University of Chicago Legal Forum

Volume 2012 Article 4

2012

Who Watches the Watchers in Public Corruption Cases?

Richard E. Myers II

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INTRODUCTION

Prosecutors managing public corruption[1] cases face numerous longstanding and well-known challenges: potential allegations of political motivation, the possibility of divided loyalties among the agencies or departments that they rely upon to build cases, and defendants who may have more experience with and more access to the news media than the prosecutors themselves. Another critical challenge, and the one that is the focus of this Article, is the challenge presented when attempting to balance two important public interests: the public's concerns as victims and voters on the one hand, and the defendant's right to a fair trial uncontaminated by excessive pretrial publicity on the other. Unlike the ordinary criminal case, where the victim class is circumscribed to the point where the prosecutor can identify and communicate directly with the victims—indeed, they are often her witnesses—in public corruption cases the victims are often the entire venire. Engaging in communication at the level that exists in other contexts would unfairly contaminate the jury pool. One solution to the problem is to permit the prosecutor to serve as the public's proxy. But this approach leaves in place all of the "occupational hazards of the dedicated prosecutor; the danger of too narrow a focus, of the loss of perspective, [and] of preoccupation with the pursuit of one alleged suspect to the exclusion of

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[1] For purposes of this Article, I will adopt the definition proposed by Norman Abrams: "any criminal offense(s) committed by governmental officials related to, or growing out of, their governmental duties." Norman Abrams, *The Distance Imperative: A Different Way of Thinking About Public Official Corruption Investigations/Prosecutions and the Federal Role*, 42 Loyola U Chi L J 207, 211 (2011).

other interests";[2] concerns that helped give rise to the victims' rights movement in the first instance. The hazards are compounded by either valence of the political motivation accusation: the prosecutor is being too lenient as a fellow insider, or too harsh as a politically motivated opponent of the defendant.

This Article proposes a possible solution, one more consonant with the challenges of public corruption cases: choose a panel of victims from the class of affected citizens to serve as a proxy for the larger whole. This solution will ensure that the multiple perspectives anticipated by the victims' rights movement are indeed represented. Choosing public individuals to participate in the criminal justice system is a very old idea—one enshrined in the grand jury and petit jury provisions of the Constitution.[3] But in a world where the grand jury is often silenced by rule (and for good reasons),[4] and petit juries are mostly avoided, this proposal reinserts a public panel as a check on—and inserts the eyes of the public into—the criminal justice process in those cases most affecting public confidence in government.

This Article proceeds in four parts. Part I describes the historic challenges regarding political motivation, public confidence, and pretrial publicity in public corruption cases. Part II describes historic checks and their limits: the press (as the public's proxy) and the historic conflict between its desire to reveal information and the defendant's desire for privacy and right to a fair trial; the special prosecutor; and the existing citizens' proxies, the grand jury and the petit jury—as well as the oversight and limited government motivations behind those institutions. Part III proposes another public participation mechanism—the proxy victim panel—specifically for public corruption cases, and compares it briefly to the rise of the victims' rights movement, and the passage of the federal Victims' Rights Act and its state analogues. Part IV concludes.

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[2] Brief for Edward H. Levi, Griffin B. Bell, and William French Smith as Amici Curiae in Support of Appellees, *Morrison v Olson*, No 87-1279, *11 (S Ct filed Apr 8, 1988) (available on Westlaw at 1988 WL 1031601) ("Morrison Brief").

[3] For a broader discussion of the checks and balances, see Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan L Rev 989, 1012 (2006) ("One of the animating features of the Constitution is its preoccupation with the regulation of the government's criminal powers.").

[4] Grand juries in the federal system operate under the constraints of Rule 6(e) of the Federal Rules of Criminal Procedure, which, inter alia, prohibits disclosure of matters appearing before the grand jury by the members of the grand jury and by attorneys for the government. See FRCrP 6(e)(2)(B). This Rule protects people who might otherwise face opprobrium arising from the simple existence of an investigation, whether or not charges are ultimately warranted.

I. HISTORIC CHALLENGES IN PUBLIC CORRUPTION CASES—PROSECUTION WITHOUT FEAR OR FAVOR

The problem is a very old one: "*Quis custodiet ipsos custodes?*"[5] Who watches the watchmen? It has vexed government scholars since before Plato proposed his Republic, but has not yet been successfully answered. As the saying now goes, it is not important just that justice be done, it must be seen to be done.[6]

We place great power in the hands of prosecutors in the American system. In most states and the federal system, they are the gatekeepers of the initiation of a criminal prosecution. We give them this power because we believe that an impartial minister of justice gives us our best chance at a fair system of criminal justice. But the politicized prosecutor—one who fails to prosecute cronies or gives them the proverbial slap on the wrist, while aggressively pursuing his political enemies for violations real or imagined—has become the stuff of legend.[7] Whether we fear that prosecutors will be afraid to prosecute powerful people, or be politically beholden to them, inaction can be the result of "fear or favor."[8] Obversely, high-level defendants often level charges that the prosecutors pursuing them are engaged in the political version of a "witch hunt," and in some cases there may be truth to the accusations.[9]

Prosecutors do take an oath to pursue justice regardless of the possible risks or benefits.[10] But that oath is only as good as public confidence in the good faith of those taking it. The Platonic ideal suggests that there is no need to guard the guardians. But faith in the ideal is not universal.

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[5] Ascribed to Roman poet Juvenal in the *Satires*. Juvenal, *Satires*, VI: 346–47.

[6] The quotation more fully is often attributed to Lord Chief Justice Hewart, writing in *The King v Sussex Justices*, [1924] 1 KB 256, 259 ("[A] long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.").

[7] See Anthony S. Barkow and Beth George, *Prosecuting Political Defendants*, 44 Ga L Rev 953, 991 (2010) ("Public perception of prosecutions of political actors is particularly sensitive.").

[8] See, for example, Abrams, 42 Loyola U Chi L J at 223 (cited in note 1) ("When a high-level government official at the local, state, or federal level is under suspicion for corruption, the public will often have concerns that political connections may operate behind the scenes to influence law enforcement decisions.").

[9] See Barkow and George, 44 Ga L Rev at 991 (cited in note 7) ("If the public perceives that prosecutors are targeting their political enemies rather than defending the public interest, the public will lose trust in the administration of criminal justice.").

[10] See, for example, Prosecuting Attorneys' Council of Georgia, *Assistant District Attorney Oath of Office* (2012), online at http://www.pacga.org/site/content/53 (visited Sept 10, 2012). See also R. Michael Cassidy, *Prosecutorial Ethics* 4–5 (West 2005).

One way to maintain oversight is political—elect the prosecutors, as many states do.[11] But concerns about the politics of money and cronyism can make that limit feel like cold comfort. United States Attorneys serve at the pleasure of the president—for example, President Clinton summarily fired all of the sitting United States Attorneys when he took office—but there is a political component of firing them for cause.[12] The political uproar over the firing of seven appointed United States Attorneys during the administration of President George W. Bush amply demonstrated the balancing act: a president is supposed to appoint, manage, and control federal prosecutors and set the priorities that the Department of Justice will follow—but will pay a political price if he is perceived to be firing prosecutors for political reasons.[13]

In public corruption cases, where the very essence of the prosecution is an absence of good faith on the part of a government official, the limitations of a claim of "trust me, I promise to be good" are highlighted.

As a society, we value prosecutorial independence—from the defense, from the legislature, from the judiciary, from witch-hunting members of the public—but also accountability to those exact actors (minus the witch-hunters). Managing that balance can be difficult.[14]

II. CONTROL MECHANISMS

As a nation, we have added multiple mechanisms to try to strike the oversight/fairness balance. I will consider, very briefly, several of these, some constitutionally mandated and others added by the legislature. The framers of the United States Constitution were skeptical of the concentration of power, and they sought to solve that problem by dividing power vertically and horizontally, and allocating rights to citizens inside and outside

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[11] See Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 Ohio St J Crim L 581, 589 (2009).

[12] See Associated Press, *Clinton Opens Up About U.S. Attorney Firings* (NBC News Mar 26, 2007), online at http://www.msnbc.msn.com/id/17801225/ns/politics-decision_08/t/clinton-opens-about-us-attorney-firings/#.Tyq47COJ8ZA (visited Sept 10, 2012).

[13] See James Eisenstein, *The U.S. Attorney Firings of 2006: Main Justice's Centralization Efforts in Historical Context*, 31 Seattle U L Rev 219, 219 (2008).

[14] See, for example, Barkow and George, 44 Ga L Rev at 955 (cited in note 7) ("[P]oliticians and other politically enmeshed actors must answer for the crimes they commit. The problem, however, is that the prosecution of these cases raises the suspicion that prosecutors are pursuing such defendants for their politics rather than for their criminal acts.").

the government: a free press, the grand jury, and the petit jury are all constitutionally protected checks on government power. The legislature has also entered the fray; it has experimented with the independent counsel and expanded victims' rights to confer with prosecutors in criminal cases. I will consider each of these in turn.

A. A Free Press

One oversight mechanism that might be used to solve the interested prosecutor problem is the free press. Operating in public view, prosecutors will be subject to all of the political checks and balances that constrain other functionaries. However, there is a countervailing question—the fair trial right of the defendant—and the balance is often struck against the press.

Pretrial publicity is a good thing if you are a member of the public who wants to know what the government is doing. It respects the values embedded in the First Amendment to the Constitution, permits the public to know and understand what the prosecutor is thinking and doing, and promotes good government generally. It is also potentially a bad thing. If you are the defendant, defense counsel, an advocate of fair trials for defendants, or a believer in decisions on the merits in criminal cases, then the values enshrined in the Due Process Clause of the Fifth and Fourteenth Amendments and the fair and public trial values of the Sixth Amendment would lead you to oppose pretrial publicity, which places those values at risk.[15] Balancing the First and the Sixth Amendments is no easy task.[16]

The pendulum has swung back and forth over time. In what may be fast becoming a relic of a time when jurors came from a single slice of the populace, the Supreme Court once observed that the press plays a crucial role in bringing attention to important cases:

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[15] See Cassidy, *Prosecutorial Ethics* at 115–26 (cited in note 10) (discussing the complex relationship in a chapter entitled "The Prosecutor and the Press"). See also Scott M. Matheson Jr, *The Prosecutor, The Press, and Free Speech*, 58 Fordham L Rev 865 (1990).

[16] For example, Justice Holmes, in *Patterson v Colorado*, 205 US 454 (1907), suggested waiting until the trial is over to go to the press. "When a case is finished, courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied." Id at 463. See also *Sheppard v Maxwell*, 384 US 333, 363 (1966) (finding a Sixth Amendment violation and overturning a defendant's conviction based on pretrial publicity and the atmosphere at trial); *Gentile v State Bar of Nevada*, 501 US 1030, 1033–34 (1991) (finding that First Amendment concerns rendered a statute regulating attorney speech unenforceable).

> [E]very case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits.[17]

The system handles those challenges through voir dire, which is designed to weed out not those who have some opinion, but those who can no longer decide fairly. And fairness is the central question.

The American Bar Association adopted Rule 3.6 of the Model Rules of Professional Conduct to address the balance between public knowledge and the danger of unfair prejudice.[18] It provides in pertinent part:

> A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.[19]

Limiting the restriction to statements that will have a "*substantial likelihood of materially prejudicing*" the case respects some of the First Amendment concerns, but many prosecutors are cautious about saying anything that falls outside the litany of facts pertaining to the investigation and charge that are expressly permitted by the rule.[20]

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[17] *Reynolds v United States*, 98 US 145, 155–56 (1878).

[18] See ABA Model Rule of Professional Conduct 3.6 (2011).

[19] Id at (a).

[20] Rule 3.6(b) permits the prosecutor to provide the following:

> (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
> (2) information contained in a public record;
> (3) that an investigation of a matter is in progress;
> (4) the scheduling or result of any step in litigation;
> (5) a request for assistance in obtaining evidence and information necessary thereto;
> (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
> (7) in a criminal case, in addition to subparagraphs (1) through (6):

While prosecutors are rarely disciplined, there have been high-profile cases involving prosecutor discipline for precisely such conduct.[21] In *Gentile v State Bar of Nevada*,[22] in an opinion by Justice Kennedy, a five-member majority of the Court overturned on vagueness grounds the criminal conviction of a defense lawyer based on statements he had made while acting as defense counsel.[23] The Court based its decision in part on the difficulties that the lawyer faced in determining whether he fell within the safe harbor permitted by law.[24] Gentile held a press conference the day after his client's indictment, accusing a police officer, rather than his client, of engaging in the theft and drug activities with which Gentile's client was charged.[25] A different majority of the Court, in an opinion by Chief Justice Rehnquist, upheld the "substantial likelihood of material prejudice" language in Model Rule 3.6 against a First Amendment attack.[26]

However one feels about the balance ultimately struck by Model Rule 3.6, it is the rule in the vast majority of jurisdictions, and significantly limits the use of voluntary (or mandated) statements to the media as an oversight mechanism for prosecutorial conduct pretrial, even in cases where the members of the public are arguably the victims.

B. The Grand Jury

To bring a federal charge, a prosecutor typically must seek an indictment from a grand jury, and then to convict the defend-

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(i) the identity, residence, occupation and family status of the accused;
(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
(iii) the fact, time and place of arrest; and
(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

Id at (b).

[21] See Laurie L. Levenson, *Prosecutorial Sound Bites: When Do They Cross the Line?*, 44 Ga L Rev 1021, 1040 (2010). For a discussion of the disbarment of Mike Nifong based in part on inflammatory and prejudicial statements regarding Duke University lacrosse players accused of rape, see Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 Geo Mason L Rev 257 (2008).

[22] 501 US 1030 (1991).

[23] Id at 1033–34.

[24] Id at 1057 (discussing the difficulty of determining how to make arguments under the safe harbor).

[25] Id at 1033, 1039–42.

[26] *Gentile*, 501 US at 1075.

ant, she must prove those allegations to a petit jury, with the members of both bodies drawn from the district wherein the crimes were committed. The grand jury is a critical historical institution—it serves as a check on government by placing a panel of citizens between the prosecution and the defendant, and requiring that the prosecutor demonstrate probable cause that a crime has been committed before going forward. Indeed, as Roger Fairfax has demonstrated, for a century and a half, federal courts treated the existence of a grand jury indictment as jurisdictional—federal jurisdiction did not and could not arise in a criminal case unless a grand jury indictment had been secured.[27] This view changed in the 1940s, when the Federal Rules of Criminal Procedure were rewritten to make the grand jury indictment a waivable right of the defendant.[28]

This limitation is actually critical in public corruption cases because collusive prosecutors and politically connected defendants, in cases where there has been a strong public outcry, might collaborate to deliberately undercharge and enter a guilty plea to a lesser crime arising out of a course of conduct. If done well, the collusion could cap the defendant's exposure to a low statutory maximum, removing from the reach of judicial oversight and sentencing much of the relevant conduct, while creating a double jeopardy bar to later prosecution.

This collusion can happen because the Federal Rules of Criminal Procedure (FRCrP) now contemplate bypassing the grand jury altogether in certain cases. According to FRCrP 7, "An offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant—in open court and after being advised of the nature of the charge and of the defendant's rights—waives prosecution by indictment."[29] The ability to waive indictment and proceed via information allows the collusive prosecutor to proceed without the oversight of the public in the form of the grand jury.[30]

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[27] Roger A. Fairfax Jr, *The Jurisdictional Heritage of the Grand Jury Clause*, 91 Minn L Rev 398, 416–23 (2006).

[28] See id at 446.

[29] FRCrP 7(b).

[30] The Advisory Committee notes to FRCrP 7(b) suggest several defendant-protective reasons for permitting the rule, principally related to speedy trial concerns. They do not appear to contemplate the collusive public prosecution problem. See FRCrP 7, Advisory Committee Notes to the 1944 Amendments, Note to Subdivision (b). This risk is cabined if the case is sufficiently high profile that grand jurors are independently aware of its existence and are led by a member that has sufficient initiative to go beyond the ordinary process, which is prosecutor led. In some states, the grand jury can issue an indictment

C. The Petit Jury

Another critical place where the public is permitted to participate in the criminal justice system is the jury trial. The Sixth Amendment to the Constitution, as incorporated through the Fourteenth Amendment, guarantees criminal defendants the right to a jury trial in "serious" cases.[31] This is thought to be a crucial check on government power. However, like the grand jury, this right, too, is deemed to belong to the defendant and is now waivable.[32] Our entire system of plea bargaining and rapid justice as currently constituted depends on that fact.

A politically connected defendant might very well want to avoid trial by jury in favor of trial by a judge with whom he or she has influence. There are some mechanisms through which a prosecutor might assert the public's right of oversight and refuse to consent to such a waiver.[33] However, if the prosecutor is in on the charade, the prosecutor might not assert that right.

In public corruption cases in particular, a defendant might also fear the anger of the public, or fear that a jury within the district will necessarily be composed of victims of the corruption. Other mechanisms, such as change of venue, might recognize both concerns, but need not be invoked. Whatever the motivation, the system allows such cases to be removed from public oversight and a structured plea entered.

D. Independent Counsel

In a subset of public corruption cases involving high-level federal officials, the United States has tried a different solution, establishing a mechanism for appointing an independent counsel operating outside the executive branch, designed to insulate the prosecutor from political pressure.[34] The independent counsel

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on its own, request its own counsel, suggest charges with a reference by a prosecutor, or go to the empanelling judge. In egregious cases its members might go public. See Wayne R. Lafave, et al, *Criminal Procedure* 446–47 (West 5th ed 2009).

[31] See Jeff E. Butler, *Petty Offenses, Serious Consequences: Multiple Petty Offenses and the Sixth Amendment Right to Jury Trial*, 94 Mich L Rev 872, 872 (1995).

[32] See, for example, *Patton v United States*, 281 US 276 (1930); FRCrP 23(a) (contemplating waiver of jury trial in federal cases).

[33] See FRCrP 23(a)(2) (requiring the government to consent to the defendant's waiver of a jury trial).

[34] See Ethics in Government Act of 1978 § 601, Pub L No 95-521, 92 Stat 1867 (1978), codified at 28 USC §§ 591–99; Ethics in Government Act Amendments of 1982, Pub L No 97-409, 96 Stat 2039 (1983), codified in various sections of Title 28. For an extensive discussion of the nuts and bolts of the statute's operation, written by someone who served as independent counsel, see generally Donald C. Smaltz, *The Independent Counsel: A*

statute, first passed in 1978, permitted a special panel of the United States Court of Appeals for the District of Columbia Circuit to appoint a prosecutor, outside the traditional government structure. Independent counsel would investigate allegations of wrongdoing leveled against the President, cabinet members, and certain other high officials in the executive branch. The statute was upheld by the Supreme Court against a separation of powers challenge in *Morrison v Olson*.[35] But as Justice Scalia's dissent suggested, removing the independent counsel from political oversight comes with potential costs. A truly independent counsel, unlike a traditional prosecutor, has very limited accountability, a singular focus, and extensive resources.[36] First one political party then the other complained, as their administrations became the targets of independent counsel. Lawrence Walsh ran the Iran-Contra investigation, ultimately focusing on a Republican Secretary of Defense; then Kenneth Starr ran the Whitewater/Monica Lewinsky investigation of a Democratic president.[37] The Independent Counsel Act became highly controversial, and was allowed to sunset on June 30, 1999.[38]

In *Morrison*, Justice Scalia quoted from the brief filed on behalf of three ex-Attorneys General, Edward H. Levi, Griffin B. Bell, and William French Smith:

> The problem is less spectacular but much more worrisome. It is that the institutional environment of the Independent Counsel—specifically, her isolation from the Executive Branch and the internal checks and balances it supplies—is designed to heighten, not to check, all of the occupational hazards of the dedicated prosecutor; the danger of too narrow a focus, of the loss of perspective, of

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View From Inside, 86 Georgetown L J 2307 (1998) (describing his experiences and outlining the history and operations of the independent counsel statute).

[35] 487 US 654, 659–60 (1988).

[36] See, for example, Joseph E. diGenova, *The Independent Counsel Act: A Good Time to End a Bad Idea*, 86 Georgetown L J 2299, 2301 (1998) ("What a dangerous creature we have now loosed upon our system of checks and balances: an independent counsel, removable only for cause, who in a real sense does not answer to Congress, the executive, or the judiciary, and, worst of all, is in no way accountable to the people.").

[37] See Symposium, *The Independent Counsel Act: From Watergate to Whitewater and Beyond*, 86 Georgetown L J 2011, 2011–2389 (1998).

[38] See *A Symposium on* Morrison v. Olson*: Addressing the Constitutionality of the Independent Counsel Statute*, 38 Am U L Rev 255, 255–393 (1989); Sixty-Seventh Judicial Conference of the Fourth Circuit, *The Independent Counsel Process: Is It Broken and How Should It Be Fixed?*, 54 Wash & Lee L Rev 1515, 1515–98 (1997); Symposium, 86 Georgetown L J at 2011–2389 (cited in note 37).

> preoccupation with the pursuit of one alleged suspect to the exclusion of other interests.[39]

The insider's perspective creates those occupational hazards, which may in fact come to fruition in a subset of cases. Public knowledge that such hazards exist leads outsiders to question whether the hazards drove decision making in any particular case, even where they did not.

E. Crime Victims' Rights

The Crime Victims' Rights Act (CVRA)[40] was passed in 2004.[41] The CVRA creates rights of consultation, participation, and allocution for crime victims. "[C]rime victims" are defined as those "directly and proximately harmed as a result of the commission of a federal offense or an offense in the District of Columbia."[42] Specifically, victims must be informed of proceedings; and they may meet with the prosecutor and be heard regarding filing and dismissal of charges, attend trials unless countervailing factors prevail, and be heard at sentencing.[43] Additionally, there is a "right to be treated with fairness and with respect for the victim's dignity and privacy."[44] Perhaps most significantly, the CVRA provides victims with the right to be heard before a judge accepts any plea.[45] The rights may be enforced via a writ of mandamus, which can be sought by the crime victim, the victim's lawful representative, or by the attorney for the government.[46] According to Professor Paul Cassell, such rights "form part of the checks and balances that ensure a properly functioning criminal justice process."[47] Nonetheless, the approach has its critics, who contend that the CVRA might "threaten the fair and just adjudication of a criminal case."[48]

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[39] *Morrison*, 487 US at 731 (Scalia dissenting), citing Morrison Brief at *11 (cited in note 2).

[40] Justice for All Act of 2004, Title I, § 102(a), Pub L No 108-405, 118 Stat 2260, 2261–62, codified at 18 USC § 3771.

[41] Justice for All Act of 2004 § 102(a), 118 Stat at 2261–62.

[42] 18 USC § 3771(e).

[43] 18 USC § 3771(a).

[44] 18 USC § 3771(a)(8).

[45] 18 USC § 3771(a)(4).

[46] 18 USC § 3771(d).

[47] Paul G. Cassell and Steven Joffee, *The Crime Victim's Expanding Role in a System of Public Prosecution: A Response to the Critics of the Crime Victims' Rights Act*, 105 Nw U L Rev Colloquy 164, 181 (2010).

[48] Danielle Levine, Note, *Public Wrongs and Private Rights: Limiting the Victim's*

There are, however, significant impediments to using the CVRA to enforce citizen participation in public corruption cases. Under current regulations, the rights may not arise at all, because the defendant in a public corruption case would most likely be deemed not to have directly and proximately harmed the victims in the class.[49] In such cases, no individual has standing to assert the rights that the CVRA creates.

Second, the CVRA also provides that when "the court finds that the number of crime victims makes it impracticable to accord all the crime victims [the panoply of rights created by the statute], the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings."[50] The courts have significant leeway to permit the attorneys for the government to avoid many of the CVRA duties where the class is large and fully involving its members would be unwieldy. In practice, this may mean that the public is excluded altogether.[51]

Given these significant limitations, the CVRA as it now stands is not the solution. But it offers a model that can be readily adapted.

III. THE PROXY VICTIM PANEL

Given the limitations of the existing constitutional and statutory schemes, how do we reassert citizen oversight over this subset of cases that has the potential to powerfully affect the public's perception of governmental legitimacy?

Congress and the several states should pass statutes that require prosecutors in public corruption cases, and other cases affecting public confidence in the operation of government, to assemble a proxy victim panel drawn from the geographic area affected by the accused's corrupt behavior. The panel would serve as a stand-in for the entire class of victims. That means that the proxy victim panel in a case where the governor is accused of

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Role in a System of Public Prosecution, 104 Nw U L Rev 335, 361 (2010).

[49] For a discussion of these issues in the environmental context, see Judson W. Starr, Brian L. Flack, and Allison D. Foley, *A New Intersection: Environmental Crimes and Victims' Rights*, 23 Nat Resources & Envir 41, 43 (2009) ("While some crimes, such as murder or fraud, clearly have a 'direct and proximate' effect on an easily identifiable victim, discerning who the 'victim' is in an environmental crime case poses a greater obstacle—an obstacle not contemplated by the statute itself.").

[50] 18 USC § 3771(d)(2).

[51] See generally Starr, Flack, and Foley, 23 Nat Resources & Envir 41 (cited in note 49) (discussing such cases in the environmental context).

public corruption would be drawn from all adults in the state. Where a county commissioner was accused, the proxy victim class would be drawn from her county; or for an accused mayor, from the city or township. They would be permitted to exercise the full panoply of rights contemplated by the CVRA in other cases.

The proxy victim class would be permitted to consult with the prosecutor, to allocute at sentencing, be heard before the entry of any plea, and would ultimately be able to report back to the press and public post-conviction regarding the nature and quality of the decisions that went into the prosecution. In effect, they would serve precisely the same oversight and public education functions that the grand jury and petit jury serve, but in a different venue.

Requiring the government to assemble a small proxy class from the voters and drivers' license rolls in the affected area—the area where the accused was responsible for implementing the government action at issue—would not be onerous. Such consultation takes place now in most classes of serious crime. Prosecutors have experience dealing with emotionally charged victims who have been directly harmed in those cases, so the new subset would not require learning new skills. Most jurisdictions have mechanisms in place, in the form of a victims' rights coordinator, to handle the mundane tasks such as notification and scheduling.

As conceived, the members of the proxy panel would be drawn from volunteers in the identified victim class. One issue that requires further thought is the potential self-selection biases that might arise. Victim participants in proximate harm cases are currently self-selecting. No one need exercise his or her rights under the CVRA. Seeking volunteers to serve as representatives on the proxy panel may create unforeseen skewing effects.

IV. CONCLUSION

Public corruption cases are critically important. They are the point at which we can expect the public's faith in government to be at its lowest ebb. They are also a point at which the who-watches-the-watchmen question becomes particularly salient. We are blessed in the United States with a dedicated staff of professionals in our criminal justice system and a deep commitment to the rule of law. Many prosecutors have personal reputations for integrity that are of the highest caliber. But not all prosecu-

tors have such reputations. And there may well be cases where politically connected defendants suffer from politically motivated prosecution or benefit from sweetheart deals.

Our system has over time reduced citizen oversight through professional prosecution instead of private prosecution, and the interpretation of the constitutional provisions of grand jury indictment and jury trial as defendants' rights that can be waived. There are significant and perhaps irreducible tensions between pretrial publicity and the defendant's right to a fair trial that reduce the press's capacity to serve as a watchdog. The CVRA, which seeks to create participatory rights in victims, is less likely to apply in public corruption cases, where proximate harm requirements limit its application.

But oversight is never more important than in public corruption cases. By creating and enforcing public participation rights on a manageable scale, the proposed proxy victim panel will help ensure that, over time, victims' voices will be heard. The public's interests will be protected through the addition of multiple perspectives. Prosecutors will be partially protected by that oversight from later charges of self-interest, and public confidence will hopefully increase. And in the end, justice will be seen to be done.