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GRAND JURY REPORTS—A SAFEGUARD OF DEMOCRACY

NOAH WEINSTEIN,† WILLIAM J. SHAW*

The right of a grand jury to report on the actions of public officials and on general conditions in its community offers to the citizens of a democracy a most effective means of controlling gross inefficiency or misconduct of public officers. One of the appealing facets of the activity of a grand jury in reporting upon conditions and public officials is the absence of authoritarian efficiency, and this has not detracted from its importance as an effective safeguard of citizens' rights in a democracy. A grand jury is a short-lived, representative, non-political body of citizens functioning without hope of personal aggrandizement. It comes from the citizens at large and soon disappears into its anonymity without individual recognition or personal reward and without ability to perpetuate itself in the public hierarchy. Grand juries are not remembered by the names of the individual members, but are recalled or forgotten by what they may have accomplished or failed to accomplish.

Reports (referred to by some authorities as a type of presentment as distinguished from an indictment charging crime and a self-generating presentment charging crime) by grand juries have generally been recognized as a common law function of the grand jury since the Middle Ages.¹

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1. This matter has been thoroughly researched, and it would be presumptuous on our part to attempt to add anything to the already existing exhaustive studies on this subject.

The following paragraphs from Kuh, *The Grand Jury "Presentment"; Foul Blow or Fair Play?*, 55 COLUM. L. REV. 1103 (1955), are a concise statement of the common law background of this grand jury power:

Early Use of the Grand Jury Report

An objection voiced today to the grand jury report is that the secrecy obligation of the jury is violated when, without charging crime, it issues a report. This objection ignores the historic fact that grand jury reports were utilized during the years when the jury was developing as an instrument against despotism.

In 1683, an English grand jury in Chester, without returning a formal indictment charged certain Whigs, including the Earl of Macclesfield, with disloyal and seditious conduct. The Earl sued the members of the grand jury for libel. [Proceedings between Charles Earl of Macclesfield and John Starkey, Esq., [1684-85] 10 How. St. Tr. 1330.] In defense, on oral argument, it was urged that "it is the constant universal practice" of grand juries to present to court any matters concerning the business of the county, and that

The necessity of a grand jury system to protect the people from abuses of government and to maintain a well informed citizenry is more imperative in this age of complex government than it was at the time of the inception of the system, when we lived in a rural society.² The scope of this article is limited to the legality and need of reports by grand juries which do not indict but which do criticize conditions and public officials.

The first Constitution for the State of Missouri³ contained a "Decla-

this was commonly done in "every assizes and sessions." [*Id.* at 1355.] In answer to this, plaintiff's contention was to the effect that "the law never did empower a jury or any other, to blast any man's reputation without possibility to clear it," and that grand juries may lodge only specific charges of crime. The defense also urged that if a grand jury learned of any national danger, the jurors' oaths bound them to make "prudent and discreet representations of their fears, and the grounds and reasons of them." [*Id.* at 1371.] The court, without opinion, unanimously found for the defendants, apparently sustaining the propriety of grand jury reports.

Sidney and Beatrice Webb have set forth specific instances of early grand jury inquiries into misconduct of royal officers. [S. and B. Webb, *English Local Government from the Revolution to the Municipal Corporations Act: The Parish and the County* 448-456 (1906). See also 10 Holdsworth, *A History of English Law* 146-51 (1938).] They mentioned grand jury reports in the seventeenth and eighteenth centuries criticizing constables and justices for their abusive market practices. They also referred to reports on horseracing and cockfighting, on the supervision by the justices of houses of correction, on the use by innkeepers and vendors of false drink measures, on the improper care of bridges, gaols, highways, and other county property, and on justices of the peace who accepted excessive fees. A Gloucestershire grand jury in 1678 noted the increasing beggar nuisance and suggested that the constables, and others so charged, enforce the law. In 1697, a county coroner was criticized by an Essex County grand jury for "vexing" a coroner's jury that failed to follow his direction to find a verdict.

This grand jury practice of issuing reports on matters of public concern was followed in the American colonies. In New York in 1688, a grand jury urged that persons selling liquor should keep lodgings. [Goebel & Naughton, *op. cit. supra* note 1, at 361-63.] Subsequent New York colonial grand juries reported on highway repair and other matters of state proprietorship. Grand juries in New Jersey rendered reports on matters of public affairs as early as 1680. [See *In re Camden County Grand Jury*, 10 N.J. 23, 41-44, 89 A.2d 416, 426-428 (1952).] In Virginia, it was common practice for grand juries to express their opinions on colonial administration. [Scott, *Criminal Law in Colonial Virginia* 70-71 (1930).]

Konowitz, *The Grand Jury as an Investigating Body of Public Officials*, 10 ST. JOHN'S L. REV. 219, 221 (1936) states: "A general investigation was permitted at common law even though there was no specific charge before it, and no suspect named. This practice was carried over into this country." (Footnotes omitted.) See also dissenting opinion of Judge Froessel in *Wood v. Hughes*, 173 N.E.2d 21, 30, 212 N.Y.S.2d 33, 45 (1961).

2. *In re Camden County Grand Jury*, 10 N.J. 23, 65-66, 89 A.2d 416, 443 (1952). See notes 44-46 *infra* and accompanying text.

3. MO. CONST. (1820).

ration of Rights" which provided that in criminal proceedings the accused had the right to a speedy trial "in prosecution on presentment or indictment,"⁴ and that no person could be proceeded against criminally by information for an indictable offense except in certain military cases or "by leave of the court, for oppression or misdemeanor in office."⁵ The constitution of 1865 contained identical references.⁶

The constitution of 1875 provided that a grand jury should consist of twelve men, any nine of whom concurring could find an indictment or true bill.⁷ In 1900 this section of the Constitution was amended and the following was added to the above:

Provided, however, that no grand jury shall be convened except upon an order of a judge of a court having the power to try and determine felonies; but when so assembled such grand jury shall have power to investigate and return indictments for all character and grades of crime.⁸

The 1875 constitution originally contained a provision (art. II, section 12) which was substantially the same as art. I, section xxiv of the 1865 constitution. However, this was amended in 1900 to establish, for the first time, indictment and information as "concurrent remedies."⁹ Other references to grand juries were contained in art IV, section 53, no. 30, which prohibited the General Assembly from passing a local or special law summoning or empaneling grand and petit juries,¹⁰ and a technical reference to the effect of the new constitution on pending or future indictments.¹¹ The constitution of 1875 also contained a reference to grand juries in the "Miscellaneous Provisions": "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 result of their investigations in writing to the court."¹²

It is not surprising that the 1875 constitution, as originally adopted, has been criticized because of "its ordinary legislative characteristics, its detailed grant of powers and restrictions, its session acts rather than fundamental, organic provisions."¹³ However that may be, it is

4. Mo. CONST. art. XIII, cl. 9 (1820). See also Mo. CONST. art. V, § 19 (1820).

5. Mo. CONST. art. XIII, cl. 14 (1820).

6. Mo. CONST. art. I, §§ XVIII & XXIV (1865). See also Mo. CONST. art. XI, § XII and art. VI, § XXVI (1865).

7. Mo. CONST. art. II, § 28 (1875).

8. Mo. CONST. art. II, § 28 (1875) as amended.

9. Mo. CONST. art. II, § 12 (1875) as amended.

10. Mo. CONST. art. IV, § 53, no. 30 (1875).

11. Mo. CONST. Schedule of 1875, § 2.

12. Mo. CONST. art. XIV, § 11 (1875).

13. Bishop, *Government of Missouri Under the Constitution of 1945*, 1 V.A.M.S. 1, 6 (1949).

worthy of note that prior to November 30, 1875, Missouri had no constitutional reference to the make up and powers of a grand jury other than vague, general references in prior constitutions which assumed that grand juries did exist and could return indictments or presentments.

Despite this paucity of constitutional authority, grand juries were always a recognized and integral part of criminal justice and procedure in Missouri. As early as 1829 the Supreme Court of Missouri, without the benefit of express constitutional authority, accepted the grand jury as "a body known to the law,"¹⁴ with the duty "to enquire diligently of all offences against law."¹⁵ Undoubtedly the framers of our constitutions, when they declared that no person could be "deprived of life, liberty, or property, but by the judgment of his peers, or the law of the land" as set out in the 1820¹⁶ and 1865¹⁷ constitutions or "that no person shall be deprived of life, liberty or property without due process of law" as in the 1875¹⁸ and 1945¹⁹ constitutions, intended to and did adopt as the law of the land all established safeguards for the rights and protection of the individual known to the law since Magna Charta.

The constitution of 1945 contains, for the first time, a separate paragraph relating to the grand jury in the following terms:

That a grand jury shall consist of twelve citizens, any nine of whom concurring may find an indictment or a true bill: provided, that no grand jury shall be convened except upon an order of a judge of a court having the power to try and determine felonies; but when so assembled such 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.*²⁰

What is the legal import of this new and additional reference to grand juries which declares "that the power of grand juries to investigate the willful misconduct of public officials and to indict in connection therewith shall never be suspended"? The power of grand juries

14. *Ward v. State*, 2 Mo. 120, 122 (1829).

15. *Id.* at 121.

16. MO. CONST. art. 8, § 9 (1820).

17. MO. CONST. art. 1, § 18 (1865).

18. MO. CONST. art. 2, § 30 (1875).

19. MO. CONST. art. 1, § 10.

20. MO. CONST. art. 1, § 16. The italicized portion represents an addition to an otherwise identical provision in the 1875 constitution as amended Nov. 6, 1900. MO. CONST. art. 2, § 28 (1875 amended 1900). The phrase "twelve men" was changed to twelve citizens.

to indict for crime had been constitutionally assumed until 1875²¹ and judicially recognized by the Supreme Court as early as 1829.²² What impelled the framers of the 1945 constitution to the conclusion that they should, as a part of the Bill of Rights, include a specific prohibition against the suspension of the grand jury right to inquire into the misconduct of public officials and to find indictments in connection therewith? All prior constitutions had contained provisions declaring that no person could be deprived of life, liberty or property without due process of law. "Due process of law" and the "law of the land" being legal equivalents,²³ this constitutional safeguard preserved inviolate the established law of England at the time of the adoption of our first constitution.²⁴ This established law included the right to trial by jury or the lack of such right in certain instances,²⁵ as well as indictment or information by a grand jury or proper prosecuting official.²⁶

It would appear reasonable to assume that the framers of the 1945 constitution were not fearful of the loss of these universally accepted elements of "due process," but rather were concerned with possible curtailment of other rights of the public. In order to determine the meaning of this constitutional provision it is proper to consult the Debates of the 1945 Constitutional Convention.²⁷

An examination of the transcript of the debates of the Missouri Constitutional Convention which resulted in the 1945 constitution discloses that the delegates to the convention gave specific consideration to the following language which became the last part of section 16, Article I of the new constitution :

And that the power of grand juries to inquire into willful misconduct in office of public officers and to find indictments in connection therewith shall never be suspended.

The thoughts of the delegates can best be presented by a review of the record made as they debated and considered reasons for placing

21. Bishop, *Government of Missouri Under the Constitution of 1945*, 1 V.A.M.S. 1, 6 (1949).

22. *Ward v. State*, 2 Mo. 120 (1829).

23. *State v. Julow*, 129 Mo. 163, 174, 31 S.W. 781, 782 (1895).

24. MO. REV. STAT. § 1.010 (1959). *State v. Harp*, 320 Mo. 1, 8, 6 S.W.2d 562, 564 (1928); *State ex inf. Crow v. Shepard*, 177 Mo. 205, 242, 76 S.W. 79, 89 (1903).

25. *State ex inf. Crow v. Shepard*, *supra* note 24.

26. *Blair v. United States*, 250 U.S. 273, 282 (1919); *State v. Kelm*, 79 Mo. 515 (1883); *Ex parte Slater*, 72 Mo. 102, 106 (1880).

27. *Preisler v. Hayden*, 309 S.W. 2d 645, 646 (Mo. 1958).

this provision in the constitution. Accordingly, the verbatim record relating to this provision is set forth below.²⁸

28. Excerpts from the transcript of the debates of the Missouri Constitutional Convention, April 18 and April 19, 1944, pages 1433-37. These transcripts are available on microfilm at the Law Library in the City of St. Louis, Missouri, (St. Louis Law Library Association), and the St. Louis Public Library, and the law libraries of the law schools of Washington University and St. Louis University. The transcripts, original or copies, are held by the Secretary of State, Supreme Court Library, Missouri University Law School Library, and the Missouri Historical Society at Columbia, Missouri.

MR. STEVENS: Mr. President, before we leave this section I've another amendment.

PRESIDENT: An amendment to the Bill of Rights file?

MR. STEVENS: Section 26.

(Amendment brought forward and read as follows:)

PRESIDENT: Is this an amendment to Section 26?

MR. STEVENS: Yes, Mr. President. This is on another subject though. (Clerk read as follows:)

"CONVENTION AMENDMENT NO. 28 offered by Mr. Stevens of the 25th District. Amend File No. 8, Article 1, Page 10, Section 26, by adding in line 17 after the period, the following: 'The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments in connection with such inquiries shall never be suspended or impaired by law.'"

MR. STEVENS: Mr. President, I move the adoption of the admendment.

PRESIDENT: Is there a second.

(Motion seconded by Mr. Garten.)

MR. STEVENS: Mr. President, the only argument I want to make on this amendment is to read an editorial from a magazine known as the Grand Jury Association of New York County and called "The Panel." This amendment is taken from the Constitution of New York with a very slight change. I read the editorial. "This Association can take justifiable pride in its successful sponsorship of the recent constitutional amendment which safeguards the rights and prerogatives of the grand jury by writing these into the constitutional law of the state. Already embodied in the statutory law, the grand jury's rights are now removed from legislative whim and transferred over into the constitution where only a majority vote of the people can change them. Specifically the provision reads"—this is a New York provision—"The power of grand juries to inquire into the willful misconduct in office of public officers, and to find indictments or to direct the filing of information in connection with such inquiries shall never be suspended or impaired by law. This proposal was included in Amendment No. 1 to the state constitution which was passed by vote of the people on November 8, last." This magazine was published in 1939. "Once again by this vote the people of New York have registered their confidence in the grand jury system prevailing in this state and once again the Association has made a contribution to the public in introducing and sponsoring this amendment. "In one respect the passage of this amendment was made easier in New York by the example of grand jury manipulation in the neighboring state of

The delegate who proposed the inclusion of the clause, Stevens, happened to be an experienced and able lawyer who practiced his profession in St. Louis County for many years. The reference to him as

Pennsylvania. Indeed, it was the act of the governor in calling a special session of the legislature to vote curbs on a Harrisburg grand jury that inspired this Association to take action in New York.

"People in New York state know all too well what an informed and intelligent grand jury means to the law enforcement machinery of this state. They have seen too many recent examples of public service resulting from grand jury activity."

Now, Mr. President, it seems to me that we ought to avoid any possibility of any legislature or governor trying to abolish or curb the grand jury right to inquire into the officials of public office of this state by putting a clause like this in our Constitution. You all remember only too well what happened in the state of Louisiana when Huey Long was in his prime down there, and virtually the grand jury and all other agencies charged with the investigation of public officials were abolished. 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. I think it is a wise clause to put in this Constitution. It is being urged by the Grand Jury Association of St. Louis and St. Louis County, an association composed of some of our most representative citizens, who in the past, have sat on state or federal grand juries.

MR. MARR: Mr. President, I'd like to interrogate Judge Stevens. Judge Stevens, I have no objection to a brief general statement as an amendment to this section providing that grand juries shall not be abolished, but I question the wisdom of singling out specific things which they shall not be prohibited from doing. Now, there are many, many things that a grand jury can do at different times, that they have the power to inquire into. Do you think it's proper to single out one particular thing that they shall not be abolished or prevented from doing, or would it be sufficient to provide that grand juries, briefly, should not be abolished.

MR. STEVENS: Well, I think the important thing is to prevent any legislature from trying to curb the activities of a grand jury when they come to investigate public officials. That's where the harm will come. For instance, suppose we had a Huey Long in the state of Missouri, and you had a Cole County grand jury investigation 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. You have a clause like this, he can't do it, and that's where you get the pressure to abolish the grand jury. You don't particularly need a grand jury to file information or indictments anymore against individuals who commit crimes, because the prosecuting attorney, the Attorney General, can do that, but you do need to maintain the grand jury to curb the corrupt act of officials, and I have just followed the New York Constitutional provision.

MR. MARR: I agree with you in your purpose and think it's a good thing, but I just wondered whether we should do it in that way, by stating that they shall not be prohibited from doing specific things. I wondered if it couldn't be in language broad enough to cover any functions of the grand jury.

Mr. STEVENS: Well, I don't think there would ever be any occasion to worry about the acts of a grand jury upon an individual. It is only when

Judge stems from the fact that he was chosen by the local lawyers to fill the unexpired term of a Circuit Judge who was absent on military leave. As Stevens expressed it, he was concerned about the possibility of curbing the right of grand juries "to inquire into the officials of public office." He referred to the activity of Huey Long in "virtually

they are investigating officials that are in power that you are liable to have some official try to pass a law to abolish a grand jury system or to curb their rights of investigation, and my thought in this proposition was to fix the constitution so that no corrupt legislature or governmental power could curb the right of a grand jury to investigate. We don't have it now. We probably haven't had it many years, but we may have it, and I think it's a wise provision to retain that in the Constitution. There is a similar section now, only it's rather garbled and miscellaneous that we struck out. It didn't mean very much, and I think probably we did well in striking it out there. It didn't have any teeth in it, but this prohibits any legislature from ever abolishing or interfering with the grand juries' investigations of public officials, and that is where you get your pressure in the event you have a corrupt government.

MR. MARR: As I understand you, you figure that is the only possible source of any agitation to abolish the grand juries. That is the reason you make it specific.

MR. STEVENS: Well, I followed the New York Constitution, Mr. Marr, because they have a powerful grand jury organization in New York. They have had it for years. It's been functioning there for twenty-five years, an association called The Grand Jury Association, who have given this matter much more study than I have and much more study, I think, than the Grand Jury Association of St. Louis and St. Louis County, and it was their wisdom which put this section in the New York Constitution because of what happened principally in Harrisburg, Pennsylvania, where the legislature tried to curb the investigation of official acts by laws that they were trying to pass.

MR. MARR: Thank you.

MR. GARTEN: I am inclined to think this is a very good amendment. As Mr. Stevens has said there was something of the sort in the Miscellaneous Provisions Article, and I voted to repeal that under the apprehension that it wasn't necessary. It required that there should be an organization of a grand jury to investigate the conduct of public officials in office, and I thought it wasn't necessary to have that provision, but they could do that anyhow, and some of the lawyers of the Convention, have since told me that that doesn't necessarily follow, and I believe such provision as Mr. Stevens has suggested here might be a very valuable and salutary restraint upon conduct of offices by officeholders, and I think we should give it some consideration and personally I think we should adopt it.

MR. MCVAY: I make a motion that we adjourn until tomorrow morning.

NOTE: Convention was adjourned until 9:30 o'clock A. M., April 19, 1944.

Convention was called to order by President
Blake on Wednesday, April 19, 1944, at 9:30 A. M.

PRESIDENT: File 8 Section 26 pending on Mr. Stevens' amendment. Any discussion on Mr. Stevens' amendment?

MR. MARR: Members of the Convention, I am of the opinion that Judge

abolishing" the grand jury and all other agencies charged with the investigation of public officials, as well as similar action in Pennsylvania.

Stevens was emphatic in declaring that:

You don't particularly need a grand jury to file information or indictments anymore against individuals who commit crimes, because the prosecuting attorney, the Attorney General, can do that, *but you do need to maintain the grand jury to curb the corrupt act of officials.* . . . ²⁹

This delegate did not have any concern about grand juries activity which affected individuals but "it is only when they are investigating officials that are in power that you are liable to have some official try to pass a law to abolish a grand jury system *or to curb their rights of investigation.*"³⁰ Stevens referred specifically to the provisions contained in par. 11, Art. XIV of the 1875 constitution,³¹ and described it as:

rather garbled and miscellaneous that we struck out. It didn't mean very much, and I think probably we did well in striking it out there. It didn't have any teeth in it, *but this* (referring to his proposal) *prohibits any legislature from ever abolishing or interfering with the grand juries' investigations of public officials, and that is where you get your pressure in the event you have a corrupt government.*³²

The statements of delegate Garten are also revealing. Garten expressed himself in the following vein:

I am inclined to think this is a very good amendment. As Mr. Stevens has said *there was something of the sort in the Miscellaneous Provisions Article,*³³ *and I voted to repeal that under the*

Stevens' amendment is a good one and as Chairman of this Committee I am not making any opposition to it.

PRESIDENT: Any further discussion? Judge Stevens, would you like to close the discussion?

MR. STEVENS: Mr. President, I don't think there is any more that I can say in the matter than I said yesterday.

(Chorus of "Question.")

PRESIDENT: Question is on the adoption of Mr. Stevens' amendment to Section 26. As many as are in favor of the amendment, let it be known by saying "Aye" . . . Contrary "No." The ayes have it. The amendment is approved.

29. *Ibid.* (Emphasis added.)

30. *Ibid.* (Emphasis added.)

31. See text accompanying notes 3-11, *supra*.

32. Emphasis added.

33. This reference is to Miscellaneous Provisions in Mo. CONST. art. XIV, § 11 (1875).

apprehension that it wasn't necessary. It required that there should be an organization of a grand jury to investigate the conduct of public officials in office, and I thought it wasn't necessary to have that provision, but they could do that anyhow . . . and I believe such provision as Mr. Stevens has suggested here might be a very valuable and salutary restraint upon conduct of offices by officeholders. . . .³⁴

The debates of the constitutional delegates on the provisions of Section 11, Art. XIV, of the 1875 constitution³⁵ are also revealing. Much has been said to the effect that the delegates in eliminating this provision intended thereby to restrict the powers of grand juries and specifically to prohibit their power to report. How far from the facts this conclusion really is can again best be demonstrated by the words of the delegates to the 1945 Constitutional Convention.

The Journal of the Convention³⁶ refers to "File No. 7, Report of the Committee on Miscellaneous Provisions, No. 20."³⁷ Section 9 of File No. 7³⁸ sets out the exact provisions of Section 11, Art. XIV, of the 1875 Constitution, to-wit: "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 result of their investigations, in writing, to the court." Page 7 of the Journal then records that "Section 9 was taken up. Mr. Searcy offered Amendment No. 4, which was read: "AMENDMENT No. 4: Amend File No. 7, Page 3, Section 9, by striking out all of said Section 9." Thereafter an unsuccessful attempt was made by delegate Stevens to offer a substitute motion which would have the effect of striking out of Sec. 9 of File No. 7 (Section 11, Art. XIV, 1875 Constitution) the words "at least once a year." Then delegate Searcy moved the adoption of his amendment which motion was seconded and passed.³⁹

Some of the pertinent statements made by Searcy at the convention on March 28, 1944 in support of his motion to eliminate Section 11, Art. XIV, 1875 Constitution are as follows:

Searcy: "In the first instance, I want every Delegate to understand that this is not a stroke at the Grand Jury system."

Searcy: "This section No. 9 in report before us is one hundred per cent legislative . . . I think it should be taken out for that reason."

34. Emphasis added.

35. See text accompanying note 12, *supra*.

36. 1943-1944 MISSOURI CONSTITUTIONAL CONVENTION 2 (March 28, 1944).

37. *Ibid*.

38. *Id.* at 4.

39. *Id.* at 7.

Searcy: "I think in behalf of the poor counties in Missouri who are forced into an expense that they cannot pay under our constitutional limits, they should be relieved of this expense. I move the adoption of the amendment."⁴⁰

It would seem fair to conclude that the purpose of the delegates in eliminating the provisions contained in Section 11, Art. XIV, 1875 Constitution, was first to relieve the poor counties in Missouri from the burden of paying the cost of a yearly grand jury, which they thought that provision required, secondly to eliminate from the constitution a provision that was legislative rather than constitutional.⁴¹ The mover of the amendment expressly declared that the action was not to curtail the grand jury's power.

If any consideration is to be given to the intention of the framers of the constitution of 1945, the following conclusions are inescapable:

1. The power of a grand jury lies not in its ability to file informations or indictments since the prosecuting attorney has sufficient power to do that.

2. The primary need of a grand jury lies in its ability "to curb the corrupt act of officials" and it was this specific power which the framers of the constitution sought to protect from abolition or encroachment.

3. That the purpose in eliminating the "Miscellaneous Provisions" clause in Section 11, Art. XIV of the 1875 Constitution was monetary, and the Stevens proposal would not only encompass the powers contained in that clause but would enlarge, strengthen and guarantee investigations by grand juries of public officials all in addition to their secondary power to file indictments and informations.

Statutory authority additionally exists which supports the power of grand juries in Missouri to file reports. Section 540.020,⁴² directs the grand jury:

(2) to examine public buildings, and report on their conditions;
 . . . [to] *make careful inquiry into the failure or refusal of county and municipal officers to do their duty, as provided by law*
 . . . *to make inquiry into any violations by county officers of laws relating to the finances or financial administration of the county.*⁴³

It should be noted that this Section 540.020 consists of two paragraphs. The substantial contents of paragraph 2 are noted above. Paragraph 1 of that statute gives grand juries the power to investigate and return indictments for all grades of crimes. It is apparent that the legislature (as did the constitutional delegates) intended to

40. See note 28 *supra* at 873-83, March 28, 1944.

41. See text accompanying note 13 *supra*.

42. MO. REV. STAT. (1959).

43. Emphasis added.

distinguish clearly between the power of a grand jury to indict and the power of the grand jury to examine buildings and report thereon, and to inquire into the conduct of county and municipal officers and to report thereon, and to inquire into the finances of the country and to report thereon.

Since both the constitution and Section 540.020 give the grand jury the power and also place upon it the duty to indict for all grades of crime, the additional provisions in both the constitution and statutes in regard to their investigation of public officials must logically entail a right to report. Common sense dictates that inefficiency, carelessness, or neglect may require correction and yet not justify indictment. All willful or corrupt misconduct in public office does not necessarily constitute a criminal offense; yet in a democracy, the public is entitled to know what its representatives in government are doing if for no other reason than to be knowledgeable when the time comes to consider retention in office or the termination in office of their elected officials.

It was no less a public figure than William J. Brennan, Jr., now a member of the United States Supreme Court, who, while a member of the Supreme Court of New Jersey, reaffirmed⁴⁴ certain principles previously concurred in by him when they were originally announced by Judge Vanderbilt of the New Jersey Supreme Court⁴⁵ relating to grand jury presentments or reports without indictment. Both judges concluded that the practice of grand jury reports was imported to this country from England three centuries ago as a part of the common law and that if presentments of matters of public concern were necessary in the public interest in the relatively simple conditions of English and colonial life three centuries ago, it is much more essential now in these days when government at all levels has taken on a complexity of organization and of operation that defies the best intentions of the citizens to know and understand it. Both judges stated that:

What is not known and understood is likely to be distrusted. What cannot be investigated in a republic is likely to be feared. The maintenance of popular confidence in government requires that there be some body of laymen which may investigate any instances of public wrongdoing. . . .

The grand jury provides a readily available group of representative citizens of the county empowered, as occasion may demand, to voice the conscience of the community. There are many official acts and omissions that fall short of criminal misconduct and yet are not in the public interest. It is very much to the public advantage that such conduct be revealed in an effective, official way. No community desires to live a hairbreadth above the criminal

44. *State v. Fary*, 19 N.J. 431, 437, 117 A.2d 499, 502-03 (1955).

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

level, which might well be the case if there were no official organ of public protest. Such presentments are a great deterrent to official wrongdoing. By exposing wrongdoing, moreover, such presentments inspire public confidence in the capacity of the body politic to purge itself of untoward conditions.⁴⁶

The scope of grand jury reporting has historically been limited to persons in government service and general conditions in a community. Comment has been made upon the unfairness of such reports, particularly as they affect any public official. However, we should bear in mind that the great protector of our democracy, Thomas Jefferson, declared that: "When a man assumes a public trust, he should consider himself as public property."⁴⁷ Moral theologians approve public criticism of public officials as being in the public good, although they condemn such criticism of individuals not having public responsibilities.⁴⁸

As stated more recently, the exposure of public officials to damaging grand jury reports:

is an occupational hazard of the uneasy trade of public service, part of the price which office holding exacts and part of the protection of the public weal in a free society. No court has the right to cut down that protection. And nothing is more hostile to the central spirit of American political philosophy than to allow any public office to suppress and bury a relevant, nonscandalous commentary on public affairs by an authorized body of citizens.⁴⁹

The benefit to the public resulting from justifiable charges of wrongdoing by public officials substantially overbalances any possible harm done to the individuals affected thereby. That occasionally grand juries may err is not only a human fault of grand juries but is an unavoidable ingredient in any democratic process that would avoid authoritarian efficiency. Judge Learned Hand has said:

No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price. Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.⁵⁰

46. *State v. Fary*, 19 N.J. 431, 437, 117 A.2d 499, 503 (1955), citing *In re Camden County Grand Jury*, *supra* note 45.

47. RAYNER, *LIFE OF JEFFERSON* 356 (Boston ed. 1832), in FOLEY, *THE JEFFERSONIAN CYCLOPEDIA* II 8596, at 887 (1900).

48. 2 MCHUGH & CALLAN, *MORAL THEOLOGY* 241 (1930).

49. *Wood v. Hughes*, 212 N.Y.S.2d 33, 45, 173 N.E.2d 21, 30 (Ct. App. 1961) (dissenting opinion of Chief Judge Desmond).

50. *United States v. Garsson*, 291 Fed. 646, 649 (S.D.N.Y. 1923).

Even citizens are known to make mistakes in exercising their voting privilege, but no one has yet advocated that because of such mistakes they should be disenfranchised.⁵¹

It should be remembered that not all indictments returned by a grand jury are pursued to trial; nor that all grand jury indictments pursued to trial result in the conviction of the person charged with crime by the grand jury. Nor for that matter are all persons charged with crime, whether by grand jury indictment or any other process known to man, and subsequently found guilty, necessarily guilty in fact although they obviously are guilty in law.⁵² Finally, we should be frank enough to concede that innocent men have been hanged in the past and will be hanged in the future unless either the death penalty is abolished or the fallibility of human judgment is abolished and judges, prosecutors, and grand jurors become supermen.⁵³

Thus, subject to all the conditions of human fallibility, it is apparent that grand jury investigations and reports resulting therefrom offer a better forum for investigations because of certain judicial controls. Those reports which the court might consider irrelevant or ill-founded may be rejected by the court before filing or expunged by the court on motion of the offended party.⁵⁴ And those reports which are accepted by the court should receive the same protection given all judicial proceedings, that is the status of "absolute privilege" as to libel. This privilege would not only extend to the grand jury members, but to the reproduction and circulation of the reports by others.⁵⁵

Occasionally the position of those advocating reports of grand juries which criticize but do not indict has been criticized as representing the views of those who are prosecution oriented. It is insinuated that such a position is in conflict with the natural rights of man as protected by bills of rights. But those who advocate the abolition of the grand jury's power to criticize officials are quick to deny that public officials should be elevated to the sacrosanct category of persons beyond the pale of criticisms. The abolitionists must and do admit that in a democracy the right to investigate and criticize must exist. But they would curtail this admitted democratic ideal by eliminating the body of citizens who constitute a grand jury and transfer this right to some full time paid official who would be expected to investigate and report the wrongdoings of his fellow office holders!

51. *United States v. Smyth*, 104 F. Supp. 283, 291 (N.D. Cal. 1952).

52. See FRANK, *NOT GUILTY* (1957); CAHN, *THE PREDICAMENT OF DEMOCRATIC MAN* ch. 1 (1961).

53. KOESTLER, *REFLECTIONS ON HANGING* ch. 8 (1957); HALE, *HANGED IN ERROR* (1961).

54. *State ex rel. Lashly v. Wurdeman*, 187 S.W. 257 (Mo. 1916).

55. See cases collected in 8 U. FLA. L. REV. 343 (1955).

Thomas Jefferson, the drafter of our Declaration of Independence, agreed so completely with the writings of Locke, and particularly Locke's *The Second Treatise of Civil Government*, that occasionally Jefferson has been accused of copying the *Second Treatise*. The thinking of Jefferson and Locke has many close connections. In political theory and practice, the American Revolution drew its inspiration from the parliamentary struggle of seventeenth century England. The philosophy of the Declaration was old-English doctrine revised to meet the then-present emergency.⁵⁶

In Locke's *The Second Treatise of Civil Government*, he asked: If man in the state of nature be so free as to be absolute lord of his own person and possessions, equal to the greatest, and subject to nobody, why will he give up his freedom and empire and subject himself to the dominion and control of any other power? Locke answered: Though man in the state of nature has such right, yet the enjoyment of it is very uncertain and constantly exposed to the invasion of others. This makes him willing to quit a condition which, however free, is full of fears and continual danger. For this reason he is willing to join in society with others for the mutual preservation of their lives, liberties and property.⁵⁷ Locke wrote his *Two Treatises of Government* to justify the Revolution of 1688 and the ascension of William to the throne of England.

Locke's *Second Treatise* has been described as the epitome of Anglo-American ideals and as presenting the distillation of a wisdom derived from centuries of struggle for liberty and justice in government. Unquestionably, Locke was the main source of the idea of the American Revolution. In this light we should consider that Locke recognized as fundamental that the end of government is the good of the community and no member of the community can have a right tending to any other end. Thus liberty under government is not affected when restrictions are imposed upon those actions of individuals which prejudice or hinder the public good.⁵⁸

John Stuart Mill in 1859 published his great defense of the individual's right to think and act for himself.⁵⁹ In somewhat familiar language he declares that all human action should aim at creating, maintaining, and increasing the greatest happiness of the greatest number of people. One of the most important ways for society to insure that its members will be able to contribute their maximum to creating, preserving, and increasing the greatest happiness of the greatest number is to extend to them the right to think and act for

56. BECKER, THE DECLARATION OF INDEPENDENCE 79 (1922).

57. LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT 62 (1946).

58. *Id.* at 81-82.

59. MILL, ON LIBERTY (1859).

themselves. But Mill clearly recognized that there had to be an adjustment between individual independence and social control; that some rules of conduct must be imposed primarily by law, but additional rules of conduct had to be imposed "by opinion on many things which are not fit subjects for the operation of law."⁶⁰

He accepted as a principle of a democratic society that the acts of an individual which might not go the length of violating the legal rights of others yet might be hurtful to others, or wanting in due consideration for their welfare and by that reason such action may then be justly punished by opinion, though not by law.⁶¹ It is apparent that modern governments may generally be divided into two groups: authoritarian, stressing what is termed efficiency in enforcement with a minimum regard for the individual; and democratic, stressing not efficiency in administration, but emphasizing the protection of individual non-restraint even possibly at the cost of guarantees of general security.

In a democracy, criminal law provides the prohibitions directed to the individual for the purpose of protecting the social interests of the community. But to protect and preserve the proper residue of the individual's freedom, which he circumscribed to the extent that it was necessary to insure its continuing enjoyment, limitations are placed upon the enforcement of these prohibitions.

The resulting internal push and pull between prohibitions and the limitations placed upon their enforcement is an essential constituent part of criminal law. These are the conflicting claims; on the one hand of the security of social institutions and the proper use of social resources, and on the other, the preservation of free individual initiative necessary for political and cultural progress. In broad terms, the rules governing this area of conflict are established by constitutional bills of rights.

This fundamental philosophy of a democratic society, which is dependent upon the proper administration of government and particularly the administration of criminal justice, should not be overlooked in any effort to make changes in government. The basic principle of man's freedom is preserved only by the equally basic principle that the end of government is the good of the community, and no member of the community has a right tending to any other end. This necessarily involves an adjustment between individual liberty and social control which is effected by two methods: one, by the prohibitions of law which proscribes certain conduct and makes it illegal, the other by the condemnation of opinion which proscribes certain conduct as being detrimental to the common good, though not the subject of legal pro-

60. *Id.* at 5.

61. *Id.* at 75.

hibitions. Both methods of adjustment between individual liberty and social control must be preserved to prevent constant attempts to erode individual liberties. Any whittling away of the right of public criticism and attempt to transfer this basic right of freedom to an additional administrative power, would directly, and in a positive manner, violate the delicate balance between the protection of the social interest of the community and the freedom of the individual.

If the power to investigate public officials and report thereon were to be removed from a short-lived representative group of grand jurors and placed in the hands of some administrative official, who would investigate this new official be he Auditor General, Comptroller General, Inspector General, or just plain General? We should bear in mind the admonition of Learned Hand:

We took the institution [grand jury] as we found it in our English inheritance, and he best serves the Constitution who most faithfully follows its historical significance, not he who by verbal pedantry tries a priori to formulate its limitations and its extent.⁶²

62. *In re Kittle*, 180 Fed. 946, 947 (S.D.N.Y. 1910).

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