Prosecutorial Immunity: The Debate Reignited

By Maranda Fritz and Brian Lanciault

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New York Law Journal (3/29/2019) *"The time has come to create some level of accountability for prosecutors."* – The Hon. Fredric Block*, Let's Put an End to Prosecutorial Immunity*, March 13, 2018

The most recent demands for prosecutorial accountability stem from disclosures concerning the conduct of New York hedge fund manager Jeffrey Epstein, and the agreement not to prosecute him entered into by then U.S. Attorney for the Southern District of Florida, Alex Acosta. Godoy, Jody, *"Epstein Case: A Turning Point for Prosecutorial Accountability?"* Law 360 (Feb. 11, 2019). This discussion comes on the heels of the barrage of criticism that has been leveled against prosecutors in social media and on the airwaves for more than a year, and a decade of development of objective data relating to wrongful convictions and the improper prosecutorial actions that contributed to them. Each of these discussions, taken individually, is driven by dramatically different interests; however diverse may be the impetus of the debates, they all share a common complaint: Prosecutors have enormous power and can wield it with veritable impunity, unfettered by professional, ethical or civil penalties.

As we navigate another discussion of whether and how prosecutors could be held accountable, we now have the benefit of and should consider the evidence of the patent flaws in the rationale underlying prosecutorial immunity, analysis of the costs and benefits of the protections currently afforded to prosecutors, and the need to substantially revise the current responses to the fact of prosecutorial misconduct.

Evidence of Prosecutorial Misconduct

An ever-growing body of evidence concerning wrongful convictions has resolved any question concerning the existence, though not the extent, of prosecutorial misconduct. The National Registry of Exonerations reported that in 2017, of the 139 exoneration cases, 84 (60 percent) of those cases involved "official misconduct" of both prosecutors

and police leading to the wrongful convictions. National Registry of Exonerations, *Exonerations in 2017* at 6 (March 14, 2018). Other academic and governmental studies have analyzed and catalogued the characteristics of wrongful convictions, detailing the percentage of cases in which prosecutorial misconduct occurred and was a component of the wrongful convictions. Id. See also *The Innocence Project, Prosecutorial Oversight: A National Dialogue in the Wake of Connick v. Thompson* (March 29, 2016) ("Prosecutorial Oversight").

Judges have likewise weighed in, citing their own experience with cases involving prosecutorial misconduct and the need for meaningful reform. District Court Judge Frederic Block penned a detailed commentary on the case of Jabbar Collins, who "languished in jail for over 16 years" for a murder he did not commit. Judge Block handled Collins' civil rights action against the prosecutors and concluded that he was bound by Circuit precedent to dismiss the case, but criticized the rationale underlying that precedent, recognizing that "solicitation and subornation of perjured testimony, the withholding of evidence, or the introduction of illegally seized evidence at trial are … truly 'deplorable' intentional acts." Concluding that "the time has come to create some level of accountability," Judge Block suggested that the veil of immunity be "judicially or legislatively lifted," that state bars and courts enforce ethical canons against prosecutors, and that prosecutors who intentionally withhold Brady material be "prosecuted for obstruction of justice."

Accountability vs. Immunity

The discussions of rights and remedies that could address the issue of prosecutorial misconduct focus on three areas: the imposition of sanctions or costs within the criminal proceeding where misconduct is demonstrated, allowance of civil remedies in favor of an accused, and disciplinary processes to sanction and deter prosecutors' improper conduct. Relevant data illustrate that each of these options is presently either unavailable or unavailing.

Within the criminal proceeding in which misconduct occurs, there are motions that can and should be made, but case law strongly favors an effort to "cure" the misconduct as opposed to discontinuing the case. Attorney's fees are supposedly available for a "prevailing party" under the Hyde Amendment, but decisional authority has rendered an award of fees all but impossible. In *United States v. Chapman*, 524 F.3d 1073 (9th Cir. 2008), for example, the defense obtained the dismissal of an indictment for prosecutorial misconduct, but the defendants were denied an award of fees, with the trial court concluding that the defendant had not "prevailed" because a dismissal of the indictment was not a "judgment on the merits" and the litigation as a whole was not vexatious (though the prosecutor's violations were determined to be in bad faith); the Ninth Circuit affirmed. *Chapman* is not unusual, and the overwhelming authority interpreting

the Hyde Amendment has required the substantial showing that the entire case was initiated "without reasonable or probable cause," effectively excusing any misconduct that occurs after indictment. See, e.g., *United States v. Terzakis*, 854 F.3d 951 (2d Cir. 2017).

Separate civil actions under §1983 remain largely precluded by the decisions creating and upholding prosecutorial immunity, but those decisions rest on an unsound foundation and need to be revisited. Described as a "constitutional ditch" in need of filling, prosecutorial immunity stems from a 1976 Supreme Court decision, *Imbler v. Pachtman*, 424 U.S. 409 (1976), which concluded that prosecutors, when engaged in their roles as advocates in the courtroom, possess complete immunity, and where they stray outside that pure courtroom advocate role, possess qualified immunity. Grometstein & Balboni, *"Backing Out of a Constitutional Ditch: Constitutional Remedies for Gross Prosecutorial Misconduct Post Thompson,"* 75 Albany Law Review No. 3, Spring 2012. The *Imbler* court relied first on an analysis of Congress' intent when it enacted 42 U.S.C. §1983, concluding that since prosecutors possessed immunity at the time §1983 was enacted, Congress must have incorporated that immunity into its prohibitions against due process and equal protection violations. The *Imbler* court also relied on the assumption that prosecutors, like other attorneys, would be subject to discipline for their misdeeds. See also *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009) (where defendant alleged failures to train and establish information management systems, held that because conduct was "directly connected to the conduct of a trial" it was immune); *Connick v. Thompson*, 131 S. Ct. 1350 (2011) (a single instance of a *Brady* violation was not sufficient to impose liability on the district attorney's office for failure to train).

Both of the assumptions underlying *Imbler* are erroneous. As confirmed by Justice Scalia, "[t]here was, of course, no such thing as absolute prosecutorial immunity when §1983 was enacted." *Kalina v. Fletcher*, 522 U.S. 118, 132 (1997) (concurrence). Various scholars have likewise demonstrated the utter lack of historical evidence supporting the court's premise in *Imbler*.

Its subsidiary premise has also been debunked. Numerous empirical studies since 1976 show that discipline of prosecutors is near non-existent. See, e.g., Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 Fordham L. Rev. 509, 521-27 (2011). For example, in 2016 the Innocence Project published a report revealing that between 2004 and 2008, out of 660 acknowledged instances of prosecutorial error or misconduct, a prosecutor was disciplined in only *one* case. See *Prosecutorial Oversight*, supra. Other studies suggest that disciplinary processes have resulted in action against prosecutors in only one percent of cases, even where the misconduct has been litigated and documented.

A cost-benefit analysis of the issue of prosecutorial immunity strongly supports the view that the most targeted and effective means of addressing the problem lies in the imposition of individual monetary penalties. A comprehensive survey of the incentives and effective deterrents to prosecutorial misconduct analyzed potential sanctions and ultimately concluded that individualized and targeted monetary sanctions would most effectively influence those who actually engage in the conduct. Dunahoe, Alexandra, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. Ann. Sur. Am. L. 45, 59-66, 96-107 (May 2005). Analytically, immunity only serves to embolden the individual actors *and* dissuades agencies from devoting attention and resources to training and oversight on issues that, if liability existed, would become a matter of far greater importance.

Recent Initiatives

The last year has seen some stutter steps toward revising the means by which allegations of prosecutorial misconduct are addressed. The New York State Legislature passed a law to create the nation's first Commission on Prosecutorial Conduct, scheduled to take effect in January 2019. That effort may have been short lived: The District Attorney's Association of the State of New York filed suit in October 2018 to block the Commission and, in January, the parties entered into a stipulation that prevents the law from taking effect until changes are made to address the concerns raised by DAASNY.

The federal landscape may also be changing. The Jeffrey Epstein case and the actions of former USA Alex Acosta were cited by members of Congress as evidence of the "urgent" need for passage of the Inspector General Access Act, which would enable the Office of the Inspector General to review complaints regarding Department of Justice attorneys, shifting those matters away from DOJ's internal Office of Professional Responsibility. A bill effecting this transition was recently proposed by Representative Cedric Richmond and co-sponsored by Senators Mike Lee and Lisa Murkowski. In January, the House unanimously passed the bill and it is now pending before the Senate Judiciary Committee, where Chairman Chuck Grassley has already confirmed his support.

Conclusion

As white-collar lawyers, we confront this issue every time we are able to achieve for our clients what we consider a positive result – an acquittal at trial, dismissal of an indictment, or even the closure of an investigation without charges being filed. The client inevitably asks what recompense exists for the enormously destructive forces that were unleashed against the client and his business along the way. Where we achieve that positive outcome due, in whole or in part, to evidence of improper conduct of the prosecution, the issue is exacerbated: the client insists that the prosecutor or the government should somehow be called to account. Given that *all attorneys* (except prosecutors) litigate effectively every day with the certainty that if they violate

ethical principles or engage in improper conduct they will be subject to monetary and disciplinary penalties, we should continue to question why prosecutors possess enormous power but face little accountability.

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