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Lessons for all as the Probation Department saga ends

By Harvey A. Silverglate and Daniel Schneider

As the trial of three former higher-ups in the Probation Department began to wind down earlier this month, The Boston Globe published a front-page mini-jeremiad against local patronage written by former Spotlight Team editor Thomas Farragher. What's interesting is that the best explanation of the trial was actually found on the back of the Metro section that day: an obituary announcing the death of James MacGregor Burns.

The famed Massachusetts historian and political scientist had a deep understanding of American politics and, more relevantly, the nature of leadership in a democracy. His 1978 book, "Leadership," describes two major types of leaders found in the political jungle: "transformational" leaders who strive to fully and positively engage the body politic, and "transactional" leaders who simply play the game. Backroom deals, winks and nods, and more than a little horse-trading characterize this second type of leader — not surprisingly, the more common type by far.

Burns' dichotomy has been at the heart of the Probation Department saga all along, although readers of the local press and fans of federal prosecutors could be forgiven for thinking it was about a crime.

Beginning with a Boston Globe exposé in early 2010, the spectacular twists and turns of this tale have managed to expose weaknesses and even outrages among our state governing elites and the institutions they manage. A sprawling report was issued, spectacular accusations breathlessly leveled against a number of state officials, and heads began to roll. Federal charges inevitably were lodged, a judge reluctantly recused himself, a massive list of potential witnesses and more than 30 "unindicted co-conspirators" were brought to light, dozens of people were put on the stand, and over 200 exhibits were introduced.

Now the trial is over, but no one is wondering aloud whether the chosen remedy — prosecution in federal court — was, perhaps, worse than the disease itself.

Few are prepared to defend the political patronage practices highlighted at the trial of former Probation Department Commissioner John O'Brien and his two deputies, Elizabeth Tavares and William Burke III. The fine legal issue at hand was whether the job allocation arrangement, if any, between legislative leaders and Probation Department officials constituted a form of federal bribery, or racketeering, or any other awful-sounding sobriquet connoting a criminally corrupt hiring system.

Even though it was not alleged that anyone — not O'Brien nor House Speaker Robert DeLeo nor their minions — personally put money in their pockets, they supposedly benefitted politically from the hiring system by distributing jobs to friends and supporters of DeLeo in order to assist him in his ultimately successful quest for the

speakership. In return, it was alleged that the Probation Department's budget, and hence O'Brien's power, was protected.

Thus came the allegation that one of many "quos" in this "quid pro quo" arrangement involved saving the Probation Department from sharp budget cuts in 2009 — a critically stupid charge, given the department's eventual 14 percent trim.

There remains an unanswered (unasked, really) but central question in this trial, one that might cause some controversy if anyone had the sense to put it forward: Should this case be considered an act of dangerous overreach by federal prosecutors?

Has this case been an intrusion of federal power into state political culture, and an assault on individuals who could not have been on fair notice that they were committing federal felonies by engaging in political favor exchanges older than the Republic itself? It's an admittedly difficult argument to get anyone to listen to in light of the "ick" factor involved here, a reminder of the old aphorism that one should not observe how either sausages or laws are made. But to ignore it entirely is to turn a blind eye to the inability of the Department of Justice to distinguish true bribery and racketeering from regular political horse-trading.

To be fair, it wasn't the U.S. Attorney's Office that started this circus. After the Globe's Spotlight Team reported that favoritism and politically mandated job allocation had managed to circumvent strictly merit-based hiring in the Probation Department, Supreme Judicial Court Chief Justice Margaret H. Marshall decided to hire an "independent counsel" to look into the mess.

Ware concluded that O'Brien's patronage-driven process amounted to an act of "pervasive fraud against the Commonwealth." Upon its release, a copy of the report

landed in the U.S. Attorney's Office, which was clearly waiting in the wings for the chance to pounce on another state government scandal.

U.S. Attorney Carmen Ortiz's office hardly initiated the tradition of indicting high state officials for what smacked to some locals as just "politics as it's done in Massachusetts." Her administration was preceded by a line of prosecutors eager to transmogrify the grime and grit of state politics into major felonies through the device of exceedingly vague, catch-all federal statutes. By the time she got to her position (due in part, ahem, to the political backing of Massachusetts Sen. Ted Kennedy), the local U.S. attorney had already indicted the past three predecessors to House Speaker DeLeo: Charles Flaherty, Thomas Finneran and Salvatore DiMasi.

Serious students of how the political game has been played between state pols and federal prosecutors surely were not surprised that Ortiz and her underlings were trying to make it four speakers in a row by "climbing the ladder."

In the end something apparently went awry. The feds stopped at O'Brien and named Speaker DeLeo simply as an unindicted co-conspirator. Perhaps, for some reason, the traditional effort to squeeze witnesses — in the words of Harvard Law Professor Alan Dershowitz — both to "sing and compose" didn't succeed this time. In any event, it would now appear that the 34 unindicted co-conspirators are safe due to the expiration of the statute of limitations.

There are many things wrong with this prosecutorial approach, despite its now universal place in the public corruption arsenal of federal prosecutors throughout the country. It unfairly (and unconstitutionally, one could argue) turns a merely unsavory local political culture into a series of major federal felonies, thus violating the "fair

notice" aspect of due process of law. (Criminal statutes, in theory, must be clear as to what they forbid, so that people of ordinary intelligence can conform their conduct to the law's requirements.)

It also requires theoretically stretching opaque bribery statutes and laws like the RICO Act to their breaking point, diminishing the public's faith in the value and power of the law when either the innocent are convicted or poorly planned prosecutions fall apart in court.

On a broader institutional level, prosecutions like these give the feds far too much power to decree how politics should and should not be practiced on the state and local level. That's a threat to the federalist nature of our constitutional scheme, and hence to liberty itself.

Indeed, there was ample legal basis for Judge William Young to have dismissed the indictment from the start had he chosen to look more closely and skeptically. In *United States v. Bass*, 404 U.S. 336 (1971), the Supreme Court, dealing with the constitutionality of the firearms control provisions of the Omnibus Crime Control and Safe Streets Act of 1968, announced that when a federal criminal statute "would mark a major inroad into a domain traditionally left to the States, we refuse to adopt the broad reading in the absence of a clearer direction from Congress."

Applied to the Probation Department indictment, that reasoning surely ought to have required the dismissal of the indictment, since it was clear that the feds have struggled mightily to squeeze these activities into vague categories of "fraudulent" and "racketeering" activity.

It was precisely that problem that prompted Young to deliver to the jury an unusually prolix and complex set of jury instructions — his attempt to clarify legal concepts that, in reality, could not be made clear.

It is true, perhaps even cliché at this point, to say that Massachusetts' political culture is ugly. However, it is supposed to be left up to the state electorate to change that culture if it wishes to do so.

The Bay State has long had an essentially one-party political system and culture, with its legislators regularly ranking among the least challenged in the country each election cycle. Despite the seeming stability of one-party control and dexterity when it comes to passing essential legislation (compared to Congress, anyway), a nasty side effect has been the development of cozy enclaves like the Probation Department, characterized by undue legislative control of patronage hiring and the give-and-take culture that federal prosecutors ominously deemed to be a bribery scheme.

What we need now isn't ham-fisted federal lawyers trying to look tough and pious while engaging in a vast, and dangerous, attempt to expand federal criminal law. We need the "transformational" leadership of the James MacGregor Burns' variety that knows how to "deal with leadership as distinct from mere power holding."

If and when the voters get sufficiently disgusted, they have the power to throw the rascals out and bring in new faces, new parties: Greens, Republicans, Libertarians, Socialists, Independents, etc. They can demand that their elected officials pass a law specifically preventing this sort of shenanigans, or a law introducing into the state hiring process a more rigid and fool-proof civil service test. Violations of such a system can be clearly criminalized under state law.

But the notion that an unelected federal prosecutor can do the job of reforming state politics by twisting vague federal statutes to mean what they say they mean surely would be puzzling and dangerous in the eyes of the Constitution's drafters.

Still, the jury in this case cannot be blamed for its inability to see the deeper meaning of this ill-considered, reckless prosecution. Judge Young, after all, instructed the jury with a complex, difficult set of directions that assumed the conduct involved might indeed violate the outer fringes of federal fraud and racketeering laws.

These fringes are impossible to define. Therein lies the principal danger of cases like this and their outcome.

Harvey A. Silverglate, a criminal defense and civil liberties litigator and writer, is of counsel at Boston's Zalkind, Duncan & Bernstein. He is the author of "Three Felonies a Day: How the Feds Target the Innocent." Paralegal and research assistant Daniel Schneider is a freelance journalist who will be attending law school in the fall. *The authors thank Boston attorney Martin G. Weinberg for reviewing an early draft of this op-ed and engaging them in a discussion of the constitutional issues.*