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THE GRAND JURY: AN EFFORT TO GET A DRAGON OUT OF HIS CAVE†

JOHN W. OLIVER*

INTRODUCTION

The subtitle to this discussion of the grand jury and its powers is borrowed from Mr. Justice Holmes' address, *The Path of the Law*.¹ In making the point that "the rational study of law is still to a large extent the study of history,"² Holmes said: "When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength."³

"But," warned Mr. Justice Holmes, "to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal."⁴ The dragon we shall attempt to get out of his cave is the ancient, yet modern, institution of the grand jury. I shall not suggest whether he should be killed or tamed but shall try to give you the data upon which a judgment might be predicated.

But why should anyone go dragon hunting today?

My personal inclination to emulate St. George was occasioned by a newspaper article that I read last May in the *New York Times* while in New York City. It stated that a Jackson County Grand Jury in Kansas City had just reported that the Mafia had been operating a criminal playground in Kansas City. Returning to Kansas City by way of Detroit and St. Louis, I found like reports in the newspapers of those cities. Kansas City was again in the national news—and the news was all bad.

The news of that criminal playground grand jury report spread quickly to the national magazines. The *Reporter*, for example, stated that it was a grand jury report that had "charged that a syndicate connected with the Mafia has for seven or eight years been operating a 'criminal playground' in Kansas City under a pact with the police that has given organized crime free reign. . . ."⁵ But by the time *Life* reached the stands, the fact that it had been a grand jury report that had merely charged a scandal was entirely omitted. Kansas City's now full blown police scandal was reported to be on a par with those actual

† Address delivered to the Lawyers' Ass'n of St. Louis, December 20, 1961, before being appointed to the Federal Court.

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1. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167 (1920).

2. *Id.* at 186.

3. *Id.* at 187.

4. *Ibid.*

5. The Reporter, July 6, 1961, p. 17.

scandals in Chicago, San Francisco and Denver. Said *Life* magazine: "The police scandal in Denver is merely the most recent of a series—Chicago, San Francisco, Kansas City. In Denver, as in other cities, respected private citizens knew about the police depredations and said nothing—or helped undermine the police with bribes and handouts."⁶

As I flew back across the country, reading newspapers as I went, I sensed that the urge to enter the grand jury dragon's cave was going to get the best of me. Several questions much more important than injured civic pride began to bother me. If a seven or eight year old pact had in fact existed between the police of my city and the Mafia—why had the grand jury failed to indict those who allegedly had made the pact? And, as the *Catholic Reporter* of Kansas City was later to ask editorially: "When will the grand jury's broad and sweeping charges against Kansas City, that 'playground of crime,' be tested in court? How can a community protect itself if its good name can be blackened at will by an agency without permanent public responsibility operating by its own rules?"⁷

I, therefore, entered the cave over the Memorial Day weekend to try to drag the grand jury dragon out into the daylight in order to count his teeth and his claws and to test the actual strength and power given him by the constitution and laws of this state.

And may I suggest at the outset, that interest in an inquiry as to whether or not a Missouri grand jury has power to issue general reports, as distinguished from its unquestioned power to return indictments, should not be confined merely to the citizens of Jackson County, Missouri. On September 19, 1961, I noticed that a newspaper in St. Louis assumed for editorial purposes that Missouri grand juries do have legal power to make reports.⁸

That editorial used a recent report of one of your local grand juries as a springboard for asking, what did a particular individual "have to say for himself?"⁹ That editorial correctly noted that a defendant "has the right to wait until he appears in court to answer" an indictment, but as to "other charges which, although they do not allege crimes," it concluded that the individual was "in a different position" and that "he owes it to the people . . . to explain the charges [made in the grand jury report] satisfactorily."¹⁰

On September 22, 1961, that same paper (which I respect and admire enough to be a regular subscriber) stated that: "The leader-

6. *Life*, Nov. 3, 1961, p. 18.

7. *Catholic Reporter*, June 23, 1961, p. 4, col. 1.

8. *St. Louis Post-Dispatch*, Sept. 19, 1961 § C, p. 2, col. 3.

9. *Ibid.*

10. *Ibid.*

ship of the Missouri Bar can perform an important service. . . ." Again the editorial conceded that no criminal proceeding has been triggered by the grand jury's allegations of improper conduct, but it concluded that "the Missouri Bar is responsible to the profession and the people for examining the evidence . . . that the grand jury described as 'certainly unethical.'"¹¹ May I make clear that I am not questioning that newspaper's right under the first amendment to comment on a pending case. The newspaper involved, in fact, did much in 1941 to straighten out the Missouri law on contempt by publication in *State ex rel. Pulitzer Publishing Co. v. Coleman*.¹² And the Supreme Court of the United States settled that question the same year in *Bridges v. California*.¹³

I use the two St. Louis editorials merely as examples of how even a newspaper with a most excellent record in the field of civil liberties is prone, perhaps without giving the matter much real thought, to assume that Missouri grand juries are still authorized under our constitution and laws to make general reports, and that editorial use of such reports is entirely justifiable.

Whether newspapers generally can so prejudice an entire community by their comment on a pending case so that a particular defendant cannot get a fair trial under the rule of *Shepherd v. Florida*¹⁴ and its progeny (particularly the concurring opinion in *Irvin v. Dowd*,¹⁵ decided in June of last year) is beyond the scope of our discussion.

Is it not important, however, for all of us to examine the validity of the assumptions upon which that newspaper based its editorials? More fundamentally, should any individual be called upon editorially, or otherwise, to answer charges contained in a general report of a grand jury which admittedly "does not allege crimes?" Should the Missouri Bar, or anyone else, accept what is said in a grand jury report about anyone?

Those questions, it seems to me, should concern all citizens of Missouri, regardless of their place of residence. And the answer to those questions is controlled by the answer to the question of whether a Missouri grand jury is empowered by the constitution and laws of this state to make any charges in a grand jury report.

As we approach that question, ponder, if you will, how one is supposed to answer a charge in a grand jury report. In what forum is he to make his satisfactory answer? To what witness stand is he to

11. *Id.*, Sept. 22, 1961, § B, p. 2, col. 3.

12. 347 Mo. 1238, 152 S.W.2d 640 (1941).

13. 314 U.S. 252 (1941).

14. 341 U.S. 50 (1951).

15. 366 U.S. 717 (1961).

call his witnesses? How is he, or anyone else, going to get the members of the grand jury to violate their statutory oaths of secrecy so that he can learn the identity of, and cross-examine, the necessarily faceless accusers?

And who is to make any real and binding adjudication that the presumption of innocence to which all persons are constitutionally entitled has or has not been overcome?

Those fundamental questions underlie any inquiry into the subject of whether or not grand jury reports are authorized by the present law of Missouri. Those are the teeth and the claws of the dragon.

As a result of my entrance into the cave, I became convinced that the 1945 constitution and laws of Missouri do not confer power on Missouri grand juries to publish general reports. And, under date of June 2, 1961, I prepared a short memorandum of my research entitled: *Inquiry Into the Power of a Missouri Grand Jury*. Let us look briefly to the authorities.

I. DISCUSSION OF LEGAL POWER OF A MISSOURI GRAND JURY TO FILE GENERAL REPORTS

The point of beginning is obviously the 1945 constitution and laws of Missouri. The Bill of Rights provides:

That a grand jury shall consist of twelve citizens, any nine of whom concurring may find an indictment or a true bill: . . . such grand jury shall have power to investigate and return indictments for all character and grades of crime; . . . 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.¹⁶

There can be no question that Missouri grand juries had the power from 1875 until 1945 to file general reports. No provision remotely similar to Article 14, Section 11 of the 1875 constitution was included in the 1945 constitution. This section, expressly rejected by the framers of the 1945 constitution, and entirely omitted therefrom, provided:

It shall be the duty of the grand jury in each county, at least once a year, to investigate the official acts of all officers having charge of public funds, and report the results of their investigations in writing to the court.¹⁷

Speaking broadly, the only statutory power conferred on a Missouri grand jury to file any sort of a report, as distinguished from returning an indictment, is conferred by section 540.020 (2)¹⁸ which provides

16. Mo. CONST. art. 1, § 16. (Emphasis added.)

17. Mo. CONST. art. 14, § 11 (1875). (Emphasis added.)

18. Mo. REV. STAT. § 540.020(2) (1959).

that a grand jury shall have power "to examine public buildings, and report on their condition."¹⁹ It should be added that powers to examine and report on particular public buildings, such as jails, are scattered throughout the statutes dealing with subjects other than grand juries.²⁰ However, as I have said, statutory power to report is generally confined to making reports on the condition of public buildings as provided in section 540.020 (2).²¹

State ex rel. Lashly v. Wurdeman,²² the only Missouri case which has dealt extensively with the power of a Missouri grand jury to report, must be laid aside because it was expressly based on that section of the 1875 constitution²³ which the framers of the 1945 constitution rejected.

As a matter of constitutional law, the Missouri cases clearly hold that the refusal of the framers of the 1945 constitution to include a provision similar to that in the 1875 constitution (which did authorize a grand jury to make reports) was a rejection and abolition of the former power. *Ex parte Slater*,²⁴ for example, involved a similar situation, regarding a provision relating to grand juries in the 1865 constitution²⁵ that the framers of the 1875 constitution refused to carry over into that document. The Supreme Court of Missouri held that the "clause of the constitution of 1865, which gave sanction to the statute under which it is claimed the indictment in this case was authorized, was not inserted in the constitution of 1875, and being thus abolished, it necessarily abolishes and destroys the statute, which rested solely upon it for support."²⁶ As a matter of statutory construction, it is clear that the affirmative grant of power²⁷ to report on the condition of public buildings, under the rule of *State v. Salmon*,²⁸ effectively excludes the existence of any implied power to report on any other matter.

The law of Missouri is entirely consistent with the law generally announced in regard to grand juries in other jurisdictions.

The courts of all jurisdictions, including Missouri, point out that historically the ancient English grand jury had a dual purpose. Its first function was to return indictments. But more importantly, its second and more important function was to protect the citizen and

19. *Ibid.*

20. *E.g.*, MO. REV. STAT. § 221.300 (1959).

21. Note 18 *supra*.

22. 187 S.W. 257 (Mo. 1916).

23. Note 17 *supra*.

24. 72 Mo. 102 (1880).

25. MO. CONST. art. 11, § 12 (1865).

26. *Ex parte Slater*, 72 Mo. 102, 109 (1880).

27. MO. REV. STAT. § 540.020(2) (1959).

28. 216 Mo. 466, 115 S.W. 1106 (1909).

the public from unfounded accusation, whether the unfounded accusations "come from the government or are prompted by partisan passion or private enmity."²⁹

The classic example of protection of the individual against unfounded charges, of course, was the trial of the Earl of Shaftesbury at Old Bailey in 1681: "the jury returned 'Ignoramus' upon the bill." "Ignoramus," under the ancient English common law, meant "we do not know," hence was equivalent to a refusal to indict. Sir John Hawkes commented about that time that "a grand jury ought not to believe coffee-house stories" and that "in truth, it was honor to be an Ignoramus jury," when necessary to protect a citizen against a tyrannical monarch. John Locke, it will be recalled, was Shaftesbury's secretary, and after the English grand jury saved Shaftesbury from indictment, Locke accompanied Shaftesbury to Holland where Locke wrote his influential essay on Civil Liberty. It was that tradition of frustrating tyrannical persecution by the Crown that caused Americans to incorporate the institution of the grand jury into the fifth amendment of the United States Constitution and into the Bills of Rights of our state constitutions.

Other jurisdictions have ruled on substantially similar constitutional and statutory provisions to those we have in Missouri. Those cases hold that a grand jury has no power to file a general report unless expressly authorized by law. *Woods v. Hughes*,³⁰ decided early this year by the highly respected Court of Appeals of New York, reviewed practically all of the authorities on the subject. *Application of United Electric Workers*³¹ contains the best review of the Federal cases. In both cases the reports of grand juries were expunged from the record. In the case of New York, a contrary decision of fifty-five years' standing was expressly overruled. Both cases relied upon *People v. McCabe*,³² which held that:

A presentment is a foul blow. It wins the importance of a judicial document; yet it lacks its principal attributes—the right to answer and to appeal. It accuses, but furnishes no forum for a denial. No one knows upon what evidence the findings are based. . . . It is like the "hit and run" motorist. Before application can be made to suppress it, it is the subject of public gossip. The damage is done. The injury it may unjustly inflict may never be healed.³³

I would suspect that a great number of people in this room heard or read something about the report of the "criminal playground" grand

29. 24 AM. JUR. *Grand Jury* § 3 (1939).

30. 9 N.Y.2d 144, 212 N.Y.S.2d 33 (1961).

31. 111 F. Supp. 858 (S.D.N.Y. 1953).

32. 148 Misc. 330, 266 N.Y. Supp. 363 (Sup. Ct. 1933).

33. *Id.* at 333-34, 266 N.Y. Supp. at 367.

jury of Jackson County, and of its indictment of four high-ranking police officers including the then Chief of Police of Kansas City. But how many of you have heard or read that the indictments against the former Chief were thrown out of court for failure to allege the commission of any crime; that the new Chief of Police has publicly stated that there is no Mafia in Kansas City with whom any alleged pact could have been made; and that on November 22, 1961 the City Council of Kansas City unanimously adopted a resolution which expressed the Council's "sincere regret for the humiliation and mental distress suffered by [former Chief of Police] Brannon as the result of these unjust charges, and our apologies for the misguided zeal of the officials responsible therefor"?

The City Council's resolution concluded: "We concur in the recent editorial in the *Star* commenting on the injustice wrought upon Chief Brannon and expressing satisfaction over his vindication."

The Missouri cases that relate to grand juries generally are entirely consistent with the rules of decision of the cases from the other jurisdictions which related specifically to the lack of power to file general reports. As Judge Lamm used to say, the curious may consult *Conway v. Quinn*,³⁴ *Mannon v. Frick*,³⁵ *State ex rel. Clagett v. James*,³⁶ and *State ex rel. Dalton v. Moody*.³⁷

And finally the cases which hold that a grand jury is personally liable in tort to an individual defamed by an unauthorized grand jury report should not be overlooked. Those cases quite clearly rest upon the proposition that no power to report exists. *Bennett v. Kalamazoo Circuit Judge*,³⁸ and *Bennett v. Stockwell*,³⁹ decided by the Supreme Court of Michigan in 1916 are the leading cases.

While my legal memorandum was privately handed the Presiding Judge of the Circuit Court of Jackson County, it became a matter of public knowledge when one of the lawyers representing one of the four high-ranking police officers who were indicted by the grand jury, used it as an authority in support of a motion filed in one of the cases. Parenthetically, it should be stated that as of this moment three out of the four indicted officers are now free from any accusation either by action of the circuit court on motions directed against the indictments or, as in one case, by dismissal by the state for want of evidence to support the charges made by the indictments. Motions are still

34. 168 S.W.2d 445 (Mo. Ct. App. 1942).

35. 365 Mo. 1203, 295 S.W.2d 158 (1956).

36. 327 S.W.2d 278 (Mo. 1959).

37. 325 S.W.2d 21 (Mo. 1959).

38. 183 Mich. 200, 150 N.W. 141 (1914).

39. 197 Mich. 50, 163 N.W. 482 (1917).

pending in regard to the final defendant.^{39a} May I make clear that I do not and have not represented any of the defendants in any of the cases.

After my initial inquiry had been handed the court, an Assistant Prosecuting Attorney prepared a brief in which he attempted to defend the power of a Missouri grand jury to issue general reports. The basic theory was predicated on the idea that a grand jury at common law possessed power to file general reports, and that somehow the alleged common law power could be looked to as a source of power in addition to that conferred by the constitution and laws of Missouri. In the face of our statute, which provides that the British criminal statutes shall never be in force in this State,⁴⁰ it is most difficult to see how such a theory is tenable.

Recently in Kansas City, a new grand jury, empanelled by the same judge who had empanelled the March Term "criminal playground" grand jury, indicated that it, like its predecessor, was going to file a general report. Counsel for one of the defendants who learned that the second grand jury report was likely to single his client out for additional comment, attempted to raise the question of its legal power by an application for preliminary writ of prohibition in the Supreme Court of Missouri. That court refused to take jurisdiction. It is therefore apparent that the question of the power of a Missouri grand jury to file a general report remains undecided. But the refusal of the Supreme Court to accept jurisdiction in that case will not make the question disappear. It presents itself every time a circuit judge in this state charges a grand jury as to its powers and duties.

It should be added, however, that in connection with the prohibition proceeding, the Kansas City Bar Association appointed a special committee composed of Rufus Burris, Charles Carr, Ius Davis, and Walter Raymond, all past presidents of the Missouri Bar. The committee was to study the questions of law involved, make up their minds in regard to the answers to those questions, and file *amicus* briefs in the Supreme Court if it should accept jurisdiction.

At the November meeting of the Kansas City Bar Association all four members of that committee reported that they were of the same opinion as that expressed in the initial inquiry. They also stated that they deeply regretted the action of the Supreme Court in refusing to accept jurisdiction because they felt the question should have been definitively determined so that both the trial courts and the individual grand jurors would have had the benefit of a Supreme Court opinion on the subject.

39a. This defendant was cleared between the time this address was delivered and its publication in the LAW QUARTERLY.

40. MO. REV. STAT. § 556.110 (1959).

II. THE QUESTION INVOLVED IS ONE OF LAW— NOT POLICY—AND SHOULD BE SO DECIDED

Legal briefs galore are now floating around Jackson County. No one, however, except an Assistant Prosecuting Attorney, has taken the position that grand juries have legal power to report generally. The *Kansas City Star* has suggested editorially that "there is only one good way to settle the issue and that is in court. The move for a prompt decision is in the public interest."⁴¹

Some court, of course, will some day be required to decide the question, and I have attempted to insist throughout the controversy that it be decided on the basis of what the law provides, and not on the basis of what one might like for the law to provide.

Policy considerations can not affect or determine the relatively narrow question of law with which we are here concerned. This is an extremely important point because there are those among us who would suggest that ends justify means, and that judges should bend the law just a bit in order to permit the publication of an unauthorized grand jury report that somehow is supposed to satisfy an immediate public demand that rumored corruption be exposed, or that assumed lax or inefficient operation of public offices be corrected by a newspaper headline.

The late, great Cardozo, while still a judge on the Court of Appeals of New York, and before he became a Justice of the United States Supreme Court, set for us the only safe guide that can serve a government that operates under law. In *Doyle v. Hofstader*,⁴² he stated:

We are not unmindful of the public interests, of the insistent hope and need that the ways of bribers and corruptionists shall be exposed to an indignant world. Commanding as those interests are, they do not supply us with a license to palter with the truth or to twist what has been written in the statutes into something else that we should like to see. . . . A community whose judges would be willing to give it whatever law might gratify the impulse of the moment would find in the end that it had paid too high a price for relieving itself of the bother of awaiting a session of the Legislature and the enactment of a statute in accordance with established forms.⁴³

It, therefore, has been and is my suggestion, that the public interest requires that the question of the power of a Missouri grand jury to report generally be settled and determined in accordance with the law as it is stated in the 1945 constitution and laws of this state. If

41. *Kansas City Star*, Sept. 8, 1961, p. 42, col. 2.

42. 257 N.Y. 244, 177 N.E. 489 (1931).

43. *Id.* at 268, 177 N.E. at 497-98.

people do not like that law, if they want grand juries to have legal power to report generally, then they should seek changes in the present law in an orderly fashion.

III. SHOULD THE MISSOURI LAW BE CHANGED TO AUTHORIZE GENERAL REPORTS OF A GRAND JURY

Before anyone decides to embark upon a campaign to change the 1945 Missouri Constitution and present laws of Missouri in order to vest Missouri grand juries with legal authority to file general reports, we suggest that some hard thought be given the question of whether any branch of government should or may be given legal authority to expose for the sake of exposure.

Those who argue that a third function be given to Missouri grand juries, namely, a broad general reporting function, base their argument on the idea that a grand jury should be permitted to expose corruption, and to give publicity to conditions which the members of a particular grand jury believe to be bad, even though such a grand jury has not been able to gather enough evidence to warrant any indictments. They do not exactly say "we want the right to give publicity to the smoke because we lack evidence to indict for arson"—but the argument is not far from exactly that.

I have never heard anyone seriously contend that any, essentially political, comment of a group of laymen who happen to have been empanelled on a grand jury is of any greater public value to the community than a report of a chamber of commerce committee, a report of a bar association or a report of any other group of private citizens. Such reports should stand on their own merit and should not be given the added circumstantial guarantee of trustworthiness that the public tends to attach to any official judicial declaration.

Judge Goff, in his opinion in the case of *In re Osborne*,⁴⁴ once suggested that a grand jury sometimes gets an "exaggerated idea of its own importance." He also added the sobering thought that "if the gentlemen of the grand jury were to meet as an association of individuals and give expression to the sentiments contained in a [grand jury report], little attention would be paid to them. . . ."⁴⁵ Can you name a single association of private individuals, including Bar Associations, that does not complain bitterly about the press' failure to take proper notice of its committee reports? But on what page does the press usually print a general grand jury report—particularly if the report either views with alarm or points with pride. More fundamentally, what training and experience do grand jurors have which

44. 68 Misc. 597, 125 N.Y. Supp. 313 (Sup. Ct. 1910).

45. *Id.* at 604, 125 N.Y. Supp. at 318.

recommends that they be authorized by law to pontificate with quasi-judicial approval on such subjects as the general conduct of a sheriff or a school board, the need for juvenile or additional circuit court judges, the economic feasibility of public projects or other matters which, by their nature, are matters of subjective judgment calling for determination by official legislative bodies or by decision at the polls. Even the most ardent advocates of vesting a reporting function in grand juries recognize that the exercise of such power in those areas is improper and not in the public interest.

Richard Kuh, an Assistant District Attorney of New York City, made the most reasoned and one of the few unemotional defenses for a reporting function for a grand jury.⁴⁶ That defense was predicated on the theory that as all government grows larger and more complex "a need develops for new modes of policing the growing body of public employees to protect their ranks from the encroachment of the corrupt, the neglectful, and the incompetent."⁴⁷

Mr. Kuh, in much the same spirit of the Muckrakers and the Progressives of fifty years ago, assumed without much examination of actual experience, that "there is no greater deterrent to evil, incompetent and corrupt government than publicity."⁴⁸ "Another advantage," argued Mr. Kuh, on behalf of a general grand jury report theoretically written by laymen, is that its language is "more dynamic, more newsworthy, and hence more effective publicly."⁴⁹ The basic assumption, of course, is that dynamic, newsworthy publicity (whatever those words may mean) is in fact a great deterrent to evil, incompetent and corrupt government. Grand jury reports, of course, had a great deal to do with electing Thomas E. Dewey as a Republican Governor of New York. And they had a great deal to do with electing Joseph W. Folk as a Democratic Governor of Missouri. But must we not inquire how much permanent improvement was established by those exceptional cases? Did evil, incompetent, or corrupt government vanish from New York City and St. Louis? Must we not therefore examine a much broader area of our experience with publicity?

We have had a wealth of experience with the power of publicity by official governmental bodies in recent years. The reports of congressional committees, for example, give us a fertile field for comparative examination. The House Un-American Activities Committee has always been convinced that exposure by publicity is in the public interest. Even now it is spending our money to make and distribute

46. Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?*, 55 COLUM. L. REV. 1103 (1955).

47. *Id.* at 1118.

48. *Id.* at 1122.

49. *Id.* at 1130.

motion pictures. And grand jury associations are so confident of their ability to serve the public interest by having publicity given to general grand jury reports, that they somewhat resent having anyone even raise the question of whether or not a general grand jury report is or is not authorized by law.

All this, therefore, would seem to raise the question of whether these separate governmental institutions have anything in common from a legal viewpoint.

IV. WHAT DO CONGRESSIONAL INVESTIGATIONS AND GRAND JURY REPORTS HAVE IN COMMON?

It does not take elaborate argument to establish that there are many points of similarity between the reports of a congressional investigating committee and the presentment of a general report by a grand jury.

In *Hannah v. Larche*,⁵⁰ the Supreme Court of the United States pointed out that "although we do not suggest that the grand jury and the congressional investigating committee are identical in all respects . . . we mention them . . . to show . . . the rules . . . which have historically governed the procedure of investigations conducted by agencies in the three major branches of our Government."⁵¹

Watkins v. United States,⁵² *Barenblatt v. United States*,⁵³ *Wilkinson v. United States*,⁵⁴ *Braden v. United States*,⁵⁵ and most recently, *Deutch v. United States*,⁵⁶ all of which involved the same congressional investigating committee, reaffirmed the fundamental proposition that there are constitutional limits beyond which even a congressional investigation cannot go.

I say "reaffirmed" advisedly because, in these days when impeachment proceedings and hanging are being suggested with regard to the Chief Justice of the United States Supreme Court, many people seem to be uninformed about the fact that those cases are but progeny of Mr. Justice Miller's opinion in *Kilbourn v. Thompson*,⁵⁷ decided by a unanimous court in 1880, some eighty years ago.

In *Deutch*,⁵⁸ decided last June, the Court reversed a contempt conviction based upon a witness' refusal to answer a question propounded

50. 363 U.S. 420 (1960).

51. *Id.* at 449.

52. 354 U.S. 178 (1957).

53. 360 U.S. 109 (1959).

54. 365 U.S. 399 (1961).

55. 365 U.S. 431 (1961).

56. 367 U.S. 456 (1961).

57. 103 U.S. 168 (1880).

58. *Deutch v. United States*, 367 U.S. 456 (1961).

by a Subcommittee of the House Un-American Activities Committee. Speaking through Mr. Justice Stewart, the court held:

One of the rightful boasts of Western civilization is that the [prosecution] has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure." *Irvin v. Dowd*, 366 U.S. 717, 729 (concurring opinion). Among these is the presumption of the defendant's innocence.⁵⁹

Even more pertinent to our grand jury inquiry is the question of whether any governmental investigation may be constitutionally carried out for the sole purpose of publicity and exposure. Publicity and exposure are the only claimed ends that could be served by a general grand jury report. I have heard of no argument that makes any greater claim on behalf of a general grand jury report.

The House Committee on Un-American Activities has attempted to defend its alleged right of publicity and exposure in much the same fashion as Mr. Kuh would attempt to defend the assumed right of a grand jury to publicize and expose people and institutions that its particular members might not like at the moment.

In its report to the Congress, the Un-American Activities Committee stated that: "While Congress does not have the power to deny to citizens the right to believe in, teach, or advocate, communism, fascism, and nazism, it does have the right to focus the spotlight of publicity upon their activities. . . ." ⁶⁰

Again, in a pamphlet issued by the Committee in 1951, the Committee stated that "exposure in a systematic way began with the formation of the . . . Committee . . ." ⁶¹ The Committee therefore believed itself commanded "to expose people and organizations. . . . That is still its job, and to that job it sticks." ⁶²

The Supreme Court of the United States has made clear that if exposure for the sake of exposure was in fact the Committee's job, it was a job to which it could not constitutionally stick. *Watkins*⁶³ held that the Committee's conception of the extent of its constitutional power to expose by publicity was completely without constitutional foundation. "Investigations," held the Court, "conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." ⁶⁴ In reversing a contempt conviction,

59. *Id.* at 471.

60. H.R. REP. No. 2, 76th Cong., 1st Sess. 13 (1939).

61. H.R. DOC. No. 136, 82d Cong., 1st Sess. 19 (1951).

62. *Id.* at 67.

63. *Watkins v. United States*, 354 U.S. 178 (1957).

64. *Id.* at 187.

with only Mr. Justice Clark dissenting, Chief Justice Warren, speaking for the majority, held:

We have no doubt that there is no congressional power to expose for the sake of exposure. The public is, of course, entitled to be informed concerning the workings of its government. That cannot be inflated into a general power to expose . . .⁶⁵

"The Bill of Rights," held the Chief Justice in *Watkins*, "is applicable to investigations as to all forms of governmental action."⁶⁶ And let us not forget, as we examine our dragon objectively, that a grand jury investigation is a form of governmental action. Must it not therefore follow that a grand jury may be entirely lacking in constitutional power "to expose for the sake of exposure"?

The reasonably strong and most recent reaffirmation of *Watkins* by *Deutch*, after the Court had, in its interim 5 to 4 decisions in *Barenblatt*, *Wilkinson*, and *Braden*, seemingly retreated from a realistic application of the broad principles of *Watkins*, reduces some of the anxiety expressed by Mr. Marquis Childs of the *St. Louis Post-Dispatch's* Washington Bureau, in his series of excellent articles based on those cases. Those articles have been reprinted in convenient pamphlet form under the title of *The Erosion of Individual Liberties*,⁶⁷ and are recommended reading for all members of the public, in which broad grouping I include the members of the legal profession.

But this group of cases does not reduce the importance or the force of the basic point under discussion. Mr. Childs pointed out that when some one is subpoenaed to appear before a congressional committee it is a "common attitude" for people to say "Well, they must be guilty of something or they wouldn't be up there . . . they'll have to take whatever happens to them. . . ."⁶⁸

Mr. Childs quoted approvingly from the Detroit speech of William T. Gossett, vice-president and general counsel of Ford Motor Company, as had Mr. Justice Brennan in one of his dissenting opinions in the interim cases above mentioned. Said Mr. Gossett:

When we are frustrated by the feeling that certain people . . . gangsters or labor racketeers, for example—have flouted society with impunity, it is tempting to pillory them through prolonged public exposure. . . .⁶⁹

But continued Mr. Gossett, "to try by such means to destroy those whom we are unable to convict by due process of law may destroy in-

65. *Id.* at 200.

66. *Id.* at 188.

67. CHILDS, *THE EROSION OF INDIVIDUAL LIBERTIES* (1961).

68. *Id.* at 9.

69. *Id.* at 27.

stead the very safeguards that protect us against tyranny and arbitrary power.”

Those words, of course, were spoken—and quoted—by both Mr. Justice Brennan and Mr. Childs in connection with the exposure by the publicity attendant to congressional hearings. But are those words not equally applicable to the publicity attendant to an unauthorized report of a grand jury? Is not a person or institution equally tried by the vigilante of publicity, given the charges in grand jury reports, in much the same fashion as one condemned by an arbitrary congressional investigating committee?

Is it not just as accurate to say that it is a “common attitude” for people to say “Well, they must be guilty of something or they wouldn’t have been mentioned in that grand jury report . . . they’ll have to take whatever happens to them”? And is it not true that the public really does not understand that there is a real and fundamental difference between an indictment and a charge in a grand jury report?

If we really get down to cases, is not the public led into total confusion when a newspaper known for its devotion to constitutional liberty, recognizes that an indicted person “has the right to wait until he appears in court to answer”—but with seeming inconsistency, asserts that one who is merely subjected to “charges . . . which do not allege crimes” made in a general report of a grand jury is in a “different position” and that he must therefore speak up?

The public is not advised by such talk that “the Bill of Rights is applicable to investigations as to all forms of governmental action,” as *Watkins* held. Nor is it advised that a grand jury’s power to investigate cannot be inflated into a power to expose for the sake of exposure. The public is led to believe, and may we respectfully suggest, hopelessly misled, into believing that a citizen’s “different position” in regard to an unauthorized grand jury report somehow requires him “to explain the charges satisfactorily”—a duty admittedly not present if he actually had been indicted for a crime.

And any “satisfactory explanation” must necessarily be an out of court explanation which somehow should be made in spite of the fact that the charged citizen does not know—nor can he legally find out—who made the accusations that the particular members of a grand jury accepted for purposes of their report—to say nothing of not having the right to cross-examine those faceless accusers.

I recognize, as did Learned Hand in his 1952 Albany speech, that “there is a risk in refusing to act till the facts are all in,” but I also join with him when he inquired “but is there not greater risk in abandoning the conditions of all rational inquiry?” And I stand with him when he concluded:

Risk for risk, for myself, I had rather take my chance that some traitors (and I would add 'governmental boodlers') will escape detection than spread abroad a spirit of general suspicion and distrust, which accepts rumor and gossip in place of undismayed and unintimidated inquiry.

Specifically, Learned Hand believed that a "community is already in process of dissolution where each man begins to eye his neighbor as a possible enemy," and "where denunciation, without specification or backing, takes the place of evidence." Hand counseled strongly against proceeding on mere suspicion. The public acceptance of the reports of governmental bodies which are based on suspicion only, and which do not afford the accused his right to hear, face and cross-examine his accusers represents, to use Hand's words again, "a solvent which can eat out the cement that binds the stones together" and "may in the end subject us to a despotism as evil as any that we dread."

In a lighter vein—but to illustrate the frustration that reflection on this subject involves—how could the following report of a grand jury be "satisfactorily answered"?

A stricter examination of applicants for licenses to operate automobiles in the city, particularly in the cases of women and young girls, who, because of their impulsive natures and hasty conclusions, are more likely to miscalculate distances, to dislike the attitude or appearance of the traffic officer who halts them, and who, when in a 'jam,' lose their heads more quickly than male drivers.⁷⁰

Or how is one to answer the report of a recent Sullivan County grand jury, recommending the abolition of the township form of government for that county and concluding: "We recommend the county court close the 'pitch room' in the basement of the court house."⁷¹

The whole point is that our system of government under law does not contemplate or tolerate trial or government by general grand jury reports. "[T]he [prosecution]," said the Supreme Court of the United States in *Deutch*, "has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure. . . . Among these is the presumption of the defendant's innocence."⁷²

If we are at all tender to the spirit of liberty and of our constitution, we shall not say to any individual that he must step right up and give an out of court explanation of any sort of a charge made in a general report of a grand jury.

70. The Panel, 1927, pp. 6-7.

71. St. Joseph News Press, Sept. 3, 1961, § D, p. 5, col. 8.

72. *Deutch v. United States*, 367 U.S. 456, 471 (1961) citing *Irvin v. Dowd*, 366 U.S. 717, 729 (1961) (concurring opinion).

If, on the other hand, there is continued insistence on the illegal and the impossible, then I shall be forced to join the pessimists mentioned by Mr. Childs in one of his articles who "take the gloomy view that . . . a serious erosion of American freedoms will continue with the public at large only vaguely aware of what is happening."⁷³ But, quite frankly, those confident words of Jefferson in his First Inaugural which hold that "error of opinion may be tolerated, where reason is left free to combat it,"⁷⁴ make me a sufficient optimist to believe that reason can even change a newspaper's mind. Particularly when the full quote from Jefferson's First Inaugural appeared in the lead paragraph of the reprint of the articles we mentioned earlier.

Is the basic argument against exposure for the sake of exposure by a general grand jury report but a reflection of the times in which we live? Or have others given evidence of having shared the doubts that we have expressed in regard to the proper and perhaps constitutional power of that ancient institution? We know generally that the grand jury probably originated at the Assizes of Clarendon in 1166 as an outgrowth of the Papal Inquisition. I can assure you that a great many people have preceded me into the dragon's cave and that they have reported fully on what they found.

V. THE RESULTS OF OTHER EXPLORATIONS INTO THE CAVE

Thomas E. Dewey, who has already been mentioned, writing for *The Panel*, the official publication of the Grand Jurors' Association of New York, in May of 1941,⁷⁵ more or less denounced "the bright young theorists, the fuzzy-minded crackpots and others, of less idealistic purpose who would like to see the grand jury abolished."⁷⁶ The record shows that a great many people other than "bright young theorists" and "fuzzy-minded crackpots" with quite well established idealistic purposes have led the ancient battle to abolish the grand jury in its entirety. In fact, some prosecuting attorneys and some members of grand jury associations find themselves quite alone in the position that they take in spite of Governor Dewey's somewhat immoderate language.

Jeremy Bentham, perhaps the most famous of legal reformers, recommended the outright abolition of the English grand jury in 1821 as "an engine of corruption" which was "systematically packed." Edward Livingstone, Bentham's disciple in this country, provided in his 1825 Code for Louisiana that grand juries should have power only to return indictments and that they be prohibited from expressing

73. CHILDS, *op. cit. supra* note 67, at 27.

74. BOWERS, INAUGURAL ADDRESSES OF PRESIDENTS 50 (1929).

75. Dewey, *Grand Jury 'the Bulwark of Justice,' The Panel*, May, 1941, p. 3.

76. *Ibid.*

any opinions on any other matter. Chancellor Kent of New York wrote Livingstone that: "I am exceedingly pleased with the provision confining grand juries to the business of the penal law and not admitting any expression of opinion on other subjects."

David Dudley Field stated in 1846 that the only reason complete abolition of the grand jury had not been recommended in his famous New York Code was the then New York Constitution required that it be maintained.

In 1859, Michigan's legislature, acting pursuant to her recently amended constitution, abolished her traditional grand jury system. Between the end of the Civil War and World War I, state after state wrote new constitutions or amended old ones in order to authorize their respective legislatures to abolish grand juries. In 1900, our own Missouri, by constitutional amendment, eliminated any compulsory use of a grand jury.⁷⁷ Eugene Stevenson, a New Jersey public prosecutor, reflected the general thought of our past common experience with grand juries when he said: "It is difficult to see why a town meeting of laymen, utterly ignorant both of law and the rules of evidence should be an appropriate tribunal. The summoning of a new body of jurors at each term insures an unfailing supply of ignorance." Stevenson further suggested that no sane legislator "would ever dream of creating such a tribunal" if it did not already exist.

In 1897, C. E. Chipperfield said: "In the name of progress which is inevitable, I invoke . . . the abolition of that relic of antiquity, the twin sister of the Inquisition, the grand jury in Illinois."

In 1915, William Howard Taft (I have difficulty in conceiving how anyone could knowingly call that gentleman either a "bright young theorist" or a "fuzzy-minded crackpot") testified against the grand jury system before the New York State Constitutional Convention. The American Judicature Society in 1920 joined the ranks of those favoring complete abolition. In 1928 the American Law Institute recommended that all criminal prosecutions be commenced by information alone. And finally, the Wickersham Commission's report to President Hoover in 1931 recommended that grand juries be abolished on the ground they serve no useful purpose and actually impede the administration of the criminal law.

After suspension from 1917 to 1922 because of World War I, Great Britain formally and finally abolished its grand jury system in 1933.⁷⁸ When the British give up on an institution that is over eight hundred years old, it is fair evidence that they were quite well convinced that it could not be made to work satisfactorily.

How then is it that there seems to be a great deal of superficial

77. Mo. Laws 1899, p. 382.

78. Administration of Justice Act, 1933, 23 & 24 Geo. 5, c. 36, § 1, at 578-79.

popular support for Governor Dewey's almost solitary view that only "bright young theorists" and "fuzzy-minded crackpots" are concerned about the extent of power exercised by grand juries?

VI. A SUGGESTED REASON FOR THE LACK OF ANY REAL
EXAMINATION INTO THE EXTENT OF THE LEGAL
POWER OF GRAND JURIES

The basic reason that has permitted the power of grand juries to go unexamined, apart from lack of interest and concern on the part of Bench and Bar, has been the wide and usually most favorable publicity given to the comparatively recent and quite sporadic grand jury efforts in particular communities in the United States. Up until quite recently, the need for any examination of the grand jury system was minimal because in most all state jurisdictions, grand juries were not used to any real extent, and in the federal system, where the grand jury is constitutionally required, any effort to file general reports was consistently and promptly halted by the federal courts, so that the problem never became acute in that jurisdiction.

As Great Britain was in the process of abolishing its grand jury system in 1933, however, state grand juries in several cities in the United States were making national headlines. A grand jury in Atlanta, Georgia, threatened in a general report that it might indict the county commissioners if they did not behave. In October, 1933 a general report of a Cleveland grand jury said that none of the local courts merited the confidence of the people, and its general report also condemned the Cleveland Bar Association for its lack of concern. Who can say that such language was not dynamic and newsworthy and therefore entitled to publicity?

But the country had seen nothing until after Governor Herbert Lehman of New York appointed Thomas E. Dewey a Special Prosecutor in September, 1935. "Racket busting" immediately made the national headlines.

Without much question, the New York experience and its attendant sensational publicity had more to do with keeping the idea of a grand jury alive than all of the other events combined. Warner and Cabot, in their 1937 article entitled, *Changes in the Administration of Criminal Justice During the Past Fifty Years*,⁷⁹ noted that "the last fifty years have witnessed the decline of the grand jury."⁸⁰ Those authors further stated that "one would unhesitatingly predict the early demise of the grand jury" were it not for the Association of Grand Jurors of New York County and their publication, *The Panel*.⁸¹

79. 50 HARV. L. REV. 583 (1937).

80. *Id.* at 596.

81. *Id.* at 597.

The Grand Jury Association of New York County (the spiritual father of all other grand jury associations) was organized in 1915 by George Haven Putnam, a New York publisher who had served on many grand juries, and by other laymen who were in the temper of those times, sincerely convinced that the grand jury was the only institution that could initiate investigations into the then abuses in government. *The Panel* commenced publication as a militantly pro-grand jury periodical in 1924, at a time when the by-products of "Normalcy" were still in a good many people's minds.

The Grand Jury Association of New York and its publication, *The Panel*, have always advocated that grand juries should be vested with power to file general reports for the reasons we have already noticed. The record, however, strongly suggests that the filing of general reports by grand juries simply has not produced the desired results, particularly in these days of sophisticated and organized crime.

Certainly the power to report, as exercised in the past by grand juries in both New York and in our own state of Missouri, has not made the problem of corruption in government an academic one. Up until the 1945 Missouri Constitution, and until *Woods v. Hughes*⁸² was decided in New York last year, grand juries in both states were reporting like mad—but on the record, just how effective has all the publicity given those reports actually been? Has all the publicity given general grand jury reports served, as Mr. Kuh argued that it surely would serve, as a truly great deterrent to evil, incompetent and corrupt government in New York and Missouri?

Frankly, I believe candor requires us to look for a better sword with which to attack the wrongdoers in the community. May we examine briefly what others have tried.

All of the foregoing does not mean that I advocate the abolition of the grand jury system. It is my personal view that a legitimate case might be made out for its continuation. But to say that, is not to say that grand juries should also be given a reporting function. The two questions are, in my judgment, separate questions and should be considered separately. I am quite convinced that the arguments made on behalf of the grand jury system generally do not support the idea that a grand jury should likewise have power to report. But, as I have tried to make clear, we Missourians do not reach those policy considerations. The quite narrow question of law with which we are concerned boils down to whether the 1945 Missouri Constitution and the present laws of Missouri do, or do not, vest power in our grand juries to file general reports. We look now to other jurisdictions.

82. 9 N.Y.2d 144, 212 N.Y.S.2d 33 (1961).

VII. HOW OTHER JURISDICTIONS HAVE ATTACKED THE PROBLEM

Great Britain and Canada administer their criminal law completely outside the glare of publicity. Even when they used grand juries, like our own federal jurisprudence, they did not permit grand juries to file general reports. Those countries now operate without the use of any grand jury at all. In fact, in those jurisdictions, any newspaper publicity in connection with a pending trial, criminal or civil, would subject the paper to fine and the newspaperman to confinement in jail for contempt of court. But more important for our purposes, those jurisdictions, like our own federal system, never relied, at least in modern times, on the frail reed of publicity given amateur grand jury reports as a deterrent against corruption in government.

Why is it that Canada, with a history not basically dissimilar from our own, has never known in the last century the corruption in government that we have had? I would suggest that when the conditions that Mark Twain described so vividly in *The Gilded Age*⁸³ were becoming evident in both our countries, we in the United States began to rely somewhat naively on the false hope that exposure and publicity afforded a real solution to the problems we faced. We opened an era of muckraking, and we have never really admitted that the idea of exposure for the sake of exposure sounds much better than it has proved to be.

Governor Folk's election in Missouri was certainly aided by Lincoln Steffens but does the record show that the exposures contained in *Tweed Days in St. Louis* put an immediate and permanent end to political bosses in your fair city? Our Kansas City experience is that success is not so easily attained.

The Canadians, on the other hand, gave their problems a great deal more hard thought and came up with a remedy, borrowed from the British experience, that over the years has seemed to be more equal to the task.

VIII. THE CANADIAN EXPERIENCE

In 1870 the Canadians established their office of Auditor General. We have nothing quite like the office of Auditor General of Canada in either our federal or state governments. The Comptroller General of the United States is perhaps our closest comparable office, although we have refused to vest that office with the full power of subpoena.

The present Financial Administration Act of Canada, contains the provisions of the 1870 law creating the office of Auditor General.⁸⁴ That Act provides that the Auditor General shall be appointed by the Governor in Council to hold office during good behavior until he

83. 10 CLEMENS, *THE WRITINGS OF MARK TWAIN* (1915).

84. CAN. REV. STAT. c. 116 (1952).

reaches the age of sixty-five years. He is removable only by joint vote of the Canadian Senate and the House of Commons. It is further provided:

[T]he Auditor General is entitled to free access . . . to all files, documents and other records relating to the accounts of every department, and he is also entitled to require and receive . . . such information, reports and explanations as he may deem necessary for the proper performance of his duties.⁸⁵

In order that the broadest sort of an investigation be authorized, the act provides:

The Auditor General may examine any person on oath on any matter pertaining to any account subject to audit by him and for the purposes of any such examination the Auditor General may exercise all the powers of a commissioner under Part I of the *Inquiries Act*.⁸⁶

Part I of the *Inquiries Act* provides that inquiry may be made into and concerning any matter "connected with the good government of Canada or the conduct of any part of the public business thereof."⁸⁷ And to carry out that broad authorization the act provides:

The commissioners (and by reference the Auditor General) have the power of summoning before them any witnesses, and of requiring them to give evidence on oath, or on solemn affirmation if they are persons entitled to affirm in civil matters, and orally or in writing, and to produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to examine.⁸⁸

Section 5 puts the necessary teeth in the grant of power. It provides: "The commissioners (and by reference, the Auditor General) have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases."⁸⁹ Section 70 of Chapter 116 requires the Auditor General to report the results of his investigations to the proper authorities for appropriate action.

I do not necessarily suggest that we adopt the Canadian system in its entirety or even in part. But I do suggest that we should give careful consideration to the question of whether that radically different system of dealing with possible corruption in government has worked better than our consistently unsuccessful idea that investigation, exposure, and newspaper publicity somehow affords a real solution and is the only way to approach the problem.

85. CAN. REV. STAT. c. 116, § 66 (1952).

86. CAN. REV. STAT. c. 116, § 74 (1952).

87. CAN. REV. STAT. c. 154 (1952).

88. CAN. REV. STAT. c. 154, § 4 (1952).

89. CAN. REV. STAT. c. 154, § 5 (1952).

IX. OTHER AMERICAN EXPERIENCE

Some of our sister states have abolished the grand jury system and recognized that it is not very satisfactory to charge some other governmental official with the duty of investigation and accusation of crime unless he is also armed with the power of subpoena. Michigan, for example, has not had any traditional grand jury for almost a hundred years. Michigan, however, vested the power of subpoena in its so-called "one-man grand juries" who, are, in fact, their trial judges. The cases of *In re Murchison*⁹⁰ and *In re Oliver*⁹¹ in the Supreme Court of the United States teach us that such a system is not entirely without its dangers, and that perhaps it could be improved upon.

Other states have vested subpoena power in their prosecuting officials. But I think we would all be agreed that we have seen some prosecuting attorneys in Missouri that we would just as soon not see in possession of that much power unless very adequate protective devices are created at the same time.

The chief point I would make is that other jurisdictions have established what they have determined to be more effective systems of investigation and prosecution than grand juries. Those states have rejected the idea that the publicity given a general grand jury report is a very effective means of meeting the challenge of organized crime in their communities. Unless our present system is beyond improvement—are we not under duty to examine and appraise the experience of systems different from our own?

I am also reminded that when congressional investigations rather than prosecutions were the order of the day in 1924 in regard to the Teapot Dome scandal, that Mr. Justice Holmes wrote Sir Frederick Pollock that he was not just then following politics. Holmes added that "we are investigating everybody and I dare say fostering a belief too readily accepted that public men generally are corrupt."

As we watch without protest investigations of all kinds into all departments of government by grand juries and other investigatory governmental bodies whose procedures do not give those being investigated their day for cross-examination and confrontation by their accusers, let us remember Holmes' forecast as to what public beliefs we may be fostering. Let us also remember that we are living in times that foster tension and that we have among us those who would build a climate for ultimate and easy answers on the quicksand of hate, suspicion, and distrust. A general report of a grand jury, or a list of a legislative committee, gives such persons a document which they can wave from public platforms.

90. 349 U.S. 133 (1954).

91. 393 U.S. 257 (1947).

Other freedom loving jurisdictions concluded a long time ago that the most complicated and difficult job of uncovering organized crime and its sometime sister, real corruption in government, was one that called for expert and professional handling; that the official individual or body charged with that high duty must be as impartial as the judiciary; that he should be selected as judges are selected; that his tenure should be as absolutely secure as it can be made; that he be armed with subpoena power to collect the evidence; and that he file his report in writing with another official body for it to take appropriate legal action consistent with all of the constitutional safeguards of due process guaranteed any defendant. Should we not give some study to that experience?

CONCLUSION

The question of whether the constitution and laws of Missouri presently authorize a grand jury to report is, of course, an important one because it involves the fundamental proposition of whether an institution that is in the business of accusing other people of violating the law is itself complying with the law.

A New York court in the case of *In re Grand Jury Report Concerning Investigation*,⁹² held:

The public interest requires that the Grand Jury, like all public bodies, acts in accordance with the law. . . . [U]nless there is explicit legislative or constitutional sanction for the making of these so-called reports, no court should indulge in any presumptions or inferences, to create the right of Grand Juries to report

Neither the court nor its arm, the Grand Jury, may take unto itself an authority or power not granted by the Constitution or the legislature.⁹³

But important as that question is, there are broader questions concerning the general effectiveness of our administration of the criminal law that are of equal importance. As we look at the grand jury dragon that we have gotten out of the cave we see that his teeth are dull, his claws blunted, and that any real strength for his assigned duty is woefully weak. There really is no problem of killing or taming the dragon. He was slain in the country of his birth over a quarter of a century ago. His demise in this country has been freely predicted and recommended by those who have given the problem impartial and serious study.

It is my personal fear that the circumstances that have prompted a revisit to the ancient institution of the grand jury will raise

92. 19 Misc.2d 682, 193 N.Y.S.2d 553 (N.Y. County Ct. 1959).

93. *Id.* at 694, 697, 193 N.Y.S.2d at 568, 570.

such an emotional reaction that the real problems will be lost in the shuffle.

But if a speech to a bar association in St. Louis in 1923 resulted in the first state-wide crime survey, is it too much to hope that perhaps this talented Bar might someday be inspired to inquire whether there might be a better way of attacking the problems that are presently known to be inherent in our present system of criminal law enforcement? Perhaps this Bar may discover methods more calculated to produce lasting results than the relatively ineffective publication of what may well be unauthorized grand jury reports. May it not also be hoped that our future inquiry will be blessed with enlightened skepticism, and hopefully again, may it have been aided in small part by our current effort to get a dragon from his cave, onto the plain and into the daylight.