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Sour Spot: No Magisterial Review in Accusatory Process

By Stanley S. Arkin

Our constitutional fathers had prescience but were not omniscient. They well understood that when the decision to indict and the duty to convict are vested in the same person or institution, there is a pronounced risk of abuse and arbitrariness.

Hence the institution of the grand jury, which was included in our Bill of Rights as a "protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor."[1]

The grand jury has been idealized as an institution in which ordinary citizens determine the propriety of an indictment in a manner designed to sift innocence from guilt and ensure that those undeserving of a criminal charge are shielded from public disclosure of the investigation.[2]

But any realistic observer of our criminal justice system must recognize that, save in highly charged cases such as those involving police shootings or alleged civil rights violations, the indicting grand jury rarely acts as a meaningful check on the prosecutor's charging decisions. The courts have only retrospective oversight of such decisions, and even this is a narrow, constricted procedural review, except conceivably in extreme circumstances.

This article proposes a mechanism whereby fundamental values of fairness and consistency can be reasserted and revitalized in the charging process.

The Grand Jury Today

As a former New York chief judge once said, grand jurors will "indict a ham sandwich" at the instance of the prosecutor. The grand jury's function as a check on unfounded or intemperate accusations has completely atrophied in a large class of cases.[3] The authors of a widely cited treatise on grand jury practice have recognized that "the indicting function of the grand jury is no longer of much importance in many jurisdictions."[4]

In practice, the decision whether to indict is in the hands of a prosecutor who, in the words of then-U.S. Attorney General Robert H. Jackson, "has more control over life, liberty and reputation than any other person in America."[5] It is unnerving to note that Mr. Jackson made this observation about prosecutorial power in 1940, before the enactment of the Federal Rules of Criminal Procedure, which gave the prosecutor even greater control over grand jury proceedings;[6] before the proliferation of enormously broad and powerful criminal statutes such as RICO;[7] before many of the interpretations of the federal wire and mail fraud statutes that have criminalized huge swaths of business and government conduct;[8] and before the passage of the Sentencing Guidelines, which tilted the balance of power even further - some might say overwhelmingly - in favor of the federal prosecutor.[9]

Despite the prosecutor's obligations under the law to remain neutral and magisterial, he will always be subject to external pressures that risk distorting his judgment in favor of indictment. Prosecutors are often ambitious and may seek to use their position for personal advancement. Many examples attest to efforts by public prosecutors to move into a broader political role: Rudolph Giuliani turned his highly public prosecutions of white-collar criminals into a mayoralty; Eliot Spitzer, who in his role as New York State Attorney General used his role as prosecutor to extort extraordinary civil tributes to the state, is now the state's governor.

The lure of a highly paid partnership in the private criminal defense bar also encourages the prosecutor to distinguish himself in the hope of increasing his worth in the private sector. It is the rare large firm that does not now have at least one partner who can claim to be an "ex-prosecutor" - a pragmatic response to the recent criminalization of much business conduct.

Structural pressures also influence the prosecutor and bias the grand jury's indicting function. Any prosecutor who has devoted months or years to an investigation will have a strong desire to demonstrate that his or her work has not

been a waste of time, and will face difficulty - consciously or not - making a truly neutral presentation to the grand jury. This is a particularly dangerous circumstance when, depending upon how a case is presented, the same facts may or may not be viewed as criminal.

A similar instinct gives rise to the recent trend in prosecutions for perjury or obstruction of justice, which are essentially crimes against the prosecutor himself. Although these cases are often justified as necessary to protect the judicial or investigative process, they are also plainly driven by a prosecutor's sense of personal offense at perceived interference with her investigations.

Chilling Observation

When we look more broadly at the state of criminal justice in this country - and particularly with respect to economic crimes, the focus of this article - the increased potential for abuse in the charging function is a cause for grave concern. The sentences now being handed down for many financial and regulatory crimes are savagely long, both on an absolute basis[10] and when compared to sentences for similar crimes in other countries.[11] Last year, in upholding a 25-year sentence for Bernard Ebbers, the former CEO of WorldCom, the U.S. Court of Appeals for the Second Circuit made the chilling observation that "under the guidelines, it may well be that all but the most trivial frauds in publicly traded companies may trigger sentences amounting to life imprisonment...."[12]

The threat of such sentences gives prosecutors extraordinary leverage in negotiating plea bargains and other concessions from individuals facing indictment. This threat is compounded by the ever-expanding criminalization of a vast amount of non-violent conduct, including the criminalization of the entire federal regulatory system.

The recent forced resignation of eight U.S. attorneys is a stark reminder that prosecutors hold political positions. The sorry spectre of a former senior aide to the attorney general asserting her privilege against self-incrimination when the very matter at issue is whether politics improperly drove the dismissal of these prosecutors raises at the least an uncomfortable negative inference.

Of course, charges that the process has been improperly politicized are nothing new. When Janet Reno announced the summary dismissal of all U.S. attorneys at the beginning of the Clinton administration, The New York Times lamented that "[a]ny hope that the Clinton administration would operate a Justice Department free of political taint - or even the appearance of political taint - grew dim...."[13] This crucial point - that appearances are important in a legal system that derives its credibility from the presumed neutrality and fairness of the grand jury and prosecutor - applies today with even greater force.

Former U.S. Attorney Mary Jo White recently dubbed the U.S. District Court for the Southern District of New York the "sovereign district of New York" - an apparent assertion of the independence exhibited by that district.[14] Yet despite the heightened deference certainly owed to that great institution, it is not insulated from the risk of simply making a wrong call, or calling it wrong for improper purposes. Indeed, U.S. attorneys in the Southern District were recently castigated for placing unconstitutional burdens on the rights of criminal defendants by cutting off their access to legal fees, and also for misrepresenting the facts in the government's defense of that allegation.[15]

Really being untouchable and unreachable are virtues, but insularity, arrogance and unaccountability to neutral review are not.

'Ambulatory Prohibitions'

Last month, in *United States v. Thompson*, No. 06-3676 (Slip Op. Apr. 20, 2007), the U.S. Court of Appeals for the Seventh Circuit reversed the conviction of a longtime Wisconsin public servant in a prosecution that casts a spotlight on the flaws in our charging process and further undermines the public's perception of our justice system. Georgia Thompson had been charged and convicted under the federal mail fraud statute for depriving Wisconsin of her "honest services." The prosecutor's theory was that Ms. Thompson assisted in steering a public contract to a particular company, the owners of which had previously made lawful campaign contributions to Wisconsin's governor. No evidence was presented that Ms. Thompson "knew or cared about" these lawful contributions, or that the government contract at issue had been awarded for improper political reasons. Ms. Thompson was nonetheless prosecuted on the theory that she had procured a "private gain" - a $1,000 annual pay raise that had been approved by Wisconsin's normal civil-service processes, and additional job security. Ms. Thompson was convicted weeks before Wisconsin's 2006 gubernatorial election, and her conviction figured prominently in campaign ads by the incumbent governor's opponents.[16]

In its opinion reversing the conviction, the court observed that:

Courts can curtail some effects of statutory ambiguity but cannot deal with the source. This prosecution, which led to the conviction and imprisonment of a civil servant for conduct that, as far as this record shows, was designed to pursue the public interest as the employee understood it, may well induce Congress to take another look at the wisdom of enacting ambulatory criminal prohibitions. Haziness designed to avoid loopholes through which bad persons can wriggle can impose high costs on people the statute was not designed to catch.

The prosecution of Ms. Thompson raises serious questions about the risks of prosecutorial discretion in an era of "ambulatory criminal prohibitions," and contributes to growing public cynicism about the fairness and neutrality of our system.

In one of the most highly publicized cases in recent memory, the Duke lacrosse team rape prosecution presents a grievous example of prosecutorial misconduct that is almost unimaginable in a highly developed justice system. Public statements by Mr. Nifong, the prosecutor, tapped into racial and class biases in Durham and elsewhere, painting a scenario that so many people seemed to want to believe - one in which a group of privileged young white men, maligned by the prosecutor as "a bunch of hooligans" whose "daddies could buy them expensive lawyers," raped and assaulted a local black woman and then tried to protect one another through a code of silence.[17] As North Carolina's Attorney General Roy Cooper later observed, "there were many points in the case where caution would have served justice better than bravado. And in the rush to condemn, a community and a state lost the ability to see clearly."[18]

Public's Trust Eroding

Events such as these have led to the public perception of a growing "sour spot" in our criminal justice system: The public's trust in the system - the primary basis for its effectiveness and legitimacy - is eroding. It is difficult to be both a hunter and at the same time the warden who determines what may be killed. Yet despite massive increases in the power of the federal prosecutor over the last century, the indicting grand jury has changed little, such that "[a]n attorney familiar with grand jury practice in the early federal courts would notice relatively few changes in the operation of the indicting grand jury."[19] Simply put, this must change if we are to remain the fundamentally decent and humane society envisioned by our forefathers.

A Magisterial Review Board

The inherent tension between the prosecutor's magisterial role and the temptation to engage in politics and self-promotion requires new safeguards to protect the integrity of the charging process.

What may be considered is the creation of a dedicated magisterial review board composed of individuals who are trained and sworn to conduct independent reviews of charging decisions by prosecutors. Where a prospective defendant has satisfied a relatively modest showing of reviewability, he or she should have the right to demand that such a review board examine the evidence, evaluate the soundness and fairness of the prosecutor's decision to seek an indictment, and determine whether the charges should be allowed to proceed.

This board would be composed of trained professionals with no stake at all in the outcome of the charging process, whose basic function is to ensure that prosecutorial discretion is exercised legitimately and fairly, and not simply with the goals of winning cases or advancing personal or political agendas. Such a body could be developed within the Department of Justice or our state attorney generals' offices, similar to Inspectors General. While such a review board could not be used to override or replace a grand jury, precharge review by the board would lend particular legitimacy to prosecutions for alleged financial crimes, political corruption, civil rights violations, and other matters that may be expected to generate a significant amount of public agitation and uncertainty.

Significantly, review would not be limited to whether the bare legal minimum of evidence has been amassed to charge a crime, for as Mr. Jackson recognized: "[w]ith the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone."[20] And as the Supreme Court has observed, there is a strong need for the government to give "full consideration to the desirability of *not prosecuting* in particular cases," in light of the "awesome consequences" that flow from the filing of criminal charges. *United States v. Lavasco*, 431 US 783, 794 (1977) (emphasis supplied).

Socially Productive Judgment

Instead, this body would operate with a higher, magisterial goal, seeking to determine whether the proposed charges reflect a sufficiently humane and socially productive judgment, consistent with the values that gave rise to the grand jury's powers in the first instance.

Such a reviewing body has the benefit of side-stepping most of the routine obstacles to grand jury reform. Many proposals for reform constitute an effort to inject defense lawyers into the grand jury process, or to subject the grand jury to watered-down adversarial aspects of the trial.[21] But such proposals are alien to the traditions and history of the grand jury, which call for flexibility and confidentiality. Moreover, judicial hesitancy to such proposals has focused upon the hard costs and inefficiencies that would flow from making the grand jury process similar to a mini-trial.[22]

A dedicated review process would pose none of these problems. It would impose no additional evidentiary requirements, and would not cabin the prosecutor in presenting his case in any respect. Nor would it require significant judicial supervision. Instead, the board would simply review the results of the investigation, and make an independent assessment of whether charges should be sought. In this way the hunter's role would be separated - not entirely, but meaningfully - from he who determines who should be killed.

There is no question that an additional layer of review such as the proposed magisterial system has potential flaws and risks of abuse. Moreover, we have to acknowledge that the great run of cases are not close ones, at least from the standpoint of determining if mere probable cause exists or charges are justified. And even in these cases there almost always is at least the ceremony of attempting to talk a prosecutor out of a charge - either by seeking a reduction in charges, a deal involving a better charge, or simply through cooperation.

But particularly with regard to non-biblical kinds of crimes, such as those involving the not infrequently muddy corpus delicti of alleged financial impropriety or corruption, our system should seek additional means, such as a form of magisterial review, to better assure less arbitrariness in the all-important charging process.

1. *United States v. Dionisio*, 410 US 1, 17 (1973).

2. See *Hale v. Henkel*, 201 US 43, 59 (1906) (value of grand jury was its power "to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will") (overruled in part on other grounds); *Ex Parte Blair*, 121 US 1, 11 (1887) (grand jury protects "individual citizens from open and public accusation of crime" and "is justly regarded as one of the securities to the innocent against hasty, malicious, and oppressive public prosecutions") (citing Chief Justice Shaw in *Jones v. Robbins*, 8 Gray 329) (overruled on other grounds).

3. See Fred A. Bernstein, "Behind the Gray Door: Williams, Secrecy, and the Federal Grand Jury," N.Y.U. L. Rev. 563, 577 (1994) (noting the various terms used to criticize the modern grand jury, including "rubber stamp," "tool," or "playtoy" of the prosecution); Roger Roots, "If It's Not a Runaway, It's Not a Real Grand Jury," 33 Creighton L. Rev. 821, 826-28 (2000) (noting widespread agreement that the prosecutor controls outcome of grand jury process); Andrew D. Leipold, "Why Grand Juries Do Not (and Cannot) Protect the Accused," 80 Cornell L. Rev. 260 (1995); Melvin P. Antell, "The Modern Grand Jury: Benighted Supergovernment," 51 A.B.A. J. 153, 155 (1965).

4. Beale, et al., Grand Jury Law and Practice, 1.1.

5. Robert H. Jackson, "The Federal Prosecutor" (1940) (reprinted in 24 Journal of the American Judicature Society 18).

6. See Roots, 33 Creighton L. Rev. 821, 835-839 (2000).

7. Organized Crime Control Act of 1970 (OCCA), Pub. L. No. 91- 452, 1, 84 Stat. 922, 922 (1970) (Congressional Statement of Findings and Purpose) (codified at 18 USC 1961 note (1982)).

8. Jeffrey J. Dean & Doye E. Green Jr., " *McNally v. United States* and Its Effect on the Federal Mail Fraud Statute: Will White Collar Criminals Get a Break?," 39 Mercer L. Rev. 697, 703 (1988) (dating the commencement of the broad and well-developed "intangible rights" theories of mail and wire fraud to the early 1970s).

9. The Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984) (codified at 18 U.S.C. 3551-3586, 3621-3625, 3742 (1988) and 28 U.S.C. 991-998 (1988)).

10. See *United States v. Ebbers*, 458 F3d 110, 129 (2d Cir. 2006) (recognizing that Mr. Ebbers' 25-year sentence "is a long sentence for a white-collar crime, longer than the sentences routinely imposed by many states for violent crimes, including murder, or other serious crimes such as serial child molestation"). Adelphia Communications founder John Rigas and his son, Timothy Rigas, were sentenced to 15 and 20 years, respectively. Ex-Tyco CEO Dennis Kozlowski was sentenced to up to 25 years, as was former CFO Mark Swartz.

11. Norimitsu Onishi, "Ex-Internet Tycoon in Japan Guilty of Fraud," New York Times (March 16, 2007) (reporting that a 34-year-old Japanese Internet tycoon found guilty of violating securities laws in an alleged multi-million-dollar scheme received a sentence of 2 years).

12. *United States v. Ebbers*, 458 F3d 110, 129 (2d Cir. 2006).

13. "Backsliding at the White House; Justice Disrupted," New York Times (March 26, 1993).

14. See Adam Liptak, "For Federal Prosecutors, Politics Is Ever-Present," New York Times, March 18, 2007.

15. See *United States v. Stein*, 435 FSupp2d 330 (SDNY 2006).

16. Adam Cohen, "A Woman Wrongly Convicted and a U.S. Attorney Who Kept His Job," New York Times (April 16, 2007).

17. "Duke Rape Suspects Speak Out," CBS News.com (Oct. 16, 2006).

18. Statement by Roy Cooper, April 11, 2007.

19. Beale, Grand Jury Law and Practice, 1:6.

20. The Federal Prosecutor, supra, at 19.

21. See Frankel & Naftalis, "The Grand Jury: An Institution on Trial," 125-26 (1997); Model Grand Jury Act 200(2) & 201(2) (1982); Arnella, "Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication," 78 Mich. L. Rev. 463, 488-89, 580-81 (1980); see e.g., 163, 1997-98 Reg. Sess. (introduced Jan. 23, 1997) (proposing to amend Penal Code 939.71 to require prosecutor to inform grand jury of existence and nature of exculpatory evidence and of its duty to order production of such evidence); Report of Commission to Reform the Federal Grand Jury (2000).

22. See *United States v. Williams*, 504 US 36 (1992) (holding that there exists no obligation for a prosecutor to present exculpatory evidence to grand jury); *Costello v. United States*, 350 US 359 (1956) (declining to enforce hearsay rule in grand jury proceedings).

Stanley S. Arkin is the senior partner of Arkin Kaplan Rice. He specializes in complex corporate litigations and negotiations and white-collar criminal defense. Disclosure: Arkin Kaplan Rice is currently involved in representations that involve issues discussed in this article, including its representation of Jeffrey Eischeid in 'U.S. v. Stein,' No. 05 Crim. 0888, No. 06 Civ. 5007 (LAK).