. CONST. of 1945, art. I, § 16.

[84] Noah Weinstein & William J. Shaw, *Grand Jury Reports—A Safeguard of Democracy*, 1962 WASH. U.L.Q. 191, 194 (1962).

[85] *Id.* at 195.

[86] U.S. CONST. amend. V; ALASKA CONST. art. I, § 8 (The first half of the provision reads "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the armed forces in time of war or public danger. Indictment may be waived by the accused. In that case the prosecution shall be by information. The grand jury shall consist of at least twelve citizens, a majority of whom concurring may return an indictment."). *See also* Weinstein & Shaw, *supra* note 84, at 194.

grand jury to curb the corrupt act[s] of officials."[87] Though Judge Stevens may not have spoken for the entire body, his perspective does suggest a reading consistent with the anti-surplusage rule.

The Alaska delegates knowingly drew inspiration from the Missouri constitution and made reference to it in their debates.[88] They did not discuss New York's then-latest constitution, but that work contains another analogous grand jury protection. The New York provision is longer than either Alaska's or Missouri's, but provides in relevant part, "The power of grand juries to inquire into the wilful [sic] misconduct 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."[89] Additionally, earlier in the same section, the New York Constitution says that a public official can be removed from office if, "upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, [he] refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matter before such grand jury."[90] These statements seem to reference a grand jury power to inquire into government corruption even when an indictment is not directly in view.

In fact, grand jury reports apart from indictments (sometimes called "presentments," despite the technical inaccuracy of that term[91]) were commonplace, though somewhat controversial, in New York at the time that the Alaska constitution was drafted.[92] As an indication of how common they were, there was one nine-week period in 1954 in which four grand juries in the state issued seven reports.[93] In greater or lesser volume, they issued steadily from other states as well, from Utah to New Jersey.[94] In some states, like New Jersey, the sheer number of grand jury reports being issued without explicit state constitutional protection is evidence that the public meaning of the grand jury power included the authority to issue reports. In other cases, there was also statutory authorization for reporting, including in many Western states.[95] If the reporting function was inconsistent with the public understanding of the grand jury's power, it is inconceivable that nearly half the states would have protected it through legislation. And because this understanding was so widespread, there would have been little need to protect the reporting function specifically (as opposed to the grand jury power as a whole) at the constitutional level. Being rooted so firmly in history, practice, and legislation, it seemed unlikely to come under serious fire.

But a countercurrent had begun in the early twentieth century. The New York case *Jones v. People*, decided in 1905, proved a watershed.[96] The majority held that grand jury reports were supported by a state criminal statute authorizing inquiry into misconduct by government

---

[87] Weinstein & Shaw, *supra* note 84, at 197 (quoting MISSOURI CONSTITUTIONAL CONVENTION 1433–37 (1944)).

[88] *See* ALASKA LEGIS. COUNCIL, *supra* note 10, at 1325, 1400 (statements of Delegate Hellenthal).

[89] N.Y. Const. of 1938, art. I, § 6.

[90] *Id.*

[91] *See supra* note 44.

[92] Kuh, *supra* note 1, at 1104.

[93] *Id.*

[94] *See id.* at 1104, 1111.

[95] *See id.* at 1111 n.31.

[96] Jones v. People, 101 A.D. 55 (N.Y. App. Div. 1905).

officials.[97] They observed that "official inquiry intends either official action or official report,"[98] and since "a grand jury lacks authority to take executive or administrative action, it must therefore have reportorial power."[99] But Justice Woodward thought that reports (or as he called them, "presentments") were inconsistent with the state constitution since the parties implicated were not given ordinary process to rebut the reports' contents.[100] His dissent caught on, and it was cited in decisions against grand jury reports in Hawaii, Alabama, Arkansas, Louisiana, Maryland, New Jersey, and Utah, as well as in subsequent New York decisions.[101]

In 1928, Louisiana banned jury reports entirely,[102] and this did not escape the notice of Missouri politicians. That was the year the infamously corrupt Louisiana governor Huey Long came into office.[103] Missouri delegate Judge Stevens warned, "[S]uppose we had a Huey Long in the state of Missouri, . . . and Huey Long of Missouri controlled the legislature. He might call the legislature in here to curb the power of grand juries to investigate official acts of all his hirelings."[104] Apparently there had also been a Huey Long of Pennsylvania, who had likewise banned jury reports.[105] Seeing the threat begin to spread, New York had constitutionalized the grand jury's power to report—the language discussed above.[106] Explicitly referencing the New York provision, Missouri followed suit in 1945.[107]

It is unclear how much of this context Delegate Barr knew when he made his proposal at the Alaska constitutional convention. It is enough that it was on his mind. It was no longer safe to assume that the public meaning of the grand jury power included the reporting power. If it were possible to constitutionalize a grand jury right but ban grand jury reports, a new constitution would need to be more specific.

CONCLUSION

The Alaska Constitution, correctly interpreted, would seem to protect the right of the grand jury to use its reporting power free of government interference in its role as public intermediary, the "official organ of public protest."[108] Neither the executive nor the courts should be permitted to decide what the people may protest about. The executive may assist the grand jury by bringing evidence to form the basis for an indictment. The judiciary may assist the grand jury by explaining the law and matters of procedure. But they may nowhere come between the citizen and the grand juror by screening out petitions.

---

[97] *Kuh, supra* note 1, at 1111 (citing *Jones*, 101 A.D. at 57).

[98] *Id.* (quoting *Jones*, 101 A.D. at 57).

[99] *Id.*

[100] *Id.* at 1112 (citing *Jones*, 101 A.D. at 63).

[101] *Id.* at 1110–11 n.29.

[102] *Id.* at 1114 n.51.

[103] *Id.*

[104] Weinstein & Shaw, *supra* note 84, at 197 n.28 (quoting MISSOURI CONSTITUTIONAL CONVENTION 1433–37 (1944)).

[105] *Id.* (quoting MISSOURI CONSTITUTIONAL CONVENTION 1433–37 (1944)).

[106] *Id.* (quoting MISSOURI CONSTITUTIONAL CONVENTION 1433–37 (1944)) ("The same thing happened in Pennsylvania and that is why the New York Constitution in 1939 put a similar clause in their Constitution whereby a grand jury's investigation of the official acts of public officials will never be abridged.").

[107] *Id.* at 195.

[108] Weinstein & Shaw, *supra* note 84, at 203 (quoting State v. Fary, 117 A.2d 499, 503 (N.J. 1955)).

The reporting function of the grand jury is an essential tool for holding the government accountable, one that developed in the early days of the Anglo-American legal system. To preserve its historic function and prevent its suspension through government capture, the grand jury must remain an intermediary: helping the people to speak to the government and aiding the government in doing justice for the community.