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The Vindictive Prosecution Defense: Back With a Vengeance?

By Evan T. Barr
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The media has reported that President Donald Trump fired Attorney General Pam Bondi based in part on her seeming inability to prosecute various political adversaries with sufficient vigor. Assuming the next Attorney General ramps up such efforts, we can expect to see some of those targets asserting a vindictive prosecution defense.

Vindictive prosecution claims had their heyday in the 1970s, and courts eventually scaled them back in subsequent years. But with the unprecedented level of chatter on pending criminal matters now coming directly from the White House—including overt demands that political foes be charged criminally—the vindictive prosecution doctrine may be poised to make a comeback.

Origins of the Doctrine

Lawyers and nonlawyers alike frequently misunderstand the concept behind vindictive prosecution. It does not refer to a thirst for vengeance or overt hostility on the part of the government attorney. To be sure, as any veteran defense attorney can attest, many prosecutors are consumed by a Javert-like obsession to bring down a client. But such zeal alone does not create grounds to attack an indictment.

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Evan T. Barr of Reed Smith

Rather, the doctrine (which is grounded in the guarantees afforded by the due process clause) prohibits a prosecutor from using criminal charges to penalize a defendant's valid exercise of his or her constitutional or statutory rights. The doctrine arose from two landmark Supreme Court rulings.

First, in *North Carolina v. Pearce*, 395 U.S. 711 (1969), the court ruled that a trial judge could not resentence a defendant to a longer sentence than had been originally imposed where the defendant was convicted, sentenced, won reversal on appeal, and was then reconvicted and resentenced. To police against such vindictive behavior, the court advanced a rule in which

a stiffer re-sentencing could only occur where the record contained objective facts concerning additional conduct that took place after the initial sentencing.

Then in *Blackledge v. Perry*, 417 U.S. 21 (1974), the defendant was convicted on a misdemeanor assault charge in a state court of limited jurisdiction. The defendant exercised his statutory right to appeal for a trial de novo. The prosector responded by bringing a more serious felony assault charge that encompassed the same conduct for which the defendant had been charged with a misdemeanor in the lower court. The Supreme Court held that this conduct by violated due process, observing that

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"a person convicted of an offense is entitled to pursue his statutory right to a trial de novo without apprehension that the state will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration."

Blackledge created a presumption of vindictiveness to take into account the difficulty in precisely divining a prosecutor's motives. Alternatively, an aggrieved defendant could also establish *actual* vindictiveness by producing objective evidence that the prosecutor intended to punish a defendant for asserting his or her constitutional or legal rights. Generally, that had been the more difficult path given the need to obtain access to information that likely would only be found buried inside government agency files. In the age of Truth Social and X, however, that all may be changing.

Important Limitations

Blackledge and Pearce offered a promising approach for defense attorneys to invoke when prosecutors tried to up the ante on a defiant client. But the Supreme Court subsequently placed some important limitations on the vindictiveness doctrine.

Specifically, in *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), the respondent was indicted on a charge of uttering a forged instrument in the paltry amount of $88.30, an offense then punishable in Kentucky by two to 10 years in prison.

Hayes and his lawyer met with the prosecutor to discuss a possible plea agreement. The prosecutor offered a five-year deal if Hayes simply pleaded guilty to the indictment. If Hayes did not plead guilty, he would go back to the grand jury to seek an indictment under the Kentucky Habitual Criminal Act, which would have subjected Hayes (who had two priors) to a mandatory life sentence. Hayes refused and the prosecutor carried though with his threat. A jury found Hayes guilty and he was sentenced to life.

In the habeas proceedings, the U.S. Court of Appeals for the Sixth Circuit ruled that the prosecutor's conduct during the plea negotiations had violated *Blackledge*. The circuit thus exempted him from serving any jail time beyond that called for under the original charge.

In a 5-4 vote, the Supreme Court reversed. The court held that "in the 'give-and-take' of plea bargaining, there is no such element

of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." A prosecutor was entitled to persuade a defendant to waive his right to trial. The court thus concluded that the conduct at issue, which "no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, did not violate the due process clause …" See also *United States v. Goodwin*, 457 U.S. 368 (1982) (no presumption of vindictiveness where a defendant, after declining to plead guilty to a misdemeanor charge and instead requesting a jury trial, was indicted on a felony related to the same events).

Because of the rulings in *Bordenkircher* and *Goodwin*, courts have rejected most vindictive prosecution claims, other than those involving clearcut retaliation in the context of an ongoing litigation.

Selective Prosecution Distinguished

Defendants invoking a vindictive prosecution claim often allege selective prosecution in the alternative, as if the two concepts were interchangeable. That's understandable given that an individual who feels unjustly targeted may also quite naturally feel singled out for overly harsh treatment as compared to others. But the two claims are distinct.

Mere selectivity in prosecution creates no constitutional problem, as the government has no obligation to prosecute all possible defendants in a case.Indeed, federal prosecutors are encouraged to achieve deterrence by bringing a handful of high-impact cases in lieu of arresting every offender.Similarly, the government does not run afoul of selective prosecution principles when it dusts off an obscure provision of the criminal code to charge a defendant simply because that law rarely has been used against others.

Rather, to prevail on a selective prosecution claim, a defendant must establish: that other persons who are similarly situated to the defendant are not generally prosecuted; that such discrimination was intentional on the part of the authorities and not simply a product of lax enforcement; and that the discrimination in question was based on an arbitrary or invidious classification, such as race, religion, national origin, or the exercise of free speech.

From a constitutional standpoint, vindictive prosecution relates to due process clause considerations whereas selective prosecution is grounded in the equal protection guarantees of the Fourteenth Amendment.

Recent Cases

Defense lawyers have asserted vindictive prosecution claims in recent high-profile cases involving criminal charges filed against former FBI Director Jim Comey, New York Attorney General Letitia James, former National Security Advisor John Bolton and Kilmar Abrego Garcia.

Each of these defendants faced a barrage of disparaging social media posts issued by the president calling for their criminal prosecution in the time leading up to their eventual indictments. Each one essentially claims they were targeted solely because of their opposition to the President and his political agenda. Each one further argues that their prosecution is an attempt to weaponize the justice system to prevent them from exercising legally protected activities.

The charges against Comey and James were dismissed based on irregularities surrounding the appointment of the U.S. Attorney. If a court ever reaches the merits of the vindictiveness claims, Comey in particular faces an uphill battle since the DOJ itself investigated the leaks at issue well before Trump's recent directive for Halligan to indict him. Similarly, Bolton came under investigation for mishandling classified information back during the Biden administration. All the above defendants, moreover, will need to show that Trump's alleged animus properly can be imputed to the prosecutor who made the charging decisions.

While Comey, James and Bolton will probably need to establish actual vindictiveness, Abrego Garcia appears positioned to invoke the presumption of vindictiveness under *Blackledge*, since the facts and the timing suggest he was criminally charged in retaliation for resisting his deportation.

Not every recent case involves a boldface name. In February 2025, Ksenia Petrova, a Russian national and researcher at Harvard Medical School, was detained at the airport by Customs and Border Protection for failing to declare frog embryos she had stowed in her luggage. Immigration authorities then canceled her visa, issued a removal order and transferred her to ICE custody, from which Petrova then sought habeas relief.

A few months later, with the immigration case still pending, the U.S. Attorney charged her with smuggling. Petrova moved to compel discovery from the government (such as policy manuals on border inspections) in support of her contemplated claims of vindictive and selective prosecution, saying she had been targeted based on her Harvard affiliation. Earlier this month, a magistrate judge, noting the suspicious timing of the criminal charges, greenlit the discovery requests.

Conclusion

For practitioners representing clients in the political crosshairs, the current environment (in which elected officials routinely comment on pending matters) offers an opportunity to take renewed advantage of the vindictiveness defense. Although getting an indictment dismissed on these grounds will always be a long-shot, the facts alleged in support of a claim of vindictiveness can also be useful in requesting a jury questionnaire, moving for change of venue, or seeking an admonition from the judge pursuant to the local and ethics rules barring prejudicial out-of-court statements.

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