

THE GRAND JURY

A BRIEF HISTORICAL OVERVIEW



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THE GRAND JURY

INTRODUCTION.

Many people have trouble distinguishing between the grand jury and the petit or trial jury. Historically, the grand jury developed in early Anglo-Saxon custom and law as a body of notable citizens who were chosen to protect the community by identifying wrongdoers and by keeping a watchful eye on certain aspects of local government. Today grand juries have three major areas of responsibility: (1) in criminal cases the grand jury decides whether a crime has been committed and if there is sufficient evidence to charge a specific person with that crime; (2) the grand jury has the power to accuse public officials of improper actions in performing official duties; (3) in its civil jurisdiction, the grand jury is the watchdog of local government.

The institution of the trial jury was brought to England by the Normans and provided the means for deciding the guilt or innocence of those accused of violating the law or customs of the community. Both types of juries were brought to the colonies by English settlers and have been important in the development of our legal system.

Trial juries are traditionally composed of 12 members, though many states permit smaller juries, especially in misdemeanor cases. Grand juries tend to be much larger. Under California law, grand juries in counties with a population of over four million have 23 members; other counties have 19.

HISTORY OF THE ACCUSATION PROCESS

In Anglo-Saxon times, English law and custom developed several procedures intended to prevent crime and to prevent the escape of those who had committed offenses against individuals and against the community. Among these were

1. The Frank Pledge - a pledge that the community would assume responsibility for the general good behavior of each free-born citizen above the age of fourteen and for his availability to answer for any infraction of the law.

The Hue and Cry (a chorus of loud noises and also an official pronouncement that a person was being sought) was raised when any offense was discovered, and the offender was pursued until taken. All members of the community who heard or knew about the hue and cry were required to join the pursuit. If the offender escaped, the community was liable to be fined.

During this period, all offenses were regarded as private, and custom allowed the offender to escape trial and punishment upon payment to the person wronged, or, if he was dead, to his next of kin, of a sum proportional to the seriousness of the crime.

2. Presentment by the inquest or jury. The law of Ethelred II (A.D. 978-1016) provided for the summoning of twelve leading citizens in each community whose duty it was to accuse those who had committed any crimes within that community. The Assize of Clarendon (1166) called for an inquest in each county to testify whether there were "robbers, murderers or thieves or if there were people who harbored robbers, murderers or thieves" in that county. Persons accused by such inquests were tried by ordeal.

The Assize of Northampton (1176) provided that "anyone charged before the king's justices with the crime of murder, theft, robbery or receipt of such offenders, of forgery or of malicious burning, by the oath of twelve knights of the hundred; if there were no knights, by the oaths of twelve free and lawful men..." should be tried by the ordeal. If he failed in the ordeal, he lost a hand and a foot and was banished. If he was acquitted by the water ordeal, he still suffered banishment if accused of certain crimes.

3. The Grand Inquest. Under Edward 111 (1368) the grand inquest emerged. This was a body of 24 knights selected by the sheriff of the county. Originally used to supplement local inquests, over time the countywide grand inquest slowly replaced the inquests of the hundreds.

Being a grand juror was not necessarily a desirable job. Records indicate that by 1201, the inquest (jury of 12) faced accusation of concealing the truth with possible punishment of fine and imprisonment for failure to accuse those who might have committed crimes. LeRoy Clark noted,

"To ensure sufficient manpower for the grand jury, heavy fines were levied on those who failed to respond to a summons to serve on a panel. Grand jurors were also penalized if they failed to return an indictment against someone considered indictable by the Crown Grand jury duty was considered so onerous that some wealthy landholders secured charters exempting them from serving."

INDEPENDENCE OF THE GRAND JURY

Before the use of the petit jury became common, punishment was likely to be the ordeal, and members of the inquest were bound to inform the court their reason for arriving at the verdict and the evidence on which it was based. When the separate trial jury became firmly established, there no

longer existed any need for interrogation of the presenting or accusing jury. This was an important factor in establishing the independence of the jury.

By the end of the 17th century, grand juries were apt to be independent of the crown and frequently intervened to protect the rights of nobles and ordinary citizens against the excesses of the crown.

SECRECY

Secrecy has long been a hallmark of grand juries. In modern times, the California Supreme Court has summarized the reasons for grand jury secrecy as follows:

- (1) to prevent the escape of those whose indictment may be contemplated;
- (2) to ensure the utmost freedom to the grand jury in its deliberations and to prevent persons subject to indictment or their friends from importuning the grand jurors;
- (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it;
- (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crime;
- (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation and from the expense of standing trial where there was probably no guilt.

EARLY FORMS OF TRIAL

The power of the early grand juries must be stressed. They identified subjects of the inquest, frequently presented evidence and determined that an accusation should be made. Since the only trial was by ordeal or the other possible defenses listed below, accusation was generally tantamount to a conviction.

ORDEALS were used as a possible defense for those accused, based on the belief that the innocent would be protected by divine intervention. While they probably predate the introduction of Christianity, the practice of ordeals was adopted by the Church and surrounded by Christian ceremonies. Ordeals were largely abandoned in England when the Fourth Lateran Council (1215) forbade clergy from performing any religious ceremonies in

connection with ordeals. Without religious sanction, the ordeal mostly ceased as a regular means of trial.

Some of the types of ordeals were:

Ordeal of the Hot Iron. A heated iron was carried by the accused over a distance of nine feet and then "the hand was sealed and kept under seal ~for three nights and thereafterwards the bandages removed. If it is clean, God be praised; but if unhealthy matter is found where the iron was held, he shall be deemed guilty and unclean."

Ordeal of Boiling Water. The accused had to plunge his hand into a bowl of boiling water and take out a stone; his guilt or innocence was ascertained by inspecting his hand after three days.

Ordeal of Cold Water. With bound hands and feet, the accused was lowered into a river or lake. If he floated, his guilt was proclaimed; if he drowned, he was deemed innocent.

Other defenses included:

Trial by Battle. Accused and accuser fought to death with some weapons such as battle-axe; winner was innocent and loser guilty.

Compurg a~ tion. Accused could be found innocent if enough people were willing to swear that he did not commit the crime; such persons swore to God that their testimony was true.

Atonement. Offender allowed to offer atonement for crime committed; price varied according to crime committed; if offender could not afford price demanded, he might be put in bondage or subjected to some other form of punishment.

THE GRAND JURY IN AMERICA

The first formal grand jury was established in Massachusetts in 1635, and by 1683 grand juries in some form were established in all the colonies. Pennsylvania records include a number of early grand jury indictments: in 1651 for holding a disorderly meeting, in 1683 for witchcraft and in 1685 and 1703 for various crimes. A Pennsylvania presentment in 1685 called attention to various public evils and suggested specific public improvements.

In New York in 1735, an attempt was made to indict John Peter Zinger on the charge that he had libeled the royal governor. The grand jury refused to indict. Zinger was later charged by information filed by the attorney general,

tried and acquitted by the trial jury. In 1765 a Boston grand jury refused to indict leaders of protests against the stamp act.

While the U.S. Constitution as originally written in 1787 contained no reference to the grand jury, this was remedied by the addition of the Fifth Amendment that provides, "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger..."

Through the Fourteenth Amendment, most of the provisions of the Bill of Rights of the United States Constitution have been made applicable to the states. This is not true of the guarantee of indictment by grand jury. In a 1984 study of grand juries, Deborah Day Emerson found that four states require a grand jury indictment for all crimes, 14 states and the District of Columbia require indictments for all felonies, six states mandate grand jury indictments for capital crimes only, 25 states (including California) make indictments optional. In a single state, Pennsylvania, the grand jury lacks the power to indict.

CALIFORNIA GRAND JURIES

Rules regarding the makeup, organization, powers and duties may be found in the California Penal Code. All of California's 58 counties are required to have grand juries, and recent changes in Section 904.6 of the Penal Code (1991) permit any county to have an additional grand jury at the discretion of the presiding judge of the superior court. (See next section on criminal indictments.)

Statutes permit some variation in the manner and time of selection of jurors. In Contra Costa County, each grand jury begins July 1 and ends its service June 30 of the following year. Nineteen individuals are chosen through a lengthy process that includes application, screening by the jury commissioner or by initial interviews by the current and past grand jury foremen, final interviews by several judges of the Superior Court, pairing the list to approximately 30 names followed by a drawing in Superior Court. Since some members of the existing grand jury may be carried over, the number of names drawn will equal those needed to provide a grand jury of 19 members.

It has been the practice in Contra Costa County to advertise widely and to encourage many people to apply for the grand jury. Because grand jury service requires an average of about twenty hours per week for a period of one year, and because the pay is only token, the grand jury tends to be

dominated by people who have retired or whose business permits them to devote a large amount of time to community service.

CRIMINAL INDICTMENTS

The California Constitution permits criminal trial on the basis of indictment by a grand jury or by information after examination and commitment by a magistrate.

Under Section 917 of the Penal Code, "the grand jury may inquire into all public offenses committed or triable within the county, and present them to the court by indictment." In actual practice, grand juries seldom initiate such inquiries; rather, such offenses are generally brought to the grand jury by the district attorney who asks for and generally receives an indictment.

Much more frequently, the district attorney bypasses the grand jury and uses the process known as a preliminary hearing. Studies undertaken at various times during the past 40 years have found that only a very small percentage of all felony prosecutions were initiated by indictment.

A 1954 survey of California district attorneys listed the following factors as influential in the decision to seek a grand jury indictment rather than using the preliminary hearing: (1) high public interest in the case, (2) the fact that a preliminary hearing would take more time than a grand jury hearing, (3) the necessity for calling children or timid witnesses who would be subject to cross-examination at a preliminary hearing, (4) the existence of a weak or doubtful case which the district attorney wishes to test, (5) cases involving malfeasance in office, and (6) the fact that witnesses are in a state prison.

A more recent study adds the following reasons for using the grand jury: (1) cases where the defendant cannot be located and the time limit under the statute of limitations is about to expire, (2) where the secrecy of the grand jury may allow defendants to be charged and taken into custody before they can pose potential danger to a witness's safety or flee from the jurisdiction, (3) the need to protect the identity of undercover agents, (4) the ability to test a witness before a jury and-(5) the opportunity to involve the community in case screening.

In some cases the prosecutor may prefer a preliminary or probable-cause hearing so that testimony can be preserved for use at the trial, especially when a witness is considered to be in danger.

From 1978 until 1990, grand juries were seldom used for indictments. A California Supreme Court ruling required holding preliminary hearings even if grand jury indictments were obtained. In 1990, a constitutional amendment

made significant alterations in California criminal law and court procedures, including a provision that defendants were not entitled to preliminary hearings if indicted by a grand jury. As noted above, recent statutes (Section 904.6) give county district attorneys the option of utilizing special grand juries chosen from the regular Jun, pool to handle criminal cases and thus ensure indictment by those who represent a cross section of the community. In Contra Costa County, the civil grand jury no longer handles criminal indictments. However, in some counties, such as Los Angeles, the regular grand jury continues to have both criminal and civil duties.

The statutory language requiring that those chosen for the additional grand jury, "shall be chosen at random" from the list of those qualified to serve as trial jurors in civil and criminal cases, and emphasis that it is the "Intent of the Legislature" that all individuals qualified for jury service have an equal opportunity to be considered for service as criminal grand jurors would indicate a legislative recognition of the desirability of separating criminal indictments from citizen oversight of government.

ACCUSATION

Section 919 (c) of the Penal Code requires the grand jury to inquire into the willful or corrupt misconduct in office of public officers of every description within the county. Where misconduct is found, the grand jury may file an accusation leading to a trial. If the official is convicted, he is thereby removed from office. Very few accusations are filed. Frequently, if there is misconduct in office, it is of a criminal nature, and an indictment rather than an accusation would be issued. It is also possible that an official would resign rather than face an accusation.

As reviewed by Frank Dougherty and Dennis Myers, misconduct in office could include any of the following:

Nonfeasance:

- (1) The failure to act where duty requires an act; or
- (2) Neglect or refusal, without sufficient cause or excuse, to do that which is the officer's legal duty to do, whether willfully or through malice; or
- (3) Willful neglect of duty.

Misfeasance:

- (1) The improper of doing of an act that a person might lawfully do; or (2) The performance of a duty or act that one ought to do or

has a right to do, but in a manner such as to infringe upon the rights of others.

Malfeasance:

- (1) The doing of an act that is positively unlawful or wrong; or (2) The performance of a wrongful act that the person has no legal right to do.

THE WATCHDOG FUNCTION OF GRAND JURIES

While the primary function of the inquest in early England was as a means of apprehending and punishing criminals, records from the early days of the grand inquest indicate that

“The inquest was required to present those whose duty it was to keep in repair bridges, causeways and highways, for neglect of duty; to inquire into defects of gaols and the nature thereof, who ought to repair them and who was responsible for any escapes which had occurred; if any sheriff had kept in gaol those «vhom he should have brought before the justices. . .”.

In some states, early grand juries developed quasi-legislative functions. In New York, the grand jury assumed direct ordinance-making powers. In the Carolinas in 1862, legislation was promptly considered if it was suggested by a majority of county grand juries.

Early in this century, statutes of many states required grand jurors to examine the condition of jails, asylums and other public institutions; to examine the books and accounts of the various public officials in the county, to fix the tax rate and to have general supervision over public improvements. “A town could be prosecuted on a presentment, and matters that were complained of, such as failure to repair streets and roads, were sometimes corrected after a grand jury report.”

A Pennsylvania statute of the late 1890’s provided that no public buildings and no bridges could be built within the county unless approved by two successive grand juries. Similar statutes of the period required Georgia grand juries to act as boards of revision of taxes and to fix tax rates. Mississippi grand juries were required to examine tax collectors’ accounts. Alabama and Tennessee grand juries were charged with investigating the sufficiency of the bonds of all county officers. Vermont grand juries had the responsibility of arresting persons having liquor for sale contrary to law.

In 1890, San Francisco grand jurors issued a report denouncing extravagance and fraud in municipal government, calling attention to

personal profits made by city officials on railway franchises, graft in street widening projects, padding payrolls and exorbitant prices paid for land to be used for public buildings.

During the latter half of the twentieth century, the watchdog function of grand juries of most states have been weakened or discontinued. A 1974 review of the California system found that “. . .only seven other states provide for any investigation of county government by any grand jury beyond cases alleging willful misconduct by public officials . . .and only California and Nevada mandate that grand juries be impaneled annually to specifically function as a ‘watchdog’ over county government. . .”.

CALIFORNIA

In California today, the grand jury is required by provisions of the Penal Code to

- (1) to make an annual examination of the operations, accounts and records of the officers, departments or functions of the county, including any special district for which officers of the county are serving as ex-officio officers of the district;
- (2) inquire into the condition and management of prisons within the county.

The grand jury may investigate or inquire into county matters of civil concern, such as the needs of county officers, including the abolition or creation of offices and the equipment for, or the method or system of performing the duties of the several offices

Other powers permitted to the grand jury include

- (1) free access, at reasonable times, to public prisons;
- (2) the right to examine all public records within the county;
- (3) the right to examine books and records of (a) any incorporated city or joint powers agency located in the county; (b) certain redevelopment agencies and housing authorities; (c) special-purpose assessing or taxing districts wholly or partly within the county; & (d) non-profit corporations established by or operated on behalf of a public entity;
- (4) the authority to investigate and report on operations and methods of performing duties any such city or joint powers agency and to make recommendations as deemed proper;

- (5) the ability, with permission of the Superior Court, to hire such experts as auditors and accountants;
- (6) the right to inquire into the sale, transfer and ownership of lands which might or should escheat to the state.

The grand jury is also likely to receive a number of citizen complaints, many of which involve operations of county, city or special districts. Whether the complaint is civil or criminal, rules of secrecy apply, and the grand jury may not divulge the subject or methods of inquiry.

With so many possible investigations and a term limited to a single year, it is necessary for each grand jury to make hard decisions as to what it wishes to undertake during the term. Except for mandated duties to report on the financial condition of the county and on the conditions of county jails, the grand jury has great discretion in determining its agenda.

Most grand juries divide into committees for conducting investigations and for writing reports, but there seems to be a wide variation between counties as to the number and structure of committees; it is up to each grand jury to determine its own method of operation.

Law requires that each grand jury submit to the presiding judge of the Superior Court a final report of its findings and recommendations. In addition to the mandated reports on financial audits and the condition of adult and juvenile detention facilities, recent Contra Costa County Grand Jury Reports have covered such topics as the deterioration of county roads, reserves amassed by special districts, hazardous waste disposal, misuse of funds in a water district, redevelopment agencies and the selection of sites for a sanitary landfill in the county.

A report, like an accusation or an indictment, must be approved by at least 12 of the 19 grand jurors (15 if it is a 23 member jury).

While surrounded by secrecy before publication, grand jury reports become public documents when signed by the grand jury foreman and the Superior Court judge. Copies are sent: to all targeted government agencies, to interested officials, to public and private groups and individuals and to the press. At the end of the year, bound or loose-leaf copies of all reports are placed in all public libraries. In Contra Costa County, individuals may request copies from the Secretary of the Superior Court in Martinez.

Government agencies that are the subject of reports are required by law to respond to specific grand jury recommendations. However, the grand jury has no enforcement power, and the agencies are under no legal obligation to

carry out the recommendations. While many recommendations are ignored, others are followed, particularly those that suggest greater efficiency for operations and that do not require the expenditure of large sums of money. Grand jury criticisms of public officials and agencies frequently attract press attention, bringing greater community awareness of what is happening in the public sector. Many grand jurors believe that public officials tend to be more accountable when they know an impartial, outside body is looking over their collective shoulders.

The California Grand Jurors Association (CGJA) , a statewide organization of former grand jurors has begun a program of identifying and indexing grand jury reports in each county with the hope of establishing a state archives of annual reports. The Association also monitors and occasionally proposes or endorses legislation to conserve and improve the grand jury as an important institution of local government. They offer services to those grand juries that may request advice and help in preparing informational manuals and in providing orientation for incoming jurors. For a number of years, The American Grand Jury Foundation, a nonprofit corporation, held seminars allowing current grand jurors from over the state to exchange ideas and experiences to enable them to be more responsible and effective in their jobs. Some members of the CGJA now provide orientation programs for those counties that request this service.

Many California counties have local organizations of ex grand jurors that are active in civic affairs, including educating the public about the functions of grand juries and monitoring compliance with grand jury recommendations. Citizens who are interested in learning about the grand jury are especially encouraged to contact the local association of grand jury alumni.

EVALUATION OF THE GRAND JURY AS AN INSTITUTION

In the early days of the republic, the grand jury was much prized as the protector of the individual and as the conscience of the community. During the twentieth century, it has been criticized as archaic, inefficient, cumbersome, irresponsible and costly. In 1933, the grand jury was abolished in England. In most states, it has been severely weakened.

Some of the major criticisms of the grand jury are:

1. Unrepresentativeness. In California, as in most states, methods used for grand jury selection do not provide for a cross section of the community. Those chosen tend to be older, better educated and more affluent than the community at large. Women and minorities tend to be underrepresented which may pose legal problems in criminal indictments. However, for

criminal indictments, some California counties (including Contra Costa) select special grand juries from the regular, petit jury rolls.

Some counties, such as Contra Costa, make efforts to recruit broadly and seek applications from all segments of the community; however, the number of hours of service required coupled with only token pay make it unlikely that the grand jury can be truly representative.

2. Reflective of a Community Bias. While grand juries may seek to be impartial, they are made up of people chosen from the local community who share the prejudices and bias of their neighbors.

3. Irresponsibility. In arguing for the abolition of the grand jury, C. E. Chipfield writing early in the century said about the juror, " He is a law unto himself; no power can regulate him and no power can control him. He can be called before no earthly tribunal, except his own conscience, to account for his action. He can pursue an enemy for personal motives of revenge; he can favor a friend or political associate..." The requirement for concurrence of 12 of the 19 members helps control the irresponsible actions of the few, but is not a guarantee against a run-away grand jury. But each jury lasts for only one year, and members, individually and collectively, are subject to laws of libel and slander. Additional protection is provided by the county counsel who offers comments and criticisms on all reports and by the grand jury judge who must sign them.

4. Secrecy. Many observers are concerned that the requirement of secrecy shields the grand jury from public scrutiny and independent review. Among the reforms that have been suggested are a right to counsel for those appearing before the grand jury and a requirement for recording grand jury proceedings.

Secrecy can also be a problem for grand jurors who, after issuing well researched reports, are unable to respond to charges of not doing their homework; but these frustrations must be balanced against the need to protect those who are being investigated.

5. Tool of the Prosecuting Attorney. In criminal investigations, grand juries almost always follow the lead of the district attorney. This may be a valid criticism in states that require grand jury indictments but does not seem especially relevant in California where the district attorney may proceed by information.

Overall, it is possible to balance these criticisms with the argument that California Grand juries, especially in the watchdog role, offer an important service by involving local citizen volunteers in the oversight of local public

affairs, shedding the light of publicity on the operation of government in areas that otherwise would tend to be ignored by the media and overlooked by regular political processes.

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| Member: | 1989-90 |
| Foreman | 1990-91 |
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GRAND JURY REPORTS

Annual Reports of the Contra Costa County Grand Jury may be found in the
main branch of the Contra Costa County Public Library, Pleasant Hill, and in
many of the branch libraries.