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Dynamic Analysis of Harmonious and Conflicting Interests Shows The Fallacy of Citizen Grand Juries as The Remedy to Prosecutorial Partiality, and Points to The Need for Strategic Thinking to Devise a Strategy For Exposing Judges' Unaccountability and Consequent Riskless Abuse of Power and Advocating Citizen Boards of Accountability

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A. Citizen Grand Juries said necessary for impartially holding people accountable

1. What they are meant to be and achieve

1. Citizen grand juries have been proposed as the solution to the problem of state and U.S. attorneys who in order to advance their personal and political party interests fail to enforce the law fairly and impartially on all people, particularly the well-connected and well-off, supporters and adversaries, and those whom the media have drawn into the public light so that the decision whether to prosecute them results from consideration of public opinion rather than legal merits. While

today's grand juries are empaneled by the authorities, these juries are supposed to be formed by citizens on their own initiative and empowered to prosecute their indictees. Their superiority is said to lie in the citizens' honesty, freedom from career ambitions and partisan bias, and commitment to advancing the public interest through impartial application of the rule of law. They are advocated by many who complain about abusive judges(jur:5§3), whom prosecutors do not dare investigate, let alone prosecute. Held unaccountable, judges risklessly abuse their power in their own interest[213], including the abusive judicial handling of the prosecution of any defendant. It follows that being able to investigate and prosecute judges is a prerequisite to conducting all other prosecutions rightfully. So these juries are intended to subject judges to investigation and prosecution and even hold them liable to compensate their victims.

2. Therefore, it is pertinent to ask whether citizen grand juries, regardless of whether formed under any currently proposed statute or by citizens invoking a law or case law found in historical legal annals, would be effective in achieving their intended objectives to the point of justifying the effort, time, and money that already has been, and will have to be, invested to secure them.

2. Dynamic analysis of harmonious and conflicting interests

3. To determine whether citizen grand juries will be effective, they must be analyzed in the context of the political and judicial systems in which they are supposed to be formed and operated. A most apt intellectual tool to undertake such determination is "dynamic analysis of harmonious and conflicting interests in an interpersonal system". This analysis seeks to determine who has an interest in favor of or against the subject being analyzed –here citizen grand juries– and how those interests change whenever a member of the system formed by persons –here grand jurors, politicians, judges, lawyers, litigants, voters, etc.– is introduced into, or eliminated from, it or one of their interests becomes more or less likely to be, or is, satisfied or denied.

4. The graphical representation of these persons as related by their interests integrates them into a sociogram that depicts a system. It is a living, evolving one, for neither the persons nor their interests are static. They are constantly changing as alliances and enmities between the persons weaken or strengthen in response to changes in their interests that modify each other or are modified from the outside. So the system is permeable since changes are intrinsic to it or occur in reaction to extrinsic forces and events. Any change requires that the degree to which all remaining interests are in harmony or conflict with each other be measured anew. The system's persons and their interests are reconfiguring themselves all the time like a kaleidoscope: As the tube containing the colored glass pieces is rotated by the hand outside, the pieces tumble, forming chromatic patterns more or less harmonious. So the system must be continuously analyzed to take into account the constantly changing persons and interests. That is why the analysis is dynamic.

3. Strategic thinking

5. The product of dynamic analysis of harmonious and conflicting interests is greater and updated understanding: How and why the persons and interests in the interpersonal system relate to each other as they do at a given point in time. In turn, that understanding is the basis for the action to be recommended or taken by the analyst. Devising a plan of action is the purpose of strategic thinking. It determines what to do in the short and long terms to maximize the chances of advancing one's interests so as to achieve one's end interests, that is, one's objectives.

6. Strategy is devised by taking into account the weakening, unchanged, or strengthening interests of the persons still in, or new to, the system and those who can be caused to join or exit it, and by affecting the degree to which their interests are harmonious or in conflict with each other. The

analyst-strategist should produce a plan of action intrinsic as well as extrinsic to the system and reasonably calculated to achieve the intended objectives.

4. What a citizen grand jury must do for its indictment to be effective

7. Let's assume that the enormous and courageous efforts of advocates of citizen grand juries are crowned with success: There are states where citizen grand juries have been empaneled as well as others where citizens on their own initiative can gather and form grand juries; and both types can investigate any persons and entities as to whom there is probable cause to believe that they engaged in abuse, including judges, and return indictments against them. However, neither investigating nor indicting a suspected abuser is the objective of a citizen grand jury. Their advocates are interested in those juries being capable of obtaining orders of discipline and executing them on the persons indicted, including judges, and obtaining orders of compensation for their victims and ensuring that the compensation is actually provided, including, when applicable, jointly and severally by judges and their respective judiciary. Investigating and returning indictments are only steps in the process leading to such discipline and compensation orders and their execution. The indictment itself is merely an accusatory document that neither disciplines any defendant nor provides compensation to any victim. It simply sets forth the charges against the defendant. A prosecution of those charges must be conducted, the case must be sent to the trial jury, and the latter must return a favorable verdict, one that is not set aside by the judge but rather is followed by an appropriate sentence by her that is executed in its entirety.

8. Who has an interest in this process neither starting nor running its full course? To begin with, the defendant. And when the defendant is an abusive judge, who else? Let's see.

B. Judges involvement in abuse of power by commission and condonation

9. Currently, the prosecution of an indictment is either as a matter of fact or law the exclusive prerogative of district or U.S. attorneys, that is, of law enforcement authorities. However, let's assume that a citizen grand jury has been empowered to prosecute its indictments. At present, such prosecution would be conducted in court. That is precisely the turf of judges. Both the indicted and the sitting judge are members of a class: the class of judges(52§c). This is similar to a policeman being a member of a class, to wit, the police force to which he or she belongs. Just as police abuse, e.g., use of excessive force, is said to be protected behind a blue wall of silence, judges' abuse(133§4) is protected behind a black robe curtain: the secrecy that pervades federal judges' adjudicative, administrative, policy-making, and disciplinary decisions; their refusal to appear at Q&A press conferences; and their unaccountability to lawmakers, such as Congress, law enforcement authorities, such as DoJ-FBI, the media, lawyers, etc.(Lsch:2)

10. As a member of that class, the sitting judge may have known personally or by reference other judges, including the indicted one, for 1, 5, 10, 15, 20, or more years. During that time, they have learned directly or by word of mouth of each other's accidental or intentional breaches of duty serious enough to amount to abuse. It is also possible that the sitting judge had no knowledge of the indicted judge's abuse before reading about it in the indictment. But by exercising due diligence to discharge his shared institutional duty to safeguard the integrity of the judiciary and of judicial process, the sitting judge would have learned about that or other types of abuse of the indicted judge or of any other judge if only the sitting judge had asked pertinent questions, investigated, or caused the investigation of what to a reasonable person with his training and knowledge should have appeared suspicious: An act or event, a pattern of conduct, or a coincidence was sufficiently out of order to prompt the normal reaction of a reasonable person

similarly situated: '*This doesn't make sense. What's going on?*' But the sitting judge suppressed that reaction by opting for willful ignorance or blindness: He looked away or closed his eyes of the mind.(90§§b-d). He had an interest in doing so.

1. Judges dominant interest: mutually dependent survival

11. The sitting judge has an interest in remaining a member in good standing of the class of judges.(60§§f-g) To foster his camaraderie with the other judges, he tolerated their abuse, thereby becoming an accomplice after the fact with respect to the committed abuse that he kept concealed knowingly or through willful ignorance or blindness, and an accomplice before the fact with respect to the abuse that he encouraged other judges to commit on the implicit or explicit assurance of impunity through his conniving silence(90§§b-d). As a result, bonds of complicity developed between him and them individually and as a class. The sitting judge is ethically compromised. If he throws the first stone at the indicted judge, it can rebound or ricochet and break his glass façade of integrity. He is bribable and extortionable, whether by the indicted judge or the latter's colleagues and friends. If he conducts a fair and impartial trial that leads to her conviction, he too risks being exposed, accused, indicted, and convicted.

12. The same can happen if one judge tells on another because then the latter can do the same as to the former or as to 'a bigger fish' in plea-bargaining in exchange for leniency or immunity. By domino effect, all can fall under the weight of their own abuse or that which they tolerated and that which they thereby encouraged others to commit. Their common interest is in maintaining the status quo. If the sitting judge fails to steer the case towards an acquittal or a slap on the wrist, the other judges will deem him an unreliable person unworthy of membership in the class. Just as he let one of their own go down, he can do the same to any of them. In self-interest, they will take precautionary measures against the possibility that he may also betray, or 'snitch' on, them to save his own skin. Thus, they will treat him as a pariah and ostracize him(56§e)

13. They will not greet him in the lobby or the elevator or talk to him except as indispensable to deal with court business. In the lounge, they will avoid him and make it clear that he is not welcome if he tries to join them. When they go out of town to the semiannual meetings of the Judicial Conference of the U.S., circuit or district conferences, meetings of classes of judicial officers and employees, private seminars and other judicial junkets for which they want to be unduly reimbursed without complying with the duty to declare it[272], he will not be invited to ride with them or to join them in the chief judge's suite at night to share in delicacies to be washed down with fine drinks distributed by nice waitresses and others and to participate in confidential conversations and tipsy-tongue boasting fit only for reliable partners in abuse. Why would the sitting judge choose to run the risk of being so treated? His interest lies in being deemed loyal to the other class members, with whom he shares his professional life, not to the transient citizen grand jury that is there at the moment but will soon dissolve naturally into powerless individuals. When did you last hear that a public servant gave precedence to duty and principle over his interest in self-preservation and the continued approval of his peers?

14. To protect their pretense of integrity that renders any investigation unnecessary and preserves their unaccountability judges cannot allow it to be known that any of them abuses his or her power. This would show that they are as inclined to abuse as the members of any other powerful class. With greater reason, they cannot allow anyone of them to be prosecuted. That would diminish their standing and threaten their power. That is why the indictment of a judge by a citizen grand jury presents a clear and present danger to them. So the sitting judge will in all likelihood exercise biased judicial discretion at the preliminary hearing to find the indictment

insufficient to bind over the indicted judge for trial. Thereby he will turn it into a mere nuisance of amateurs at the role of players in the legal and judicial system. If for the sake of appearances, he cannot dismiss it then, he will use every other opportunity throughout the course of the case to achieve the same result: impunity. In fact, judges have developed for their protection doctrines of judicial immunity(jur:26§d), although they are contradicted by the U.S. Constitution[192] and the foundational tenet of our republic: In government, not of men, but by the rule of law, nobody is above the law. However, the judges stand in a relation of mutually dependent survival. Surviving is their dominant interest; they will give it precedence over any other consideration.

2. Politicians as protectors of their judges due to harmonious interests

15. For citizen grand juries to be established, elected politicians have to adopt laws to that end. These are the very politicians who up to now have nominated, confirmed, appointed, recommended, and/or campaigned for, the judges.(78§6) In so doing, they pursued their own interests: In exchange, they expected the judges to look favorably on cases supported by such politicians; to pass on to them confidential information that the judges obtained in sealed documents or closed-door meetings; if those politicians or their friends were indicted and prosecuted before such judges or their colleagues, to steer the cases to failure and, if convicted, to impose unjustifiably lenient sentences. Given the importance of these harmonious interests, politicians will not turn against their powerful judicial protégés unless they advance thereby a more compelling interest: not to be voted out of, or not into, office by an outraged electorate.

C. Prosecutors in conflict with judges: the means of judicial retaliation

16. District and U.S. attorneys whose offices lose case after case for whatever reason can only envisage dim prospects of reelection or reappointment. If they indict a judge, never mind prosecute him, they can only provoke the sitting judge to close rank with her fellow judges in defense of herself, the indicted judge, and all the other judges. The resulting massive retaliation by the whole class of judges need not be blatant at all. It can take numerous subtle forms, whether the defendant is or is not a judge and the charges against him or her are civil or criminal:

1. Welcome mat treatment

17. The defendant can be given ‘the welcome mat treatment’: At the reading of the indictment, the judge can find that there is no probable cause to hold the defendant; or at a probable cause hearing she can find likewise; or she can release the defendant on his own recognizance or set bail at all or set it at an unjustifiably low level despite the risk that the defendant may flee the jurisdiction or stay around but fail to appear for trial; or confine the defendant, not to jail, but rather to a ‘club med’ facility, for example, for detoxification, psychological evaluation, or other alleged medical treatment that normally is provided behind bars by prison doctors.

2. Limbo treatment

18. The prosecutors’ files can receive ‘limbo treatment’ by the judges, their clerks, and other court staff: They get lost; or are not entered on the docket allegedly because the filing fee was not paid or a statistical filing form is missing or a coffee spill rendered them unreadable or a decision is being made whether they comply with the formatting rules; or are entered untimely or with the wrong docket number or date or with the parties’ names misspelled so that computer searches cannot find them; or are delivered to the abusive judge; or after redelivery to the assigned judge she puts them at the bottom of her calendar or recuses herself ‘due to conflict of interests’; or the transferee judge in turn transfers them alleging that her calendar is clogged; etc.

3. Biased 'non-discretionary' treatment

19. When the files emerge from limbo, the sitting judges can give them biased 'non-discretionary' treatment, whereby they pretend that under the law 'they have no choice but to…' take decisions that always harm the prosecutors and favor the defense: The judges deny every pretrial motion of the prosecutors and sustain every one of the defense, including dismissal through summary judgment; and decide discovery motions to hinder the prosecutors from investigating their cases to obtain the necessary evidence while allowing the defense to go on an expensive and burdensome fishing expedition outside the scope of the case in search for a counterclaim.

20. If the cases make it to trial, the sitting judges overrule every objection of the prosecutors and sustain those of the defense; hamper and cut short the prosecutors' examination and cross-examination of witnesses and expert witnesses, that is, if they are allowed to take the witness stand at all because they have not been disqualified due to lack of testimony bearing on the case, or for being incompetent, or because of a defendant's privilege, etc. In the courtroom, the sitting judges make gestures that cast doubt on the prosecutors' statements but signal approval of whatever the defense attorneys say; the judges can meticulously abstain from making comments to the same effect, which would be taken down by the court reporters and could be used by the prosecutors to support appeals on grounds of lack of impartiality. Before the transcriptions of court proceedings are released, the sitting judges redact them accordingly and release doctored versions that are poisonous to the prosecutors' cases and a balm to those of the defense.

21. During trial, the judges can qualify their decisions as not final and thus, not appealable, or as final, and appealable, so as to harm the prosecutors and favor the defense. Interlocutory appeals can drag out a case, during which time the memories of witnesses can fade and their commitment to the cases can subside or they can move away, die, or be pressured into recanting. A non-final decision can keep the trial going forward under unfavorable conditions for the prosecutor and favorable ones for the defense. After prosecutors rest their cases, judges can sustain a defense motion to dismiss due to the prosecutors' failure to make out the elements of their cases.

4. Damning instructions and blessing sentence treatment

22. If the judges allow cases to go to the jury, they can phrase their instructions to make it appear that as a matter of law the acts of the defendants did not meet the requirements of the charges and an acquittal should be returned. If the verdict is for the prosecutors, the judges can enter judgment notwithstanding verdict on motion of the defense or of their own. If judges proceed to sentencing, their sentences can be so mild as to be irrelevant or jail sentences can be suspended or deemed extinguished by time served by the defendants since their arrests. If there are appeals, the judges can continue defendants' bail or release them on their own recognizance.

5. Conflict with little to gain for prosecutors and everything to lose

23. Judges' plentiful retaliatory means can establish that they are in practice beyond prosecution: untouchable. Prosecutors realize that they have little to gain by prosecuting one judge while risking all their other cases before all the other judges. Their interest lies in being on good terms with each judge and certainly with the class of judges. If they cannot avoid indicting and prosecuting a judge, e.g., due to public pressure, they are likely only to pretend to be doing so while steering the case to an acquittal or token discipline. If citizen grand juries depend on prosecutors to proceed with their indictments against judges, their indictments will be treated with the greatest reluctance and given the lowest priority, that is, if they are not dismissed by prosecutors' exercising prosecutorial discretion to decide which cases to prosecute. Any prosecution will be in

all probability ineffective in disciplining the abusive judges, let alone obtaining compen-sation for their victims. The citizen grand juries' work will be turned into an exercise in futility.

6. Citizen grand juries as prosecutors

24. Let's assume that some jurisdiction empowers citizen grand juries to prosecute the judges that they indict. They will be all but doomed to fail not only at the hands of those judges' peers. Since the overwhelming majority of the jurors have no formal legal training, they will in all pro-bability also fail at the hands of another formidable foe: their own ignorance of substantive and procedural law and litigation tactics. They will be confounded by the sheer complexity of the law from the outset of their dabbling in it and their fumbling with the provisions that they invoke, if they invoke any rather than rely on their own notions of justice, their outrage in sympathy with other laypeople that have been abused by judges, or their own hurt from being their victims.

25. Advocates of citizen grand juries commit a gross miscalculation if they are counting on laypeople, whether jurors or not, to prosecute the people indicted by the juries, let alone indicted judges. The latter will not only know the law more than enough to represent themselves, but will also know the best lawyers in town and have access to them. It is in any lawyer's and law firm's interest to represent a judge. Becoming privy to the judge's information surrounding the charges against him and how he, his clerks, his fellow judges, and the court staff work will be more than enough pay. If the lawyer is successful in representing the judge or at least the latter is satisfied with her representation, the lawyer will have an invaluable friend in that judge and access through him to other judges and to unpublished, if not inside, information about them. Laypeople who think that they can take on a lawyer, let alone a battery of the best and brightest lawyers at top law firms eager to defend judges, reveal their incapacity to realistically assess the abilities and limitations of themselves and others, and what is necessary to prevail in a confrontation.

26. If advocates of citizen grand juries are counting on hiring lawyers, where will the money come from to pay their attorney's fees, discovery expenses, expert trial services, etc.? What quality of lawyers and with what experience and career prospect will undertake an all but hopeless prosecution of a judge and run the all but certain chance of becoming the nemesis of all judges?

27. Advocates of citizen grand juries can invest in their noble quest for Equal Justice Under Law a great amount of effort, time, and money, be successful in securing their establishment, only to lose every prosecution at the hands of judges or their own laypersons' hands. They rely on the reality-disconnected idea that all one needs to deal with public servants who abuse their power and disregard the law is honest, God-fearing people with high moral values and an unwavering commitment to our Constitution and the rule of law. Their advocacy betrays a failure to think through from the necessary legislation to the sentencing of defendants through the identification of the players, the detection of their interests, and the dynamic interplay of those harmonious and conflicting ones that provides the basis for devising a strategy to be implemented through a plan of action. Even that does not begin to address the issue of who pays for what kind of compensable harm to what kind of victims. Despite being well intended, advocates of citizen grand juries run a fool's errand as they lapse into delusional wishful-thinking.

28. In the interest of sparing themselves such waste, they should review their quest against a proposal anchored in facts and precedent. That proposal does include a citizen board of judicial account-ability and discipline created through legislation with the investigative and reporting duty and subpoena power of a grand jury and the fact-finding duty of a trial jury, and disciplining power. But other details(160§8) and the proposed path(next) to that legislation make a fundamental dif-ference because they change the legal and judicial context in which those boards would operate.

D. Proposal for exposing judges' abuse and leading to judicial reform

1. Strategic thinking: need for the media and an outraged national public

29. The strategy proposed here is based on exposing, not one abusive judge at a time, but rather using one test case that reveals how the class of judges has abused its power in such routine, widespread, and coordinated fashion(21§§1-3) as to have turned abuse into their institutionalized modus operandi(49§4). That case should be national in scope, for what happens in the judiciary of one state is of little relevance to the people of another. So it must be a federal case and implicate Supreme Court justices(71§4) in participating in, or condon-ing, criminal activity, not in exercising questionable, but permissible judicial discretion. That will cause national outrage. It should be conspicuous so as to convince the media that public interest in the case warrants a large investment of money, manpower, and air time/print space to investi-gate it and publish findings over a long period of time. This will satisfy the media's interest in higher viewership/readership and advertisement revenue. A long-running story can keep building public pressure to force Congress, DoJ-FBI, and their state counterparts to open official investigations into judicial abuse. By using their subpoena, search and seizure, contempt, and penal powers, and holding public hearings, the authorities can make other findings that will so further outrage the public as to empower it to coerce politicians, lest voters frustrate their interest in a political career, into undertaking substantial legislated judicial reform. That is the strategy.

30. It is based on the public's current profound distrust of government(ol:11), which makes it more prone to believe that public servants were involved in yet another scandal. It is also based on the power shown by the Tea Party to force politicians to support its tenets or risk disaster at the polls. It is likewise based on the precedent set by the Watergate Scandal, which began on June 17, 1972, when the so-called "five plumbers" were caught after breaking into the Democratic National Headquarters at the Watergate complex in Washington, D.C. Their arrest evolved into a generalized media investigation that dominated the news for years. It discovered political espionage orchestrated by the Republican Committee for the Reelection of President Nixon. Mounting outrage led to the nationally televised Senate hearings that exposed the involvement of all of Nixon's White House aides in a cover-up through further abuse of power. It caused the President to announce his resignation on August 8, 1974. The Watergate Scandal(jur:4¶¶10-14) prompted the adoption of significant laws to ensure more transparency and accountability of the federal government and its officers[107d]; those laws served as model for state legislation.

2. A unique and outrageous national case: the Obama-Sotomayor story

31. Such national outrage can be provoked by a test case(xxxv) founded in articles in *The New York Times*, *The Washington Post*, and Politico[107a] that suspected Then-Judge, Now-Justice Sotomayor of concealing assets[107c], which is a crime[10](26usc7206). President Obama could also learn about it through the FBI report on the vetting of her as a justiceship candidate, but disregarding it, vouched for her integrity(77§5): He wanted to ingratiate himself with voters interested in another woman and the first Latina on the Supreme Court and from whom he expected in exchange support for his key personal and political interest: the passage of the Affordable Health Care Act (Obamacare). The involvement of a sitting president and a sitting justice nominated by him in concealment of assets and its cover-up can so outrage the public as to set in motion events harmonious with the interest of advocates of citizen grand juries in legislation to ensure the impartial holding of all public officers accountable. The advocates and the other readers can help secure that objective by making possible Dr. Cordero's presentation of the above strategy and his plan of action to implement it through a multidisciplinary academic and business venture(Lsch:9§§A-C).