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## Adding Bite to the Watchdog's Bark: Reforming The California Civil Grand Jury System

Stephanie A. Doria\*

### I. INTRODUCTION

What is the grand jury, and what does it do? Who are its members? A thorough comprehension of the functioning of the grand jury eludes most citizens. Even many in the legal profession lack a clear understanding of the grand jury, especially its civil investigatory capacity.<sup>1</sup> Grand jurors themselves are frequently unsure of their duties and responsibilities.<sup>2</sup> Despite its long history, the grand jury may be the least understood institution in our legal system.<sup>3</sup>

Among those familiar with grand juries, there is immense disagreement with respect to the virtues of the system. The grand jury has been both heralded and maligned.<sup>4</sup> Many former members regard the grand jury as an indispensable institution.<sup>5</sup> Others call for its abolition.<sup>6</sup> Some praise it as the only mechanism for ordinary citizen involvement and oversight of local government.<sup>7</sup> Still others criticize it as an obsolete forum for a meddling group of amateurs.<sup>8</sup>

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1. See BRUCE T. OLSEN, *THE CALIFORNIA GRAND JURY: AN ANALYSIS AND EVALUATION OF ITS WATCHDOG FUNCTION* 2-3 (1966) (stating that the grand jury is largely misunderstood, even by members of the legal profession).

2. See Robert W. Stewart, *Experts Question Role State Grand Juries Failing Civil "Watchdog" Function*, L.A. TIMES, Aug. 5, 1986, § 1 at 1 (quoting a 1984-85 Los Angeles County grand juror, "Forget the civil side completely. It's sort of ridiculous . . . we're just like babes in fairyland when we go down there [to the grand jury room], we don't know what the hell we're doing").

3. Aidan R. Gough & Mary B. Emery, *The Nature of the California Grand Jury: An Evaluation*, 2 SANTA CLARA LAW. 72, 72 (1962).

4. See Stevan Rosenlind & Cyndee Fontana, *Valley Official's Views Mixed on Grand Jury Watchdog Role*, FRESNO BEE, July 15, 1995, at A1 (discussing the strengths and weaknesses of the grand jury system in California).

5. See Catherine Bridge, *Man With a Mission: Retired Educator Successfully Pushes for Grand Jury Reform*, SACRAMENTO BEE, Oct. 17, 1996, at N1 (quoting Dan Taranto, President of the California Grand Jurors Association, who called the grand jury process "the most magnificent democratic process: empowering lay citizens to oversee the actions of their loftiest citizens and get a public response to their findings").

6. Stewart, *supra* note 2, § 1 at 1; see Clyde Leland, *No Bark, No Bite*, 5 CAL. LAW. 8 (July 1985) (quoting the foreman of the 1983-84 Los Angeles County Grand Jury as stating, "[t]he whole thing is a farce. It is meaningless and should be abolished").

7. See Stewart, *supra* note 2, § 1 at 1 (stating that many officials and former jurors feel that the "watchdog" role of the California grand jury is "the only opportunity afforded the citizen to take a direct role in monitoring local government").

8. See David Hasemyer & Anne Krueger, *The Grand Jury: Behind Closed Doors*, SAN DIEGO UNION-TRIB., June 12, 1986, at A1 (discussing the amateur quality of some grand jury reports and questioning the capacity of a citizen panel to monitor the sophisticated mechanisms of modern government).

This Comment focuses on the distinct civil investigatory, or "watchdog" function, of the grand jury in California. As a means of exposing political corruption, waste, and inefficiency, California law requires the grand jury to exercise its power by investigating local governments and reporting on the findings of such investigations.<sup>9</sup> The grand jury is also empowered to make recommendations pursuant to its findings.<sup>10</sup> This Comment discusses the bases for the criticism and praise of the grand jury system. The wide-ranging attitudes regarding the grand jury come from former members, as well as from those agencies and officials it investigates. In addition, this Comment analyzes several suggested reforms.<sup>11</sup> This Comment advocates the retention of the grand jury system in California, and in particular, the watchdog role of the grand jury.

Part II of this Comment examines the history, background and evolution of the grand jury system from its origins in England and colonial America to modern times.<sup>12</sup> Part III of this Comment outlines the structure of the grand jury in California.<sup>13</sup> Part III also evaluates the civil investigatory powers of California grand juries and the state constitutional and statutory sources of that power.<sup>14</sup> Part IV of this Comment examines common criticisms of the grand jury in its civil function.<sup>15</sup> Part V evaluates a current attempt at grand jury reform and suggests ways to improve the grand jury system in California.<sup>16</sup>

## II. HISTORICAL BACKGROUND

### A. *The Development of the Grand Jury in England*

The grand jury system originated in twelfth century England.<sup>17</sup> A common but inaccurate assumption was that the grand jury was developed to protect ordinary citizens from oppressive government action.<sup>18</sup> However, the grand jury originally investigated and brought charges for criminal conduct only at the request of King

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9. See *infra* notes 136-92 and accompanying text (discussing the civil investigatory role of the grand jury in California).

10. See *infra* notes 173-76 and accompanying text.

11. See *infra* notes 343-88 and accompanying text.

12. See *infra* notes 17-115 and accompanying text.

13. See *infra* notes 116-35 and accompanying text.

14. See *infra* notes 136-93 and accompanying text.

15. See *infra* notes 194-342 and accompanying text.

16. See *infra* notes 343-88 and accompanying text.

17. MARVIN E. FRANKEL & GARY P. NAFTALIS, *THE GRAND JURY: AN INSTITUTION ON TRIAL* 6 (1977); RICHARD D. YOUNGER, *THE PEOPLE'S PANEL* 1 (1963).

18. See Helene E. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701, 702-03 (1972) (commenting that in common law jurisprudence the grand jury is regarded as a means to prevent politically motivated judicial persecution, but that the history of the grand jury indicates that the grand jury is vulnerable to political manipulation).

Henry II.<sup>19</sup> The King created the grand jury to wrest power away from the Church and ecclesiastical courts and to gain control of criminal prosecutions.<sup>20</sup> Additionally, the grand jury was used to generate revenue for the Crown.<sup>21</sup> For approximately the next 400 years, the grand jury was firmly under the control of the King.<sup>22</sup>

The indictment function of the grand jury originated at its inception.<sup>23</sup> In 1166, King Henry II created the Assize of Clarendon, under which twelve members of each township served on grand juries.<sup>24</sup> Originally, all charges originated with the members of the panel based upon their personal knowledge, but eventually the grand jury heard charges made by outsiders as well.<sup>25</sup> Since the only trial at that time was trial by ordeal, an indictment was tantamount to a conviction.<sup>26</sup>

It was only five centuries after its creation that the grand jury developed the reputation as being a protector of individuals.<sup>27</sup> The first two significant examples of

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19. See FRANKEL & NAFTALIS, *supra* note 17, at 6; see also Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL'Y & L. 67, 68 (1995).

20. See LEROY D. CLARK, *THE GRAND JURY: THE USE AND ABUSE OF POLITICAL POWER* 9 (1975) (describing the King as creating the first grand juries to function as a "citizens police force as a means of ensuring central control over criminal prosecution"); Susan M. Schiappa, Note, *Preserving the Autonomy and Function of the Grand Jury: United States v. Williams*, 43 CATH. U. L. REV. 311, 326 (1993) (noting that "[r]ather than safeguard individual rights, King Henry II's purpose in creating the Assize was to aggrandize the Crown's power at the expense of the ecclesiastical and baronial courts").

In the twelfth century, the power of the monarchy in England was being eroded by the ecclesiastical courts. The height of church power and the coinciding development of ecclesiastical law threatened the secular common law. The ecclesiastical courts had sole jurisdiction over many types of cases, including those involving clerics, marriage, and inheritance of property. Moreover, the church accumulated wealth from fines imposed by its courts. *Id.*

21. See Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1, 6 (1996) (stating that the King received all fines and forfeitures as a result of an accusation by the grand jury); see also LEROY D. CLARK, *THE GRAND JURY: THE USE AND ABUSE OF POLITICAL POWER* 9 (1975) (asserting that the revenue generating purpose of the grand jury was minimized by the 17th century when Parliament developed and exercised its taxing power).

22. See YOUNGER, *supra* note 17, at 1-2 (discussing the grand jury in England from its origin in 1166 to the grand jury's assertion of independence in the Shaftesbury case in 1681).

23. YOUNGER, *supra* note 17, at 1-2.

24. YOUNGER, *supra* note 17, at 1.

25. YOUNGER, *supra* note 17, at 1.

26. See FRANKEL & NAFTALIS, *supra* note 17, at 7-8 (quoting at length from MELVILLE BIGELOW, *HISTORY OF PROCEDURE IN ENGLAND* 325-26 (1972), describing methods of trial by ordeal practiced in England).

There were four methods of trial by ordeal practiced in England. One method required the accused to hold a piece of burning iron in his hand and walk nine feet without dropping it. Another method required the suspect to plunge his hand into a pot of boiling water to retrieve a stone. If the suspect's burns healed within three days he was pronounced innocent. A third variation required that the accused be thrown into cold water. If he sank, he was pronounced not guilty. If he swam, he was declared guilty. Yet another method required the accused to swallow a piece of bread or cheese which weighed one ounce. If the suspect choked, he was adjudged guilty. *Id.*; see also THEODORE F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 113-15 (5th ed. 1956).

27. See FRANKEL & NAFTALIS, *supra* note 17, at 9 (stating that the idea of the grand jury as a protector of individual citizens against government oppression developed in 1681 with the Shaftesbury and Colledge affairs, some 500 years after the Assize of Clarendon); OLSEN, *supra* note 1, at 53 (asserting that both the Shaftesbury and Colledge incidents seem to have forwarded the independence of the grand jury).

grand jury independence and its protection of individuals against government oppression came in the late seventeenth century.

In 1681, a London grand jury ignored a bill of indictment for high treason against Stephen Colledge.<sup>28</sup> In extraordinary defiance of the Crown, the grand jury refused to explain its verdict.<sup>29</sup> Later, the foreman of the grand jury was forced to flee the country when false charges were made against him.<sup>30</sup>

That same year, another grand jury refused to indict Anthony Ashley Cooper, the Earl of Shaftesbury, for high treason despite intense pressure by King Charles II.<sup>31</sup> The grand jurors were instructed that if they did not return an indictment, they would be subject to criminal charges themselves.<sup>32</sup> King Charles II, seeking to make an example of Shaftesbury, attempted to hold the grand jury proceedings in public.<sup>33</sup> The grand jury balked, but was subsequently overruled.<sup>34</sup> However, the members were later commended for attempting to use the practice of secrecy to protect the rights of individuals and the fairness of proceedings.<sup>35</sup>

The beginnings of grand jury secrecy, however, are found prior to the Colledge and Shaftesbury affairs.<sup>36</sup> Oaths administered to grand jurors in the fourteenth century included a vow of secrecy.<sup>37</sup> Secrecy among grand jurors served to prevent the escape of those suspected of criminal activity, to detect bias in witnesses, to impeach witnesses, and to permit the full development of evidence.<sup>38</sup> Although the King's justices maintained the power to conduct public grand jury proceedings, they were no longer able to monitor jury deliberations by the time of the Colledge and

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28. GEORGE J. EDWARDS, *THE GRAND JURY 28-29* (1906); see FRANKEL & NAFTALIS, *supra* note 17, at 9 (stating that indictment for treason was sought against Colledge, a Protestant who vocally opposed the King's efforts to re-establish the Catholic church in England).

29. See EDWARDS, *supra* note 28, at 29 (stating that when asked the reason for their refusal to indict Colledge, the grand jurors merely stated that "they had given their verdict according to their consciences and would stand by it").

30. EDWARDS, *supra* note 28, at 29.

31. EDWARDS, *supra* note 28, at 29; YOUNGER, *supra* note 17, at 2. Shaftesbury, once one of the King's most important advisors, abandoned the King upon the realization that the King planned to restore the power of the Catholic church in England. Schwartz, *supra* note 18, at 712-13. Shaftesbury became the leader of the Protestant opposition, drafting a proposal to create an association which would work to prevent the re-establishment of the Catholic church. *Id.* at 716. The draft was found upon a search of Shaftesbury's home, and was used as proof that Shaftesbury was guilty of high treason. *Id.*

32. Andrew D. Leipold, *Why Grand Juries Do Not (And Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 282 n.109 (1995).

33. CLARK, *supra* note 20, at 10.

34. CLARK, *supra* note 20, at 10.

35. See CLARK, *supra* note 20, at 10 (noting that the grand jury's assertion of its right to conduct secret proceedings in the Shaftesbury affair was subsequently praised by commentators).

36. See Kadish, *supra* note 21, at 13 (describing the development of the grand jury secrecy requirement).

37. Kadish, *supra* note 21, at 13. Some commentators trace grand jury secrecy back further, evidenced by the oath taken by grand jurors in the late 12th century in which grand jurors swore to "do this faithfully, that they will aggrieve no one through enmity nor show deference to any one through love, and that they will conceal those things which they have heard." Harold W. Kennedy & James W. Briggs, *Historical and Legal Aspects of the California Grand Jury System*, 43 CAL. L. REV. 251, 255 (1955).

38. Kadish, *supra* note 21, at 15.

Shaftesbury affairs due to the development of the secrecy requirements.<sup>39</sup> Thus, secrecy became an important factor in enabling the grand jury to be independent of the monarchy by allowing the grand jury to deliberate privately and thereby protect those wrongly accused.<sup>40</sup> The tradition of grand jury secrecy continues to the present.<sup>41</sup>

The events of 1681 are generally cited as the first examples of the grand jury acting to shield individuals from government oppression.<sup>42</sup> However, some commentators assert that these events were merely examples of grand juries with Protestant sympathies acquitting Protestant defendants.<sup>43</sup> Both Shaftesbury and Colledge were Protestants who opposed the re-establishment of the Catholic church in England.<sup>44</sup> Colledge was later indicted by an Oxford grand jury whose members were more sympathetic to the King.<sup>45</sup> He was convicted and executed.<sup>46</sup> Fearful that he would also be indicted by a second grand jury, the Earl of Shaftesbury fled to Holland where he died in exile.<sup>47</sup> Examples of grand jury refusals to indict are notably absent in England in the 200 years after the Shaftesbury and Colledge affairs.<sup>48</sup>

The origins of the grand jury's civil watchdog function also appeared during the fourteenth century.<sup>49</sup> Grand juries were empowered to inquire into the duties of officials to repair roads and bridges and to issue a report as to any neglect of these duties.<sup>50</sup> Additionally, the grand jury investigated and reported on prison escapes, as well as any prisoners being held who had not appeared before a court.<sup>51</sup>

## B. *The Development of the Grand Jury in the United States*

In conformance with the English system, grand juries were also employed in the American colonies. The first formal grand jury was empaneled in the Massachusetts

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39. Kadish, *supra* note 21, at 13.

40. Kadish, *supra* note 21, at 13.

41. See *infra* notes 151-56 and accompanying text (discussing the role of secrecy in present-day grand jury proceedings).

42. CLARK, *supra* note 20, at 11.

43. See CLARK, *supra* note 20, at 11 (stating that "The grand jury may not have been freeing the 'innocent'; it was simply a Protestant jury chosen by Protestant sheriffs, protecting men widely known to be supporters of the Anglican church"); EDWARDS, *supra* note 28, at 29-30 (noting that the Earl of Shaftesbury was held in high regard by the people, and that the grand jury was comprised largely of those sympathetic to the Earl); Schwartz, *supra* note 18, at 719 (asserting that in light of their eventual outcomes, the cases illustrate that "[f]ar from epitomizing the often-praised independence of the grand jury in political cases, the [Shaftesbury and Colledge cases] only serve[] to prove the extreme vulnerability of that body to the cynical political machinations of the executive").

44. Schiappa, *supra* note 20, at 327.

45. Schiappa, *supra* note 20, at 328 n.86.

46. Schiappa, *supra* note 20, at 328 n.86.

47. Schiappa, *supra* note 20, at 328 n.86.

48. CLARK, *supra* note 20, at 12.

49. OLSEN, *supra* note 1, at 53.

50. OLSEN, *supra* note 1, at 53.

51. OLSEN, *supra* note 1, at 54.

Bay Colony in 1635.<sup>52</sup> The colonial grand jury continued to perform its traditional indictment function.<sup>53</sup> Members of the grand jury heard evidence against individuals and determined whether criminal charges should be brought against those individuals.<sup>54</sup> The early grand juries in colonial America also performed a watchdog function.<sup>55</sup> For example, the early grand juries publicly criticized officials for failing to maintain highways, bridges, public buildings, and jails.<sup>56</sup> The grand jury report developed as a means of publicizing the grand jury's concerns and compelling public officials to correct perceived wrongs or inefficiencies.<sup>57</sup> Additionally, the grand juries suggested new legislation, performed administrative functions, exposed governmental abuses, represented people in the community, determined tax rates, and suggested price controls for essential goods.<sup>58</sup>

Reflecting the mood of fellow citizens, grand jury members had become antagonistic to the British Crown at the time of the American Revolution.<sup>59</sup> They frustrated British authorities by continually refusing to indict those who opposed British rule.<sup>60</sup> Despite pressure from the Crown, grand juries resisted taking action and ignored the presiding judges' directions.<sup>61</sup> Grand juries also issued reports charging the British with oppression as the climate turned toward war.<sup>62</sup> Individuals with British sympathies were disqualified from grand jury service.<sup>63</sup> During this period, the grand jury lived up to its historical reputation as a body that protected

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52. OLSEN, *supra* note 1, at 57; YOUNGER, *supra* note 17, at 11.

53. Schiappa, *supra* note 20, at 328.

54. See Schiappa, *supra* note 20, at 328 (stating that colonial grand jurors "presented suspected criminals and protected innocents from wrongful prosecution").

55. OLSEN, *supra* note 1, at 56.

56. See YOUNGER, *supra* note 17, at 11 (stating that early grand juries in Virginia were responsible for "reporting on the condition of roads, bridges, and public buildings"); see also Kadish, *supra* note 21, at 10 (stating that an early Massachusetts grand jury criticized town officials for failure to maintain the highway and stocks).

57. CLARK, *supra* note 20, at 15.

58. Schiappa, *supra* note 20, at 328.

59. See YOUNGER, *supra* note 17, at 27-40 (discussing grand jury activity during the Revolutionary Era).

60. An early example of this resistance was the refusal of two separate grand juries to indict Peter Zenger for criminal libel based on his published criticism of the colonial governor in 1743. Ronald F. Wright, *Why Not Administrative Grand Juries?*, 44 ADMIN. L. REV. 465, 469 (1992). Although it was likely that Zenger had technically violated British law, his prosecution seemed like an attempt to silence political opposition to the British. CLARK, *supra* note 20, at 18. In another well-known example, Boston grand jurors refused to indict the leaders of the Stamp Act Riots in 1765. Wright, *supra*, at 469.

61. See Wright, *supra* note 60, at 469 (stating that the grand jury refusals to indict during the Revolution reflected "the ability of the people, through the grand jury, to thwart the will of a government that had lost their support and sympathy").

62. CLARK, *supra* note 20, at 17.

63. CLARK, *supra* note 20, at 17.

citizens from monarchial oppression.<sup>64</sup> As a result, the institution of the grand jury emerged from the Revolution with more prestige and public support.<sup>65</sup>

As the country expanded after the Revolution, the grand jury continued to perform its watchdog role in local government.<sup>66</sup> Members suggested policies and laws to improve the welfare of the community.<sup>67</sup> Indeed, grand juries were the only voice available to people in the areas of the new frontier that were officiated by nonresident political appointees, and thus were deprived of Congressional representation.<sup>68</sup>

However, by the late 19th century a strong movement to abolish the grand jury system had emerged.<sup>69</sup> Many opponents of the grand jury believed that the system was inefficient and outdated.<sup>70</sup> They asserted that the grand jury was no longer necessary to protect against royal absolutism or an absentee government.<sup>71</sup> The anti-grand jury sentiment in America was partly inspired by similar movements in England.<sup>72</sup>

In 1889, reformers who favored the abolishment of the grand jury system successfully eliminated grand juries in several new western states.<sup>73</sup> Idaho, Montana and Washington all discontinued the use of the grand inquest for most purposes.<sup>74</sup> Similarly, the legislatures in North Dakota, South Dakota, and Wyoming passed laws abolishing their grand jury systems.<sup>75</sup> Significantly, reformers were unsuccessful in California when a proposal to amend the state constitution to abolish grand jury inquests was rejected in 1902.<sup>76</sup> The proposal failed in large part because grand juries had gained a reputation in California for exposing municipal corruption and wrongdoing.<sup>77</sup>

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64. However, the protection of the "innocent" was not the goal of the partisan grand juries of the Pre-Revolutionary and Revolutionary eras. *Id.* at 18. Many whom the grand juries refused to indict were in fact guilty of illegal activity, such as burning cargo brought to the colonies on British ships. *Id.* Additionally, there is evidence that a Boston grand jury may have indicted four innocent civilians suspected of being British sympathizers after the Boston Massacre. *Id.* at 17-18.

65. YOUNGER, *supra* note 17, at 40; see CLARK, *supra* note 20, at 19 (stating that "[t]he grand jury was a highly esteemed institution when the colonies formed themselves into a nation").

66. YOUNGER, *supra* note 17, at 72.

67. YOUNGER, *supra* note 17, at 80.

68. YOUNGER, *supra* note 17, at 81.

69. YOUNGER, *supra* note 17, at 81; see *id.* at 134-54 (discussing the grand jury reform movement of the late 19th and early 20th centuries).

70. YOUNGER, *supra* note 17, at 138.

71. YOUNGER, *supra* note 17, at 138-39.

72. YOUNGER, *supra* note 17, at 225. The English movement to abolish the grand jury had a long history before it finally succeeded in 1933. During World War I, the English Parliament suspended the use of grand juries, citing a shortage of manpower. *Id.* at 224. When the war ended, many critics lobbied for the permanent elimination of grand juries. *Id.* at 225. However, it was not until the onset of the Great Depression that the grand jury system, viewed as expensive and burdensome, was finally abolished. *Id.* at 225-26.

73. YOUNGER, *supra* note 17, at 152.

74. YOUNGER, *supra* note 17, at 152.

75. YOUNGER, *supra* note 17, at 152.

76. YOUNGER, *supra* note 17, at 153.

77. YOUNGER, *supra* note 17, at 153.

C. *The Early Development of the Grand Jury in California*

The grand jury was active in early California history. The first penal code in California contained provisions for the creation and empowerment of the grand jury.<sup>78</sup> The civil watchdog powers of the California grand jury can also be traced back to early statehood.<sup>79</sup> In 1880, grand juries were given statutory authorization to conduct civil investigations of county governments.<sup>80</sup> This power was extended to allow for grand jury investigations of city governments and special districts in 1973.<sup>81</sup>

Early examples of grand jury watchdog activity closely mirror what the grand jury does today.<sup>82</sup> An 1851 state statute gave the grand jury the power to inquire into "the condition and management of public prisons."<sup>83</sup> In the early 1900s, the grand jury in San Francisco investigated matters concerning government corruption and waste, violations of election and civil service laws, and misallocation of public resources.<sup>84</sup> Yolo County grand juries in the 1920s primarily focused on whether expenditures of public funds were appropriate.<sup>85</sup> The final report of the 1925 Yolo County grand jury sought to remedy several violations of law by public officials, from admonishing the sheriff "not to use prisoners to work for him on his ranch," to requiring the district attorney to refund illegal payments made to his stenographer.<sup>86</sup> Early grand juries also promoted legislation designed to improve public accounting procedures.<sup>87</sup>

D. *The Modern Grand Jury In California*

Grand juries are active in almost all states and perform various roles. The best known role of the grand jury is its indictment function.<sup>88</sup> Grand juries in most states

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78. A. Wells Petersen, *The California Grand Jury System: A Review and Suggestions for Reform*, 5 PAC. L.J. 1, 4 (1974).

79. OLSEN, *supra* note 1, at 76.

80. Petersen, *supra* note 78, at 4.

81. 1973 Cal. Stat. ch. 1036, at 2055 (enacting CAL. PENAL CODE § 925(a)).

82. See OLSEN, *supra* note 1, at 71 (noting that "jail[s], treatment of indigent patients, accounting matters, 'taxes,' public works and law enforcement have been California grand jury concerns since early statehood"); Petersen, *supra* note 78, at 4 (stating that early California grand juries "conducted audits of county books and investigated local prisons and other similar matters of community interest").

83. 1851 Cal. Stat. ch. 29, sec. 214, at 235 (codified as CAL. PENAL CODE § 919(b)); *People v. Superior Court* (1973 Grand Jury for Santa Barbara County), 13 Cal. 3d 430, 436 n.5, 531 P.2d 761, 765 n.5, 119 Cal. Rptr. 193, 197 n.5 (1975).

84. OLSEN, *supra* note 1, at 72.

85. See *id.* at 73 (analyzing several Yolo County grand jury reports from the 1920s).

86. *Id.* at 74.

87. See *id.* at 76 (noting that obtaining improved accounting procedures was one accomplishment of the 1934-1939 Solano County Grand Jury) (quoting the 1934-1939 Solano County Grand Jury Final Report).

88. See Bill Johnson, *Worthwhile Facts About Grand Juries*, ORANGE COUNTY REG., Oct. 13, 1994, at B1 (stating the grand jury's "most famous function is weighing criminal indictments").

as well as the federal judicial system are assembled exclusively to hear charges against individuals and to decide whether such individuals should be indicted.<sup>89</sup>

California grand juries serve in the indictment capacity as well.<sup>90</sup> However, unlike the grand juries in most states and in the federal system, California grand juries are empowered to conduct many types of civil investigations.<sup>91</sup> In fact, grand juries in California spend most of their time exercising their civil watchdog powers.<sup>92</sup>

The use of the grand jury in the indictment capacity was dramatically reduced by the 1978 California Supreme Court decision of *Hawkins v. Superior Court*.<sup>93</sup> In *Hawkins*, the court held that the procedural disadvantages that resulted from an indictment by a grand jury violated the equal protection provision of the state constitution.<sup>94</sup> The defendants in the case were charged by a grand jury indictment.<sup>95</sup> The court first noted that there was considerable disparity in the procedural rights afforded to defendants prosecuted by information and those prosecuted by grand jury indictment.<sup>96</sup> The court noted the fact that defendants were not afforded counsel in grand jury proceedings.<sup>97</sup> Thus, the defendants were not able to cross-examine witnesses or put on evidence.<sup>98</sup> Moreover, the court held that the overall secrecy of the proceedings additionally disadvantaged defendants in an indictment procedure.<sup>99</sup> The court also emphasized the "excessive prosecutorial influence" present in grand jury indictment proceedings.<sup>100</sup> In contrast, defendants prosecuted by information are

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89. See Brenner, *supra* note 19, at 116 (noting that federal grand juries are only authorized to investigate criminal matters).

90. See CAL. PENAL CODE § 917 (West 1985) (stating that the grand jury "may inquire into all public offenses committed and triable within the county and present them to the court by indictment").

91. See *infra* notes 136-66 and accompanying text (discussing the civil investigatory powers of the California grand jury).

92. See Brooks v. Binderup, 39 Cal. App. 4th 1287, 1290, 46 Cal. Rptr. 501, 503 (1995) (stating that the civil investigatory role is the one most often played by the modern California grand jury). Note, however, that the court was quoting *McClatchy Newspapers v. Superior Court (1983-1984 Grand Jury for Fresno County)*, 44 Cal. 3d 1162, 751 P.2d 1329, 245 Cal. Rptr. 774 (1988), which was decided after the *Hawkins* decision, but prior to the passage of Proposition 115. See *infra* notes 110-15 and accompanying text (expounding on Prop. 115). *Hawkins* effectively restricted the use of grand jury indictments. *Id.* Proposition 115 overruled *Hawkins* and increased the use of grand jury indictments in some counties. *Id.* Today, time spent by the grand jury in its indictment capacity varies greatly from county to county, although grand juries in most counties concentrate on the civil function. *Id.*

93. 22 Cal. 3d 584, 586 P.2d 916, 150 Cal. Rptr. 435 (1978).

94. *Id.* at 593, 586 P.2d at 922, 150 Cal. Rptr. at 441; see CAL. CONST. art. I, § 7 (stating that "[a] person may not be . . . denied equal protection of the laws").

95. *Id.* at 586, 586 P.2d at 917, 150 Cal. Rptr. at 436.

96. *Id.* at 587, 586 P.2d at 917, 150 Cal. Rptr. at 436.

97. *Id.*, 586 P.2d at 918, 150 Cal. Rptr. at 437.

98. *Id.* at 587, 586 P.2d at 918, 150 Cal. Rptr. at 437.

99. *Id.*

100. See *id.* at 589-92, 586 P.2d at 919-21, 150 Cal. Rptr. at 438-40 (discussing the prosecutor's control and influence over grand jury indictment proceedings). Indeed, one of the major criticisms of the grand jury in its indictment capacity is that the grand jury is a rubber stamp for the prosecutor. See Hasemyer & Krueger, *supra* note 8, at A1 (reporting that a lack of sophistication among grand jurors results in domination of the panel by the district attorney's office. One former grand juror indicated that the grand jury would indict despite minimal evidence if the district attorney requested indictment).

entitled to a preliminary hearing before a magistrate, representation by counsel, confrontation of witnesses, and an opportunity to be present.<sup>101</sup>

Applying traditional equal protection analysis, the court noted that a discriminatory classification which impairs fundamental rights will be subjected to strict judicial scrutiny.<sup>102</sup> Thus, the state carried the burden of proving that the classification was necessary to promote a compelling state interest.<sup>103</sup> The court held that the procedural rights afforded by a preliminary hearing were fundamental.<sup>104</sup> Further, the court held that the state had failed to demonstrate a compelling interest that was served by the classification.<sup>105</sup>

Rather than abolish the state constitutionally sanctioned grand jury indictment power,<sup>106</sup> the *Hawkins* court held that individuals indicted by a grand jury had an additional right to a postindictment preliminary hearing.<sup>107</sup> Understandably, after *Hawkins*, most prosecutors relied on preliminary hearings rather than on grand jury indictment proceedings to eliminate the repetition and expense of two procedures.<sup>108</sup> *Hawkins*, therefore, left the grand jury with more time to carry out its watchdog function.<sup>109</sup>

In 1990, the voters of California passed Proposition 115<sup>110</sup> which amended the state constitution and overruled *Hawkins*.<sup>111</sup> Specifically, the initiative added § 14.1 to article I of the California Constitution which provides that a defendant is not

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101. *Hawkins*, 22 Cal. 3d at 587, 586 P.2d at 917-18, 150 Cal. Rptr. at 436-37.

102. *Id.* at 592, 586 P.2d at 921, 150 Cal. Rptr. at 440.

103. *Id.*

104. *Id.* at 592-93, 586 P.2d at 921, 150 Cal. Rptr. at 440.

105. *Id.*

106. See CAL. CONST. art. I, §14 (stating that "[f]elonies shall be prosecuted as provided by law, either by indictment or, after examination and commitment by a magistrate, by information").

107. *Hawkins*, 22 Cal. 3d at 593-94, 586 P.2d at 922, 150 Cal. Rptr. at 441.

108. Kevin Johnson, *D.A. Sees Grand Jury as Newest Crime Weapon*, L.A. TIMES, Sept. 23, 1990, at B1.

109. See Stewart, *supra* note 2, § 1 at 1 (reporting that grand juries spend "almost all of their time and money on civil inquiries" and that 90% of grand jurors' time is spent performing the watchdog function).

110. See Tupper Hull & Steven A. Capps, *Anti-Crime, Legislative Reform Initiatives Win Decisive Victories*, S.F. EXAMINER, June 6, 1990, at A12 (reporting the results of the June 4, 1990 election and stating that 57% of voters approved Proposition 115 while 43% opposed the initiative). Proposition 115, known as the Crime Victims Justice Reform Act, added article I, § 14.1 to the California Constitution which provides, "[i]f a felony is prosecuted by indictment, there shall be no postindictment preliminary hearing." STATE OF CALIFORNIA DEPARTMENT OF JUSTICE, CRIME VICTIMS JUSTICE REFORM INITIATIVE, PROPOSITION 115 MANUAL 86 (1990). In addition, Proposition 115 made other extensive changes to the criminal justice system in California, including: providing for reciprocal discovery, allowing hearsay in preliminary hearings, allowing a finding of probable cause based on hearsay, increasing the penalties for certain murders, expanding the category of murders subject to capital punishment, and requiring the court to conduct voir dire of prospective jurors in criminal cases. Criminal Law Initiative Constitutional Amendment and Statute - Crime Victims Justice Reform Initiative, Prop. 115, Official Title and Summary.

111. STATE OF CALIFORNIA DEPARTMENT OF JUSTICE, CRIME VICTIMS JUSTICE REFORM INITIATIVE, PROPOSITION 115 MANUAL 86; see *Bowens v. Superior Court (The People)*, 1 Cal. 4th 36, 39, 820 P.2d 600, 602, 2 Cal. Rptr. 376, 378 (1991) (concluding that the constitutional provision included in Proposition 115 abrogated the holding of *Hawkins*, and that therefore, defendants are no longer entitled to a postindictment preliminary hearing when prosecuted by grand jury indictment).

entitled to a postindictment preliminary hearing when prosecuted by grand jury indictment.<sup>112</sup> Proposition 115 thus opened the door once again to the use of grand juries for criminal indictments.<sup>113</sup> Since the passage of Proposition 115, grand juries are most often used in the indictment capacity for high profile cases such as child abuse cases or cases involving public officials where there is a need for a private proceeding.<sup>114</sup> Thus, the grand jury continues to act mainly as a civil investigatory body in many California counties.<sup>115</sup>

### III. STRUCTURE AND POWERS OF THE CALIFORNIA CIVIL GRAND JURY

Grand juries are impaneled in every county in California.<sup>116</sup> Depending on a county's population, a specified number of citizens in each of California's fifty-eight counties are empowered to investigate and report on various activities of county and city government.<sup>117</sup> Of all the states, only California and Nevada require the annual impanelment of grand juries to conduct civil watchdog investigations.<sup>118</sup>

Article I, § 23 of the California Constitution states: "a grand jury shall be drawn and summoned at least once a year in each county."<sup>119</sup> A grand jury is a body of county citizens, under the supervision of the superior court, charged with investigating public offenses committed or triable within the county in which the grand jury

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112. CAL. CONST. art. I, § 14.1.

113. Johnson, *supra* note 108, at B1; see Brian E. Michaels, *Is Something Wrong With Grand Juries? No, Grand Jury Here Has Proud History*, SAN DIEGO UNION-TRIB., July 25, 1990, at B7 (noting that the grand jury indictment function was "restored to full vitality" after the enactment of Proposition 115).

114. See Johnson, *supra* note 108, at B1 (citing one commentator who estimated that after the passage of Proposition 115 the grand jury would mainly be used "in child abuse cases, capital cases, and political corruption type cases"); see also Richard C. Paddock, *The Simpson Murder Case: Their Lips are Sealed But Grand Jury Members Talk About How Gruesome Accounts Affect Them*, L.A. TIMES, June 26, 1994, at A20 (stating that the grand jury holds private sessions partly to "shield prominent suspects from public attention").

115. See Rosenlind & Fontana, *supra* note 4, at A1 (reporting that "the civil watchdog role is the most used and the most important reason for a grand jury's existence"); *Capizzi Was Correct to Curb Grand Jury*, L.A. TIMES, Jan. 28, 1996, at B6 (noting that after the passage of Proposition 115 it continues to be rare for the Orange County grand jury to issue criminal indictments). *But see* Stephanie Simon, *Grand Jury a Tool of the D.A., Ex-Member Says*, L.A. TIMES, Aug. 26, 1995, at B3 (stating that the Los Angeles County grand jury spends approximately 80% of its time on indictment hearings).

116. See CAL. PENAL CODE § 905 (West 1985 & Supp. 1997) (stating "[i]n all counties there shall be at least one grand jury drawn and impaneled in each year").

117. See *id.* § 888.2 (West 1985 & Supp. 1997) (stipulating that the required number of grand jurors per county with a population exceeding 4,000,000 is 23; 11 in counties with a population of 20,000 or less; and 19 in all other counties).

118. See *id.* § 914.1 (West 1985 & Supp. 1997) (authorizing the grand jury to investigate or inquire into "county matters of civil concern"); cf. NEV. REV. STAT. § 172.175(2) (1995) (providing that the grand jury "may inquire into any and all matters affecting the morals, health and general welfare of the inhabitants of the county, or of any administrative division thereof, or of any township, incorporated city, irrigation district or town therein").

119. CAL. CONST. art. I, § 23.

sits.<sup>120</sup> Every county in California is required to assemble a grand jury for each fiscal or calendar year.<sup>121</sup>

#### A. Selection and Compensation of Grand Jury Members

Members of a grand jury must be at least 18 years of age and have United States citizenship.<sup>122</sup> Additionally, members must have resided in the county in which the grand jury sits for at least one year.<sup>123</sup> Although no special training or expertise is required, members must have sufficient knowledge of the English language and be "in possession of [their] natural faculties, of ordinary intelligence, of sound judgment, and of fair character."<sup>124</sup>

The selection process varies depending upon the county where the grand jury sits. In counties which have appointed a jury commissioner, the jury commissioner will prepare a list of qualified candidates to be considered for nomination to the grand jury.<sup>125</sup> The names for the grand jury list must be selected from the different wards, judicial districts, or supervisorial districts of each county in proportion to the county's population.<sup>126</sup> Depending on county practice, potential jurors may volunteer for service, may be randomly selected by the same method as trial jurors, or may be recommended by community organizations, civic leaders or the court.<sup>127</sup> The list of potential grand jurors must be kept separate from the trial jury list.<sup>128</sup>

The superior court judge is not required to select potential grand jurors from the jury commissioner's list.<sup>129</sup> However, judges should take steps to "ensure broad-based representation from the community" when selecting names of potential grand jurors to be put into a drawing.<sup>130</sup> In all counties, the final selection of grand jurors is made by lottery.<sup>131</sup>

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120. See CAL. PENAL CODE § 888 (West 1985 & Supp. 1997).

121. See *id.* § 905 (West 1985) (stating that in all counties there shall be at least one grand jury drawn and empaneled each year); see also *id.* § 905.5 (West 1985) (authorizing the board of supervisors of a county to empanel the grand jury during the calendar or fiscal year).

122. *Id.* § 893 (a)(1) (West 1985).

123. *Id.*

124. *Id.* § 893 (West 1985).

125. CAL. RULES OF COURT, Appx, Div I, § 17(b) (1996); see CAL. PENAL CODE § 903 (West 1985 & Supp. 1997) (stating that California Penal Code Title 4, Chapter 2, Article 3 (Jury Commissioners) applies to counties which have appointed a jury commissioner pursuant to California Code of Civil Procedure § 195); see also CAL. PENAL CODE § 903.1 (West 1985) (requiring the jury commissioner to provide the court annually with a list of qualified candidates to serve as grand jurors "pursuant to written rules or instructions adopted by a majority of the judges of the superior court of the county").

126. CAL. PENAL CODE § 899 (West 1985).

127. CAL. RULES OF COURT, Appx, Div I, § 17(b) (1996).

128. CAL. PENAL CODE § 899 (West 1985); CAL. RULES OF COURT, Appx, Div I, § 17(b)(1) (1996).

129. See CAL. PENAL CODE § 903.4 (West 1985) (stating judges may select persons to serve as grand jurors regardless of the jury commissioner's list if the judge determines it is required by the "due administration of justice").

130. CAL. RULES OF COURT, Appx, Div I, § 17(d) (1996).

131. CAL. PENAL CODE § 906 (West 1985).

Compensation paid to grand jurors ranges from ten to fifteen dollars per meeting.<sup>132</sup> State law requires that grand jurors be paid at least ten dollars for each day of attendance as a grand juror.<sup>133</sup> In addition, grand jurors are required to be compensated for mileage at the minimum rate of fifteen cents per mile traveled to the meeting place.<sup>134</sup> Counties may also increase grand jury compensation by county ordinances.<sup>135</sup>

## B. Civil Powers and Duties of the California Grand Jury

### 1. Investigation

Grand juries have broad investigative powers which are conferred by statute.<sup>136</sup> As an autonomous extension of the judicial branch of county government, the grand jury is subject to the supervision of the county's superior court.<sup>137</sup> However, the grand jury enjoys full independence when investigating and reporting on the activities of local government.<sup>138</sup> The grand jury is given wide latitude and access while investigating these activities.<sup>139</sup> The grand jurors are entitled to unlimited access to all public records, as well as to all public jails within the county.<sup>140</sup>

The California Penal Code authorizes the grand jury to, among other things, investigate "county matters of civil concern."<sup>141</sup> This includes investigation into the status of unindicted prisoners and realties subject to escheat to the state.<sup>142</sup> Moreover,

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132. Robert W. Stewart, *Selection Process Seen as Haphazard; Grand Juries Crippled by Lack of Experience, Skills*, L.A. TIMES, Aug. 6, 1986, § 1 at 1; see Report of the 1994-1995 San Francisco Civil Grand Jury, *Restructuring and Funding the San Francisco Civil Grand Jury*, June 12, 1995, at 5 (finding San Francisco civil grand jurors are paid \$11 per meeting); Paddock, *supra* note 114, at A20 (noting that Los Angeles county grand jurors are compensated \$25 per day).

133. CAL. PENAL CODE § 890 (West 1985).

134. *Id.*

135. *Id.*

136. See generally CAL. PENAL CODE §§ 888-939 (West 1985 & Supp. 1997) (setting forth the structure, powers, and limitations of the grand jury); Karl Kinaga & Robert F. Jordan, *Some Limitations and Controls of the California Grand Jury System*, 2 SANTA CLARA LAW. 78, 81 (1962) (observing that "in theory, there is very little the grand jury cannot investigate").

137. See *People v. Superior Court (1973 Grand Jury for Santa Barbara County)*, 13 Cal. 3d 430, 438, 531 P.2d 761, 766, 119 Cal. Rptr 193, 198 (1975) (quoting *In re Gannon*, 69 Cal. 541, 543, 11 P. 240, 241 (1886) stating "[t]here is no doubt that a grand jury is part of the court by which it is convened, and that it is under the control of the court").

138. *Id.* at 439, 531 P.2d at 765, 119 Cal. Rptr. at 198.

139. *Id.*

140. See CAL. PENAL CODE § 921 (West 1985) (stating that "the grand jury is entitled . . . to the examination, without charge, of all public records within the county" and entitling the grand jury to "free access, at all reasonable times, to the public prisons").

141. *Id.* § 914.1 (West 1985 & Supp. 1997).

142. See *id.* § 919 (a),(b) (West 1985) (authorizing the grand jury to inquire into the cases of unindicted individuals imprisoned in the county jail and mandating that the grand jury inquire into the condition and management of county prisons); *id.* § 920 (West 1985) (allowing the grand jury to investigate the sales and transfers of land which may escheat to the state).

grand jurors may initiate investigations based upon their personal knowledge of offenses.<sup>143</sup> The grand jury is authorized to look into the abolition or creation of county offices and the methods and operations of such offices.<sup>144</sup> The grand jury also investigates the need for an increase or decrease in the salaries of elected county officials upon its own initiative or at the request of the county's Board of Supervisors.<sup>145</sup>

Additionally, certain investigations by the grand jury are required. Section 925 of the California Penal Code states that the grand jury "shall" investigate the "operations, accounts and registers of the officers, departments, or functions of the county."<sup>146</sup> The California Penal Code also requires the grand jury to look into prison conditions and management, as well as any wilful or corrupt conduct on the part of public officers within the county.<sup>147</sup> In addition, § 925 of the California Penal Code states that the grand jury must investigate and report on the offices, accounts and records of the officials or entities of the county, including any special or legislative districts.<sup>148</sup> Under this section, there is some discretion given to the grand jury to select which agencies it will investigate in a given year.<sup>149</sup> After investigating the books and accounts of a public agency, the grand jury may order the district attorney to file suit to recover any money that the grand jury determines is owed to the county.<sup>150</sup>

Grand jury investigations are to be conducted in secret; members are forbidden from discussing them even with their spouses.<sup>151</sup> Moreover, any grand juror who wilfully discloses evidence or statements from a grand jury proceeding is guilty of a misdemeanor.<sup>152</sup>

The main function of grand jury secrecy in the civil function is the protection of witnesses, many of whom are "whistle blowers."<sup>153</sup> Without the assurance of con-

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143. See *id.* § 918 (West 1985) (stating that a grand jury member may inform fellow members of an offense which the grand juror knows or has reason to believe has been committed, whereupon the grand jury may initiate an investigation into the matter).

144. *Id.* § 928 (West 1985).

145. *Id.* § 927 (West 1985).

146. *Id.* § 925 (West 1985).

147. *Id.* § 919 (West 1985).

148. *Id.* § 925 (West 1985).

149. See *id.* (stating that grand jury "investigations may be conducted on some selective basis each year").

150. *Id.* § 932 (West 1985).

151. Each grand juror takes the following oath: "I will not disclose any evidence brought before the grand jury, nor anything which I or any other grand juror may say, nor the manner in which I or any other grand juror may have voted on any matter before the grand jury." CAL. PENAL CODE § 911 (West 1985).

152. See *id.* § 924.1(a) (West 1985 & Supp. 1997) (stating that wilful disclosure of evidence, deliberations or votes of grand jurors is a misdemeanor); *Id.* § 19 (West 1988) (stating that misdemeanor offenses are punishable by imprisonment in the county jail not to exceed six months, or by fine not to exceed 1,000 dollars).

153. See *McClatchy Newspapers v. Superior Court* (1983-1984 Grand Jury for Fresno County), 44 Cal. 3d 1162, 1175-76, 751 P.2d 1329, 1335-36, 245 Cal. Rptr. 774, 781 (1988) (discussing the importance of secrecy in grand jury civil investigations); Petersen, *supra* note 78, at 11 (noting that "[s]ecrecy is . . . important to the watchdog function in that it provides the proper atmosphere in which to generate uninhibited testimony from county employees who might otherwise be intimidated by political and employment considerations").

fidentiality, many potential whistle blowers may be deterred from coming forward with their information.<sup>154</sup> In addition, secrecy is important to “shield the innocent and uncharged from [the] embarrassment or ridicule” which may attach as the result of being subject to a grand jury investigation.<sup>155</sup> However, the grand jury may make a request to hold public sessions where the subject matter of the investigation involves the misconduct of public officials or employees and affects the general welfare of the public.<sup>156</sup>

The grand jury may employ the use of experts, such as accountants, if, in the judgement of the grand jury, it is deemed necessary for the execution of its duties.<sup>157</sup> The grand jury may also provide assistants to such experts if it believes assistants are required.<sup>158</sup> Compensation for experts and assistants are to be agreed upon and approved by the court.<sup>159</sup> Additionally, the grand jury, with the consent of the county board of supervisors, may employ expert auditors or appraisers to assist the grand jury in examining the “books, records, accounts, and documents maintained and processed by the county assessor.”<sup>160</sup>

The grand jury may also request legal advice from the court, district attorney, or county counsel to aid the grand jury in an investigation.<sup>161</sup> Further, the grand jury is authorized to request that the Attorney General employ special counsel or investigators to assist the grand jury in an investigation.<sup>162</sup> If the presiding judge of the grand jury determines that a conflict exists that would prevent the district attorney, county counsel or attorney general from assisting with an investigation for the grand jury, the presiding judge may employ special counsel and special investigators to investigate and present evidence to the grand jury.<sup>163</sup> The authority of the court to appoint special counsel and investigators is contingent upon the certification of the auditor-comptroller of the county that the grand jury has sufficient funds to compensate the special counsel or investigators.<sup>164</sup> The court has no authority to make an

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154. See Memorandum from California Grand Jurors Ass'n Boards of Directors, to California Grand Jurors Ass'n Legislation Committee, (Jan. 6, 1997) (copy on file with the *Pacific Law Journal*) (evaluating legislation which would compromise grand jury confidentiality and stating that it would “discourage in-house sources from fully cooperating with [a grand jury] investigation”).

155. Lorie Hearn, *Grand Jury Has Been Used and Abused for 900 Years*, SAN DIEGO UNION-TRIB., July 22, 1990, at A1; see *McClatchy*, 44 Cal. 3d at 1175, 751 P.2d at 1336, 245 Cal. Rptr. at 781 (stating that secrecy protects the reputations of individuals who may be unjustly accused pursuant to a grand jury civil investigation).

156. CAL. PENAL CODE § 939.1 (West 1985).

157. *Id.* § 926(a) (West 1985 & Supp. 1997).

158. *Id.*

159. *Id.*

160. *Id.* § 926(b) (West 1985 & Supp. 1997).

161. *Id.* § 934 (West 1985).

162. *Id.* § 936 (West 1985). See, e.g., Ted Rohrlich, *Grand Jury Seeks Lawyer to Aid Jailhouse Informant Inquiry*, L.A. TIMES, Feb. 16, 1989, § 2 at 3 (reporting that the Los Angeles County Grand Jury requested the Attorney General to provide counsel to investigate the use of jailhouse informants in criminal cases).

163. CAL. PENAL CODE § 936.5 (a),(b) (West 1985).

164. *Id.* § 936.5(c).

appointment of special counsel without the certification of the auditor comptroller.<sup>165</sup> However, if the county board of supervisors or one of its members is under investigation, the county must appropriate the necessary funds for the appointment of special counsel.<sup>166</sup>

In addition to its broad investigative power, a grand jury may remove, on accusation, public officials for wilful or corrupt misconduct while in office.<sup>167</sup> Under the statute, wilful misconduct requires serious misconduct that involves criminal behavior or, at minimum, a purposeful failure to carry out the mandatory duties of office.<sup>168</sup> An accusation to remove an official must have the concurrence of a minimum of eight grand jurors where the grand jury has eleven members or at least twelve grand jurors in a county with nineteen or twenty-three grand jurors.<sup>169</sup> Once an accusation is made, the official is notified and required to appear in court.<sup>170</sup> If the accusations are denied, the official is entitled to a trial and, if convicted, is then removed from office.<sup>171</sup> Generally, this procedure is not used as most officials resign before the process is undertaken.<sup>172</sup>

## 2. Reports

The Supreme Court of California has declared, "the reporting function of the grand jury is central to its effective operation in the public interest."<sup>173</sup> A grand jury

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165. *Id.*

166. CAL. PENAL CODE § 936.5 (c) (West 1985).

167. CAL. GOV'T CODE § 3060 (West 1995 & Supp. 1997). *See, e.g.*, *People v. Hawes*, 129 Cal. App. 3d 930, 181 Cal. Rptr. 456 (1982) (district attorney removed for intoxication during working hours); *People v. Hale*, 232 Cal. App. 2d 112, 42 Cal. Rptr. 533 (1965) (county auditor-controller removed for covering up management and accounting irregularities of his previous employer who held a county contract); *People v. Mullin*, 197 Cal. App. 2d 479, 17 Cal. Rptr. 516 (1961) (sheriff removed from office for wilful refusal to investigate complaint of child molestation); *People v. Elliot*, 115 Cal. App. 2d 410, 252 P.2d 661 (1953) (school official removed from office for conflicts of interest).

168. *Steiner v. Superior Court*, 50 Cal. App. 4th 1771, 1782, 58 Cal. Rptr. 2d 668, 676 (1996). *Steiner* involved allegations of misconduct against two Orange County Supervisors after the county declared bankruptcy in 1994. *Id.* at 1774. The grand jury returned accusations against the supervisors, charging that their failure to properly oversee the county treasurer's investments constituted wilful misconduct under § 3060 of the California Government Code. *Id.* at 1775. The court ruled that the alleged failure to properly oversee the actions of the treasurer fell far below the serious misconduct required under § 3060. *Id.* at 1782. Moreover, the court ruled that use of § 3060 to accuse county supervisors of acts or omissions which are part of the supervisor's legislative functions and are not criminal is an unconstitutional violation of the separation of powers doctrine. *Id.* at 1790-91. The court first stated that under separation of powers principles, legislators have absolute immunity from lawsuits based on legislative acts. *Id.* at 1784. Further, the court held that the supervisors' alleged failure to supervise the county treasurer in effect constituted a failure to exercise legislative discretion. *Id.* at 1788. Thus, legal action could not be taken against the supervisors under § 3060.

169. CAL. GOV'T CODE § 3060 (West 1995 & Supp. 1997).

170. *Id.* § 3063-3064 (West 1995).

171. *Id.* §§ 3069, 3072 (West 1995).

172. *Kinaga & Jordan*, *supra* note 136, at 81.

173. *McClatchy v. Superior Court* (1983-1984 Grand Jury for Fresno County), 44 Cal. 3d 1162, 1170, 751 P.2d 1329, 1332, 245 Cal. Rptr. 774, 778.

files a final report at the end of its term in which it publicly discloses the results of its investigations conducted during that year.<sup>174</sup> The major means by which a grand jury effects change is through the publicity garnered by the issuance of its final report.<sup>175</sup>

A grand jury's report is submitted to the superior court of the county in which it sits.<sup>176</sup> The court reviews the report, but may refuse to file it if the report exceeds the legal authority of the grand jury.<sup>177</sup> A report exceeds the legal authority of the grand jury if it exceeds the grand jury's jurisdiction or is based upon an investigation not personally conducted by the grand jury.<sup>178</sup> Indeed, the court must file the report even if the court believes that the report is libelous.<sup>179</sup> However, the court may strike portions of reports which disclose raw evidentiary materials such as transcripts of witness testimony, summaries and analyses of testimony, and documentary exhibits from a civil investigation.<sup>180</sup>

Within sixty days of the publication of the final report, every elected county officer or agency head is required to comment on grand jury findings and recommendations pertaining to matters under the control of that officer or agency head.<sup>181</sup> Additionally, the governing body of any public agency subject to the reviewing authority of the grand jury must comment on a grand jury's findings or recommendations within ninety days of the report's issuance.<sup>182</sup> In any city, the mayor is also required to comment on the findings and recommendations of the grand jury.<sup>183</sup>

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174. See CAL. PENAL CODE § 933(a),(b) (West 1985 & Supp. 1997) (providing that the grand jury submit a final report containing its findings and recommendations regarding its investigations at the end of its term).

175. See *Putting Teeth in Grand Jury Reports*, L.A. TIMES, May 13, 1993, at B10 (stating the grand jury has no power to enforce recommendations and must rely on publicity to provoke officials to respond to recommendations); see also Bill Billiter, *Past Grand Jurors Say Education Department, Chief Resist Changes*, L.A. TIMES, Jan. 23, 1987, § 2 at 5 (describing a press conference called by the Grand Jurors Association in which members criticized the county Department of Education for "virtually ignoring 'a decade of grand jury recommendations'").

176. CAL. PENAL CODE § 933(a),(b) (West 1985 & Supp. 1996).

177. See *People v. Superior Court* (1973 Grand Jury for Santa Barbara County), 13 Cal. 3d 430, 441, 531 P.2d 761, 768, 119 Cal. Rptr. 193, 200 (1975) (holding "the court may only refuse to file a proposed report if it exceeds the grand jury's lawful reporting powers").

178. *Id.* at 434, 531 P.2d at 763, 119 Cal. Rptr. at 195. The court recognized the possibility that "other situations may support a superior court's refusal to file a grand jury report," but declined to consider them. *Id.* at 442.

179. See *id.* at 439, 531 P.2d at 766, 119 Cal. Rptr. at 198 (holding that "the court has no authority to suppress a report simply because it considers it ill-advised, insufficiently documented or even libelous").

180. See *McClatchy Newspapers v. Superior Court* (1983-1984 Grand Jury for Fresno County), 44 Cal. 3d 1162, 1167, 751 P.2d 1329, 1330, 245 Cal. Rptr. 774, 775 (holding that the superior court properly sealed raw evidentiary materials, such as witness testimony, summaries and analyses of testimony, and documentary exhibits from a grand jury investigation).

181. CAL. PENAL CODE § 933(c) (West 1985 & Supp. 1997).

182. *Id.*

183. *Id.*

Recent legislation sets forth the required content of the response to a grand jury's findings and the time frame necessary for the response.<sup>184</sup> Section 933.05 of the California Penal Code, enacted in 1996, requires the responding person or entity to indicate whether the respondent agrees or disagrees with the finding of the grand jury.<sup>185</sup> If the responding person or entity disagrees with the report, the respondent is required to explain the reasons for disputing the grand jury's determination.<sup>186</sup>

Additionally, § 933.05 requires a detailed response to grand jury recommendations.<sup>187</sup> The responding person or entity is required to report whether a recommendation has been implemented and if so, an explanation of actions taken in this regard.<sup>188</sup> If a recommendation has not yet been implemented but will be in the future, the respondent must set forth a time frame for its implementation.<sup>189</sup> If any agency determines that further analysis is necessary prior to implementation of a recommendation, the agency must explain the scope of further study and provide a time frame to prepare the matter for discussion.<sup>190</sup> This time frame is not to exceed six months from the publication date of the grand jury report.<sup>191</sup> If the responding person or agency decides not to implement the recommendation, the respondent must explain why the recommendation is unwarranted or unreasonable.<sup>192</sup>

Section 933.05 also authorizes the grand jury to request a person or entity that is the subject of a grand jury finding to come before the grand jury to discuss and verify the accuracy of the report's finding prior to its release.<sup>193</sup>

#### IV. PROBLEMS AND CRITICISMS OF THE CIVIL GRAND JURY SYSTEM

There is a long history of anti-grand jury sentiment in the United States.<sup>194</sup> As a result of this criticism, the powers of the grand jury have been limited in most states to passing upon criminal indictments submitted to them.<sup>195</sup> Only California and Nevada mandate the annual impanelment of grand juries to initiate and conduct broad

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184. *Id.* § 933.05 (West Supp. 1997).

185. *Id.* § 933.05(a) (West Supp. 1997).

186. *Id.*

187. *Id.* § 933.05(b) (West Supp. 1997); *see infra* notes 320-27 (discussing how § 933.05 was intended to remedy the problem where the subjects of grand jury reports would merely respond with a "no comment").

188. CAL. PENAL CODE § 933.05(b)(1) (West Supp. 1997).

189. *Id.* § 933.05(b)(2) (West Supp. 1997).

190. *Id.* § 933.05(b)(3) (West Supp. 1997).

191. *Id.*

192. *Id.* § 933.05(b)(4) (West Supp. 1997).

193. *Id.* § 933.05(d) (West Supp. 1997) (stating "[a] grand jury may request a subject person or entity to come before the grand jury for the purpose of reading and discussing the findings of the grand jury report . . . in order to verify the accuracy of the findings prior to their release").

194. *See* EDWARDS, *supra* note 28, at 3 (examining the historical criticism of the grand jury). *See generally* YOUNGER, *supra* note 17 (discussing the history of the grand jury in the United States and examining movements to limit or abolish the grand jury throughout).

195. Petersen, *supra* note 78, at 2-3.

civil investigations.<sup>196</sup> In addition, the grand jury was abolished in England, the land of its origin, in 1933.<sup>197</sup> Similar calls for the abolition of grand juries have been made in this country.<sup>198</sup> However, despite criticisms, the institution has endured.

#### A. Abuse of Power

One criticism is that the broad statutory powers of the grand jury invite abuse.<sup>199</sup> On a few occasions, grand juries have issued reports which fall beyond their legal jurisdiction.<sup>200</sup> Although most grand jurors are dedicated and conscientious citizens,<sup>201</sup> some grand juries have been accused of abusing their authority.<sup>202</sup>

Civil investigations by grand juries expose individuals to attack or allegations of misconduct, and those individuals may be unable to defend themselves due to the secretive nature of grand jury proceedings.<sup>203</sup> Further, criminal charges may never be filed.<sup>204</sup> However, professional reputations are damaged due to the negative con-

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196. See CAL. PENAL CODE § 914.1 (West 1985 & Supp. 1997) (authorizing the grand jury to investigate or inquire into county matters of civil concern); cf. NEV. REV. STAT. § 172.175(2) (1995) (providing that the grand jury "may inquire into any and all matters affecting the morals, health and general welfare of the inhabitants of the county, or of any administrative division thereof, or of any township, incorporated city, irrigation district or town therein").

197. YOUNGER, *supra* note 17, at 226. The abolishment of the grand jury in England was initiated by those who felt that grand juries were too expensive, especially in light of the economic depression of the 1930s. *Id.* at 225-26.

198. See *supra* notes 69-75 and accompanying text (discussing efforts to abolish the grand jury in the United States).

199. See *supra* notes 136-93 and accompanying text (describing the broad statutory powers of the grand jury to investigate and report on public offices and agencies).

200. See, e.g., Kevin Johnson & Rene Lynch, *O.C. Grand Jury Lacks Diversity, Critics Say Backlash*, L.A. TIMES, June 28, 1993, at A1 (reporting that the 1992-93 Orange County Grand Jury issued a report recommending a nationwide ban on immigration and associating immigration with a variety of social problems); see also *People v. Superior Court* (1973 Grand Jury for Santa Barbara County), 13 Cal. 3d at 437-38, 531 P.2d at 765-66, 119 Cal. Rptr. at 197-98 (noting that a grand jury is only authorized to issue findings and recommendations within its own county, and "is not authorized to roam at will throughout the state or country reporting on what it might view as shortcomings in distant locales").

201. Stewart, *supra* note 132, § 1 at 1.

202. See, e.g., *The Runaway Jury*, PRESS DEMOCRAT, Aug. 16, 1996, at B4 (criticizing the Sonoma County Grand Jury due to the attempt by grand jury members to demand access to private business records); Mark Platte, *Counsel Says Grand Jury Was Unfair*, L.A. TIMES, Nov. 19, 1992, at B1 (stating that one county counsel accused a grand jury of "adopting a 'stealth-like attitude' in investigating [the county counsel's] office" and called the grand jury's report "incomplete and misleading"); Rosenlind & Fontana, *supra* note 4, at A1 (quoting the mayor of Fresno who stated, "[s]ince I've been in office, the grand jury has had a history of unprofessional meddling in the business of the city"); Carol Sottili, *Jury May Be Ignored, But Seldom Quiet*, SAN DIEGO UNION-TRIB., June 6, 1985, at B1 (reporting that the 1983-84 grand jury in San Diego County was criticized for urging the county to resist a federal court order on minority hiring and for labeling bilingual education as "un-American").

203. See *McClatchy Newspaper v. Superior Court* (1983-1984 Grand Jury for Fresno County), 44 Cal. 3d 1162, 1178, 751 P.2d 1329, 1336-37, 245 Cal. Rptr. 774, 781-82 (1988) (discussing grand jury secrecy and the vulnerability of unindicted individuals who are criticized in grand jury reports).

204. *Id.*

notations society associates with a grand jury investigation.<sup>205</sup> Despite the potential for abuse by the grand jury, the system contains some natural checks and balances on its power.<sup>206</sup>

Section 930 of the California Penal Code provides that comments in grand jury reports regarding any person or official not indicted are not privileged.<sup>207</sup> Thus, individual grand jurors may be sued for defamation. In *Gillett-Harris-Duranceau v. Kemple*,<sup>208</sup> members of the Lake County Grand Jury were sued for allegedly defamatory statements contained in its final report.<sup>209</sup> The appellate court held that § 930 did not unconstitutionally infringe upon the grand jury's prerogative as a judicial institution.<sup>210</sup> The court held that the civil function of the grand jury was a "unique creature of the California Legislature," and not inherently judicial.<sup>211</sup> The court further reasoned that the legislature was thus free to impose "reasonable limitations" upon the civil power of the grand jury.<sup>212</sup> The court distinguished the civil function of the grand jury from its indictment function by emphasizing that an indicted individual has an opportunity to defend himself publicly, whereas an unindicted individual criticized in a report does not have access to a comparable forum.<sup>213</sup>

The California Supreme Court has also recognized the risk of harm to individuals unfairly criticized by grand jury reports.<sup>214</sup> The court has stated that secrecy is necessary in civil grand jury proceedings which "require that witnesses testify without fear

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205. See Barry J. Stern, *Revealing Misconduct of Public Officials Through Grand Jury Reports*, 136 U. PA. L. REV. 73, 85 (1987) (noting "[i]n the public's mind, the distinction between a public report made that revealed official misconduct and an indictment that initiated a prosecution may have become blurred").

206. See *infra* notes 207-41 and accompanying text (describing the natural constraints on grand jury abuse including defamation actions, limited terms and a consensus requirement).

207. CAL. PENAL CODE § 930 (West 1985). The constitutionality of § 930 was recently challenged. *Brooks v. Binderup*, 39 Cal. App. 4th 1287, 46 Cal. Rptr. 2d 501 (1995). In *Brooks*, Yuba County grand jurors were sued for defamation by the directors of the Yuba County Planning and Building Services department. *Id.* at 1289. The grand jurors claimed that § 930 violated their right to procedural due process because other statutes relating to grand jury secrecy prevented them from offering relevant and competent evidence in defense of the defamation allegations. *Id.* at 1294. Specifically, the grand jurors cited §§ 924.1 and 924.2, which prohibit disclosure of the state of mind of grand jurors during deliberations. *Id.* at 1290. The appellate court ruled that although statute prevents disclosure of grand jury deliberations and evidence, other sources were available to provide grand jurors with the information to defend themselves. *Id.* at 1294. The court noted that "the grand jury report itself provides a framework for discovery of evidence" related to issues relevant to the defense, and suggested that the evidence could be obtained through department employees or documents. *Id.*

208. 83 Cal. App. 3d 214, 147 Cal. Rptr. 616 (1978).

209. *Gillett-Harris-Duranceau & Associates v. Kemple*, 83 Cal. App. 3d 214, 215, 147 Cal. Rptr. 616, 617 (1978). In *Gillett-Harris-Duranceau*, the plaintiff was a firm which contracted with Lake County to provide engineering, land surveying, and architectural services. The final report of the 1974-75 Lake County Grand Jury stated that the plaintiff had been "negligent, incompetent and wrong in the performance of its duties." *Id.*

210. *Id.* at 222, 147 Cal. Rptr. at 621.

211. *Id.* at 221, 147 Cal. Rptr. at 620.

212. *Id.*

213. *Id.* at 222, 147 Cal. Rptr. at 621.

214. *McClatchy Newspapers v. Superior Court (1983-1984 Grand Jury for Fresno County)*, 44 Cal. 3d 1162, 1176-77, 751 P.2d 1329, 1336-37, 245 Cal. Rptr. 774, 781-82.

of reproach by their peers or their superiors.”<sup>215</sup> However, secrecy may deprive unindicted individuals of a public forum in which to defend against accusations by the grand jury.<sup>216</sup> Courts thus recognize that the possibility of a defamation action provides an important balance against grand jury power.<sup>217</sup>

Grand jurors may be intimidated by the possibility of a defamation action.<sup>218</sup> Grand jury reports contain statements regarding public officials and agencies. Although it is difficult for a public official to prevail in a defamation action, lay citizens on a grand jury panel may nevertheless fear legal action.<sup>219</sup> No doubt this may prevent abuses of grand jury power.<sup>220</sup> However, this constraint may go too far and prevent important investigations from being undertaken by grand jurors who are unwilling to report on controversial matters because they fear being sued.

Because the civil grand jury is a creature of statute, the state supreme court has held that “the grand jury acts without authority when its action is not based on some specific legislative provision.”<sup>221</sup> Thus, in the absence of direct statutory authorization, the powers of the grand jury have been interpreted narrowly by the courts, which helps to prevent abuse of grand jury power.<sup>222</sup> For example, in *McClatchy*

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215. *Id.* at 1175, 751 P.2d at 1336, 245 Cal. Rptr. at 781.

216. *See id.* at 1176, 751 P.2d at 1336-37, 245 Cal. Rptr. at 782 (stating that a grand jury’s final report is “the first and last step in the judicial process”).

217. *See Brooks v. Binderup*, 39 Cal. App. 4th 1287, 1293, 46 Cal. Rptr. 2d 501, 505 (noting that § 930 balances the costs to unindicted individuals and grand jurors and encourages grand jurors to proceed cautiously when commenting on unindicted officials).

218. *See Pamela Martineau, Suit Against Grand Jury Survives*, SACRAMENTO BEE, Oct. 8, 1996, at B4 (stating that some grand jurors feel the threat of defamation suits may have a chilling effect on grand jury reporting).

219. *See id.* (reporting that some believe that the threat of libel suits will cause potential grand jurors to be more cautious while noting that proving libel is “relatively difficult”). The United States Supreme Court has held that in order to recover damages for a defamatory statement regarding a public official’s official conduct, the public official must prove that the statement was made with “actual malice.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). Actual malice was defined by the Court as “knowledge that [the statement] was false or with reckless disregard of whether it was false or not.” *Id.* at 280.

220. *See Brenner, supra* note 19, at 131 n.218 (stating “[a] grand jury’s willingness to issue a highly critical report may be influenced by the fact that . . . comments in a grand jury report are not privileged, and so can become the basis of an action for defamation”); *see also Brooks v. Binderup*, 39 Cal. App. 4th 1287, 1293, 46 Cal. Rptr. 2d 501, 505 (1995) (noting that “section 930 encourages grand jurors to proceed cautiously when commenting on the conduct of unindicted individuals and public officials”).

221. *McClatchy Newspapers v. Superior Court* (1983-1984 Grand Jury for Fresno County), 44 Cal. 3d 1162, 1179, 751 P.2d 1329, 1338, 245 Cal. Rptr. 774, 783 (1988).

222. *See, e.g., id.* at 1184, 751 P.2d at 1342, 245 Cal. Rptr. at 787 (holding that a grand jury has no authority to disclose raw evidentiary materials from civil investigation); *Unnamed Minority Members of the 1987-88 Kern County Grand Jury v. Superior Court*, 208 Cal. App. 3d 1344, 1348-49, 256 Cal. Rptr 727, 729-30 (1989) (ruling that a grand jury has no authority to submit a report that has not been considered by the full grand jury for inclusion in final report); *Allen v. Payne*, 1 Cal. 2d 607, 608-09, 36 P.2d 614, 614-15 (1934) (deciding there was no grand jury authority to hire an investigator); *Board of Trustees v. Leach*, 258 Cal. App. 2d 281, 285-89, 65 Cal. Rptr 588, 591-93 (1968) (stating that a grand jury has no authority to investigate personnel records of school district); *People v. Bartlett*, 199 Cal. App. 2d 173, 177, 18 Cal. Rptr. 480, 483 (1962) (finding that a grand jury has no authority to take judicial notice of public records); *County of Fresno v. Roberson, M. & Co.*, 124 Cal. App. 2d Supp. 888, 893-94, 269 P.2d 252, 255-56 (1954) (concluding that a grand jury has no authority to hire an expert).

*Newspapers v. Superior Court*,<sup>223</sup> the California Supreme Court held that the grand jury was not authorized to release raw evidentiary materials collected pursuant to a grand jury civil investigation.<sup>224</sup> The court held that § 933 of the California Penal Code only authorizes the grand jury to “find, recommend, and report,” and thus implicitly requires the grand jury to first process, analyze, and draw conclusions from raw evidentiary material.<sup>225</sup> Such conclusions are then authorized to be released publicly as findings or recommendations.<sup>226</sup> Further, the court looked to the enactment of § 924.4 of the California Penal Code in 1975, which permits the grand jury to disclose evidence it has gathered to a succeeding grand jury.<sup>227</sup> The court reasoned that if the grand jury could not disclose evidentiary materials even to a succeeding grand jury prior to the enactment of § 924.4, then it followed that it could not disclose evidentiary materials to the public absent explicit statutory authorization.<sup>228</sup>

The *McClatchy* decision evidences the balance inherent in the grand jury system which operates to prevent the grand jury from abusing its broad statutory authority. Non-disclosure of evidence gathered during grand jury proceedings serves to protect both the unindicted subject of a grand jury investigation as well as witnesses who have testified before the grand jury in reliance that the proceedings are to be confidential.<sup>229</sup>

In Nevada, a statute requires that any criticism of public officers or agencies in a final report must be made in support of a recommendation.<sup>230</sup> Additionally, if such criticism is made in the report which is not attended by an indictment or presentment, the report must contain an affirmative statement that no indictable criminal activity was discovered by the grand jury.<sup>231</sup> These requirements may also ensure against grand jury abuse. California has no such requirements. Courts only have the power to suppress illegal reports.<sup>232</sup> Reports are deemed illegal only under narrow circumstances.<sup>233</sup>

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223. 44 Cal. 3d 1162, 751 P.2d 1329, 245 Cal. Rptr. 774 (1988).

224. *See id.* at 1184, 751 P.2d at 1342, 245 Cal. Rptr. at 787 (holding that the superior court acted properly in striking the portion of a grand jury report that contained raw evidentiary materials).

225. *Id.* at 1180, 751 P.2d at 1339, 245 Cal. Rptr. at 784.

226. *Id.*

227. *Id.* at 1181, 751 P.2d at 1339-40, 245 Cal. Rptr. at 785.

228. *Id.* at 1181, 751 P.2d 1340, 245 Cal. Rptr. at 785.

229. *Id.* at 1175-76, 751 P.2d 1336, 245 Cal. Rptr. at 781.

230. NEV. REV. STAT. § 172.269 (1995).

231. *Id.* § 172.269 (1995).

232. *See People v. Superior Court (1973 Grand Jury for Santa Barbara County)*, 13 Cal. 3d 430, 439, 531 P.2d 761, 766, 119 Cal. Rptr. 193, 198 (1975).

233. *See id.* at 439, 531 P.2d at 766, 119 Cal. Rptr. at 198 (holding that the superior court has no authority to suppress a grand jury report unless it is either not based on its own investigation or exceeds the jurisdictional limits of the grand jury).

The limited terms of grand juror service may also minimize the power of the grand jury, thereby preventing abuse of its authority.<sup>234</sup> Grand jury members only serve terms of one year.<sup>235</sup> Because of the grand jury's broad statutory mandate to conduct investigations, the one-year term requirement has been a source of frustration and criticism by grand jurors who are unable to complete their investigations in the time allotted.<sup>236</sup> However, the time limit may serve the important purpose of preventing abuse by limiting the power of any one grand jury.

Another aspect of the system which may prevent abuse is the need for a consensus. Most grand jury action requires a consensus of approximately two-thirds of the grand jury's members.<sup>237</sup> The inclusion of findings and recommendations in a final report must be agreed upon by at least twelve jurors of a nineteen-member panel.<sup>238</sup> However, a final report does not reflect the results of grand jury votes as to each finding or recommendation.<sup>239</sup> Rather, the report is presented as containing the views of the grand jury panel as a whole.<sup>240</sup> By requiring consensus, the grand jury is encouraged to deliberate, which helps ensure that the members of the jury examine the issues carefully.<sup>241</sup>

### *B. Lack of Time*

A major constraint on the operations of the grand jury is simply lack of time. Grand jurors serve a term of only one year.<sup>242</sup> Although this time limit may help prevent abuse, many members feel one year is inadequate for the grand jury to

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234. See CAL. PENAL CODE § 905.5 (West 1985) (providing that the grand jury serve a term of one fiscal or calendar year). *But see* Dawn Garcia, *Why Grand Juries Get No Satisfaction*, S.F. CHRON., Aug. 17, 1987, at 2 (stating that time constraints hinder the effectiveness of the grand jury); *infra* notes 242-46 (discussing how lack of time may limit the effectiveness of a grand jury).

235. CAL. PENAL CODE § 905.5 (West 1985 & Supp. 1997).

236. See *infra* notes 242-46 and accompanying text (discussing the time constraints faced by the grand jury).

237. See CAL. PENAL CODE § 916 (West 1985 & Supp. 1997) (stating that "all public actions of the grand jury, whether concerning civil or criminal matters . . . including the adoption of final reports, shall be only with the concurrence of that number of grand jurors necessary to find an indictment under § 940"); CAL. PENAL CODE § 940 (West 1985 & Supp. 1997) (stating that an "indictment cannot be found without concurrence of at least 14 grand jurors in a county in which the required number of members . . . is 23, at least 8 grand jurors in a county in which the required number of members is 11, and at least 12 grand jurors in all other counties"); see also *Unnamed Minority Members of the 1987-88 Kern County Grand Jury v. Superior Court*, 208 Cal. App. 3d 1344, 256 Cal. Rptr. 727 (1989) (upholding superior court's refusal to file and publish a minority report of five grand jurors and stating that the grand jury is authorized to file a single final report and that the final report must be considered by the full grand jury).

238. CAL. PENAL CODE §§ 916, 940 (West 1985 & Supp. 1997).

239. Telephone interview with Dan Taranto, President, California Grand Jurors Association, Feb. 23, 1997 (notes on file with the *Pacific Law Journal*).

240. *Id.*

241. However, the consensus requirement may stifle necessary investigations. See, e.g., Chris Knap, *Grand Jury Oversight Function Often Fails*, ORANGE COUNTY REG., Apr. 14, 1996, at A1 (reporting that prior to the Orange County bankruptcy, three Orange County grand jurors unsuccessfully urged their fellow jurors to investigate the investment practices of the county treasurer).

242. CAL. PENAL CODE § 905.5 (West 1985 & Supp. 1997).

perform its civil oversight functions.<sup>243</sup> In addition, members on a grand jury may have no experience in local government affairs.<sup>244</sup> Once jurors are oriented to their responsibilities as members, significant time has usually passed.<sup>245</sup> Many public officials are aware of this phenomenon and, not surprisingly, the grand jury is sometimes subjected to stalling tactics by agencies under investigation.<sup>246</sup>

However, proposals to extend the grand jury term have not been embraced.<sup>247</sup> In smaller counties, it is difficult enough to find the requisite number of grand jurors willing to serve a one year term.<sup>248</sup> In larger counties, grand juries may meet every weekday.<sup>249</sup> Thus, it may be difficult to find citizens who are able to afford to commit longer than one year to jury service.<sup>250</sup>

Some counties have alleviated the time problem by impaneling separate criminal and civil grand juries.<sup>251</sup> Section 904.6 of the California Penal Code authorizes counties to impanel additional grand juries at the discretion of the presiding judge of their superior courts.<sup>252</sup> The second grand jury impaneled is authorized to act in the indictment capacity only.<sup>253</sup> San Francisco County has employed the use of two

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243. See Garcia, *supra* note 234, at 2 (stating that some jurors feel "one year is not long enough for a group of 19 strangers . . . to focus on what to do, investigate and write a report on their findings"); Stewart, *supra* note 2, § 1 at 1 (noting that many former grand jury members have suggested longer terms for grand juries).

244. See Stewart, *supra* note 2, § 1 at 1 (reporting that "for the most part, [grand jurors] do not have a lot of experience in government affairs").

245. See Hasemyer & Krueger, *supra* note 8, at A1 (stating that the lack of adequate training of grand jurors has the effect of wasting much of the grand jury term); Report of the 1994-1995 San Francisco Civil Grand Jury, *supra* note 132, at 9 (finding that the lack of training for incoming grand jurors has the effect of leaving jurors "at sea" during the first months of the grand jury term); see also *infra* notes 262-87 and accompanying text (discussing the lack of training in the grand jury system).

246. See Hasemyer & Krueger, *supra* note 8, at A1 (stating that some grand jurors felt their investigations were hindered by officials who knew they could stall because grand jurors serve limited one year terms); Stewart, *supra* note 132, § 1 at 1 (quoting one former grand juror "The bureaucrats know you last for only one year . . . If they can stonewall you for six months, they've got you").

247. See Leland, *supra* note 6, at 9 (stating that proposals to lengthen grand jury terms have not been implemented despite frustration jurors feel due to lack of time).

248. See Stewart, *supra* note 132, § 1 at 1 (discussing the difficulty many counties have in finding citizens who are able to devote a year to grand jury service).

249. See Anne Krueger & David Hasemyer, *The Grand Jury: Behind Closed Doors*, SAN DIEGO UNION-TRIB., June 12, 1986, at A10 (examining the time commitment required in large counties and its prohibitive effect).

250. *Id.*

251. See Simon, *supra* note 115, at B3 (stating that several counties have solved the time problem by assembling a second grand jury to hear criminal indictments, including Santa Barbara, Riverside and San Bernardino counties); see also Electronic Mail from Dan Taranto, President, California Grand Jurors Association to Author, (Mar. 15, 1997) (noting that Humboldt, Contra Costa, and Alameda counties successfully maintain dual grand juries) (copy on file with the *Pacific Law Journal*).

252. CAL. PENAL CODE § 904.6(a) (West Supp. 1997).

253. *Id.* § 904.6(d) (West Supp. 1997).

grand juries for over two decades.<sup>254</sup> Other counties, such as Humboldt, Alameda, and Contra Costa, have also successfully implemented the dual grand jury system.<sup>255</sup>

Assembling a second grand jury increases the effectiveness of the civil grand jury in many counties.<sup>256</sup> In Los Angeles county, jurors complain that their indictment responsibilities leave little time for conducting civil investigations.<sup>257</sup> A separate criminal grand jury would enable the civil grand jury to solely exercise its watchdog function.

However, this provision seems to be underutilized despite the potential benefits. Only about half of the counties have impaneled additional criminal grand juries pursuant to § 904.6.<sup>258</sup>

Impanelment of two grand juries may be impracticable or unnecessary in some counties. Some counties have trouble finding enough citizens to serve on the regular grand jury.<sup>259</sup> Additionally, some county budgets may preclude the funding of an additional grand jury.<sup>260</sup> In many smaller counties, grand jurors meet less frequently and may not have the need for an additional grand jury.<sup>261</sup>

### *C. Lack of Training and Expertise*

No formal knowledge of government is necessary for a citizen to serve on the grand jury.<sup>262</sup> Although the presiding judge is required to inform the grand jurors of their statutory responsibilities, there is currently no requirement that grand jurors

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254. See CAL. PENAL CODE § 904.5 (West 1985 & Supp. 1997) (repealed by stats. 1991, c. 464 (A.B. 607), § 1 eff. Oct. 2, 1991) (authorizing the assembly of one additional grand jury in any county with a population greater than 6,000,000); see also Stewart, *supra* note 132, § 1 at 1 (stating that San Francisco has maintained separate civil and criminal grand juries since 1975).

255. Electronic Mail from Dan Taranto to Author, *supra* note 251.

256. See CALIFORNIA GRAND JURORS ASSOCIATION, PROCEEDINGS OF THE ELEVENTH ANNUAL CONFERENCE, at 6-20 (1993) (evaluating the advantages of using separate civil and criminal grand juries).

257. Simon, *supra* note 115, at B3; see Bill Boyarsky, *The Watchdog With Scant Time To Watch*, L.A. TIMES, May 11, 1994, at B3 (reporting that only a small portion of the Los Angeles County Grand Jury's time is spent investigating the efficiency and honesty of local officials); Paddock, *supra* note 114, at A20 (stating some believe that the Los Angeles County Grand Jury cannot fulfill its civil responsibilities because it is too overloaded with criminal indictments).

258. Electronic mail from Dan Taranto to Author, *supra* note 251.

259. See Stewart, *supra* note 132, § 1 at 1 (discussing the difficulty many counties have in finding citizens who are able to devote a year to grand jury service).

260. See *infra* notes 288-96 and accompanying text (examining the problem of inadequate funding and resources of grand juries).

261. Compare HUMBOLDT COUNTY SURVEY OF THE TEN GRAND JURIES OF THE 1980's, 1990-91, at 1 (finding that grand jurors in Humboldt County serve an average of 12.5 hours per week) with Paddock, *supra* note 114, at A20 (reporting that grand jurors work full-time in Los Angeles County); Krueger & Hasemyer, *supra* note 249, at A10 (noting that jurors in San Diego County often work from 4 to 6 days a week).

262. See *supra* Part III (discussing the requirements for grand jury service).

undertake any formal or practical training once they have been impaneled.<sup>263</sup> This raises two related issues: (1) Whether civil grand juries should be made up of individuals who possess expertise in local government and finance; and (2) whether there should be a requirement that grand jurors participate in a formal training program once selected.

Some critics argue that civil grand juries should be comprised of citizens who have extensive knowledge of or experience in public administration, finance or politics.<sup>264</sup> Since the mechanisms of government have become highly sophisticated, it may be unreasonable to assume that a grand jury with no expertise in government would have any effectiveness at all as a government watchdog.<sup>265</sup> When superior court judges were solely responsible for selecting potential grand jurors, the panel tended to mostly include people from the business sector.<sup>266</sup> This resulted in the so-called "blue ribbon" grand jury, which was perceived as reflecting only the upper classes of society, and thus, was highly criticized.<sup>267</sup> A return to the "blue ribbon" grand jury might ensure a better qualified panel, but it may also erode one of the fundamental values behind the grand jury concept.<sup>268</sup> The grand jury is valued as an outlet for lay citizen involvement in the oversight of local government.<sup>269</sup>

Training for grand jurors once selected is important regardless of whether the qualifications for grand jury service are changed.<sup>270</sup> Grand jurors have complained

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263. See CAL. PENAL CODE § 914 (West 1985) (requiring that the court give the grand jurors "such information as it deems proper, or as is required by law, as to their duties"); CAL. PENAL CODE § 914.1 (West 1985 & Supp. 1997) (stating that the judge "shall inform and charge the grand jury especially as to its powers, duties, and responsibilities").

264. See Leland, *supra* note 6, at 8 (examining the frustrations of grand jurors and stating that many feel some grand jurors are unqualified to perform the functions required).

265. See Hasemyer & Krueger, *supra* note 8, at A1 (stating that the sophistication of modern local government has led some to conclude that non-expert citizens are unqualified to oversee its functions).

266. See Leland, *supra* note 6, at 8 (discussing the early system of selection of grand jurors by judges which resulted in "blue ribbon" panels).

267. Leland, *supra* note 6, at 8.

268. See Brenner, *supra* note 19, at 119 (noting that some defenders of the watchdog role of the grand jury maintain "that the grand jurors' lack of professional expertise is precisely the quality that makes their inquiries valuable for bringing the common sense perspectives shared by the populace of a given community to bear on certain government activities"); Leonard Lahtinen, *Grand Juries Can Have an Impact*, L.A. TIMES, Sept. 7, 1986, §1 at B14 (stating that discontinuing the practice of "blue ribbon" grand juries has led to more diverse panels and "enhances the ability of a jury to look at issues from different points of view").

269. See *People v. Superior Court (1973 Grand Jury for Santa Barbara County)*, 13 Cal. 3d 430, 437, 531 P.2d 761, 765, 119 Cal. Rptr. 193, 197 (1975) (stating, "[i]n our system of government, a grand jury is the only agency free from possible political or official bias that has an opportunity to see the operation of government"); Stewart, *supra* note 2, § 1 at 1 (stating that many officials and former jurors feel that the "watchdog" role of the California grand jury is "the only opportunity afforded the citizen to take a direct role in monitoring local government").

270. See Report of the 1994-1995 San Francisco Civil Grand Jury, *supra* note 132, at 9 (finding that the lack of training for incoming grand jurors has the effect of leaving jurors confused and lost during the first months of the grand jury term).

that they are unsure of their statutory authority and responsibilities.<sup>271</sup> Many counties have a short session in which the presiding judge and district attorney inform grand jury members of the grand jury's statutory authority and confidentiality requirements.<sup>272</sup> This usually consists of reading certain penal code sections to the jury.<sup>273</sup> The entire process generally lasts an hour to an hour and a half.<sup>274</sup>

Many former grand jurors believe that their training was inadequate.<sup>275</sup> The California Grand Jurors Association advocates more extensive training and stresses the importance of training by individuals who are not themselves subject to grand jury scrutiny.<sup>276</sup> Until recently, the American Grand Jury Foundation (AGJF), a non-profit organization based in Modesto, California, conducted training seminars for grand jurors.<sup>277</sup> These seminars provided three days of instruction for grand jurors on a range of issues.<sup>278</sup> Grand jurors participated in workshops and case studies and attended lectures.<sup>279</sup> Topics included practical skills such as how to interview witnesses, officials and agency heads.<sup>280</sup> Jurors were given basic lessons on how to conduct an investigation.<sup>281</sup> Grand jurors were further instructed on how to write a final report.<sup>282</sup> Members also received instruction regarding the local government

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271. *Id.*; see Rachel Gordon, *The S.F. Grand Jury Investigates Itself, Calls for Overhaul*, S.F. EXAMINER, July 12, 1995, at A25 (describing recommendations made by the San Francisco Civil Grand Jury and stating that the grand jury receives "virtually no training").

272. See CAL. PENAL CODE § 914 (West 1985) (requiring that the court give the grand jurors "such information as it deems proper, or as is required by law, as to their duties"); CAL. PENAL CODE § 914.1 (West 1985 & Supp. 1997) (stating that the judge "shall inform and charge the grand jury especially as to its powers, duties, and responsibilities").

273. See Telephone Interview with Dan Taranto, *supra* note 239 (describing the grand jury training process in many counties).

274. Telephone Interview with Dan Taranto, *supra* note 239.

275. See Report of the 1994-1995 San Francisco Civil Grand Jury, *supra* note 132, at 9-10 (finding that the lack of training impedes the function of the grand jury and recommending that grand jurors attend a professional training seminar).

276. See Memorandum from California Grand Jurors Association Legislation Committee to California Grand Jurors Association Boards of Directors (Jan. 6, 1997) (copy on file with the *Pacific Law Journal*) (analyzing the training provision included in the current legislative effort by the California State Association of Counties).

277. American Grand Jury Foundation, Handbook of the Sixteenth Annual Grand Jury Exchange Seminar, Aug. 1995 (hereinafter AGJF Handbook) (copy on file with the *Pacific Law Journal*); see Report of the 1994-1995 San Francisco Civil Grand Jury, *supra* note 132, at 9 (stating that the American Grand Jury Foundation conducts an annual training seminar for grand jurors and recommending that San Francisco civil grand jurors undergo similar training).

The AGJF seminars have been temporarily discontinued due to time constraints. They may be renewed as time becomes available. The seminars conducted by the AGJF in the past are used here as an example of a successful and comprehensive training program for grand jurors.

278. See AGJF Handbook, *supra* note 277 (setting forth the agenda of the grand jury seminar).

279. AGJF Handbook, *supra* note 277.

280. AGJF Handbook, *supra* note 277, at 10-16.

281. AGJF Handbook, *supra* note 277, at 18-26.

282. See AGJF Handbook, *supra* note 277, at agenda (listing workshops attended by grand jurors regarding report writing).

entities over which they had investigative authority.<sup>283</sup> In addition, they were trained on various aspects of the penal code, case law and defamation law.<sup>284</sup>

Currently, Yuba County Citizens Alliance (YCCA) is the only independent agency which conducts seminars of this nature for grand jurors.<sup>285</sup> The two-day YCCA seminars cover the same topics as the AGJF's seminars.<sup>286</sup> In 1996, 164 jurors representing 18 counties participated in the YCCA seminar.<sup>287</sup>

#### D. Inadequate Resources

Another problem affecting the efficiency of grand juries is the amount of resources allocated to them. The disparity from county to county is vast with respect to grand jury resources.<sup>288</sup> In many counties, grand juries lack basic supplies necessary to carry out their statutory mandate.<sup>289</sup> Grand jurors frequently raise this issue as a serious obstacle to the effectiveness of the grand jury.<sup>290</sup>

A report by the San Francisco civil grand jury in 1995 documented complaints voiced by many grand jurors.<sup>291</sup> The report found deficiencies in grand jury funding, support staff, and supplies.<sup>292</sup> In San Francisco, the grand jury had no phone number, mailing address or specific meeting place.<sup>293</sup> Grand jury investigations sometimes begin as a response to citizen requests. An independent phone number and address make it easier for citizens to contact the grand jury and alert it to potentially neces-

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283. AGJF Handbook, *supra* note 277, at 62-71.

284. See AGJF Handbook, *supra* note 277, at 73-77 (indexing the California Penal Code sections pertaining to grand juries); *id.* at 58-59 (summarizing the California Supreme Court's decision in *McClatchy v. Superior Court*); *id.* at 53-56 (suggesting ways for grand jurors to avoid libel suits).

285. See *Training Success*, GRAND JURORS J. (California Grand Jurors Ass'n, Eureka, Cal.) Winter 1996, at 4 (announcing the 4th Annual Grand Jury Seminar); see also Electronic mail from Dan Taranto to Author, *supra* note 251 (stating that the YCCA is the only active program that accepts Northern California grand jurors).

286. Electronic mail from Dan Taranto to Author, *supra* note 251.

287. See *Training Success*, *supra* note 285 at 4; Electronic mail from Dan Taranto to Author, *supra* note 251.

288. See Stewart, *supra* note 132, § 1 at 1 (comparing the \$1,200 annual budget of the Alpine County grand jury with the \$280,820 annual budget for the grand jury in Orange County).

289. See Dave Thom, *Visions of Grandeur; California Citizens Are Trying to Restore the Glory Once Held By Civil Grand Juries*, THE RECORDER, Sept. 21, 1995, at 1 (reporting that grand juries face serious problems such as lack of a meeting room, telephones, and support staff in approximately 30 of the state's 58 counties).

290. See Report of the 1994-1995 San Francisco Civil Grand Jury, *supra* note 132, at 11 (examining the resources of the San Francisco civil grand jury); CALIFORNIA GRAND JURORS ASSOCIATION, PROCEEDINGS OF THE ELEVENTH ANNUAL CONFERENCE, *supra* note 256, at 4 (finding lack of money and facilities among the top ten constraints of the civil function of the grand jury).

291. See Report of the 1994-1995 San Francisco Civil Grand Jury, *supra* note 132, at 11 (examining the resources of the San Francisco civil grand jury); Thom, *supra* note 289, at 1 (noting that as a result of the report, the San Francisco grand jury was given its own meeting room, additional clerical help, more training, and a budget increase of \$17,400).

292. Report of the 1994-1995 San Francisco Civil Grand Jury, *supra* note 132, at 11; Thom, *supra* note 289, at 1.

293. Report of the 1994-1995 San Francisco Civil Grand Jury, *supra* note 132, at 11; Gordon, *supra* note 271, at A-25.

sary investigations. The lack of an independent phone number and meeting room hinders grand jury effectiveness.

Additionally, the San Francisco grand jury recommended that the grand jury be provided with a library consisting of past grand jury reports and responses, budgets, departmental policy manuals, audit reports and government codes.<sup>294</sup> This proposal sought to provide continuity between successive grand juries, so that grand juries would not be required to gather the same materials year after year.<sup>295</sup> The report also recommended that the grand jury be provided with a suitable meeting place within which they could store these materials.<sup>296</sup>

#### *E. Lack of Response to Grand Jury Reports*

A common criticism of grand juries by government agencies and officials whom they investigate is that grand jury reports are often overly simplistic and based on opinion rather than fact.<sup>297</sup> Grand jury reports are also criticized as only restating problems rather than offering potential solutions.<sup>298</sup> Partly as a result of these shortcomings, many in government do not pay much attention to grand jury reports.<sup>299</sup>

Grand jurors often complain that their findings are ignored and their recommendations rarely implemented.<sup>300</sup> The governing body of any agency subject to a grand jury investigation is required to respond to grand jury recommendations within 90 days of the filing of the final report.<sup>301</sup> At the end of the 90 day period, the grand jury that conducted the investigation has been disbanded and a new grand jury has been impaneled.<sup>302</sup> The new grand jury is busy getting oriented, and may have an entirely different agenda from the previous grand jury.<sup>303</sup> As a result, many reports fall by the wayside.<sup>304</sup>

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294. Report of the 1994-1995 San Francisco Civil Grand Jury, *supra* note 132, at 13.

295. Telephone Interview with Dan Taranto, *supra* note 239.

296. Report of the 1994-1995 San Francisco Civil Grand Jury, *supra* note 132, at 13.

297. Hasemyer & Krueger, *supra* note 8, at A1.

298. Hasemyer & Krueger, *supra* note 8, at A1.

299. See Hasemyer & Krueger, *supra* note 8, at A1 (citing one former grand jury foreman who estimated that less than 20% of the grand jury's recommendations were acted upon by county officials in San Diego County).

300. See Hasemyer & Krueger, *supra* note 8, at A1 (reporting that one grand juror estimated that 80% of all grand jury recommendations are disregarded); see also Ben Wildavsky, *Past Jurors Doubt Anyone Listens*, S.F. CHRON., July 15, 1993, at A18 (discussing frustrations of former grand jurors resulting from lack of follow-up on grand jury recommendations).

301. CAL. PENAL CODE § 933(c) (West 1985 & Supp. 1997).

302. See Wildavsky, *supra* note 300, at A18 (quoting the foreman of one San Francisco county civil grand jury, "[e]ven the jurors themselves aren't advocates for their recommendation, because the jury isn't sitting anymore when the [report] comes out").

303. See Hasemyer & Krueger, *supra* note 8, at A1 (reporting that by the time responses arrive to the preceding grand jury report, the newly empaneled grand jury is "off and running on their own programs").

304. See *id.* (stating that some grand jurors believe that because responses are not due until after the end of the grand jury term, even recommendations that county supervisors agree with are not implemented).

Many former grand jurors emphasize the need for continuity to help alleviate the problem of non-responsiveness.<sup>305</sup> To this end, some advocate the frequent use of the statutory provision that enables the court to hold over up to ten grand jurors from a given term to serve on the succeeding grand jury.<sup>306</sup> Grand jurors who helped conduct investigations during the prior year may continue to pressure agency heads and officials to respond to the report and recommendations while serving for another year. This provision was employed with some success by the San Francisco civil grand jury in the 1980s.<sup>307</sup>

However, the power of the court to hold over grand jurors for a second term may have little practical effect. In many counties, it is hard enough to find enough members who are willing to serve for one year.<sup>308</sup> There simply may be no jurors willing or able to serve for a second term. Thus, lack of response to reports is a serious problem despite the holdover provision in § 901.<sup>309</sup>

Some grand jurors have proposed that a committee of past grand jurors be appointed to follow-up on grand jury recommendations to prevent recommendations from being ignored.<sup>310</sup> In many counties, grand jury reports reflect the same concerns and make the same recommendations year after year.<sup>311</sup> Even with this continuous pressure from consecutive grand juries, many recommendations are still not implemented.<sup>312</sup> For instance, the 1982, 1983 and 1984 San Francisco civil grand juries all recommended that the city buy a back-up generator for the county jail to prevent blackouts.<sup>313</sup> The generator was finally installed in 1985.<sup>314</sup> To alleviate the problem of grand juries dealing with the same problems year after year, the civil grand jury

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305. Telephone Interview with Dan Taranto, *supra* note 239; see Chris Knap, *Jurors Call for Changes*, ORANGE COUNTY REG., Apr. 14, 1996, at A10 (reporting that the Orange County grand jury suggested an institutional system for following up on grand jury recommendations).

306. See CAL. PENAL CODE § 901(b) (West 1985 & Supp. 1997) (authorizing the court to select up to ten jurors to serve for a second year); see also Report of the 1994-1995 San Francisco Civil Grand Jury, *supra* note 132, at 8 (recommending that a minimum of two grand jurors be appointed to a second term if possible).

307. Garcia, *supra* note 234, at 2.

308. See *supra* notes 248-50 and accompanying text (discussing the difficulty in some counties of finding the required number of citizens to sit on the grand jury).

309. Despite the existence of the hold-over provision since 1979, many grand jurors have complained about non-existent or insufficient responses to grand jury findings and recommendations. CAL. PENAL CODE § 901(b) (West 1985 & Supp. 1997); Wildavsky, *supra* note 300, at A18 (discussing frustrations of former grand jurors resulting from lack of follow-up on grand jury recommendations); Hasemyer & Krueger, *supra* note 8, at A1 (reporting that one grand juror estimated that 80% of all grand jury recommendations are disregarded).

310. See Kevin Johnson, *Grand Jury Asks Formal Follow-Up on Findings Investigations*, L.A. TIMES, May 12, 1993, at B5; Knap, *supra* note 305, at A10.

311. See Garcia, *supra* note 234, at 2 (comparing past reports of the San Francisco County Grand Jury which repeat the same recommendations over several years).

312. See Garcia, *supra* note 234, at 2 (citing several examples of grand jury recommendations regarding the same problems year after year which were not implemented).

313. Garcia, *supra* note 234, at 2.

314. Garcia, *supra* note 234, at 2. The generator may not have been installed but for the efforts of one grand juror who made its installation his "personal crusade." *Id.*

in San Francisco created a grand jury subcommittee responsible for following up on the previous grand jury's recommendations.<sup>315</sup>

Other grand juries have attempted to tackle this problem as well. In 1993, the Orange County grand jury proposed that a tracking committee be created to ensure that grand jury recommendations are implemented.<sup>316</sup> The grand jury suggested that the panel could be created at a minimal cost to the county by using former grand jury members as committee volunteers.<sup>317</sup> This recommendation was finally approved by the Orange County Board of Supervisors in 1996.<sup>318</sup>

Prior to the passage of § 933.05 of the California Penal Code, reports were routinely ignored or responses were inadequate.<sup>319</sup> In many instances, the subject of a grand jury finding or recommendation simply issued a "no comment" in response.<sup>320</sup> Section 933.05, enacted last year in an effort to remedy the non-responsiveness problem, effectively disallows "no comment" responses.<sup>321</sup>

In fact, § 933.05 was inspired by just such a response. When the El Dorado County District Attorney issued a "no comment" in response to the final report of the El Dorado County Grand Jury, its foreman enlisted Senator Quentin Kopp to sponsor a bill, which mandated a detailed and timely response to a grand jury's findings and recommendations.<sup>322</sup> This legislation was further spurred by an informal opinion by the state's attorney general in 1992 stating that there was no clarification in the statute or case law and, therefore, the sufficiency of a "no comment" response was a local matter.<sup>323</sup> Indeed, the bill was modeled after a Humboldt County ordinance.<sup>324</sup> Stating that the bill was an unnecessary state mandate, Governor Wilson vetoed the bill.<sup>325</sup> The Governor noted the Humboldt County ordinance and stated, "If inad-

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315. Garcia, *supra* note 234, at 2.

316. Johnson, *supra* note 310, at B5; see Shelby Grad, *Board Vows to Follow Up on Grand Jury Advice*, L.A. TIMES, July 24, 1996, at B5 (stating that the establishment of the grand jury follow-up committee came after a decade of recommendations which were ignored, sometimes leading to later public scandals).

317. Johnson, *supra* note 310, at B5.

318. Grad, *supra* note 316, at B5; see *Association News*, GRAND JURORS J. (California Grand Jurors Ass'n, Eureka, Cal.), Winter 1996, at 3 (reporting that the Orange County Board of Supervisors approved the recommendation of the 1992-93 grand jury for the establishment of a Tracking and Implementation and Review Committee and stating that the purpose of the committee "will be to look into past grand jury reports' recommendations and corresponding county responses").

319. See Wildavsky, *supra* note 300 (citing complaints of lack of response to grand jury reports); see also Thom, *supra* note 289, at 1 (reporting that one commentator estimates that only about 30% of all grand jury recommendations are implemented).

320. See Bridge, *supra* note 5, at N1 (stating that the district attorney issued a "no comment" response to the El Dorado County Grand Jury, which prompted the initiation of legislation to enact § 933.05 of the California Penal Code).

321. CAL. PENAL CODE § 933.05 (West 1985 & Supp. 1997); see *supra* notes 184-192 and accompanying text (discussing the response requirement under § 933.05 of the California Penal Code).

322. See Bridge, *supra* note 5, at N1 (discussing the history leading up to the passage of SB 1457, later enacted as § 933.05 of the California Penal Code).

323. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1457, at 3 (Apr. 9, 1996).

324. *Id.*

325. Governor's Veto Message on SB 1457 (Sept. 28, 1994) (copy on file with the *Pacific Law Journal*).

quate response made by a public official to the findings of a grand jury is a problem in a particular jurisdiction, the legislative body for that jurisdiction should pass a resolution requiring a specific response format . . . ."<sup>326</sup> Largely due to the efforts of former grand jury members, the bill was reintroduced in 1996 and was enacted into law on September 30, 1996, as § 933.05 of the California Penal Code.<sup>327</sup>

This legislation may be helpful to instruct grand jury members as well as subjects of grand jury investigations regarding the nature of the response required.<sup>328</sup> However, § 933.05 contains no penalty for non-compliance. Because the grand jury lacks the power to enforce its recommendations, it remains to be seen whether § 933.05 will solve the problem of non-responsiveness. If the subject of a grand jury investigation refuses to comply with the requirements of § 933.05, the only means the grand jury has to compel compliance is to go public with its report and recommendations.<sup>329</sup> However, after the enactment of 933.05, the grand jury has specific, statutory requirements to rely on which did not previously exist.<sup>330</sup> There is now no way to interpret a "no comment" as satisfying the statutory requirement of a "comment."<sup>331</sup>

Section 933.05 also authorizes a grand jury to request that a person or entity that is the subject of a grand jury finding, come before the grand jury to discuss and to verify the accuracy of its finding prior to the final report's release.<sup>332</sup> This may be beneficial in establishing a dialogue which will ensure the correctness of grand jury reports. However, this provision does not require the grand jury to request a responding person or entity to appear.<sup>333</sup> A grand jury which has an ax to grind with respect to a particular person or entity may simply file its report without discussing its findings with that person or entity.

Requiring the grand jury to discuss its findings and recommendations of a report prior to its public release may actually have the adverse effect of decreasing the accuracy of the report. Allowing the subjects of a grand jury investigation to meet

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326. *Id.*

327. See Bridge, *supra* note 5, at N1 (recounting the efforts of a former El Dorado County Grand Jury foreman to secure passage of SB 1457, now § 933.05 of the California Penal Code).

328. See *supra* notes 184-92 (describing the required statutory response to grand jury findings and recommendations under § 933.05).

329. See *Putting Teeth in Grand Jury Reports*, L.A. TIMES, May 13, 1993, at B10 (stating the grand jury has no power to enforce recommendations and must rely on publicity); Sottili, *supra* note 202, at B1 (reporting that one supervisorial aid noted that the "public takes the grand jury a lot more seriously than the board [of supervisors]").

330. See *supra* notes 184-92 and accompanying text.

331. See CAL. PENAL CODE § 933.05 (West 1985 & Supp. 1997) (mandating a standardized and detailed response to grand jury findings and recommendations); ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT, COMMITTEE ANALYSIS OF SB 1457, at 2 (July 3, 1996) (noting that SB 1457 would eliminate the problem of "no comment" responses by "establishing a uniform procedure detailing the response a public agency must make to a grand jury report").

332. CAL. PENAL CODE § 933.05(d) (West 1985 & Supp. 1997).

333. *Id.* (stating that "[a] grand jury may request a subject person or entity to come before the grand jury").

with the grand jury to discuss the report may result in political pressure and intimidation on the grand jury to change a finding or recommendation.<sup>334</sup>

#### F. Lack of Enforcement Power

Regarding the lack of response to grand jury findings and recommendations, one of the biggest complaints of former grand jurors is that there is no mechanism by which grand jury recommendations may be enforced.<sup>335</sup> Despite the broad power of the grand jury to conduct civil investigations, the grand jury has no power to enforce the recommendations that result from its investigations.<sup>336</sup> Although many grand jurors bemoan the lack of enforcement power, there have been no recent attempts to propose legislation which would empower the grand jury to force compliance with its recommendations.<sup>337</sup> Some type of enforcement power may be helpful to ensure accountability of public agencies and officials.<sup>338</sup> However, the grand jury system may be looked at as a system of checks and balances. Features of the system which seem to operate against the full effectiveness of the system may prevent abuse of the system.

The enactment of § 933.05 of the California Penal Code may compel the accountability that was previously lacking. Since § 933.05 provides an unambiguous statutory framework for responses to grand jury reports, many officials may hesitate to be found in blatant disregard of the law, even though no penalties are provided.<sup>339</sup> The detail required by the statute coupled with the grand jury's use of publicity may be enough to compel adequate responses, as well as implementation of most of its recommendations.<sup>340</sup>

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334. See *infra* notes 355-66 and accompanying text (discussing the potential ramifications of the current proposal to require the grand jury to consult with subjects of grand jury reports prior to the public release of the reports); Letter from Joseph Kase, Jr., Chair, Legislation Committee, Past Grand Jurors Association of San Diego County, to Honorable Paula Boland, Chair, Assembly Committee on Public Safety (June 11, 1996) (opposing SB 1457 and stating that to ask the agency to come before the grand jury to verify the findings is intimidating to the grand jury, and may result in further disagreement and argument over the findings) (copy on file with the *Pacific Law Journal*).

335. See Brenner, *supra* note 19, at 119 (stating that one of the major criticisms of the effectiveness of the civil investigatory role of the grand jury is that the grand jury "has no way to ensure that their findings will receive serious consideration or that their recommendations will be implemented"); Hasemyer & Krueger, *supra* note 8, at A1 (reporting that one grand juror estimated that 80% of all grand jury recommendations are disregarded); Wildavsky, *supra* note 300, at A18 (discussing the frustrations of former grand jurors resulting from lack of follow-up on grand jury recommendations).

336. See *supra* notes 298-334 and accompanying text (discussing the problem of non-responsiveness to grand jury reports).

337. See discussion *supra* Part IV.E.

338. See discussion *supra* Part IV.E.

339. See *supra* notes 184-92 and accompanying text (explaining the nature of the response required under § 933.05).

340. See *supra* notes 184-92 and accompanying text (explaining the nature of the response required under § 933.05); *supra* note 175 (discussing the use of publicity by the grand jury to compel accountability).

However, the lack of grand jury enforcement power may actually be an asset to the system by providing a balance to the broad powers of the grand jury.<sup>341</sup> In effect, the lack of enforcement power prevents potential abuse by the grand jury. A grand jury cannot force implementation of ill considered recommendations, whether they be made by a grand jury motivated by ill will or by a well-meaning grand jury operating under systematic disadvantages. However, the new requirements imposed by § 933.05 will ensure that all findings and recommendations be given proper consideration by public agencies and officials.<sup>342</sup> Agencies and officials will be free to reject proposals that are unrealistic or unadvisable, but they must explain their reasons for doing so.

## V. THE FUTURE OF CIVIL GRAND JURIES IN CALIFORNIA

### A. Proposed Legislation

The California State Association of Counties (CSAC) empaneled a task force in 1996 to study the area of potential grand jury reform.<sup>343</sup> The task force was charged with investigating "a myriad of issues ranging from how grand jurors are selected to the scope of their authority."<sup>344</sup> The investigation resulted in a proposal to amend several areas of the California Penal Code with respect to grand juries.<sup>345</sup> Assembly Bill 829, introduced by Assemblymember Helen Thompson, is entitled the "Civil Grand Jury Training, Communication, and Efficiency Act of 1997."<sup>346</sup> The stated goal of the bill is to promote effective communication between a grand jury and the entities subject to its investigations.<sup>347</sup> The legislation is based on provisions that CSAC requested be amended into SB1457, the Kopp bill, but which were not added

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341. See *supra* notes 136-72 and accompanying text (evaluating the broad authority of the grand jury to conduct civil investigations).

342. See *supra* notes 184-192 and accompanying text (discussing the requirements of § 933.05 of the California Penal Code).

343. CSAC Task Force on Grand Juries Meets to Discuss Potential For Reform, BUS. WIRE, Sept. 30, 1996, available in LEXIS, News Library, Cumws File (copy on file with the *Pacific Law Journal*).

344. *Id.* This legislative effort has been criticized by the California Grand Jurors Association. See Letter from Dan Taranto, President, California Grand Jurors Ass'n, to All California Boards of Supervisors (Feb. 1, 1997) (stating that the CSAC task force met for a combined total of only four hours before the legislation was created "over the adamant objections of the three veteran grand juror minority votes," and asserting that the legislation is a "subtle and not so knowledgeable sabotage of the grand jury process" because it exposes grand jurors to political intimidation prior to the publication of their final report) (copy on file with the *Pacific Law Journal*); Message From the President, GRAND JURORS J. (California Grand Jurors Ass'n, Eureka, Cal.) Winter 1996, at 1 (calling the CSAC legislation "self-serving" and stating that the CSAC Task Force "utterly failed to fulfill the broad-based and comprehensive evaluation of the California grand jury system it publicly boasted undertaking in September").

345. See AB 829 (1997-1998 Reg. Sess.) (Feb. 27, 1997) (outlining several provisions which reform the grand jury in California).

346. AB 829 (1997-1998 Reg. Sess.) (Feb. 27, 1997). Assemblymember Alfred Alquist was added as a co-author of AB 829 on May 14, 1997 (Assem. Member to AB 829 (1997-1998 Reg. Sess.) (May 14, 1997)).

347. See CSAC Legislative Bulletin, Feb. 10, 1997 at 5 (stating that the legislation is intended to add "a collaborative component to the grand jury process").

to that legislation.<sup>348</sup> The proposals include lengthening the civil grand jury term,<sup>349</sup> increasing grand jury training, and changing the timing of the final report.

### 1. Training

The proposed legislation would also require the superior court, in consultation with the district attorney and county counsel, to train grand jurors.<sup>350</sup> At a minimum, the provision would require that grand jurors be instructed regarding the scope of the grand jury's authority and trained in interviewing and report writing skills.<sup>351</sup>

However, this training provision in AB829 does not provide for sufficient training of grand jurors. Although the amendment recognizes the need for better training for grand jurors, it fails to provide the type of comprehensive training that grand jurors need to be more effective.<sup>352</sup> It would provide for little more than currently exists under the statutes.<sup>353</sup> Additionally, it does not address the need for training by an independent organization not subject to grand jury scrutiny itself.<sup>354</sup>

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348. See Floor Alert from CSAC to Members of the Assembly, Aug. 9, 1996 (copy on file with the *Pacific Law Journal*) (urging Assembly members to vote "no" on SB 1457 if not amended to require the grand jury to request subject entities to meet with the grand jury to discuss its findings, require that the grand jury provide subject entities with a copy of its report five working days prior to publication, and require that the grand jury provide the subject entity with the opportunity to comment on the provisions of the report and to have those comments included in the report at the request of the subject entity).

349. Originally, AB 829 contained a provision which would have lengthened the term of the civil grand jury to 18 months. AB 829 (1997-1998 Reg. Sess.) § 3 (Feb. 27, 1997). Article I, Section 23 of the state constitution states that "One or more grand juries shall be drawn and summoned at least once a year in each county." CAL. CONST. art. I, § 23. There was some dispute as to whether this provision violated the California Constitution. Compare Memorandum from Dan Taranto, President, California Grand Jurors Association to Senator Quentin L. Kopp, (Feb. 3, 1997) (stating that an 18 month grand jury term would require a state constitutional amendment) (copy on file with the *Pacific Law Journal*) with CSAC Legislative Bulletin, Feb. 10, 1997, at 6 (asserting the belief of CSAC that the provision would not violate the state Constitution as it would ensure that a grand jury would be in place "at some point during each year"). After a determination by the legislative counsel that the provision was unconstitutional, it was amended out of AB 829. (Assem. Amend. to AB 829 (1997-1998 Reg. Sess.) (May 14, 1997).

350. AB 829 (1997-1998 Reg. Sess.) § 4 (May 14, 1997).

351. AB 829 (1997-1998 Reg. Sess.) § 4 (May 14, 1997).

352. See Letter from Dan Taranto to All County Boards of Supervisors, *supra* note 344 (stating that "the California Grand Jurors Association would like to see a bill focusing on real training").

353. See CAL. PENAL CODE § 914 (West 1985) (requiring that the court give the grand jurors "such information as it deems proper, or as is required by law, as to their duties"); CAL. PENAL CODE § 914.1 (West 1985 & Supp. 1997) (stating that the judge "shall inform and charge the grand jury especially as to its powers, duties, and responsibilities").

354. Memorandum from California Grand Jurors Ass'n Legislation Committee to California Grand Jurors Ass'n Boards of Directors, *supra* note 154.

## 2. Final Reports

The CSAC legislation would also change the timing of a grand jury's final report.<sup>355</sup> The proposed amendment to § 933 of the California Penal Code would require a grand jury to submit its final report to the court thirty days prior to the expiration of its term.<sup>356</sup> Current law requires the grand jury to submit its final report no later than the end of its term.<sup>357</sup> The amendment would also add a provision to § 933 that would require the grand jury to be available to discuss its recommendations concerning an agency with its chief executive or governing body during the last thirty days of the grand jury's term.<sup>358</sup>

In addition, the new legislation would amend § 933.05(d) which was enacted in 1996.<sup>359</sup> AB 829 would add a provision to § 933.05 that would require the grand jury to meet with the heads of agencies under investigation during the investigation and prior to the approval of the final report, "to discuss the nature of the investigation and receive the comments of the chief executive or governing body."<sup>360</sup>

Requiring the grand jury to confer with heads of subject entities before the publication of the final report may have detrimental consequences to the overall autonomy and confidentiality of the grand jury, as well as adding a significant time burden. The grand jury may be subjected to political pressure from the public officials it must meet with during an investigation.<sup>361</sup> The California Grand Jurors Association

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355. AB 829 (1997-1998 Reg. Sess.) § 5 (May 14, 1997).

356. AB 829 (1997-1998 Reg. Sess.) § 5 (May 14, 1997). Prior to the publication of this Comment, the provision of AB 829 requiring the grand jury to submit its report 30 days prior to the end of its term was deleted. (Sen. Amend. to AB 829 (1997-1998 Reg. Sess.) (June 23, 1997). The provision was further amended to require the foreperson of the grand jury and his or her designees to be available for 45 days after the end of the term upon reasonable notice, to clarify the recommendations of the final report. *Id.* This allows a representative of the grand jury to communicate with subject agencies without cutting into the time the panel relies on to conduct investigations. *Id.*

357. CAL. PENAL CODE § 933(a) (West 1985 & Supp. 1997).

358. AB 829 (1997-1998 Reg. Sess.) § 5 (May 14, 1997).

359. CAL. PENAL CODE § 933.05 (West Supp. 1997)

360. AB 829 (1997-1998 Reg. Sess.) § 6 (May 14, 1997). Originally, AB 829 included a provision which would have amended § 933.05(d) to require a grand jury to request a subject person or entity to come before the grand jury to discuss the findings of the final report which relate to that person or entity. AB 829 was later amended to omit this provision, leaving current § 933.05(d) unchanged, which permits, but does not require, a grand jury to take this step. (Assem. Amend to AB 829 (1997-1998 Reg. Sess.) (May 14, 1997). As a routine matter, most grand juries consult with department heads throughout an investigation. Letter from Dan Taranto, President, California Grand Jurors Ass'n, to Assembly Judiciary Committee (Mar. 28, 1997) (on file with the *Pacific Law Journal*).

361. See Letter from Steven R. Phipps, Friends of the California Civil Grand Jury to Honorable Charles M. Claderon, Chairman, Senate Judiciary Committee (Apr. 5, 1996) (reflecting this concern with respect to § 933.05(e) [the Kopp bill] which requires the grand jury to provide a copy of the grand jury report regarding a subject entity to that entity two working days prior to the release of the final report and stating that the provision "allows the miscreant student to try and wheedle the teacher into changing the grade before [M]om and [D]ad get to see the report card") (copy on file with the *Pacific Law Journal*).

emphatically opposes this provision due to fear that grand jurors will be pressured to change or omit their findings.<sup>362</sup>

In addition, the provision may compromise the secrecy of the grand jury's functions.<sup>363</sup> The bill proposes to add a section to the California Penal Code requiring the grand jury to discuss the nature of its investigation with the head of the agency under investigation prior to the approval of the final report.<sup>364</sup> Requiring the grand jury to hold themselves out for questioning regarding their investigation by those investigated before the release of the final report will undermine the underlying purpose behind the secrecy requirement in a grand jury's civil investigation.<sup>365</sup> Protection of witness confidentiality is necessary for a grand jury to conduct its civil watchdog investigation properly.<sup>366</sup> A grand jury conducting an investigation pursuant to its watchdog powers may rely heavily on whistle blowers. Knowledge that the "boss" may find out the identity of grand jury sources while discussing the investigation with the grand jury may prevent these sources from coming forward.

Even if the political intimidation and confidentiality problems are minimal, AB 829 may impose cumbersome time restrictions on the grand jury. The legislation would require the grand jury to submit its final report one month prior to the end of its term.<sup>367</sup> This means the grand jury loses one month of its term in which it can conduct investigations.

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362. See Letter from Dan Taranto to all California Boards of Supervisors, *supra* note 344 (stating that "to provide executive officials with the power to intervene and intimidate the grand jury report writing process prior to the publication of final reports is a direct interference with the independence of the grand jury process").

363. See Letter from Dan Taranto to Assembly Judiciary Committee, *supra* note 365 (stating that AB 829 would "jeopardize the confidentiality of witnesses and raw evidentiary information").

364. AB 829 (1997-1998 Reg. Sess.) § 6 (May 14, 1997). Prior to publication of this Comment, AB 829 was amended to provide that the grand jury is not required to meet with agencies if "the court, either on its own determination or upon request of the foreperson of the grand jury, determines that such a meeting would be detrimental." (Sen. Amend. to AB 829 (1997-1998 Reg. Sess.) (June 23, 1997). This provides the grand jury and its witnesses with a measure of protection against possible political intimidation. *Id.*

365. See *supra* notes 153-56 and accompanying text (discussing the purposes behind the secrecy requirement in civil investigations of the grand jury).

366. See *McClatchy v. Superior Court* (1983-1984 Grand Jury for Fresno County), 44 Cal. 3d 1162, 1175, 751 P.2d 1329, 1336, 245 Cal. Rptr. 774, 780 (stating "[c]ompared with indictment proceedings, the efficacy and credibility of watchdog investigations no less require that witnesses testify without fear of reproach by their peers or their superiors. Though the watchdog investigation and report serve a different societal purpose than the criminal indictment, eliciting candid testimony is obviously critical to both functions of the grand jury").

367. AB 829 (1997-1998 Reg. Sess.) § 5 (May 15, 1997). The potential problems which would arise when shortening the term of the grand jury were averted when the bill was subsequently amended. The provision requiring the grand jury to submit its report 30 days prior to the end of its term was deleted. (Sen. Amend. to AB 829 (1997-1998 Res. Sess.) (June 23, 1997).

B. Further Suggested Reforms

1. Comprehensive Training

To increase the effectiveness of the grand jury, a program of comprehensive training for grand jurors is also needed. The system suffers from a lack of expertise among grand jurors.<sup>368</sup> A return to the "blue ribbon" grand jury would probably decrease the legitimacy of the grand jury, and thus, would not be positive for the system.<sup>369</sup> Comprehensive training of grand jurors would do the most to benefit the grand jury process overall, without resulting in major changes to the structure and functioning of the current grand jury system. Currently, jurors are told merely *what* their powers and responsibilities are. In order to be most effective, grand jurors must be shown *how* to carry out their mandate. This necessarily entails instruction on interviewing, investigating, and report writing.<sup>370</sup>

Even if a grand jury member is highly educated, this type of comprehensive instruction is particularly helpful to provide instruction on aspects of the grand jury system that are not well known by the public. Proper training becomes even more consequential where the panel is made up of citizens with minimal qualifications, who may be more easily intimidated by government officials.<sup>371</sup>

Grand jurors who are oriented and trained properly would be able to get started more quickly and utilize their time more effectively.<sup>372</sup> It would also increase the efficiency of grand jury investigations and thus, increase the value of the grand jury findings and recommendations. Jurors with a thorough understanding of their authority and responsibilities under the statutes would be less likely to be stonewalled or intimidated by agency heads or officials under investigation.<sup>373</sup>

Additionally, grand jurors who undertake extensive training might be less likely to abuse their authority.<sup>374</sup> Investigations will be conducted more professionally by jurors trained in interviewing, note taking, and the basic structure of the agencies the

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368. See *supra* notes 262-74 (discussing the problem of lack of expertise and training of grand jurors).

369. See *supra* notes 264-69 and accompanying text (discussing "blue ribbon" panels and stating that use of "blue ribbon" grand juries may undermine the value of ordinary citizen oversight behind the grand jury system).

370. See *supra* notes 275-87 and accompanying text (discussing independent training seminars for grand jurors).

371. See Stewart, *supra* note 132, § 1, at 1 (stating that "because of their inexperience, grand jurors rarely have enough self-confidence—or knowledge—to question public officials aggressively") (quoting Bernard E. Ramos, foreman of the 1983-84 Los Angeles County Grand Jury).

372. See Knap, *supra* note 310, at A10 (stating that the time required for grand jurors to learn how to fulfill their responsibilities would be shortened with a better orientation program).

373. See *supra* notes 245-46 and accompanying text (describing the stalling tactics of those investigated by grand juries).

374. The seminars conducted by the AGJF warned grand jurors that they could be sued for libel and instructed grand jurors to exercise their powers carefully, thoughtfully and lawfully. AGJF Handbook, *supra* note 277, at 5.

grand jury is authorized to investigate.<sup>375</sup> Informed about defamation law, trained jurors will likely be more deliberative in developing their final report.<sup>376</sup> The likely result of this deliberation is a better, more factually based final report.

## 2. *Separate Civil and Criminal Grand Juries*

In addition to comprehensive training programs, counties should empanel separate civil and criminal grand juries whenever feasible. Section 901.6 of the California Penal Code authorizes all counties to impanel a second criminal grand jury.<sup>377</sup> Although separate grand juries may not work in counties with smaller budgets, the provision seems to be underutilized.<sup>378</sup> The use of separate grand juries whenever practicable would ultimately increase effectiveness by alleviating time constraints.<sup>379</sup>

## 3. *Increased Public Awareness*

Public education regarding the grand jury system would also likely improve its effectiveness. The California Grand Jurors Association stresses the importance of public awareness of the grand jury system.<sup>380</sup> Some counties have already been effective in publicizing the grand jury.<sup>381</sup>

An important way to increase the effectiveness of the grand jury is to broadly publicize its final reports.<sup>382</sup> In some counties, newspapers have already agreed to publish grand jury reports county-wide.<sup>383</sup> In Humboldt County, this procedure has

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375. Grand jurors participating in AGJF seminars engaged in exercises designed to foster interview skills, including preparation, listening, observing, note-taking, and analyzing information. *Id.* at 10-15.

376. The AGJF seminars instructed grand jurors to have a group of jurors play "devil's advocate" with a draft of the final report to help ensure its accuracy. *Id.* at 53.

377. CAL. PENAL CODE § 904.6 (West Supp. 1997).

378. *See supra* notes 258-61 and accompanying text.

379. *See supra* notes 251-57 and accompanying text.

380. *See* CALIFORNIA GRAND JURORS ASSOCIATION, PROCEEDINGS OF THE ELEVENTH ANNUAL CONFERENCE, *supra* note 256, at 4 (listing public education about the grand jury system as the best method with which veteran grand juror associations can serve the grand jury system).

381. In many counties, such as Santa Barbara, San Francisco, San Mateo, Solano, Yolo, Calaveras, and Stanislaus, grand juries have sites on the World Wide Web, providing general information to the public regarding the grand jury system, final reports and responses, and information on how to apply for grand jury service. Additionally, the California Grand Jurors Association sees public education as part of its function as an organization. CALIFORNIA GRAND JURORS ASSOCIATION, PROCEEDINGS OF THE ELEVENTH ANNUAL CONFERENCE, *supra* note 256, at 4. To facilitate this goal, CGJA is currently implementing its own Web site. *Web Site Planned*, GRAND JURORS J. (California Grand Jurors Ass'n, Eureka, Cal.) Winter 1996, at 4.

382. *See* Brenner, *supra* note 19, at 120 (noting that a publicized report may create enough of a public reaction to produce changed conditions).

383. *See* CALIFORNIA GRAND JURORS ASSOCIATION, PROCEEDINGS OF THE FOURTEENTH ANNUAL CONFERENCE, at 6 (1995) ("[i]ncreasing numbers of juries are having success in finding a local newspaper willing to print the grand jury report"); Rosenlind & Fontana, *supra* note 4, at A1 (noting that the Tulare County Grand Jury "raised its profile" by publishing its report in local newspapers); Telephone Interview with Dan Taranto, *supra*

been employed successfully.<sup>384</sup> In addition to publishing the final report when it is made public, many newspapers reprint the final report along with any responses after the 90-day statutory response period.<sup>385</sup> With knowledge that the reports will be widely publicized, officials and agency heads have been more careful about responding to grand jury findings and recommendations.<sup>386</sup> This procedure has already helped produce better responses.<sup>387</sup> Further, compelling grand jury recommendations, once publicized, were implemented more quickly.<sup>388</sup>

## VI. CONCLUSION

The grand jury serves an important and necessary purpose in California. The current structure of the grand jury provides a good balance for the competing interests involved. There are many examples of grand jury success stories around the state.<sup>389</sup> For example, when the Alameda County Grand Jury issued its final report alleging widespread welfare fraud in the county, the Board of Supervisors voted to double the county's welfare fraud investigation unit.<sup>390</sup> The new fraud unit helped to nearly double the county's welfare fraud convictions in the subsequent year.<sup>391</sup> Although many successes reflect changes made pursuant to a grand jury's findings and recommendations, one must look beyond the final report to appreciate the effectiveness of the grand jury.<sup>392</sup>

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note 239 (observing that newspaper publication of grand jury reports and responses is employed in approximately one-third of California's counties).

384. Thom, *supra* note 289, at 1.

385. Thom, *supra* note 289, at 1.

386. Thom, *supra* note 289, at 1.

387. See CALIFORNIA GRAND JURORS ASSOCIATION, PROCEEDINGS OF THE ELEVENTH ANNUAL CONFERENCE, *supra* note 256, at 31 (quoting one department head as stating, "[i]f I'd known you were going to publish our response in the newspaper, I would have written it differently"); Thom, *supra* note 289, at 1 (stating that after beginning the newspaper publication of final reports and responses, the quality of the responses increased, compelling recommendations were implemented more quickly, and ill-advised recommendations were more carefully rebutted).

388. Thom, *supra* note 289, at 1.

389. See, e.g., Lahtinen, *supra* note 268, § 2 at 14 (reporting that an Orange County Grand Jury recommendation regarding emergency freeway phones was in the process of being implemented); Rosenlind & Fontana, *supra* note 4, at A1 (stating that the report of the 1993-94 Fresno County Grand Jury exposed abuses of the homeless food stamp program and resulted in changes in the county's welfare office); Stewart, *supra* note 2, § 1 at 1 (listing examples of successful recommendations: many police officials are now required to read a San Francisco Grand Jury study of police misconduct during the riots after the murders in 1978 of Mayor George Moscone and Supervisor Harvey Milk; a 1977 study commissioned by the 1977 San Diego County Grand Jury regarding the county's fleet of motor vehicles included 51 recommendations, 33 of which were adopted, estimated to produce savings of \$75,000). *But see id.* (noting that most of the successfully cited reports were actually done by private accounting firms hired by the grand jury and not grand jurors themselves).

390. Judy Ronningen, *Beefed Up Welfare Fraud Unit Will Have Watchdog*, OAKLAND TRIB., Nov. 28, 1990, at D11.

391. Judy Ronningen, *Welfare Fraud Unit Convictions Double*, OAKLAND TRIB., Jan. 18, 1992, at A1.

392. See Lahtinen, *supra* note 268, § 2 at 14 (stating that the effectiveness of grand juries is evidenced in ways more subtle than implementation of recommendations).

The very presence of the grand jury as a civil watchdog serves an important function.<sup>393</sup> The underlying threat that a particularly active grand jury may be impaneled which might expose fraudulent or corrupt operations may in itself curtail such operations.<sup>394</sup> The mere fact that the grand jury has initiated an investigation may expose inefficiencies and prompt the timely resolution of many problems.<sup>395</sup> In effect, the grand jury compels public officials and administrators to look at themselves and their respective agencies more closely.<sup>396</sup>

The grand jury system should be retained and strengthened in California as one of the only institutions providing citizens the opportunity to engage in the process of effectively monitoring their local government.<sup>397</sup> In order to improve this institution, programs of comprehensive training should be instituted, the dual grand jury system should be used whenever feasible, and public awareness of the grand jury system should be raised. As one commentator has remarked, "it is to nobody's interest except citizens to have an effective civil grand jury."<sup>398</sup>

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393. *Id.*; see Wildavsky, *supra* note 300, at A18 (stating that grand juries give citizens access to the operations of local government, expose important public issues, and keep officials on their toes).

394. See Michaels, *supra* note 113, at B7 (noting that despite occasional error, the grand jury is important to oversee government).

395. See, e.g., Rosenlind & Fontana, *supra* note 4, at A1 (reporting that a simple inquiry by the Fresno county grand jury resulted in amendment of county testing procedures).

396. Lahtinen, *supra* note 268, § 2 at 14.

397. See Stewart, *supra* note 2, §1 at 1 (stating that one commentator notes that the grand jury is a good institution for promoting the value of citizen participation in government).

398. Thom, *supra* note 289, at 1.

