

The Faculty Lounge

Conversations about law, culture, and academia

February 19, 2013

Paterno, Grand Juries, and Monuments

[Brian Gallini](#) presented a [paper](#) at South Carolina last week analyzing the propriety of state grand jury procedures that follow the practice of presentments and reports rather than the federal system of indictments. Gallini's major concern is that state grand jury presentments often name third parties and make allegations in regard them when, in fact, the third parties are not even the subject of the investigation. Gallini uses the Joe Paterno saga to highlight the problem.

The prosecutors in the Jerry Sandusky case were always clear that Paterno was not the subject of the investigation and would not be charged with anything. Nonetheless, the Sandusky grand jury presentment contained a single, vaguely worded paragraph about Paterno. The presentment stated that Paterno had been told by a graduate assistant that he had seen Sandusky “fondling or doing something of a sexual nature,” and that Paterno reported this. Because presentments are public documents and, unlike federal grand jury documents, are not redacted or sealed, the media gets the opportunity to run wild with any vagueries in the presentment.

In a matter of days, the whole country, based on this single line in the presentment, began speculating about what Paterno knew or did not know, focused on this as much as the actual charges in the case, and assumed the worst in regard to Paterno. Gallini offers this up, not as a defense of Paterno, but to point out that named third parties do not get to defend themselves. Moreover, knowing that naming third parties adds to the profile of a case, prosecutors have incentives to be over-inclusive in presentment. Gallini's basic concern is that there is no check on these presentments, even though they have the capacity to do significant harm to reputations and lives.

This talk reminded me of various posts Al Brophy made last fall about the removal of the Paterno statue from the stadium grounds. If these presentments are overbroad and sometimes careless in their use of words, as Gallini suggests, one ought be skeptical of state action in regard to third parties based on them. The naming of Paterno in the Sandusky presentment was seemingly a major factor that led to his termination and the removal of the statue.

School teachers would not recognize this type of action as new. Several have faced immediate suspension or termination when they are charged with some crime, and courts often have found this does not violate due process. But I question whether the same conclusion follows when the state takes action against third parties. In short, Gallini's paper adds strenght to some of Brophy's concerns about monument removal and the rewriting of history, and my concerns about adverse employment decisions. Even assuming there is a problem here, the real question, of course, is what protective procedures would be appropriate.

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