The Decision to Indict

by Carl H. Loewenson, Jr.

The power to indict is the power to destroy. For the defendant, an indictment hurts everywhere—in the family, business, and community. At the end of the road, the indictment can lead to loss of liberty and financial ruin. The prosecutor must wield with caution and reverence the power to indict.

The decision to indict is often complicated, involving a detailed weighing of legal and factual elements. In the end, however, the decision should—and generally does—focus on two crucial factors: (1) factual guilt ("Did she do it?"); and (2) proof beyond a reasonable doubt ("Can we prove that she did it?"). Both require difficult exercises of judgment.

If the prosecutor has determined that both questions should be answered "yes," certain discretionary factors may still come into play. These include the individual's minor role in the offense, adequate private civil remedies or regulatory sanctions, lack of a significant prosecutorial interest in the subject matter, possible prosecution in another jurisdiction, extraordinary personal or family circumstances, or an offer to cooperate in exchange for immunity.

The two key threshold factors—factual guilt and proof beyond a reasonable doubt—govern the decisions of prosecutors, both federal and state, from the largest city to the most sparsely populated rural county. Both are necessary before making a decision to indict. Neither factor is sufficient by itself.

If the first factor—factual guilt—is present, but the prosecutor does not have confidence that he can win at trial, he has no business indicting. Never indict based solely on the conviction that the guy "did it." If the prosecutor is not convinced that the admissible evidence will probably be sufficient to obtain and sustain a conviction, the case should not be brought, no matter that the potential defendant is a "bad guy" or that the case is of highest priority.

John Gotti burnished his reputation as the "Teflon Don" because some early prosecutors thought they were justified in forging ahead with prosecutions of the Gambino Family boss when the evidence was thin. (In fairness, according to some published reports, there were also indications of jury tampering and intimidation.) The battle against organized crime received enormous setbacks each time Gotti was acquitted. The prosecutors were, of course, certain that he "did it," but did not fulfill part two of the necessary two-part test: They did not have proof beyond a reasonable doubt. That the story ended well for law enforcement—Gotti was finally convicted and is now behind bars—does not excuse the prosecutors who went after Gotti before they had sufficient proof.

Some early warning signs of unhealthy prosecutorial decision-making include such bromides as: (a) "I'll let the jury decide this one;" (b) "I enjoy a horse race;" (c) "I'm not afraid to roll the dice;" and (d) other such macho breast-beating. The prosecutor should also not indict based on the hope or expectation that the defendant will plead guilty and/or cooperate with the investigation. No one should be prosecuted or threatened with prosecution for purely instrumental reasons. Prosecutors should not bluff.

Prosecutors' Pitfall

Another familiar pitfall is overcharging, either a count too many against a particular defendant or a defendant too many in a case. A multi-defendant trial against n defendants can get dragged down by attempting to add on a thin case against defendant $n + 1$. In such cases, jurors may question the prosecutor's judgment in a way that taints the entire case, and the prosecutor is forced to make strained arguments that can damage her credibility.

The second factor alone—"Can we prove she did it?"—is never sufficient to indict absent the first factor, the belief that the potential defendant committed the crime. This seemingly strange circumstance can arise when abundant circumstantial evidence could support an unjustified inference of guilt, or where inequality of resources or lawyering talent gives the prosecutor the upper hand. In the typical case, the focus will be on questions of proof, not questions of factual guilt, because the question of factual guilt should form the initial

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hurdle for the decision to indict. Factual guilt often receives less attention, because it should be an obvious threshold determination.

Of course, a grand jury may properly indict based on the presence of probable cause to believe that a person has committed an offense, *see United States v. Calandra*, 414 U.S. 338, 343 (1974), and it is widely believed that a competent prosecutor could convince a grand jury to indict the proverbial ham sandwich. But any prosecutor who indicts based solely on probable cause—perhaps in the hope that the defendant will plead guilty or that more evidence will turn up by trial—exhibits a woeful disregard for the rights of the accused, the purposes of the criminal justice system, the limited resources of the prosecutor's office, and probably the prosecutor's own career. Probable cause may be enough to obtain an arrest warrant on a complaint or to justify a search warrant, but is not sufficient to justify an indictment.

A good prosecutor knows that the decision to prosecute has significant consequences for not only the accused, but also for his family, friends, and business, and for the wider audience that will likely be deterred by successful prosecutions or emboldened by prosecutorial flops.

To guide the discretion of United States attorneys in the decision to indict, the United States Department of Justice has published "Principles of Federal Prosecution." *See* 8 *Department of Justice Manual—Criminal Division* 9-27.000 et seq. The "Principles of Federal Prosecution" provide a handy checklist not just for the Assistant United States Attorney, but also for defense counsel who are preparing a preindictment presentation to any prosecutor—federal, state, or local. But don't bother filing a motion to dismiss an indictment based on the allegation that an Assistant United States Attorney has failed to comply with the "Principles of Federal Prosecution." It is no surprise that the Department of Justice Manual states explicitly that the "Principles" are intended solely for the guidance of the attorneys for the government and do not create any legally enforceable rights. *Id.* at 9-27.150.

The Department of Justice Manual confirms the two-part litmus test of factual guilt and proof beyond a reasonable doubt, but then provides several bases for discretionary decisions to decline prosecution. The Manual states that the government attorney should commence or recommend federal prosecution if she believes that the person's conduct constitutes a federal offense and that the admissible evidence will probably be sufficient to convict, unless prosecution should be declined because: (1) no substantial federal interest would be served by prosecution; (2) the person is subject to effective prosecution in another jurisdiction; or (3) there exists an adequate, noncriminal alternative to prosecution.

The federal prosecutor should test any potential case against these criteria, and, to ward off prosecution, defense counsel should muster arguments from these principles.

The prosecutor should not (and most prosecutors do not) take into account the specter of jury nullification. Certain cases are unpopular with the jury, either because of the nature of the offense or the popularity of the defendant. Prosecutors brought bootlegging cases during Prohibition, even though jurors generally did not like the cases. Today, newly minted assistant United States attorneys still have to cut their teeth by prosecuting Postal employees for stealing silver dollars out of test letters, even though jurors roll their eyes when they first hear about the case. And the Simpson prosecution had its many well-catalogued problems, not the least of which was a handsome, charismatic defendant who won the Heisman Trophy, starred in professional football, and had a familiar smile on television.

Unpopular prosecution witnesses, on the other hand, raise different issues from those of unpopular statutes or popular defendants. The prosecutor should not just grit his teeth and forge ahead in the face of proof problems, including concerns about witness credibility. Such problems raise questions about whether the prosecutor can pass part two of the litmus test: can we prove the case beyond a reasonable doubt? Most government-cooperating witnesses—co-conspirators who have entered pleas to reduced charges and agreed to testify against their erstwhile partners in crime in hope of a reduced sentence—are not likable. Jurors (like all of us) do not like criminals or tattletales, and jurors especially do not like tattling criminals. The responsible prosecutor knows that no jury will swallow whole what a turncoat says, so the prosecutor has to find corroborating evidence—physical evidence or testimony from other witnesses—to shore up the cooperator's version.

Substantial Federal Interest

Prosecutors do not bring every case that they can win. Sometimes it's just not worth it. In determining whether prosecution should be declined because the case involves no substantial federal interest, the federal prosecutor looks to:

(1) federal law-enforcement priorities;

(2) the nature and seriousness of the offense;

(3) the deterrent effect of prosecution;

(4) the person's culpability;

(5) the person's criminal history;

(6) the person's willingness to cooperate; and

(7) the probable sentence or other consequences upon conviction.

Adapted for state and local enforcement priorities, these factors should also govern state and local prosecutions.

Prosecutorial priorities vary in response to changes in business conditions, cultural mores, and public perceptions. For instance, as technology and intellectual property play an ever-increasing role in driving the national (and world) economy, federal prosecutors have become more interested in bringing criminal cases involving copyrights, trademarks, and trade secrets. Prosecuting any offense involving use of the Internet has taken on additional cachet. Congress has provided additional tools for federal prosecutors by enacting new laws or providing new teeth for old laws that prohibit trafficking in counterfeit goods, reproducing or distributing copyrighted works, and stealing trade secrets.

The Economic Espionage Act of 1996, codified at 18 U.S.C. §§ 1831-39, is likely to catch the attention of prosecutors. Recognizing the substantial contribution that the United States makes to the world's intellectual property base, the statute criminalizes the wrongful copying of or trafficking in trade secrets if done with the intent either to benefit a foreign government, or to injure the owner of the trade secret and benefit another. In May 1997, the Justice Department issued a "how to" manual for all federal prosecutors entitled "Federal Prosecution of Violations of Intellectual Property Rights." For defense counsel to argue that there is no substantial federal interest in prosecution of, for instance, manufacturers of counterfeit computer software, is difficult. In a similar vein, environmental crimes and health care fraud are high priorities.

Certain cities or regions develop their own priorities. Securities fraud prosecutions have for many years been a priority for the United States Attorney's Office for the Southern District of New York, because the national securities exchanges and many securities firms are located in Manhattan. The Southern District of Florida has battled narcotics, and the Southern District of California and the Southern District of Texas, not surprisingly, have significant dockets of immigration offenses.

Nature of the Offense

Prosecutors generally do not expend their limited resources in prosecuting cases of trivial or merely technical violations. For example, the DA in New York's Suffolk County recently declined prosecution of Martha Stewart, the doyenne of domesticity, on assault charges after she pinned her neighbor's gardener against a metal post with her pickup truck. Although local papers had tremendous fun and the prosecutor apparently had proof of the offense, the DA decided that his office had higher priorities.

A key factor, according to the "Principles of Federal Prosecution," is "the actual or potential impact of the offense on the community and on the victim." The typical prosecutor will be less interested in a case if the statute has not been enforced for years or if the alleged offense arises out of a garden-variety business dispute. Prosecutors routinely decline cases presented by counsel for the plaintiff in a business-related litigation. It is generally not difficult for creative plaintiffs' counsel to add fraud counts to a civil complaint alleging breach of contract, but prosecutors usually (for good reason) show little interest in such disputes.

The identity of the offender or the victim may often—for better or worse—tip the scales in favor of prosecuting a case that otherwise would not fit the guidelines for prosecution. For example, while Martha Stewart was not prosecuted, she would likely not even have been investigated had she not been Martha Stewart. And if Autumn Jackson had attempted to extort money from a purported father who was not as famous as Bill Cosby, she may well have remained below the prosecutors' radar. Likewise, many professional athletes and well-known entertainers are prosecuted for vice and drug possession offenses that would likely go unprosecuted if committed by a less recognizable figure whose arrest and prosecution would garner no coverage in the tabloids or on "Entertainment Tonight." If you don't believe this, just ask Hugh Grant or Eddie Murphy.

Maximum Deterrence Effect

Prosecutors do and should bring cases for maximum deterrent effect. Police and prosecutors cannot catch and convict more than a small percentage of wrongdoers. Effective criminal laws, and indeed the future of the social compact, depend on general deterrence. The message must go out that those who commit crimes will be investigated, apprehended, prosecuted, and convicted. The need to promote general deterrence is no excuse, however, for grandstanding by the prosecutor, particularly pretrial, and is no excuse to target famous people or large, well-known companies. The deterrent value of a prosecution disappears entirely and may become negative when the government indicts without sufficient probability that it can prove guilt beyond a reasonable doubt. In a highly publicized criminal price-fixing case a few years ago against General Electric Company concerning industrial diamonds, the government's case did not even survive the defense motion to dismiss at the close of the government's case under Rule 29 of the Federal Rules of Criminal Procedure. Such an ill-conceived indictment may have a negative deterrent value by inducing future corporate antitrust defendants to take close cases to trial, or more important, making would-be violators think that law enforcement will never catch them.

Criminal History. It is tempting and seemingly logical to take into account the criminal history of a person or corporation in deciding whether to prosecute. Recidivists deserve greater attention from law enforcement. This factor can be

dangerous, however, because it distracts the prosecutor from the two-part litmus test: "Did she do it?" and "Can we prove it?" For the same reason that a jury can learn of a defendant's prior convictions and prior bad acts only under limited circumstances, a prosecutor should, in fairness, focus primarily on the offense under consideration rather than on whether the potential defendant is a "bad guy" or has a record.

Cooperation. In their charging decisions, prosecutors obviously weigh heavily the nature and extent of a potential defendant's cooperation. Where the prosecutor believes that the person has committed a crime and that she can prove the person guilty at trial, the person is not likely to get a pass (in the form of no action, letter immunity, or court-ordered immunity). The person's value as a witness for the prosecution is greatly diminished if it appears that the government has provided a disproportionate benefit in return for testimony against persons on trial. Such excessive generosity for

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a cooperating witness not only damages the credibility of that witness, but can drag down an entire case by making the prosecutor seem too desperate to nail the defendants on trial. Jurors have a particularly difficult time voting to convict if the government's witnesses seem far more culpable than the defendants. The classic cooperator is the small fry testifying against Mr. Big. No one wants to hear Mr. Big rat out his messengers and flunkies.

The Probable Sentence. Prosecutors consider the likely sentence in determining whether to indict. If a potential defendant is already serving a long sentence, it makes less sense to expend scarce prosecutorial resources just to pile on additional time. This factor calls into question the decision of the District Attorney in Oklahoma City to prosecute Timothy McVeigh, who currently sits on death row following his federal conviction for the Oklahoma City bombing.

At the other end of the spectrum, prosecutors often decide that a misdemeanor case, which would result in only a light sentence, is not worth prosecuting.

Multiple Jurisdictions. A prosecutor may legitimately refrain from bringing a case if the defendant will be adequately prosecuted in another jurisdiction. More often, however, jurisdictional overlap results in turf battles that can make fights for corporate control and will contests seem tame. It can get ugly when neighboring prosecutors fight for credit for bagging a high-profile criminal. When overlapping federal and state prosecutors work together effectively, they will cross-designate their assistants to help each other. Local public corruption cases are generally best brought by the federal prosecutor, who is less likely than the District Attorney to be part of the local political system and does not need the support of political types to assist in re-election. On the other hand, violent crimes are generally left to the state and local prosecutor absent some connection to organized crime (against which the federal RICO statute is a potent weapon) or some other substantial federal interest.

Legal or evidentiary considerations might also lead prosecutors to favor one forum over another. The very same wiretap evidence that would be suppressed at the state trial might be admissible in a federal trial under the federal wiretap statute, Title III of the Omnibus Crime and Safe Streets Act of 1968. The likely sentence available in various jurisdictions may also be a factor. For instance, if drug dealers are getting only revolving-door justice in the state system, local police should direct some selected narcotics arrestees into the federal system, where sentences are often longer (per the Federal Sentencing Guidelines) and forfeitures are available as well.

Noncriminal Alternatives. Perhaps the most used and least successful argument against prosecution is that an adequate civil alternative exists. It is the rare securities, tax, customs, or antitrust prosecution that is not preceded by an in-office meeting among defense counsel, the Assistant United States Attorney, and the Assistant's supervisor, in which defense counsel makes this argument. The adequate civil remedy could be a Securities and Exchange Commission administrative proceeding or a civil case brought by the IRS, Customs, or the Antitrust Division of the Justice Department. When this argument is made, the prosecutor's attention may well wander to whether he should be good and have a salad for lunch or go ahead and enjoy a plump, juicy steak sandwich. Arguments about civil alternatives can be effective, however, in cases in which a new legal theory needs to be tested or in which for any one or more of the other discretionary factors, the prosecutor is sitting on the fence. This argument is more credible if the enforcement agency is capable and not just a paper tiger. Pointing out noncriminal alternatives to prosecution may tip the balance in an otherwise close decision, but will generally be unavailing when the prosecutor thinks he has his guy and can prove it.

It is not only civil tax cases, SEC administrative proceedings, or other governmental actions that can substitute for criminal cases. A private civil action can occasionally provide the adequate noncriminal alternative to prosecution. This is most likely to occur when plaintiffs can employ extraordinary civil remedies, such as forfeitures for trademark violations or treble damages plus attorneys' fees available under civil RICO. The government is not interested in taking sides in run-of-the-mill business disputes, but may want to get involved and bring charges if the conduct is particularly egregious, if the defendant is judgment-proof, or if the defendant's assets have been secreted outside the jurisdiction.

If the alleged offense has been committed by a licensed professional, the prosecutor may take a pass and instead refer the matter to the licensing authority, such as a local attorney disciplinary body or the National Association of Securities Dealers Regulation, Inc.

Discretion and Its Limits

The prosecutor's discretion whether to indict and for which offenses is extremely broad. Courts are largely deferential on the decision to prosecute, recognizing that it is "particularly ill-suited to judicial review" and that the factors under evaluation by the government are "not readily susceptible to the kind of analysis the courts are competent to undertake." *Wayte v. United States*, 470 U.S. 598, 607 (1985). The government's discretion, however, is not without constitutional and practical limits. Three ways to challenge the constitutionality of a decision to indict are by showing that a person was the victim of selective prosecution, vindictive prosecution, or double jeopardy. Finally, the Fifth Amendment's