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O'Brien indictment: the sausage factory and the democratic process

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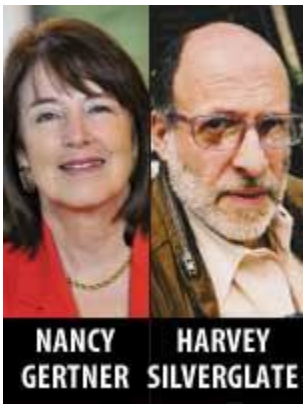

It is said that no one should see how laws or sausages are made. But the occasional unpleasantness of the legislative process is just the stuff of political life in a representative democracy — until the Department of Justice intervenes to recast such activities as federal felonies.

After a series of Boston Globe reports and an official investigation commissioned by then-Supreme Judicial Court Chief Justice Margaret H. Marshall revealed that individuals recommended by powerful legislators and even by judges enjoyed a hiring edge during former Probation Department Commissioner John J. O'Brien's tenure, the U.S. Attorney's Office issued a sprawling indictment against O'Brien for bribery and racketeering.

But while the Probation Department's hiring practices were hardly a model of good government, they were not crimes, at least not under the present federal criminal code.

The deposed Probation Department commissioner is alleged to have hired some 40 individuals to run the then-new sex offender monitoring program. Those O'Brien hired were largely candidates touted by legislative leaders and some judges. In exchange, the Probation Department received special consideration in obtaining the budget it requested. This was not cash stuffed into the

pockets of individual officials, nor exotic vacation junkets, nor hidden bank accounts. These were jobs in exchange for legislators' looking kindly at the agency's budget.

And it is clear that no participants — not the legislative leaders nor the judges nor the probation department officials — believed they were committing a crime. Although cronyism linked to budgetary self-interest may be unsavory, especially in a one-party dominated legislature, it is not the stuff of which federal felonies are made. Yet in the federal indictment, each rejection letter sent to a candidate deemed by prosecutors to have been more qualified than the patronage hire is labeled a separate "racketeering act."

It is hard to find a fair and credible line between "politics as usual" job recommendations made by legislative higher-ups and what the U.S. Attorney, in a superseding indictment on April 24, called "an enterprise" affecting "interstate and foreign commerce" that was run as a "racketeering conspiracy."

Conduct similar to O'Brien's is clearly widespread. As this piece was being written, the New York Times reported on its front page the awarding of jobs by New York Governor Andrew M. Cuomo to the children of personal associates, friends and campaign donors, no doubt in the hopes that they would continue to support him. Some of the appointees are said to have had no experience for the jobs they were filling. Is Cuomo to be indicted, too? How many of us know of large political donors awarded "access" to elected officials, or presidentially-allocated prestigious ambassadorships to some of the world's most coveted garden spots, no matter how minimally qualified?

Is there a state in the nation or a period in our national history going back to George Washington in which government officials — legislative, executive, or even judicial — would not be subject to prosecution under such a large and nebulous definition of "corruption" and "fraudulent pretenses" as the U.S. Attorney describes in this indictment?

Indeed, independent counsel Paul F. Ware Jr., appointed to produce the official report on patronage practices within the Massachusetts Probation Department, admitted that he and the seven lawyers on his staff were operating in a notoriously undefined arena. Ware claimed to recognize that "such recommendations [by government officials] are neither inappropriate nor inconsistent with fairness and objectivity in and of themselves." He also claimed, however, to be able to discern the line crossed when a "well-oiled … machine no longer serves the public interest."

U. S. Attorney Carmen M. Ortiz went further. To her, Beacon Hill's patronage system was not only against the public interest: It was bribery.

Political influence in the allocation of jobs is not new, is not unique to Massachusetts and is common even in federal politics. A vague federal catch-all like "racketeering conspiracy" doesn't make the grade in a nation of laws where, in theory at least, a person is convicted and punished only for engaging in an intentional violation of a known and clear legal duty.

The Feds' grandiose description — calling the probation scheme "racketeering" and "bribery" — squeezes a round peg into a square hole. They have re-characterized the conduct in order to evade the constitutional limitations that are supposed to keep the federal government from dictating what is acceptable in state and local politics. What is the difference between politics as usual and the Probation Department situation? Nothing, from our vantage point.

If the problem of runaway political favoritism is to be solved in Massachusetts, it is up to the legislature to enact laws that will accomplish this. If the legislature refuses, the commonwealth has elections every two years. The ballot box, not an unelected federal prosecutor, is the vehicle established by the drafters of both the state and federal constitutions for correcting problems of political culture gone awry.

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