



FEDERALLY SPEAKING



by Barry J. Lipson

Number 55

Welcome to *Federally Speaking*, an editorial column for **ALL** interested in the **Federal Scene**, originally compiled for the members of the Western Pennsylvania Chapter of the Federal Bar Association and all FBA members. Its purpose is to keep you abreast of what is happening in the Federal arena, whether it be a landmark US Supreme Court decision, a new Federal regulation or enforcement action, a "heads ups" to Federal CLE opportunities, or other Federal legal and related occurrences of note. Its threefold objective is to educate, to provoke thought, and to entertain. This is the 55th column in this series, and together with prior columns is available on the website of the U.S. District Court for the Western District of Pennsylvania: <http://www.pawd.uscourts.gov/Pages/federallyspeaking.htm>.

LIBERTY'S CORNER

"Prosecutorial Indiscretion" & The Jackson Prosecutorial Discretion Doctrine

In seeking Congressional oversight of a Federal Prosecutor, a Member of Congress recently reminded the *U.S. House Committee on the Judiciary*: "I know that you are acutely aware of the power and discretion that the U.S. Attorney's Office has to conduct investigations and prosecutions. Indeed, the U.S. Attorney's Office has the authority to bring the full weight of the federal government upon those individuals and parties whom they consider under suspicion of federal law. ***Therefore, it is clear that the necessary supervision must occur through the federal government, especially by the Congress, to ensure that no abuse of power can occur unchecked***" (see *infra*).

"Spitzer and Spritzer on Spitzer"

With regard to such extreme "power and discretion," investigative reporter Greg Palast has observed concerning resigned Democratic ex-New York Governor Eliot Spitzer being on the receiving end of alleged Republican Federal "Prosecutorial Indiscretion": "Not all crimes lead to Federal bust or even public exposure. It's up to something called 'prosecutorial discretion.' Funny thing, this 'discretion.' For example, Senator David Vitter, Republican of Louisiana, paid Washington DC prostitutes to put him in diapers (ewww!), yet the Senator was not exposed by the [Republican] US prosecutors busting the pimp-ring that pampered him. Naming and shaming and ruining Spitzer – rarely done in these cases - was made at the 'discretion' of Bush's Justice Department. Or maybe we should say, 'indiscretion'."

Contemporaneously with Palast's observation, your columnist observed in "Spitzer and Spritzer on Spitzer": "A hypocrite or another Republican Political persecution? While I believe the secret ratting to the FBI by Banks on their clients is a serious violation of an important fiduciary relationship, Spitzer's 'holier than thou' stance left the prosecutors with no real practical choice but to 'spritz on him' and exercise their 'prosecutorial discretion' to his detriment. But what of having a wronged lady, with an expression that she is ready to 'spitzer' on you, standing next to you for all the World to see?"

Former Governor Spitzer became Governor through his very zealous (some would say overzealous) corruption-fighting prosecutorial performance as Democratic New York Attorney General, where he was then on the giving end of Prosecutorial Discretion, though some would say "Prosecutorial Indiscretion," accusing him of using his Prosecutorial Discretion to advance his political ambitions.

Among them were former New York Stock Exchange (NYSE) Chair Richard Grasso and former NYSE Compensation Committee Chair Kenneth Langone, who charged that Democratic AG Spitzer, for improper motives, selectively prosecuted them (but refrained from prosecuting prominent Democrat NYSE Chair Carl McCall), to recover the lion's share of Grasso's \$139.5 million compensation package. Such motives allegedly included Spitzer's gubernatorial ambitions and his desire to "discretionarily" exclude, protect and not call to account "prominent Democrat" Carl McCall. It is also alleged Spitzer further overreached "when he took aim at Grasso's character, when he questioned his secretary about a possible affair the two might have had and started looking into whether Grasso has an illegitimate child" (Rizk, *From the Sheriff of the Street to Shooting Himself in the Foot*, markets-hub.com, March 11, 2008).

Spitzer had claimed that as the NYSE was a non-profit organization, New York's non-profit law providing that a non-profit's executive receive "reasonable compensation," was violated, in that "the \$139.5 million payout Grasso received in the summer of 2003 wasn't only unreasonable, it just didn't seem right." *USA Today* reports that in 2007 "a New York State Appellate Court ruled," in a 3-2 decision, "that former New York Attorney General Eliot Spitzer overstepped his authority in seeking the return of \$112 million in salary and benefits that Grasso accumulated during his tenure as the Big Board's boss from 1995 to 2003."

The Jackson Prosecutorial Discretion Doctrine

On April 1, 1940, U.S. Attorney General Robert H. Jackson, the Chief U.S. Legal Officer, in the *Great Hall of the United States Department of Justice* in Washington, D.C., under the outspread arms of "Minnie Lou," the statuesque "**Spirit of Justice**," in her original full bodied *au naturel* form (see *Federally Speaking* No. 13), promulgated what is best called "**The Jackson Prosecutorial Discretion Doctrine**."

In this most perceptive presentation, the **Attorney General** personally instructed all of the then serving United States Attorneys, who are the Chief Federal Prosecutors, the "Federal District Attorneys," of these United States, to responsibly exercise their "tremendous" **Prosecutorial Discretion** so as to "*protect the spirit as well as the letter of our civil liberties*," seek "truth and not victims," serve "the law and not factional purposes," preserve impartiality, and temper its exercise with "human kindness," "humility," and "sensitiveness to fair play and sportsmanship" (31 *Journal of Criminal Law & Criminology* 3-6 (1940); 24 *Journal of the American Judicature Society* 18 (1940)).

But read these instructions for yourself, in his own words:

"The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole. While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst....

Nothing better can come out of this meeting of law enforcement officers than a rededication to the spirit of fair play and decency that should animate the federal prosecutor.... The federal prosecutor has now been prohibited from engaging in political activities [*Hatch Act*, 5 U.S.C. §§ 7321-7326; still applicable]. I am convinced that a good-faith acceptance of the spirit and letter of that doctrine will relieve many district attorneys from the embarrassment of what have heretofore been regarded as

legitimate expectations of political service. There can also be no doubt that to be closely identified with the intrigue, the money raising, and the machinery of a particular party or faction may present a prosecuting officer with embarrassing alignments and associations. I think the *Hatch Act* should be utilized by federal prosecutors as a protection against demands on their time and their prestige to participate in the operation of the machinery of practical politics....

What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain. If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. With 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. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it; it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself....

In the enforcement of laws which protect our national integrity and existence, we should prosecute any and every act of violation, but only overt acts, not the expression of opinion, or activities such as the holding of meetings, petitioning of Congress, or dissemination of news or opinions. Only by extreme care can we protect the spirit as well as the letter of our civil liberties, and to do so is a responsibility of the federal prosecutor.... A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility."

A Time of Fear

And Attorney General Jackson was speaking at a "*Time of Fear*" -- even more incendiary than our post-9/11 era. On August 31, 1939 the British fleet had mobilized and Civilian evacuations from London began. This was followed immediately by the September 1, 1939 German invasion, without warning, of Poland. Within about a week Britain, France, Australia, New Zealand, Canada and South Africa were at war with Germany. Warsaw fell on September 27, 1939; and on October 9, 1939 the Germans captured the U.S. Freighter *City of Flint* (liberated by Norwegian commandos on November 3, 1939). Then, on November 4, 1939 the **U.S. Congress**, in apparent retaliation, authorized the sending of arms and other aid to Britain and France for use in their fight against the Germans. Followed, on February 2, 1940 by the first Allied Troops arriving in the Middle East, and by the first German Jews being deported to occupied Poland. The "*Time of Fear*" intensified when on March 16, 1940 German bombings killed the first British civilian; and six days later on March 22, 1940 German U-boats sank seven neutral ships. That was the incendiary climate when on April 1, 1940 U.S. Attorney General Jackson gave his laudatory briefing to his Federal Prosecutors, thus promulgating "**The Jackson Prosecutorial Discretion Doctrine**" of fairness even in times of adversity.

With regard to such incendiary times, **U.S. Attorney General Jackson's Doctrine**, on that enlightened day, also had much to say:

"*In times of fear or hysteria* political, racial, religious, social, and economic groups, often from the best of motives, cry for the scalps of individuals or groups because they do not like their views. Particularly do we need to be dispassionate and courageous in those cases which deal with so-called 'subversive activities.' They are dangerous to civil liberty because the prosecutor has no definite standards to

determine what constitutes a 'subversive activity,' such as we have for murder or larceny. Activities which seem benevolent and helpful to wage earners, persons on relief, or those who are disadvantaged in the struggle for existence may be regarded as 'subversive' by those whose property interests might be burdened or affected thereby. Those who are in office are apt to regard as 'subversive' the activities of any of those who would bring about a change of administration. Some of our soundest constitutional doctrines were once punished as subversive. We must not forget that it was not so long ago that both the term 'Republican' and the term 'Democrat' were epithets with sinister meaning to denote persons of radical tendencies that were 'subversive' of the order of things then dominant."

Topsy-Turvy April Fools

But were all of Jackson's cautions "*merely April Fools' Day remarks?*" Some current-day Federal Prosecutors seem to be telling us that they are, and that we must rely on their unfettered, their unchecked discretion. These are the same indiscreet ones, the true "April Fools," whose then leader caused the **Pittsburgh Tribune-Review** to editorialize: "**FREE MINNIE LOU!**" She being "the exquisite 1936 C. Paul Jennewein Art Deco statuary rendition of the '**Spirit of Justice,**' which presides over the **Great Hall of the U.S. Department of Justice,**" and which "somehow displeased the Earl of Ash [then U.S. Attorney General John Ashcroft, whom we meet again herein in the "*The Case of the Machiavellian \$52 Million Back Kicked Knees*"], and so he ordered her charms sequestered behind a wall of cloth. But **Justice** should always be fully exposed and open to public scrutiny, should she not? [*Federally Speaking* No. 13]" In contrast, Attorney General Jackson, who promoted keeping the Spirit of Justice and "the spirit as well as the letter of our civil liberties" protected, expressed no objection to her being uncovered and exposed to view, but one might think intentionally promulgated this Doctrine before her as she stands there to reflect the "Spirit of Justice." And so the **Tribune-Review** concluded, "please, sir, reconsider. This is more than a nation can bear. Free Minnie Lou."

Yes, sir, these miscreant April Fools who have strayed from **Attorney General Jackson's Doctrine**, have inexcusably turned the Spirit of the USA "*topsy-turvy,*" erroneously acting as if Founding Father Benjamin Franklin had caution: "Those who would give up a little *Temporary Safety* to purchase *Essential Liberty*, deserve neither Safety nor Liberty." The same miscreants, who appear to use their Government Offices as hatchets (and in many instances to do so as "hatchet men" in apparent violation of the *Hatch Act*), to prosecute political adversaries; to punish Federal Prosecutors who don't; to help their friends and political allies; to prosecute in furtherance of their political agendas; to conduct their prosecutions in "fear," in "hysteria" and in abrogation of civil liberties; to prosecute defendants from one area of the country in other areas where "community standards" and/or juries may be more malleable for them; and to for political reasons prosecute as Federal crimes basically local matters.

In this latter regard **Attorney General Jackson's Doctrine** also has cautions for Federal Prosecutors:

"In spite of the temptation to divert our power to local conditions where they have become offensive to our sense of decency, the only long-term policy that will save federal justice from being discredited by entanglements with local politics is that it confine itself to strict and impartial enforcement of federal law, letting the chips fall in the community where they may. Just as there should be no permitting of local considerations to stop federal enforcement, so there should be no striving to enlarge our power over local affairs and no use of federal prosecutions to exert an indirect influence that would be unlawful if exerted directly."

The DiBiagio Debacle

The U.S. Attorney for Maryland, Thomas DiBiagio, provides us with another example of apparent Prosecutorial Indiscretion, when he set not only an indictment quota for specified types of violations, but set the number that actually needed to receive "front page" coverage. The "proof" was a publicly disclosed memorandum calling for three high profile "front page" corruption indictments and convictions, and an e-mail complaining that there had not been a Federal conviction in Maryland of an elected official by his office since 1988, apparently presuming that elected officials could not remain

uncorrupted for such a period of time. This appears to be a clear "Jackson Prosecutorial Indiscretion," a Prosecutorial Debacle, for which U.S. Attorney DiBiagio actually received an official reprimand from the U.S. Department of Justice. Didn't DiBiagio remember that e-mails, like diamonds, are forever?" One consolation, it would seem that such a reprimand would be "front page" news.

The Case of the Machiavellian \$52 Million Back Kicked Knees

Then there is "The Case of the Machiavellian \$52 Million Back Kicked Knees," where a dutiful U.S. Attorney, the U.S. Attorney for New Jersey, Christopher Christie, appears to kneel to the Earl of Ash, the former U.S. Attorney General John Ashcroft, who knighted him as U.S. Attorney, perhaps on their serfs very replacement knees, and directed to his benighted Earl the apparently oh so generous secretive titling of \$52 million-plus. This tale is told by Member of Congress Bill Pascrell, Jr. (D NJ), first quoted above, in his letter to the *U.S. House Committee on the Judiciary*, and deals with both the specific question of awarding a "non-public" \$52 million-plus no-bid contract to one's former boss; and the general exercise of prosecutorial discretion in the area of deferred prosecution:

"I have become concerned about the issue of deferred prosecution in part because of published reports regarding the actions taken by the U.S. Attorney's Office in New Jersey. U.S. Attorney for the District of New Jersey, Christopher Christie, has done an admirable job of enforcing the law and reigning in public corruption. However, it has been recently reported that Mr. Christie announced he had reached a \$311 million settlement to end an investigation into kickbacks being made by leading manufacturers of knee and hip replacements. This settlement reportedly ended a two-year federal probe into allegations that these manufacturers paid surgeons millions of dollars to use and promote their knee and hip replacements, which would constitute a violation of Medicare fraud statutes. Within this agreement these manufacturers agreed to hire a federal monitor, selected by the U.S. Attorney, which would ensure they comply with the law and a strict set of reforms. However, there is little transparency within this provision of the agreement as it could allow the federal monitor to act with impunity while the manufacturers remain under the threat of prosecution.

Furthermore, this agreement raises questions about the discretion of the U.S. Attorney's Office to select federal monitors. In this case, I understand that the U.S. Attorney selected Ashcroft Group Consulting Services, which according to reports stands to collect more than \$52 million in 18 months for its monitoring of Zimmer Holdings of Indiana. Apparently, these compensation agreements for federal monitors are almost never known publicly and were only released in this instance because they were disclosed in the SEC filings for Zimmer Holdings of Indiana. Under the continued threat of prosecution, any party being investigated seemingly has little choice but to agree to the selection of these federal monitors and their exorbitant fees. Therein the selection of these federal monitors by the U.S. Attorney's Office could give the impression of impropriety and political favoritism. While I certainly applaud the prosecution of public corruption cases, the Justice Department has the responsibility to ensure that there is a certain level of transparency and openness in its proceedings....

Therefore, it is clear that the necessary supervision must occur through the federal government, especially by the Congress, to ensure that no abuse of power can occur unchecked. It is with that interest in mind, that I am formally requesting that you hold hearings in the Judiciary Committee on the issue of deferred prosecution agreements entered into by the U.S. Attorney's Office and whether there is a need for further oversight of these agreements."

Questions have also been raised about the propriety of this Republican U.S. Attorney implicating in an Indictment New Jersey's Number 1 Official, who was then an actual or potential political rival of his, without actually charging "Numero Uno." The Number 1 Official in any State is, of course, the Governor, and in New Jersey, at the time of the issuance of this 47 page Indictment referring to "State Official 1" more than 80 times, that would have been the, then still "closeted," Democratic Governor James E. McGreevey, who is alleged therein to have spoken the code word "*Machiavelli*," which the indictee had been lead to believe meant "they knew a deal was in place." "Investigate or cut free," some

had urged, but Christie sat pat, wanting, it is reported, the voters to “draw [their] own conclusions.” *Too Machiavellian?*

The Future of Future Federal Political Prosecutions?

There are all too many other examples of apparent **Federal Political Prosecutions/Persecutions** that could be explored -- The firing of U.S. Attorneys for *NOT* bringing political cases. The refusal to pursue *Contempt of Congress* charges against former members of the current Administration. The federal prosecution in a *Northeast City* of a *West Coast “Pop Hero,”* apparently to take political advantage of differing community standards. The Republican prosecution federally of a *nationally renowned Democrat*, in the same Northeast City, on what appear to be *basically local* (and relatively minor) transgressions, etc. But, the point seems to have already been made! While “Prosecutorial Discretion” is most important when properly administered and utilized, it is becoming too **politicized** and is too often morphing into “*Prosecutorial Indiscretion.*”

We must adopt and institutionalize “**The Jackson Prosecutorial Discretion Doctrine,**” requiring *all* prosecutors, both federal and local: a) to seek “truth and not victims,” b) to serve “the law and not factional purposes,” c) to temper “zeal with human kindness,” “humility,” and “sensitiveness to fair play and sportsmanship,” d) to be “impartial,” and e) to “*protect the spirit as well as the letter of our civil liberties.*”

We must assure that our prosecutors honor founding father Benjamin Franklin’s true wisdom that: “Those who would give up *Essential Liberty* to purchase a little *Temporary Safety*, deserve neither Liberty nor Safety.” **We must “ensure” that in the exercise of Prosecutorial Discretion, “no abuse of power can occur unchecked.”**

This Column is dedicated to the preservation of the U.S. Constitution & the Bill of Rights.

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