Study J-1150 January 28, 1994

Memorandum 94-12

Authority of the Attorney General: Analysis of Article V, Section 13 of the California Constitution

INTRODUCTION

Article V, Section 13 of the California Constitution presently provides:

> Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced. The Attorney General shall have direct supervision over every district attorney and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices, and may require any of said officers to make reports concerning the investigation, detection, prosecution and punishment of crime in their respective jurisdictions as to the Attorney General may seem advisable. Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law ***of which the superior court shall have jurisdiction,*** and in such cases the Attorney General shall have all the powers of a district attorney. When required by the public interest or directed by the Governor, the Attorney General shall assist any district attorney in the discharge of the duties of that office. [Emphasis added.]

The Commission's 11/24/93 tentative recommendation regarding trial court unification would have left Article V, Section 13 unchanged.

The Attorney General favored this approach, but pointed out that leaving Article V, Section 13 unchanged while expanding the jurisdiction of the superior courts would result in an expansion of his power to prosecute violations of law. The Attorney General requested addition of a Comment to Article V, Section 13 setting forth this point:

> [T]here should be . . . express acknowledgment that the Attorney General's current authority over criminal violations within the jurisdiction of the superior court will be extended to

> misdemeanors that presently fall within the jurisdiction of municipal and justice courts. The Attorney General now handles recusals for misdemeanors at the request of District Attorneys. This new authority would be a logical extension of what we are presently doing. [First Supplement to Memorandum 94-1 at Exhibit p. 21; *see also id.* at pp. 2-3.]

Upon considering the issue at its January meeting, however, the Commission decided that trial court unification should not effect an expansion of the Attorney General's powers, but rather should preserve those powers unchanged. The Commission therefore concluded that the fourth sentence of Article V, Section 13 should be revised as follows:

> Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law , *other than causes* of which the superior court shall have *appellate* jurisdiction, and in such cases the Attorney General shall have all the powers of a district attorney.

The Attorney General opposes this proposed amendment and urges the Commission to readopt the approach of its tentative recommendation. See Exhibit p. 1. He now maintains that leaving Article V, Section 13 unchanged while giving superior courts jurisdiction over matters now assigned to the municipal and justice courts would ***not*** expand his authority, but merely "maintai[n] the status quo with respect to the Attorney General's role as the chief law officer of the state."

This memorandum examines the merits of the contention that the Attorney General presently has authority to prosecute violations of law other than ones within the jurisdiction of the superior courts. We anticipate receiving input from the Attorney General supporting this contention, as well as opposition from the District Attorneys' Association. A supplement to this memorandum will include those materials if they arrive before the Commission's upcoming meeting.

OVERVIEW

The staff found only one authority, a 1947 opinion of the Attorney General, directly confronting the issue of whether the Attorney General has power to prosecute cases outside the jurisdiction of the superior courts. Even that opinion does not fully answer the question, and the weight to be accorded the opinion is

debatable. Neither policy considerations nor accepted rules of interpretation nor other existing authorities clearly dictate what the Attorney General's prosecutorial power is or should be. However, a general framework of the balance of power between the Attorney General and district attorneys can be ascertained from a consideration of the available material. Consistent with the Commission's overall approach of preserving the current balance of power intact while accomplishing trial court unification, the staff proposes a slight revision of the Commission's recommendation on Article V, Section 13. Proposed language appears at the end of this memorandum.

HISTORY OF ARTICLE V, SECTION 13

Article V, Section 13 derives from former Article V, Section 21 of the California Constitution, which was approved by the voters in November 1934. Prior to that time, the role of the California Attorney General was regulated only by statute, which did not address the issue. Former Polit. Code § 470.

Former Article V, Section 21 was much the same as Article V, Section 13, but it included some additional provisions not relevant here, as well as this language which is not in Article V, Section 13: "[The Attorney General] shall also have such powers and perform such duties as are or may be prescribed by law and which are not inconsistent herewith."

As part of the 1966 constitutional revision, former Article V, Section 21 was replaced with Article V, Section 13, and the paragraph regarding the Legislature's power to prescribe additional duties was deleted. According to a report of the California Constitution Revision Commission,

> [t]his paragraph was deleted as unnecessary. The Legislature inherently has the power to pass laws on matters not inconsistent with the Constitution or their powers under it [See Collins v. Riley (1944) 24 Cal. 2d 912, 916, 152 P.2d 159.]

Since 1966, Article V, Section 13 has remained unchanged, except for a 1974 amendment replacing masculine references with gender neutral language.

The staff notes in passing that "violations of law of which the superior court shall have jurisdiction" evidently refers to the original, as opposed to appellate, jurisdiction of the superior court. We have seen no argument that the more expansive meaning is intended, and have dismissed such an interpretation in preparing this memorandum.

STATUTORY PROVISIONS IMPLEMENTING ARTICLE V, SECTION 13

Statutory provisions implementing Article V, Section 13 include Government Code Section 12550, which states:

> The Attorney General has direct supervision over the district attorneys of the several counties of the State and may require of them written reports as to the condition of the public business entrusted to their charge.
>
> When he deems it advisable or necessary in the public interest, or when directed to do so by the Governor, he shall assist any district attorney in the discharge of his duties, and may, where he deems it necessary, take full charge of any investigation or prosecution of violations of law ***of which the superior court has jurisdiction.*** In this respect he has all the powers of a district attorney, including the power to issue or cause to be issued subpenas or other process. [Emphasis added.]

The language of this statute tracks that of the constitutional provision, "except in this respect: the last sentence of Section 12550 also invests the Attorney General with the powers of a district attorney when assistance is rendered by the former in the discharge of the latter's duties." 9 Ops. Cal. Att'y Gen. 74, 76 (1947). Government Code Section 12550 was enacted in 1945 and has never been amended.

Another statute implementing Article V, Section 13 is Government Code Section 12553, which provides:

> If a district attorney is disqualified to conduct any criminal prosecution within the county, the Attorney General may employ special counsel to conduct the prosecution. The attorney's fee in such case is a legal charge against the State.

Like Government Code Section 12550, this statute was enacted in 1945 and has never been amended.

1947 ATTORNEY GENERAL OPINION

The only authority the staff could find directly confronting the issue of whether the Attorney General may prosecute matters outside the jurisdiction of the superior courts is an opinion of the Attorney General, 9 Ops. Cal. Att'y Gen. 74 (1947) (hereafter "the 1947 AG Opinion"). The issue in that opinion was

whether "the Attorney General is empowered 'to supersede a district attorney in the prosecution of fish and game misdemeanor cases where it appears that the district attorney's prosecution is inadequate.'" *Id.* at 74. The Attorney General answered that question in the affirmative.

In so doing, the Attorney General relied primarily on a Montana case, State ex rel. Nolan v. District Court, 22 Mont. 25, 55 P. 916, which concluded that the Montana Attorney General could appear before the grand jury as well as the county attorney, even though a statute specified that the only person authorized to make such an appearance was the county attorney. The court in *Nolan* relied on statutes making the Montana Attorney General responsible for supervising county attorneys and authorizing the Attorney General to assist county attorneys in performing their duties. The court broadly interpreted the Attorney General's authority under those statutes, concluding that "[t]he attorney general may, in his assistance, do every act that the county attorney can perform, and, in his supervision, may even undo any that he has already done."

Based on that aspect of *Nolan*, as well as on some early California decisions regarding his powers, the California Attorney General determined that the clauses in former Article V, Section 21 regarding his authority to assist and supervise district attorneys should likewise be broadly interpreted. The Attorney General also decided that "additional power was conferred upon [him] by Section 12550 of the Government Code." 1947 AG Opinion at 78. From these two determinations, the Attorney General further concluded that notwithstanding the reference in Article V, Section 21 to prosecutions "of which the superior court shall have jurisdiction," the Attorney General "may supersede a district attorney in the prosecution of offenses of which the justices' courts have jurisdiction when required by the public interest." *Id.*

The Attorney General explained this conclusion as follows:

> We are not unmindful of the rule of interpretation contained in the maxim that the expression of one thing excludes all others not mentioned (*expressio unius est exclusio alterius*). This is frequently employed in constitutional construction and some may advance the theory that it has application here because the third sentence of Section 21 makes specific mention of offenses triable in the superior court. If that maxim is invoked in construing Section 21, the object sought to be accomplished by the other sentences of the section, together with legislation enacted pursuant thereto, must be laid aside. Under such circumstances the maxim should not be applied [cite omitted], because otherwise a reading of all provisions of

> Section 21 and of the applicable statutes would leave one in doubt as to how the Attorney General may see that *all* laws of California are uniformly and adequately enforced if he does not at least have power to assume control in criminal cases triable in justices' courts when required by the public interest--as, for example, when a district attorney is derelict in his duty or his prosecution is patently inadequate. [1947 AG Opinion at 78 (emph. in original).]

For purposes of interpreting existing Article V, Section 13, several aspects of the 1947 AG Opinion are important. First, the question before the Attorney General was whether the Attorney General may supersede a district attorney in a misdemeanor case being inadequately prosecuted, not whether the Attorney General may commence a misdemeanor prosecution in the first instance. Nonetheless, the reasoning of the opinion, particularly the reliance on the Attorney General's duty to see that *all* California laws are uniformly and adequately enforced, would apply equally well in the latter situation.

Second, the constitutional provision interpreted in the 1947 AG Opinion was essentially the same as Article V, Section 13 in all relevant respects, except that former Article V, Section 21 expressly said that "[the Attorney General] shall also have such powers and perform such duties as are or may be prescribed by law and which are not inconsistent herewith." The Attorney General relied at least in part on that constitutional language in the 1947 AG Opinion (at 76, 78). But the 1966 deletion of the express language regarding the Legislature's authority to prescribe additional duties was not intended to have any substantive effect. See History of Article V, Section 13, above.

Third, the 1947 AG Opinion has been on record for a long time, yet the constitutional language regarding the Attorney General has not been amended to clearly repudiate the result. This may, of course, be due to pure oversight or to downplaying the significance of the opinion. But it may also signify acceptance of the reasoning and result.

On the other hand, however, in the 1947 AG Opinion the Attorney General takes an expansive view of his own powers. This tends to undercut the weight of the opinion.

Moreover, some of the reasoning in the opinion can be criticized. For example, the Attorney General contends that authority to take over misdemeanor prosecutions is essential if he is to see that *all* of California's laws are properly enforced. This ignores his authority to influence such prosecutions through

supervision of the district attorneys, as by bringing problems and proposed solutions to their attention. That degree of control may be sufficient for lesser offenses.

Further, the authorities on which the Attorney General relied in the 1947 AG Opinion do not mandate the result he reached. The Montana case, *Nolan,* did not concern authority to prosecute misdemeanors and did not involve a constitutional provision specifying that the Attorney General shall "prosecute any violations of law ***of which the superior court shall have jurisdiction."*** (Emph. added.) The early California decisions cited in the 1947 AG Opinion likewise focus on the Attorney General's duty to render assistance to district attorneys, interpret statutory rather than constitutional authority regarding the Attorney General, and do not explore the degree to which the Attorney General may prosecute offenses outside the jurisdiction of the superior courts. *See* County of Modoc v. Spencer, 103 Cal. 498, 37 P. 483 (1894); County of Sacramento v. Central Pacific Railroad Co., 61 Cal. 250, 254 (1882). Moreover, as acknowledged in the 1947 AG Opinion, dictum in another case, People v. Brophy, 49 Cal. App. 2d 15, 28, 120 P.2d 730 (1942), which was decided after the enactment of former Article V, Section 21, takes a narrower view of the Attorney General's power to assist district attorneys than the expansive formulation in the *Central Pacific* case.

In sum, the 1947 AG Opinion lends some support to the contention that the Attorney General currently has authority to prosecute offenses outside the jurisdiction of the superior courts. It does not, however, resolve the issue.

OTHER RELEVANT AUTHORITIES

Aside from the 1947 AG Opinion, the staff found some authorities tangentially bearing on the Attorney General's authority, or lack thereof, to prosecute cases outside the jurisdiction of the superior courts. But none of these cases directly confronts the meaning of the constitutional phrase specifying that "it shall be the duty of the Attorney General to prosecute any violations of law ***of which the superior court shall have jurisdiction."*** (Emph. added.)

For example, in a footnote in People v. Gilbert, 1 Cal. 3d 475, 481 n.5, 462 P.2d 580, 82 Cal. Rptr. 724 (1969), the California Supreme Court said in passing: "A welfare recipient who violated section 11482 could be arrested by any person who witnessed the misdemeanor, . . . brought to trial pursuant to a complaint signed by welfare authorities, . . . ***and prosecuted by the Attorney General*** (see

Gov. Code, 12550)." (Emph. added.) The Court did not explain the reference to prosecution by the Attorney General.

Similarly, in People ex rel. Younger v. Superior Court, 86 Cal. App. 3d 180, 203, 150 Cal. Rptr. 156 (1978), the court said that "if the district attorney and all his deputies are disqualified from prosecuting a case, the Attorney General may undertake the prosecution." *See also* Deukmejian v. Superior Court, 110 Cal. App. 3d 427, 430, 168 Cal. Rptr. 27 (1980). Neither *Younger* nor *Deukmejian* mentions any limit regarding misdemeanor prosecutions. Whether constitutionally authorized or not, the Attorney General currently undertakes such prosecutions when district attorneys must recuse themselves. See First Supplement to Memorandum 94-1 at Exhibit p. 21.

Other cases make broad pronouncements regarding the Attorney General's authority to prosecute *civil* suits. For example, in D'Amico v. Board of Medical Examiners, 11 Cal. 3d 1, 520 P.2d 10, 112 Cal. Rptr. 786 (1974), the Supreme Court said that "'in the absence of any legislative restriction, [the Attorney General] has the power to file ***any civil action or proceeding*** directly involving the rights and interests of the state, or which he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights and interest.'" *Id.* at 14-15 (emph. added), *quoting* Pierce v. Superior Court, 1 Cal. 2d 759, 761-62, 37 P.2d 460 (1934). It is unclear whether the reference in Article V, Section 13 to "prosecut[ing] any violations of law of which the superior court shall have jurisdiction" applies to civil suits. The sentence including that reference says that the Attorney General has a duty to conduct such prosecutions "[w]henever in [his or her] opinion ***any law of the State*** is not being adequately enforced in any county." That language seems broad enough to encompass civil actions. However, the sentence also states that "in such cases the Attorney General ***shall have all the powers of a district attorney."*** (Emph. added.) That reference primarily is to powers invoked in criminal cases, although the district attorney may also have some civil enforcement duties. The immediately preceding and immediately following sentences also pertain to the criminal context, although not necessarily exclusively. Thus, the relevance of cases discussing the Attorney General's authority in the civil context is debatable.

Finally, there is authority simply reciting in passing that "[t]he Attorney General is charged with the supervision of district attorneys and the prosecution or assistance in prosecuting violations of law ***over which the superior court has jurisdiction.*** (Cal. Const., art. V, § 13; Gov. Code, § 12550.)" People v. Mendez,

234 Cal. App. 3d 1773, 1783, 286 Cal. Rptr. 216 (1991) (emph. added). Such authority could be viewed as support for the idea that the Attorney General's prosecutorial power is limited to superior court cases. But it could also be explained (perhaps better) as a pure restatement of Article V, Section 13 and Government Code Section 12550, without bearing at all on the question of whether the Attorney General's prosecutorial power extends to misdemeanors.

Thus, the case law the staff found regarding Article V, Section 13 is at best inconclusive. It neither definitively establishes, nor refutes, the contention that the Attorney General currently has authority to prosecute misdemeanors.

RULES OF INTERPRETATION

Do accepted rules of constitutional interpretation resolve whether the Attorney General may prosecute misdemeanors? Unfortunately, they provide no clear answer either.

"'The Constitution furnishes a rule for its own construction.'" State Board of Education v. Levit, 52 Cal. 2d 441, 460, 343 P.2d 8 (1959), *quoting* Matter of Maguire, 57 Cal. 604, 609 (1881). Article I, Section 26 provides that "[t]he provisions of this Constitution are mandatory and prohibitory unless by express words they are declared to be otherwise." "[A]rticle I, section 26, commands obedience to all provisions of the Constitution, and prohibits disobedience." Zumwalt v. Superior Court, 49 Cal. 3d 167, 179, 776 P.2d 247, 260 Cal. Rptr. 545 (1989). This rule

> "is an admonition placed in this the highest laws in this State, that its requirements are not meaningless, but that what is said is meant, in brief, ***'we mean what we say."*** Such is the declaration and command of the highest sovereignty among us, the people of this State . . . ." [*Levit,* 52 Cal. 2d at 460 (emph. added), *quoting Maguire,* 57 Cal. at 609.]

Further, under the rule

> "it is the duty of this court to ***give effect to every clause and word of the constitution, and to take care that it shall not be frittered away by subtle or refined or ingenious speculation. The people use plain language in their organic law to express their intent in language which cannot be misunderstood, and we must hold that they meant what they said."*** [*Levit,* 52 Cal. 2d at 460

> (emph. added), *quoting* Oakland Paving Co. v. Hilton, 69 Cal. 479 (1886).]

What does the rule of Article I, Section 26 mean in the context of Article V, Section 13? Arguably, it means that the reference to "prosecut[ing] any violations of law ***of which the superior court shall have jurisdiction"*** (emph. added) must be given effect and necessarily restricts the Attorney General's prosecutorial power to cases within the jurisdiction of the superior courts. This is a natural interpretation of the language. Under it, the reference to the jurisdiction of the superior courts has meaning and is not surplussage.

Moreover, the interpretation draws additional support from the doctrine of *expressio unius est exclusio alterius:* mention of one thing implies exclusion of another. People v. Kuwata, 18 Cal. App. 4th 1019, 22 Cal. Rptr. 874 (1993). As applied to grants of powers, this doctrine means that no other than the expressly granted power passes by the grant, and the power is to be exercised only as specified in the grant. Wildlife Alive v. Chickering, 18 Cal. 3d 190, 196, 553 P.2d 537, 132 Cal. Rptr. 377 (1976). Because Article V, Section 13 grants the Attorney General power to prosecute cases within the jurisdiction of the superior courts, the doctrine of *expressio unius est exclusio alterius* dictates that the Attorney General lacks authority to prosecute any other cases.

But "*expressio unius est exclusio alterius* is no magical incantation, nor does it refer to an immutable rule." Estate of Banerjee, 21 Cal. 3d 527, 539, 580 P.2d 657, 147 Cal. Rptr. 157 (1978). The doctrine "is inapplicable where its operation would contradict a discernible and contrary legislative intent." Thorning v. Hollister School Dist., 11 Cal. App. 4th 1598, 1608, 15 Cal. Rptr. 91 (1993); People v. Saunders, 232 Cal. App. 3d 1592, 1596 (1991).

Likewise, although resort to legislative intent is inappropriate where the meaning of a constitutional provision is clear on its face, Mutual Life Ins. Co. v. City of Los Angeles, 50 Cal. 3d 402, 407, 787 P.2d 996, 267 Cal. Rptr. 589 (1990), the "plain meaning" rule is not without qualifications:

> [T]he "plain meaning" rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with the other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. . . .

> Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. . . . An interpretation that renders related provisions nugatory must be avoided; . . . each sentence must be read not in isolation but in the light of the statutory scheme; . . . and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed . . . . These rules apply as well to the interpretation of constitutional provisions. [Lungren v. Deukmejian, 45 Cal. 3d 727, 735, 755 P.2d 299, 248 Cal. Rptr. 115 (1988) (cites omitted).]

As is evident from the 1947 AG Opinion, it is arguable that limiting the Attorney General's prosecutorial authority to superior court cases is inconsistent with the overall intent of Article V, Section 13, to wit, ensuring that the Attorney General "see[s] that the laws of the State are uniformly and adequately enforced." It is also arguable that Article V, Section 13 is ambiguous as to the scope of the Attorney General's authority to conduct prosecutions: It specifies that he or she may prosecute superior court cases, but it does not expressly exclude the possibility that he or she may also prosecute other violations of law. Thus, it is further arguable that (1) the doctrine of *expressio unius est exclusio alterius* should not apply, and (2) the rule of according provisions their plain meaning does not preclude interpretation of Article V, Section 13 to allow prosecution of misdemeanors by the Attorney General. In short, then, the rules of constitutional interpretation do not provide a clear answer to what Article V, Section 13 means regarding the Attorney General's authority to prosecute cases.

POLICY CONSIDERATIONS

Solely from a policy standpoint, should the Attorney General's powers include authority to prosecute misdemeanors?

On the one hand, limiting the Attorney General to prosecuting felonies serves to concentrate the Attorney General's resources on these more serious crimes. The Attorney General's authority to supervise and assist in misdemeanor prosecutions may afford sufficient control over such lesser offenses. Allowing the Attorney General to initiate and direct such prosecutions may be unnecessary.

Further, if misdemeanor prosecutions are the exclusive province of district attorneys, there is a greater degree of local control and responsibility to the

electorate. As the *Younger* court stated when considering disqualification of a district attorney and substitution of the Attorney General,

> The district attorney is the exclusive statutorily designated public prosecutor. . . . His statutory duties include conducting on behalf of the People all prosecutions for public offenses. . . . He is vested with important discretionary powers in relation to the prosecution of public offenses both before and after the jurisdiction of the court has been invoked. . . . Moreover, he is an elected county officer. . . . He has been chosen by vote of the electorate as the person to be entrusted with the significant discretionary powers of the office of district attorney and he is accountable to the electorate at the ballot box for his performance in prosecuting crime within the county. Thus, the assumptions that there are available to the client a number of qualified advocates other than the attorney or firm to be replaced and that consequently the interest of the client is largely in avoiding inconvenience and duplicative expense are unsound as respects a district attorney. ***It is true, of course, that if the district attorney and all his deputies are disqualified from prosecuting a case, the Attorney General may undertake the prosecution.*** . . . It is also no doubt true that the Attorney General is equally as competent as the district attorney as a prosecutor and it might be difficult to conclude that his substitution as prosecutor "would work a substantial hardship" on the People in the ordinary sense of those words. ***Nevertheless, when the entire prosecutorial office of the district attorney is recused and the Attorney General is required to undertake the prosecution or employ a special prosecutor, the district attorney is prevented from carrying out the statutory duties of his elected office and, perhaps even more significantly, the residents of the county are deprived of the services of their elected representative in the prosecution of crime in the county. The Attorney General is, of course, an elected state official, but unlike the district attorney, is not accountable at the ballot box exclusively to the electorate of the county. Manifestly, therefore, the entire prosecutorial office of the district attorney should not be recused in the absence of some substantial reason related to the proper administration of criminal justice.*** [86 Cal. App. 3d at 203-04 (emph. added) (cites omitted).]

On the other hand, however, if the Attorney General has authority to prosecute lesser offenses, this may further statewide coordination and uniformity in enforcement of these offenses. When former Article V, Section 21 was first adopted by the voters in 1934, the ballot argument in favor of it (authored by then district attorney Earl Warren, Secretary of the District Attorneys'

Association of California) stressed the need for coordination and uniformity in law enforcement:

> The law enforcement business of California is a gigantic business costing the people of the state thirty million dollars a year, and it is being run in a most unbusinesslike manner. There are in this State 276 incorporated cities and 58 counties, each of which is handling its law enforcement work in its own way without supervision. Any private business operated in this manner could result in but one thing--bankruptcy.
>
> . . . .
>
> The adoption of this amendment will make possible the organization of our law enforcement agencies which is so sadly lacking at the present time. Such a result is not only advisable but is positively necessary if the law is to be adequately enforced and life and property protected. We can not hope to successfully fight organized crime unless our law enforcement agencies are soundly organized and their activities coordinated.

The ballot argument did not, however, overlook the interest in local control:

> The amendment makes possible the coordination of county law enforcement agencies and provides the necessary supervision to insure that result. ***Without curtailing the right of local self government*** and without creating any new commission to accomplish this purpose, it merely enlarges the duties of the Attorney General so as to give him that supervision and make him responsible for the uniform and adequate enforcement of law throughout the State. [Emph. added.]

This cognizance of the interest in local control suggests that the constitutional amendment was deliberately fashioned to balance that interest against the competing need for statewide uniformity and coordination. The reference to "prosecut[ing] any violations of law ***of which the superior court shall have jurisdiction"*** (emph. added) may reflect a conscious decision to limit the Attorney General's prosecutorial authority to such cases, reserving prosecution of lesser offenses to local control.

Finally, however, denying the Attorney General authority to prosecute misdemeanors may create a problem regarding lesser included offenses. It is clear that superior courts have jurisdiction over such offenses even though they could not independently be brought in those courts. Witkin & Epstein, Cal. Criminal Law (2d ed.), *Jurisdiction and Venue,* § 1834, p. 2173. Thus, lesser

included offenses are "violations of law ***of which the superior court shall have jurisdiction"*** (emph. added) and the Attorney General's prosecutorial authority extends to them. But the Commission's proposed amendment of Article V, Section 13 says that "it shall be the duty of the Attorney General to prosecute any violations of law ***, other than causes of which the superior court shall have appellate jurisdiction."*** (Emph. added.) This language could (but need not necessarily) be interpreted to deprive the Attorney General of authority to prosecute ***any*** misdemeanors, regardless whether they are lesser included offenses. The inefficiencies and complications inherent in precluding the Attorney General from prosecuting lesser included misdemeanors are patent. The Commission should seek to foreclose this result.

RECOMMENDATION

Our effort is to determine what the status quo is concerning the Attorney General's authority under Article V, Section 13 so that we may preserve it in the course of unification of the trial courts. The staff has been able to find no clear answer to the question, and our general conclusions are subject to modification on receipt of supplemental material from the Attorney General and the California District Attorneys Association.

Despite the paucity of material on the question of the Attorney General's authority to prosecute violations of law within the jurisdiction of the municipal court, the general outlines of the current balance of power can be ascertained. It is the staff's judgment, based on everything we have seen, that the Constitution's general purpose and effect is to limit the Attorney General's prosecutorial authority to felonies and other matters within the original jurisdiction of the superior court. However, the Constitution, as currently drafted, would not preclude the Attorney General from acting in matters within the jurisdiction of the municipal court in some circumstances. For example, the Attorney General's prosecution of a felony would encompass prosecution of a lesser included offense even though the lesser included offense is within the jurisdiction of the municipal court. And where the district attorney is disqualified, the Attorney General of necessity may act in matters outside the jurisdiction of the superior court.

Given this situation, the staff believes that the Commission's effort to capture the status quo in its report on SCA 3 is unduly restrictive. The report

recommends amendment of Article V, Section 13 to limit the Attorney General's authority to violations of law "other than causes of which the superior court shall have jurisdiction." This negative phrasing could be construed to deny the Attorney General the ability to prosecute a lesser included offense or to act where the district attorney is disqualified. The negative phrasing should be contrasted with the current affirmative reference to the ability of the Attorney General to prosecute matters within the jurisdiction of the superior court. It does not expressly preclude the Attorney General from prosecuting matters within the jurisdiction of the municipal court, thereby leaving open the possibility of extension of the Attorney General's basic authority in appropriate circumstances.

The staff believes we need to more closely parallel the existing constitutional structure if we are to capture the status quo of balance of power. This will require that the Attorney General's authority be phrased affirmatively rather than negatively. Specifically, we suggest that the Attorney General be authorized to prosecute matters of which the Supreme Court and courts of appeal have appellate jurisdiction.

This formulation may result in a slight decrease in the Attorney General's authority, since the Attorney General's current authority extends to superior court matters regardless of appealability. The Commission considered this approach and rejected it at the January meeting for that reason. But given the overall structure and effect of the Constitutional provision, the staff believes this decrease is insignificant when weighed against the benefits of preservation of the Attorney General's residual authority in this area. This approach we believe is more in keeping with the spirit of existing law than the draft in the Commission's report on SCA 3.

The staff recommends that the Commission supplement its report to the Legislature on this point in order to be consistent with the Commission's general approach of making only those constitutional changes necessitated by trial court unification. The staff would add a Comment to the proposed revision noting the intent to preserve the Attorney General's authority to act in matters not within the appellate jurisdiction of the Supreme Court and courts of appeal in some circumstances.

> Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced. The Attorney General shall

have direct supervision over every district attorney and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices, and may require any of said officers to make reports concerning the investigation, detection, prosecution and punishment of crime in their respective jurisdictions as to the Attorney General may seem advisable. Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law of which the ~~superior court~~ *supreme court or courts of appeal* shall have *appellate* jurisdiction, and in such cases the Attorney General shall have all the powers of a district attorney. When required by the public interest or directed by the Governor, the Attorney General shall assist any district attorney in the discharge of the duties of that office.

Comment. Section 13 is amended to reflect unification of the superior courts, municipal courts, and justice courts in a county-based system of superior courts of general jurisdiction. See Article VI, Section 4 (superior court) and former Section 5 (municipal court and justice court).

The amendment preserves the authority of the Attorney General with respect to prosecution of matters of a type formerly within the superior court, as opposed to municipal and justice court, jurisdiction. The appellate jurisdiction of the Supreme Court includes capital cases; the appellate jurisdiction of the courts of appeal includes felonies other than capital cases and civil appeals other than those assigned to the appellate division of the superior court. Article VI, Section 11 (appellate jurisdiction).

Although the authority of the Attorney General to prosecute violations of law is generally limited by this section, the amendment is not intended to affect any authority the Attorney General may have in appropriate circumstances to prosecute a violation of law not within the appellate jurisdiction of the supreme court or courts of appeal. See, e.g., People ex rel. Younger v. Superior Court, 86 Cal. App. 3d 180, 203, 150 Cal. Rptr. 156 (1978) (prosecution by Attorney General where district attorney disqualified).

Respectfully submitted,

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Memo 94-12 EXHIBIT Study J-1150

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RE: SCA 3

Dear Chairperson Skaggs:

Our original concern about Article V, section 13 was based on the fact that SCA 3 calls the new unified trial courts "district courts". If this nomenclature is ultimately selected, Article V, section 13, if not amended, would create confusion because there would be a reference to superior courts in Article V while all superior courts would have been eliminated.

If, however, the new courts are called "superior courts", we believe that there would be no such confusion.

The Attorney General agrees with the Commission's stated goal of making only those changes to the state Constitution that are absolutely necessary for the implementation of trial court unification. We believe that leaving Article V, section 13 as it is currently written (so long as the new courts are called "superior courts") will be in keeping with the twin goals of maintaining the status quo with respect to the Attorney General's role as the chief law officer of the state and recommending only changes necessary to create a unified trial court system. We prefer retaining this existing language to the language adopted by the Commission at its January 6, 1993 meeting, *vis.* "... it shall be the duty of the Attorney General to prosecute violations of law other than causes of which the superior court shall have appellate jurisdiction, ...".

Sincerely,

DANIEL E. LUNGREN
Attorney General

Charlotte Sato

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Special Assistant Attorney General