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## SOME LIMITATIONS AND CONTROLS OF THE CALIFORNIA GRAND JURY SYSTEM

Defenders of the grand jury system consider it one of the bulwarks of our liberties, a protector of the innocent, and the people's weapon for preventing abusive practices by public officials. In California today, such an optimistic view seems questionable in view of some of the limitations on its grand jury system. Opponents of the system seem to believe the grand jury is a rubber stamp for the district attorney and a place for him to shift his responsibility, particularly where "political hot potatoes" are involved. It has been charged that the grand jury system is a relic of medievalism; is cumbersome, slow, and inefficient; that it has outgrown its usefulness; and has no place in modern society.<sup>1</sup>

The Statutory provisions dealing with the grand jury were amended and combined in the California Penal Code in 1959.<sup>2</sup> The purpose of this section of the current study is to examine the statutes and the conflicting language of some of their provisions, in an attempt to determine where the public fits into the picture in terms of the grand jury's functions, limitations, and controls.<sup>3</sup>

If the scope of the investigatory powers of the grand jury is too severely limited by statute, or by direct or indirect judicial control, then it would seem obvious the usefulness of the grand jury is severely limited. At the same time, an uncontrolled grand jury might do more harm than good. For the purposes of this study, since the primary interest is the functional aspect of the grand jury, the present report is divided into three parts: (1) the grand jury's role in criminal indictment; (2) investigation of public offices and officers; and (3) discretionary controls on the powers of the grand jury.

### THE GRAND JURY ROLE IN CRIMINAL INDICTMENT

In federal criminal prosecutions where the penalty may involve infamous punishment, grand jury indictments are a matter of constitutional compulsion.<sup>4</sup> However, grand jury indictments are not a requirement of due process under the Fourteenth Amendment.<sup>5</sup> In California, criminal

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<sup>1</sup> Morse, *A Survey of the Grand Jury System*, 10 ORE. L. REV. 101.

<sup>2</sup> Cal. Annotated Penal Code, West's Supp. 1960. Further reference to West's Annotated Codes (Supp.) will be to Code name and Section number only.

<sup>3</sup> See Kennedy & Briggs, *Historical and Legal Aspects of the California Grand Jury System*, 43 CALIF. L. REV. 251; Note, *Some Aspects of the California Grand Jury System*, 8 STAN. L. REV. 631.

<sup>4</sup> U.S. Const. amend. V; *Duke v. United States*, 301 U.S. 492 (1936).

<sup>5</sup> *Hurtado v. California*, 110 U.S. 516 (1884).

prosecutions may be initiated by either an indictment by grand jury or by information and preliminary hearing.<sup>6</sup> The code provisions with respect to criminal indictments provide that "the grand jury may inquire into all public offenses. . . ." <sup>7</sup> and where a "grand juror knows, or has reason to believe. . . , such offense has been committed he shall declare it to his fellow jurors, who shall investigate it." <sup>8</sup> This indicates that the grand jury may initiate its own investigation into public offenses, as well as investigating those matters brought to its attention by the district attorney.

These two sections do not appear to be particularly objectionable in themselves. If it is assumed that the selection of the membership has been made in an unbiased manner, then any abuse of the system would not stem from these provisions taken alone. But, as a practical matter grand juries rarely initiate such actions.<sup>9</sup> The district attorney usually bypasses the grand jury in the great majority of criminal prosecutions,<sup>10</sup> and where the district attorney does bring the matters to the attention of the grand jury, they almost always vote an indictment.<sup>11</sup> These factors seem some justification for eliminating the indicting function of the grand jury on the basis that it serves no great practical end. As mentioned above, since the district attorney may initiate a criminal prosecution by information, eliminating this particular function of the grand jury would not seriously impair the administration of justice in this area.

Matters most frequently presented for grand jury action are murder, rape, and sex offenses.<sup>12</sup> These are cases involving a certain degree of "sensationalism." District attorneys give six reasons for prompting them to seek indictments: "(1) high public interest in the case, (2) preliminary hearing would take more time than grand jury hearing, (3) necessity exists for calling children or timid witnesses who would be subject to cross-examination at a preliminary hearing, (4) existence of a weak or doubtful case which the district attorney wishes to test, (5) cases involving malfeasance in office, and (6) the fact that witnesses are in a state prison."<sup>13</sup> Whether these reasons are sufficient by themselves to retain this function appears questionable.

The secrecy of the grand jury proceedings is assured by (1) Section 939<sup>14</sup> which limits the attendance during a grand jury session investigating criminal offenses to members, witnesses under examination, and those specified in Chapter 3, Article 3 of the Code;<sup>15</sup> namely, the

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<sup>6</sup> Cal. Const. art. 1, § 8; CAL PENAL CODE § 682.

<sup>7</sup> CAL. PENAL CODE § 917.

<sup>8</sup> *Id.* § 918.

<sup>9</sup> Note, *supra* note 3.

<sup>10</sup> *Id.* at 643.

<sup>11</sup> *Id.* at 643.

<sup>12</sup> *Id.* at 644.

<sup>13</sup> *Ibid.*

<sup>14</sup> CAL. PENAL CODE § 939.

district attorney, special investigators, interpreter, and stenographic recorder; (2) furthermore, other code sections<sup>16</sup> make willful disclosure of certain information a misdemeanor. The code also contains the usual procedural rules as to subpoena of witnesses and administering oaths.<sup>17</sup>

However, the code sections<sup>18</sup> relating to evidence may leave some doubt as to the "fairness" of the system.<sup>19</sup> Section 939.6 provides, "... the grand jury shall receive no other evidence than such as is given by witnesses produced and sworn before the grand jury. . . ." and "The grand jury shall receive none but legal evidence and the best evidence in degree, to the exclusion of hearsay or secondary evidence." The interpretation of the term "legal evidence" seems to be in doubt. The California courts previously held that unlawfully obtained evidence could be used by a grand jury;<sup>20</sup> however, since the decision in the *Cahan* case,<sup>21</sup> the validity of this holding is now in question. Up to that time, unlawful evidence could be used in any criminal proceeding, but the *Cahan* case held that evidence obtained in violation of constitutional guarantees is not admissible in criminal trials. It might be argued, however, since grand jury investigations are not criminal trials, they might not come within the scope of the *Cahan* decision.<sup>22</sup>

Under Section 939.7,<sup>23</sup> "The grand jury is not required to hear evidence for the defendant but it should weigh all the evidence submitted to it. . . ." and by Section 939.8,<sup>24</sup> "The grand jury shall find an indictment when all the evidence before it, taken together, if unexplained or uncontradicted. . ." would support a verdict of guilty at trial. Since the grand jury is expected to indict where there is "reasonable" evidence to believe that a crime has been committed and that the accused has committed it, it would seem that grand juries are by their very nature "unfair." But since grand jury indictments are by no means the same as a criminal conviction, it might be argued that there is no necessity of any additional safeguards. However, it is suggested here that the adverse publicity

<sup>15</sup> *Id.* §§ 935-38.

<sup>16</sup> *Id.* §§ 924, 924.1, 924.2.

<sup>17</sup> *Id.* §§ 939.2 939.4.

<sup>18</sup> *Id.* §§ 939.6, 939.7, 939.8.

<sup>19</sup> For fuller discussion on this aspect, see the preceding article in this section, Gough & Emery, *Nature of the California Grand Jury. An Evaluation.*

<sup>20</sup> *In re McDonough*, 21 Cal.App.2d 287, 288, 68 P.2d 1020, (1937), citing *People v. Mayen*, 188 Cal. 237, 205 Pac. 435 (1922).

<sup>21</sup> *People v. Cahan*, 44 Cal.2d 434, 445, 282 P.2d 905 (1955), overruling *People v. Mayen*, 188 Cal. 237, 205 Pac. 435 (1922).

<sup>22</sup> The federal courts have allowed the use of evidence before a grand jury which would have been inadmissible (hearsay) before a petit jury. *Costello v. United States*, 350 U.S. 359 (1956).

<sup>23</sup> CAL. PENAL CODE § 939.7.

<sup>24</sup> *Id.* § 939.8.

<sup>25</sup> *People v. Pipes*, 179 Cal.App.2d 547 (1960), 3 Cal. Rptr. 814.

resulting from an indictment might do irreparable harm; and that it might be more fair to give the defendant an opportunity to make an appearance.

In summary, there seems to be some basis for challenging the fundamental fairness of the grand jury system in the area of criminal indictment. As to the charge that the grand jury is nothing but a rubber stamp for the district attorney, there is some justification from a solely statistical viewpoint. A far more important objection may be that there is no longer sufficient need for the grand jury in this area to justify their existence. Again, on the basis of a statistical study, the grand jury role in the overall criminal prosecutions picture appears to be minimal.

#### INVESTIGATING PUBLIC OFFICE AND OFFICERS

The grand jury's function of criminal indictment has become less important in recent years.<sup>26</sup> It would seem that today, the jury's primary task has become that of investigating public offices and those exercising them. In theory, there is very little the grand jury cannot investigate. The various code sections have provided for investigation of such things as corporations, county prisons and prisoners, hospital districts, public offenses, public officers, real estate sales, county needs, and special assignments of the Attorney General.

The grand jury is given power to remove on accusation, public officers of every description for willful or corrupt misconduct in office.<sup>27</sup> It has been shown that this procedure is not used extensively, because often such misconduct is also a criminal offense.<sup>28</sup> In that case, the district attorney often acts by filing an information. More often than not, the official resigns and no further action is taken.

The statute gives no answer to the problem of who can be prosecuted thereunder. Who is a public official? Can the jury act to remove a district attorney under the authority of this section? To remove a Judge? *Main v. Claremont Unified School District*<sup>29</sup> indicates the "existence of a contract of employment is essentially inconsistent with the status of public officer." An irrigation district officer was deemed a public officer subject to removal in *Rose v. Superior Court*.<sup>30</sup> In *Mono County v. Industrial Acc. Com.*, it was said, "It is well settled that salaried public offices, created by the Legislature, are not held by contracts."<sup>31</sup> Further refinement was found in *Leymel v. Johnson*<sup>32</sup> which indicated, "that one of the necessary characteristics of a public officer is that he perform a public function for the

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<sup>26</sup> Note, *supra* note 3 at 638.

<sup>27</sup> CAL. PENAL CODE § 922.

<sup>28</sup> Note, *supra* note 3 at 647.

<sup>29</sup> 161 Cal.App.2d 189, 198, 326 P.2d 573, 579 (1958).

<sup>30</sup> 80 Cal.App. 739, 252 Pac. 765 (1927).

<sup>31</sup> 175 Cal. 752, 167 Pac. 377 (1917).

<sup>32</sup> 105 Cal.App. 694, 699, 288 Pac. 858, 860 (1930).

public benefit and that in so doing he be invested with the exercise of some of the sovereign powers of the state." Where, as in Santa Clara County (and in many counties in California) a merit system or some form of civil service prevails for most public positions, considerable doubt is cast on the jury's scope of investigation. Does the merit or civil service system incorporate a "contract of employment" within the meaning of this holding?

Also, under this section, "willful or corrupt" implies simply a purpose of willingness to commit the act or make the omission, and does not require an intent to violate law, injure another or to acquire any advantage.<sup>33</sup> Thus, the jury has no fixed guidelines as to whether the official whose conduct is in question is one within their scope, as defined by the statute, or what kind of conduct they may act upon.

*People ex rel. Bagshaw v. Thompson*<sup>34</sup> added two additional qualifications. An officer serving his second term will not be removed for offenses committed during his first term, nor for a violation while serving in another office.

Although the grand jury should not engage in "fishing expeditions" of its own, the Attorney General has the authority to direct the grand jury to investigate matters of public interest.<sup>35</sup> Can the Attorney General, for political reasons, use this section to send the grand jury on a "fishing expedition" of his own?

One of the principal bodies of county government that the grand jury shall investigate is the county jails.<sup>36</sup> The problem under this section is whether members of the grand jury are to conduct their investigations only under the direction of a public official, or whether they can use their own methods of investigation. It appears from the code that the grand jury can make periodic inspection at any reasonable time, but it is not clear how far such investigation may go.<sup>37</sup>

In addition to the above mentioned duties, the grand jury is required to investigate possibilities of land escheating to the state;<sup>38</sup> investigate and make recommendations as to county needs;<sup>39</sup> examine records of any housing authority in the county;<sup>40</sup> inquire into all public offenses;<sup>41</sup> and examine the records of all the officers and of all hospital districts.<sup>42</sup> The means by which the grand jury is to accomplish these functions are

<sup>33</sup> *People v. Tice*, 144 Cal.App.2d 750, 301 P.2d 588 (1956).

<sup>34</sup> 55 Cal.App.2d 147, 130 P.2d 237 (1942).

<sup>35</sup> CAL. PENAL CODE § 923.

<sup>36</sup> *Id.* § 919.

<sup>37</sup> *Id.* § 921.

<sup>38</sup> *Id.* § 920.

<sup>39</sup> *Id.* § 928.

<sup>40</sup> *Id.* § 914.1.

<sup>41</sup> *Id.* § 917.

<sup>42</sup> *Id.* § 925.

(1) free access to all public records within the county,<sup>43</sup> (2) the power to hire experts,<sup>44</sup> and (3) the power to hear testimony of all witnesses.

#### DISCRETIONARY CONTROLS ON THE POWERS OF GRAND JURIES

There exist further discretionary controls whose improper exercise with respect to those means of investigation can to a great extent limit the effectiveness of the grand jury.

Section 905, which states, ". . . there shall be at least one grand jury drawn and impaneled in each year,"<sup>45</sup> would appear to make one grand jury per year mandatory. It would also appear to justify the impaneling of more than one, if the one first impaneled does not accede to the court's wishes. The drawing and impaneling of the jury is left to the discretion of the superior court.<sup>46</sup> It has been pointed out that these sections allow the superior court to determine the tenure of a grand jury.<sup>47</sup> One might ask, what can the citizens do if the superior court does not impanel a grand jury? Though the language of the statutes is mandatory, there is no apparent way to enforce this provision. Whether there are any remedies available through the courts does not appear to have been answered. Section 913<sup>48</sup> provides that the Attorney General "may demand" that a grand jury be impaneled, but the language here is permissive and no route of appeal or enforcement is provided.

In the smaller counties where the number of superior court judges is limited, the above provisions would seem to provide an opportunity to use the grand jury for political purposes. By "properly" timing the impaneling and dismissing of the grand jury, it would seem possible that a judge could virtually nullify the purpose and effectiveness of a grand jury and still comply with the statutes; e.g., the life of a grand jury could be cut to a few days by impaneling late in the year and impaneling another jury early the following year.<sup>49</sup>

The grand jury might be indirectly limited in the scope of their activity by control of its purse strings. There seem to be two general areas where this might be done; namely, the pay and allowance for grand juror expenses and the costs that might be incurred in hiring outside help. While pay and allowances for the grand jurors' expenses are set by statute,<sup>50</sup> it can only be paid upon the written order of the judge.<sup>51</sup>

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<sup>43</sup> *Id.* § 921.

<sup>44</sup> *Id.* § 926.

<sup>45</sup> *Id.* § 905.

<sup>46</sup> *Id.* §§ 903.3, 903.4, 904.

<sup>47</sup> Note, *supra* note 3 at 641.

<sup>48</sup> CAL. PENAL CODE § 913.

<sup>49</sup> For statistics on this point see note, *supra* note 3 at 642.

<sup>50</sup> CAL. PENAL CODE § 890.

<sup>51</sup> *Id.* § 890.1.

The code allows for hiring of outside experts whenever such help is required.<sup>52</sup> However, Section 926 states that this may be done when they ". . . are necessary for the purpose of Section 925." Section 925 outlines the grand jury duties with respect to "books, records, and accounts;" the hiring of doctors, engineers, private investigators, and others would seem to be precluded. In view of the highly technical nature of many of the matters raised for investigation, e.g., the operation of the County Hospital, or of a Water District, this restriction could defeat much of the jury's purpose. The California Supreme Court has held that hiring of private investigators is not within the scope of the grand jury powers.<sup>53</sup>

The Code provides that the Attorney General may employ special counsel and investigators when requested to do so by the grand jury.<sup>54</sup> Since the wording of the statute is permissive and there is no provision for implementation, the discretion seems to lie in the hands of the Attorney General. However, the statutes fail to provide any route for requesting such assistance, or any remedy in the event the superior court does not desire such investigation.<sup>55</sup> Should a grand jury investigation unearth evidence which is insufficient for indictment or accusation, but still enough to arouse suspicion that further investigation is warranted, then they may make a report in this matter. Whether further action is taken appears to lie in the hands of the proper investigatory body.<sup>56</sup> It is entirely possible that a court could severely limit or even stop an investigation by withholding its approval of the expenditure.

In view of the fact that in California the grand jury is considered an arm of the judiciary, it is not surprising to find the superior court exercising general supervisory control. While generally the extent of control currently exercised by the superior court does not appear to be excessive, considering the express purpose, nevertheless, the wisdom of a system which allows the court to limit or stop an investigation that the grand jury has undertaken by cutting off its funds is certainly open to question.

In conclusion, though the California laws providing for the grand jury do have some weaknesses, and have the inherent possibility for abuse, still, in view of the flexibility desired, the basic system is reasonably well-suited to the performance of the grand jury's tasks. Nevertheless, since the limitations appear to arise from statutory conflicts and omissions, and the weaknesses from the failure to provide any implementation for most of its provisions, some statutory revisions are warranted.

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<sup>52</sup> *Id.* §§ 925-26.

<sup>53</sup> *Allen v. Payne*, 1 Cal. 2d 607, 36 P.2d 614 (1934).

<sup>54</sup> CAL. PENAL CODE § 936.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Id.* §§ 927-30, 939.9.

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