

**COMPARING U.S. AND FRENCH MODELS OF
CRIMINAL PRE-TRIAL INVESTIGATION**

PARTY-PROSECUTOR v. NEUTRAL *JUGE D'INSTRUCTION*

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Abstract

The criminal procedure of the United States is being exported to France. It started with “pick-and-choose” reforms, such as the cross-examination of trial witnesses and the guilty plea mechanism. In late 2005, a bill was presented to the French legislature to vote on the abolition of the “investigating magistrate” (*juge d’instruction*) and follow the adversarial *Anglo-Saxon* judicial structure, thus transferring his fact-finding role to the public prosecution service.

In France, the preparation of criminal matters for trial is directed, not by the prosecutor with the assistance of investigating agencies, as is the case in the United States, but by a judge, distinct from the prosecutor, who is positioned between the latter and the putative criminal defendant. His *raison d’être* is to uncover the truth through “seeking out both incriminating and exculpatory evidence (*instruction à charge et à décharge*);” he does not take part in the adjudication phase.

This thesis raises the overlooked issue of the impact of the party affiliation of the prosecutor on the orientation of the pre-trial investigation and, consequently, its results. This thesis claims that it is a material determination to make, given (i) the distinctive nature of the virtue of impartiality of the investigating magistrate, (ii) the fact that the impossibility to fulfill such obligation is offered as one of the main justifications for abolishing this institution, and (iii) the conventional wisdom opinion that prosecutors, because they are the charging authority, are biased towards a finding of guilt.

Based on a literature review and qualitative interviews with French investigating magistrates and French and U.S. prosecutors, the purpose of this research is to determine whether a prosecutor collects and weighs evidence differently as compared to a neutral investigating magistrate. The U.S legal system is used as a point of reference.

This “insider” approach has shown that prosecutors and investigating magistrates *share* the same commitment to exhaust the facts of a matter, including seeking out evidence refuting the criminal charge. Logically, they concluded that the neutrality of the investigating magistrate does not represent added value.

Although other viewpoints may contradict these findings, in particular, that of defense counsels, this study clarifies that the choice of a prosecutor-investigator does not result in the confrontation of two opposite versions of the facts, or “half-truths” as it has been argued.

This study shows nonetheless that material differences exist in the operation of the two models which relate to the respective significance granted to the voice of the putative criminal defendant and this of the public authority in the pre-trial phase.

Such insight over the U.S. experience will further help shaping the reform of the French criminal justice system in the respect of its value system.

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CHAPTER 1: INTRODUCTION

The criminal procedure of the United States is being exported. Statute n° 2002-204 of June 15, 2000 entitled Reinforcing the Protection of the Presumption of Innocence and the Rights of Victims introduced a form of cross-examination of trial witnesses in the French criminal justice system and Statute n° 2004-204 of 9 March 2004 Adapting Justice to the Evolutions of Criminality, adopted the mechanism of the “guilty plea” (*comparution sur reconnaissance de culpabilité*).

Concurrent with these “pick-and-choose” reforms has been a U.S.-inspired challenge to the structure of the French criminal prosecution and investigation model. On November 9, 2005, members of one chamber of the French parliament (*Assemblée Nationale*) proposed eliminating the “investigating magistrate” (*juge d’instruction*).¹ In stating the purpose of their bill, they explained that:

[a]mong the topics which nurture the debate about justice, the replacement of our inquisitorial criminal procedure, whose emblematic character is the investigating magistrate, with a proceeding of the accusatorial type, *where the police or the public prosecution service [NB: Ministère Public] is in charge of searching for evidence* and where disputes are settled by a judicial independent authority, is the most ancient and recurring topic. (Emphasis added)²

To measure the significance of the reform suggested – to vote on the abolition of one French institution, the investigating magistrate, and to transfer his investigation powers to another existing institution, the public prosecution service (and/or the police) –³, one can refer to the common saying from Napoléon or Balzac “the investigating

¹ Bill n° 2659. The bill has not been discussed in the Assembly yet; it is under examination by the Commission of Constitutional Laws of the Legislation and the General Administration of the Republic, which will issue a report when its work is completed (not released as of April 25, 2007).

² Other imports from the U.S. system have been made or are pending review in France (e.g. class action). Other civil law countries are following the same trend, in particular Italy and Germany.

magistrate is the most powerful man in France;”⁴ the investigating magistrate has also been qualified as “[one of the] two pillars of French legal culture.”⁵

Such initiatives follow the judicial disaster of the *Affaire d’Outreau* three years ago in France. This case was open subsequent to accusations of sexual assaults proffered by children and implicated adults. Dozens of people have been investigated; 18 were put in preventive detention for up to three years, one of whom committed suicide, and kids were removed from parental custody. 17 persons were referred to the court for trial at the close of the investigation. At trial, most of the accusations were found to be lies. Ten of the accused were declared “not guilty” at the close of the first-instance trial in July 2004, and six more were also found innocent in the appeal proceeding in December 2005. Five years after the start of the investigation, only four people were ultimately convicted. A massive public outcry followed. For the first time in French judicial history, the highest public authorities of France apologized to the innocent.⁶ On December 7, 2005, a parliamentary commission was formed to inquire into the causes of the malfunctioning of justice in this case and to formulate proposals to avoid repeating them. The commission issued its final report on June 6, 2006, in which 80 proposals were made to rectify French criminal procedure.⁷ In particular, the commission answered the question regarding

³ The bill also provides that the jurisdictional powers of the investigating magistrate would be exercised by another institution. However, this thesis focuses exclusively on the fact-finding role of the investigating magistrate.

⁴ The paternity is disputed.

⁵ A. Garapon et I. Papadopoulos, *JUGER EN AMERIQUE ET EN FRANCE*, Paris, Ed. O. Jacob, 2003, p. 29. The other pillar is the Council of the State (*Conseil d’Etat*).

⁶ On December 1, 2005, the Prime Minister recognized “in the name of the Government, in the name of the State, the fault which has been committed” and on December 5, 2005, the President of the French Republic wrote to the non-guilty “in the name of justice, which I must guarantee, I would like to present regrets and excuses in the face of what will have been a judicial disaster without precedent.” The Minister of Justice and the Attorney General of the Paris court of appeals apologized as well.

⁷ Accessible at www.assembleenationale.fr.

whether “the investigating magistrate must be suppressed.”⁸ The first sub-question examined by the Commission was whether “an adversarial procedure [should] be introduced?”⁹

Within this context of pressure to replace the investigating magistrate with the public prosecutor in the pre-trial fact-finding phase of criminal matters, this thesis offers to inform the debate by focusing on one feature of the investigating magistrate, that is, his duty to investigate both to establish the charge and to disprove the charge (*instruction à charge et à décharge*). This thesis raises the issue of the implications of joining the prosecution and investigation functions in the hands of the prosecutor with respect to the orientation of the investigations, showing that the proponents of the reform ignore the question. This thesis claims that because the neutrality of the investigating magistrate is considered to be essential, and because one of the main justifications to abolish this institution is that maintaining such a virtue in reality is impossible, the expectations of the role that a prosecutor-investigator should play, must be clarified. This is all the more important in that the common wisdom opinion is that prosecutors are biased towards guilt. Through interviews of investigating magistrates and prosecutors and using the American judicial system as a point of reference, this thesis sought to determine whether a prosecutor, because he is the charging authority, would carry out his fact-finding functions differently as compared to an investigating magistrate. This very original perspective, pinpointing the issue of the impact of the party status of the prosecutor on the conduct of the pre-trial investigation and trying to answer this question through empirical research, is the added value of this thesis.

⁸ Outreau Commission Final report, p. 337.

⁹ *Ibid*, p. 338,

At this point, and as an *aparte*, the French pre-trial criminal procedure in force today¹⁰ needs to be described further and to be put in perspective with its competitor, the common law system and, more specifically, the U.S. *federal* model.¹¹ Only the legal framework is laid out; the practice is not discussed yet.

In the United States, the public authorities involved in the pre-trial phase of a criminal case are primarily (i) the prosecutors (known as U.S. Attorneys), and (ii) investigative agencies, such as the Federal Bureau of Investigation (F.B.I.) (individually referred to as “special agents” or “agents”). These authorities are all members of the U.S. Department of Justice (thereafter “D.O.J.”), within the Executive branch of the government. Occasionally, when measures imposing on the freedom of individuals, such as arrest warrants, are necessary, the authorization of a court must be obtained — however, this falls outside the scope of this thesis, which focuses on the *mindset* of prosecutors and investigating magistrates, rather than on actual investigative measures and their procedural framework, and will not be examined further.¹² The U.S. Attorneys are the prosecuting authority filing and advocating criminal charges in court. The agents are in charge of making the factual findings; they can act on their own leads or upon the request of the prosecutor – when he is first informed of some suspicious activities or

¹⁰ The Statute n° 2007-291 of 5 March 2007 Tending To Reinforce The Balance Of The Criminal Procedure reformed significantly the rules of criminal procedure. Such changes, which will enter in force at the earliest on July 1, 2007 and at the latest on January 1st, 2010 depending on the provision, will be revealed as relevant in the courts of this thesis.

¹¹ The British model and the U.S. states’ individual systems, although surely informative, are not examined in this thesis.

¹² Likewise, to simplify the description, it is assumed that the investigation does not start with the arrest of the alleged criminal defendant. Consequently, Miranda rights and the preliminary hearing are not described herein.

needs supplemental information.¹³ If coercion is needed to collect evidence, a jury of laymen, known as the Grand Jury, can authorize the prosecutor, assisted by the agents, to subpoena witnesses to testify or produce documents. When the prosecutor, exercising his discretion, estimates that criminal prosecution is appropriate, he must show the Grand Jury, that there is probable cause that a crime has been committed. If he succeeds, the Grand Jury issues the indictment, which the prosecutor will file in court within 70 days. The putative criminal defendant becomes a *party* at the time of the indictment. From that moment, he acquires a series of constitutional procedural rights, either autonomous or enshrined in the Due Process Clause, including the right to appointed legal counsel (6th Amendment), the right to access some documents of the prosecutor's file, in particular exculpatory evidence, the right against self-incrimination (5th Amendment), the right to confront witnesses (Compulsory Process Clause), etc.

In France, similar to the U.S., the prosecutor (*Procureur de la République*) holds the charging power, whereas the preliminary factual findings are compiled by the police,¹⁴ who report to the prosecutor. When the suspected criminal activities are complex and/or serious, the prosecutor must, or may depending on the seriousness of the suspected criminal activities, call in an investigating magistrate.¹⁵¹⁶ The investigating magistrate is a judge distinct from the prosecutor and the criminal defendant whose

¹³ Chapters 3 and 4 of this thesis elaborate the nature of the interaction between the prosecutors and the agents with respect to the collection of evidence. For now, it should be assumed that the prosecutor is in charge of that phase.

¹⁴ The autonomous fact-finding mandate of the judicial police, who are placed under the authority of the prosecutor, ends when the investigating magistrate is put in charge of the investigation (Arts. 12 and 14).

¹⁵ There are three levels of seriousness for criminal offenses in French law: *crime*, *délit* and *contravention*. Investigation by the investigating magistrate is legally mandated for *crimes*.

¹⁶ Nowadays, about 5% of criminal matters in France go before an investigating magistrate; the other 96% are handled by the judicial police and the public prosecution service *on their own*. This thesis focuses on this minority of cases where the prosecutor opts for the involvement of an investigating magistrate.

raison d'être is “[to uncover the truth through] seeking out evidence of innocence and guilt” (Article 81 of the French Code of Criminal Procedure).¹⁷

Unlike the U.S. prosecutor, both the French prosecutor and the investigating magistrate are members of the judiciary; however, this fact does not make the French prosecutor independent from the government, as opposed to the investigating magistrate who is an independent judge. This thesis does not address the separation of power issues raised by the ties, or absence thereof, of prosecutors or investigating magistrates to the Executive branch— which is not to deny its importance.

The investigative magistrate leads the investigation within the limits of the “request to investigate” (*réquisitoire aux fins d’informer*) filed by the prosecutor.¹⁸ Besides his investigatory functions, the investigating magistrate holds jurisdictional powers. Thus, he is the authority who indicts criminal suspects (*mise en examen*) when “there is strong and concordant evidence making it probable that [the person] may have participated, as perpetrator or accomplice, in the commission of the offences [under investigation].”¹⁹ At the close of the investigation, he also decides, to either refer the indicted persons to the trial court or not. He will not adjudicate the matter himself. A separate judge, the Judge of the Freedoms and the Detention (*Juge des Libertés et de la Detention*), decides upon the placement of an indicted individual in preventive detention – as indicated above, this aspect of each national structure is not analyzed in this thesis. The prosecutor gives his opinion (*requisitions*) on each of these decisions. These judicial determinations can be appealed before the Chamber of the Investigation (*Chambre de*

¹⁷ This code is referred to as the “Code” in the rest of this paper.

¹⁸ Upon the discovery of new facts susceptible to prosecution, the investigating magistrate must seek the authorization of the prosecutor to investigate those new facts further.

¹⁹ Article 80-1 of the Code of Criminal Procedure.

l'Instruction). Each party, prosecutor and putative defendant,²⁰ has access to the investigation file and can recommend that specific investigation measures be carried out.

Thus, it appears that the French investigating magistrate and the U.S. prosecutor resemble each other functionally, except at the initiation of the investigation (as explained above, the investigating magistrate cannot initiate an investigation on his own). They have the responsibility of preparing complex or serious criminal matters for trial, if any. They weigh whether there is enough evidence for a court to decide upon a criminal charge and supplement their file accordingly (or classify the file if not suitable for trial). Significantly, in words comparable to those of Napoleon or Balzac, Robert H. Jackson, then U.S. Attorney General,²¹ declared “[t]he American prosecutor has more control over life, liberty and reputation than any other person in America.”²²

However, their quality status, or posture, within each system is very different. The French investigating magistrate, whose position is characteristic of the inquisitorial approach, is a *neutral* investigator who is *not interested in the adjudication* phase of the criminal matter. In contrast, the U.S. federal prosecutor, who symbolizes the adversarial tradition, is *a party* against the defendant, who, after having been involved in the fact-finding, may potentially *argue his case at trial*.

This thesis aims at assessing the impact of this difference in structural design—bipartite or tripartite – on the conduct of pre-trial factual investigations and, as a consequence, the substance of its conclusions. Such a determination is interesting to explore from a theoretical perspective, since the neutrality of the investigating magistrate

²⁰ Both the indicted person and the assisted witness (*temoin assiste*), that is a special status before indictment, can access the file.

²¹ He was thereafter appointed Justice to the U.S. Supreme Court.

²² Speech given on April 1, 1940, to the U.S. Attorneys, subsequently published in *The Federal Prosecutor*, 24 J. Am. Jud. Soc'y 18 (1940).

is claimed to be his defining attribute – together with his independence (not researched in this thesis as stated above). In turn, as stated by Professor J. Pradel: “one believes too commonly... [that the prosecutor is] the champion of the accusation, or the enemy of the prosecuted party.”²³. Jean-Pierre Zanoto, a former investigating magistrate and now the Inspector of the Judiciary at a colloquium at the national school which trains all future French judges (*Ecole Nationale de la Magistrature*), framed the argument in the context of the pressures for the demise of the investigating magistrate to the benefit of the prosecutor: “[t]he impartiality, whose the investigation in charge and is only one form, is...the sole added value that the investigating magistrates can bring. It only can make them survive in a contemporary time period where the tendency is to entrust in an independent²⁴ prosecutor the preparatory phase of the trial...”²⁵ (Emphasis added). The comparison with the U.S. system is interesting to make in this respect, since no such institution as the investigating magistrate exists, and the prosecutor is in charge of preparing for trial criminal matters.

Second, opponents of the continued use of investigating magistrates claim, among other reasons, that investigating both guilt and innocence is an impossible task.²⁶ Thus, Antoine Garapon, Secretary General of the *Institut des Hautes Etudes sur la Justice*, a non-profit organization aimed at contributing to the thinking about justice in France and whose members include the Minister of Justice and the Chief Justices of all French

²³ J. Pradel, [FRENCH] CRIMINAL PROCEDURE, Editions Cujas, 13th Ed. 2006/2007, n° 164, p. 142.

²⁴ By *independent*, Mr. Zanoto refers here to the absence of subordination of the prosecutors to the Executive branch.

²⁵ *The Place of the Investigating Magistrate and the Lawyer in the Trial*, http://www.enm.justice.fr/centre_de_ressources/actes_sessions/loyaute_proces/place_juge.htm

²⁶ Other criticisms included his isolation, his lack of experience, etc.

highest courts, stated “[t]o assert that the judges investigate in charge and in discharge is an institutional lie.”²⁷

Assuming for the sake of argument for now, that this allegation is true, the logical alternative seems to be the reciprocal *summa divisio*: the separation of the investigation supporting the charge and the investigation against the charge (unless one admits that the reform limits itself to a transfer of functions with the same duty to investigate in charge and in discharge which, as a result, would be a null sum change). Since the prosecutor is designated as the new idol, the next logical step seems that the public prosecution service will investigate in the sense of the guilt, while the alleged criminal defendant and her counsel will conduct the investigation against the charge.

But what would replace the duty imposed on investigating magistrates by Article 81 remains essentially undetermined in the debate about the reform of French criminal procedure. Discussions focus on the independence of the prosecutor from the Executive branch (*i.e.* between prosecutors and politicians). The advocacy dimension of the prosecutorial functions is mentioned only to assert that the new system would guarantee the balance between the parties, prosecution vs. defense (by reinforcing the rights of the defense and ensuring judges’ control of the prosecutors’ work). Nevertheless, whether in carrying out their fact-finding, the prosecutors, like investigating magistrates, would have to be neutral, or whether they would be authorized to conduct the investigation to the extent necessary to perform their duty, which is to decide whether to prosecute or not, without seeking to prove the defendant’s defenses, is hardly addressed by the proponents of the enactment of a U.S.-inspired adversarial investigation model. Again, the U.S. experience should be illuminating here for the same reasons as explained above.

²⁷ Cited in <http://www.reforme.net/archive/article.php?num=3160&ref=1193>.

These questions relate to the concept of *impartiality*. This concept must be defined. First, impartiality is *not* independence. Impartiality is a virtue appreciated with respect to the parties to the proceeding, whereas independence is a condition assessed with respect to the other branches of the government, namely, the executive power and the legislature. Second, a judge can be held partial (i) for personal circumstances – the judge is partial because of individual characteristics of this judge; or (ii) for organizational reasons – the magistrate is partial because of the very exercise of his functions and independently of his own beliefs and attitudes (that is to say, any magistrate placed in the same situation would be as partial).²⁸ This thesis focuses on the organizational neutrality or partiality of the public authorities in charge of investigating criminal matters in France and the U.S. Although organizational partiality is usually understood as encompassing the situation in which the judge has already heard a case, it is one theoretical by-product of this thesis that the concept of organizational impartiality also includes the absence of partiality in the orientation of the authority's work because of its positioning within the judicial pantheon, and in the case under examination, the absence of partisanship, *i.e.* objectivity, in the conduct of a pre-trial criminal investigation.

Adopting an *insider's* approach by interviewing the interested parties, this paper seeks (i) to determine what the opinion of French investigating magistrates and prosecutors is with respect to the former's duty to seek out both evidence of guilt and innocence, (ii) to assess whether, from these public authorities' viewpoint, there is a propensity for prosecutors to investigate in the sense of the charge, because their *raison*

²⁸ S. Guinchard & J. Buisson, [FRENCH] CRIMINAL PROCEDURE, Litec, 3d Ed., December 2005, p. 309-312, citing R. Koering-Joulin, *Justices*, 1998-10, p. 1.

d'être is to prosecute crimes rather than to defend alleged criminals, (iii) consequently,, to explore whether the neutrality of the French investigating magistrate offers some added value as compared to the collection and weighing of evidence carried out by prosecutors. The U.S. judicial experience is used as a point of reference.

The place of the defendant in the U.S. adversarial model and the French hybrid model and related overarching concepts, such as the principle of the contradiction, the balance between the parties, the “equality of the arms” and the rights of the defense, and ultimately due process and fairness, furnish the legal framework of this research and will occasionally be mentioned. The focus and standpoint of this study are nonetheless the actual perceptions of investigating magistrates and prosecutors. It is in particular acknowledged that the standpoint of defense counsels would be informative, but this paper has not been so ambitious as to exhaust the topic.

The ultimate goal of the thesis is to clarify the significance of a transfer of the investigative powers of the investigating magistrate to the prosecutors with respect to the preparation of criminal matters, and consequently to help shape the criminal procedure reformation under way in France. Some insight regarding the U.S. system will also result from this research work.

Chapter 2 presents the methodology designed to address the research questions. Chapter 3 describes the reasons for this research more extensively, that is, on the one hand, the choice of France to entrust in a neutral (and independent) judge the investigation of criminal matters, the current challenges to that claim and the unclear alternative, and on the other hand, the U.S. comparative model. Chapter 4 describes the results of the empirical research conducted. Chapter 5 discusses these findings and

suggests some inputs informing the debate about the reformation of the French criminal procedure system.

CHAPTER 2: METHODOLOGY

As explained in introduction, this thesis addresses an issue raised by the envisaged reform of the institution of the investigating magistrate which is largely overlooked in the debate in France. My methodology is aimed at exposing the issue and its importance, and at proposing an answer based on the opinions of investigating magistrates and prosecutors.

A. Scope of the Research

First, I observe that the time period encompassed by this thesis is nowadays and the future with some historical perspective. Another important framework of my research is that I intended to focus on white-collar crime cases, in which no regulatory agencies are involved and lead to parallel investigation or prosecutions. The reasons for this limitation include my personal work experience, because white-collar offenses often involve a complex set of facts requiring sophisticated preliminary investigation and because I decided to exclude issues specific to violent crimes from the discussion. Some information about other crimes has nonetheless been incidentally collected and is discussed whenever relevant herein.

This study is also limited to the post-police and pre-trial phase of a criminal proceeding. The reasons for such limits are the following:

1. In French criminal procedure, the investigation and the adjudication phases must be kept within the hands of separate public actors. Article 49 of the French Code of Criminal Procedure provides that “[the investigating magistrate] cannot take part of the adjudication of matters he has worked on in his capacity of investigating magistrate”;

2. In the US, only very few white-collar defendants are tried, since most of them enter into a plea bargaining agreement with the prosecutor.²⁹

B. Methods

Although I referred occasionally to some statistical data about the current operation of the two prosecution systems based on secondary sources, *i.e.* data already compiled, for instance, by official governmental entities, I have conducted mostly qualitative research to understand the perception of the U.S. and French prosecution models through interviews with its actors and its users, *i.e.* the “law in action” Professor Friedman would say (in addition to describing the structures).

1. Literature Review

The review of the research literature was an important task since my topic is highly theoretical. It consisted of a content analysis of a variety of French and U.S. binding legislation, guidelines, such as the U.S. Attorneys’ Manual, as well as casebooks and law review articles about either the French or the U.S. criminal procedure, and more specifically pre-trial investigation and prosecution, using a comparative law approach. Opinion essays and books recently written by judges, prosecutors and lawyers about the reform of the investigating magistrate institution in France were particularly informative.

Such work aimed at acquiring first the necessary background knowledge of the U.S. system. Second, it was necessary to expose the issue addressed in this thesis, despite the fact that few law review articles have been written on my precise research

²⁹ 96% of all convictions in 2003 were obtained by either a guilty plea or no-contest (increasing from 87% in 1990). See U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Federal Justice Statistics, www.ojp.usdoj.gov/bjs/fed.htm; 94% of felony convictions nationwide are obtained by a guilty plea. See, p. 1161, Allen, Hoffman, Livingston and Stuntz, *Comprehensive Criminal Procedure*;

question, so in the absence of other sources, online blogs and newspapers articles became a material source of information.

The attached bibliography lists the main books, articles of interest, websites, dictionaries that I have consulted.

2. Interviews

To answer my research question, I decided to conduct interviews to gather real-life data from system insiders, that is, information about the “law in action” – as per the expression of Professor Lawrence Friedman – offered by its primary sources, the actors of the system.

a. Sample

I first identified groups and then selected individual members of each group, if possible leaders in these groups. My primary interviewees were representatives of the three professions I was studying, *i.e.* U.S. federal prosecutors, French investigating magistrates and French prosecutors (a total of 23 interviews).

Thus, I interviewed nine Assistant U.S. Attorneys, five currently working at U.S. Attorneys’ Offices around the country and one who quit this profession few months ago (Los Angeles, Miami, New York City, San Francisco and Washington D.C) and three working at the U.S. Department of Justice in Washington, D.C. (Fraud Section, Public Integrity Section and Narcotic and Dangerous Drug Section). These individuals have requested to remain anonymous since they are not allowed to give interviews in their capacity as U.S. Assistant Attorneys. I coded these interviews numerically by

chronological order, when these nine prosecutors were interviewed along the 23 interviews.

For information about the French judicial system, I interviewed:

- Six French investigating magistrates, most of them based now or previously in the Financial Pole of the Paris Court of Appeals, *i.e.* the most respected section.

- Three French prosecutors of the Republic, *i.e.* head of the public prosecution service in the district of their respective Courts of Appeal.

Although I have been authorized to communicate names, I have chosen not to identify, the content of the interviews individually. I coded the interviews in chronological order, similar to the procedure used for the U.S. prosecutors. Other groups have been selected to serve as verification resources.

My third group is comprised of individuals directly involved, or interested, in the French reform. I was unable to contact Mr. Fenech, the author of the bill proposing to suppress the investigating magistrate despite many attempts. However, I did have the opportunity to talk with Professor Delmas-Marty who was president of the Commission Criminal Justice in 1990. I also was able to discuss the reforms with two prominent French criminal procedure professors, Professor Serge Guinchard from the Paris II-Assas University and Professor Jean Pradel from the Poitiers Law School, who has been an investigating magistrate for 10 years.

Finally, for the contextual information at three points of my research, I was able to contact lawyers in New York and one French Judge of the Freedoms and the Detention.

I had hoped that I could have talked to more legal professionals, especially defense counsels. Likewise, I had intended to interview users, *i.e.* French and U.S. companies or individuals involved in criminal pre-trial investigations in one of the two countries. Ideally, I also wanted to meet with international companies who had undergone prosecution in the two countries. However, because it was not feasible to assemble such a large array of interviewees in the time limitation of the SPILS program, I limited my research to the aforementioned groups.

b. Technical Information

From a technical point of view, I conducted most of my interviews by phone because people were located in France or in distant locations in the continental United States. The only individual whom I did interview in person was the U.S. counsel whom I met with in New York. Although I had initially planned to record my interviewees, I decided against that idea in order to gain the confidence of interviewees whom I would ask delicate questions. Each interview lasted about one hour for the U.S. prosecutor and between 45 to 75 minutes for French interviewees.

c. Interview Protocol

I adapted my questions depending on the audience. Although the questions were based on the same outline, I had designed four different questionnaires to be used in interviews of (i) U.S. federal prosecutors, (ii) French prosecutors, (iii) French investigating magistrates, (iv) French law professors. For each of them or for each national group (French interviewees, U.S. interviewees), I went over the main issues, *i.e.*

an objective description of current practice of pre-trial investigations (incl. content of daily work; relationship with other actors; relationship to the police; etc);

- discussion with a critical eye toward the existing system;
- opinions about pending proposals for reforms;
- opinions regarding the main features of the other system.

In the course of the interviews, it turned out to be impossible to exactly follow my planned interviewing protocol; therefore, I had to adjust it on the spot to get my interviewees to address the issues I wanted them to inform me about. Most questions were open-ended questions. For a significant number of them, I had to provide some background information both to gain the confidence of the interviewee regarding the delicate questions as well as for them to understand the purpose of the question in the comparative law context of my research (*e.g.* to investigate in the sense of guilt and innocence would not make sense just told as such to a U.S. prosecutor; I had to explain that the French investigating magistrate was a neutral judge statutorily obliged to investigate in the sense of guilt and of innocence). I refrained as much as I could from leading questions. I designed some new questions in the course of my research after having received some unexpected answers from the first interviewees.

CHAPTER 3: A SEAT FOR TWO? THE INVESTIGATING AND THE PROSECUTOR, TWO PUBLIC AUTHORITIES COMPETING FOR THE PREPARATION OF CRIMINAL MATTERS FOR TRIAL

The purpose of a pre-trial criminal investigation is to collect evidence of a crime, and to identify its perpetrators. Such work encompasses carrying out a series of investigative measures, but also “conducting” the investigation; thus, someone must guide the investigation, that is, determine axes for research and make choices between options as needed. France has vested this fact-finding role in an investigating magistrate. Thus, “[i]n France, the proceeding rests on a judge investigator whose power is intrusive, brutal and moral. The investigative magistrate has a religious dimension. *Our system believes in a unity of the truth, which the judge can reach through his personal virtue.*” (Emphasis added).³⁰ Article 81 of the French Code of Criminal Procedure enacts this belief: as per its official translation into the English language, this provision provides that “[t]he investigating judge undertakes in accordance with the law any investigative step he deems useful for the discovery of the truth. *He seeks out evidence of innocence as well as guilt [...] [il instruit à charge et à décharge].*”³¹

Such neutrality of the public authority in preparing criminal matters for trial, if any, is perceived in France as being distinctive. Thus, the author of the above quotation opined further that:

“[i]n the accusatory system, the truth of the facts is sought in a contradictory manner from the start, each party *gathering the evidence supporting its version of the facts* [...]. To copy the American system, one would need to accept that the

³⁰ Antoine Garapon in Article in *Le Monde* dated March 31, 2006, available at www.lemonde.fr.

³¹ Available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=34&r=3917>

The following disclaimer is posted on the Legifrance website www.legifrance.gouv.fr : “LEGIFRANCE wishes to point out that only the French versions of the texts published in the Official Journal have legal force and that the translations are provided for information purposes only.”

public force is taken down to the *status of a party like any other*, what hurts very deeply our representations.” (Emphasis added).³²

This section depicts this purported uniqueness of the French criminal system structure consisting of placing a *neutral* investigating between the prosecutor and the putative criminal defendant to collect enough evidence to assess the charges. To the extent relevant to appreciate the validity of this claim of impartiality, this section also offers a description of the competing U.S. model – where prosecutors prepare complex criminal matters for trial.

This comparison frames the proposal which has recently been made in France to abolish the investigating magistrate and replace him with a prosecutor in his fact-finding role, and the subsequent research question of this thesis to be answered in Chapters 3 and 4, which is to determine whether the difference in posture of the prosecutor – being the charging authority – and the investigating magistrate – being a non-party disinterested in the outcome – on the conduct of a pre-trial criminal investigation.

A. France: the Tri-Partite System

1. The (Purported) Neutrality of the French Investigating Magistrate

a. The Obligation of the Investigating Magistrate to Seek out Evidence of Guilt and Innocence: a Structural Choice *Against* the Prosecutor

- The Source of this Duty: Article 81 of the French Code of Criminal Procedure

It has been described that “[t]he investigating magistrates [are placed] at the exact balance point between the public prosecution service on one side, and the Defense on the

³² Antoine Garapon, Secretary General of the Institut des Hautes Etudes sur la Justice, in *Le Monde* dated March 31, 2006.

other side... They must make all possible efforts to gather... all pieces of evidence supporting the charge and opposing the charge.”³³

Article 81 of the French Code of Criminal Procedure is the foundational provision of such neutral positioning: “[the investigating judge] *seeks out evidence of innocence as well as guilt* [...] [*il instruit a charge et a décharge*].”³⁴

This second sentence of this abstract of Article 81 – which is the focus of this thesis – was formally introduced by the Statute n° 2000-516 of June 15, 2000 Reinforcing the Protection of the Presumption of Innocence and Victims’ Rights, based on the proposal of one member of the Parliament and the Commission of the Constitutional Laws, the Statutory Law, and the General Administration of the Republic, of the National Assembly (thereafter “the Commission of the Laws”), M. Alain Tourret. The discussions which followed in the Senate, the other chamber of the French Parliament, are interesting since they show a strong attachment to the principle of an investigation in both the sense of guilt and of innocence.³⁵ The then Minister of Justice Elizabeth Guigou, who presented this bill, after noting the recurring question as to whether France should adopt an adversarial procedure, declared “I prefer, I say it clearly, an independent judge who investigates in the sense of guilt and innocence, over policemen who carry out alone, without judicial control, the most part of the investigations;” to the Commission of the Laws, she had said previously that rather than weakening the investigating magistrate, she intended to reinforce him through the creation of the Judge of the Freedoms and the

³³ M. Dorwling-Carter, *Must One Abolish The Investigating Magistrate*, JCP Ed. GF, n° 31-32, Doc. 3458.

³⁴ Available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=34&r=3917>

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³⁵ See as well opinions of Mr. Michel Dreyfus-Schmidt, Mr. Jean-Jacques Hiest and Mr. Alain Peyrefitte in the Senate debate of June 15, 16 and 17, 1999.

http://www.senat.fr/seances/s199906/s19990615/s19990615_mono.html.

Detention, by “positioning him clearly *as a neutral referee between the parties*. [...] *He must be the one who rules upon the requests [of the different parties in the investigation proceeding]*. [...] *His mission to seek the truth in the sense of the guilt and in the sense of the innocence will be comforted.*” (Emphasis added).³⁶

Although this obligation to seek evidence of guilt and innocence was statutorily enacted only in 2000, it is said to be of the essence of the institution of the investigating magistrate (“[t]his principle is essential and must be reminded” asserted one member of the Commission of the Laws).³⁷

It results from the Modern French criminal procedural principle of the separation of the judicial functions, and more precisely, the organizational rule of the separation of the prosecution and the investigation.^{38, 39} In short, the prosecution belongs to the public prosecution service alone,⁴⁰ whereas the investigation belongs to the investigating jurisdictions alone. As the historic sources reveal, this structural choice has been made *against the prosecutor*.

- The Historical Principle of the Separation of the Investigation and the Prosecution

During the preparation of the Criminal Investigation Code of 1808, the predecessor of the current code, the combination of the prosecution and the investigation

³⁶ Declarations of March 9, 1999 reproduced in Article in *Le Monde*, “The Most Powerful Man of France,” March 24, 1999.

³⁷ *Ibid.*

³⁸ Ancient law, *i.e.* prior to the French revolution, did not include such a principle. It was expressly introduced in the Code of Criminal Instruction in 1887. It should also be mentioned that there are few exceptions, but they are not the subject matter of this paper.

³⁹ The separation of the investigation and the adjudication and the separation of the prosecution and the adjudication are the two other organizational rules following from the principle of the separation of the judicial functions. This paper focuses on the investigative role of the investigating magistrate and does not address the issue of his holding both investigative and jurisdictional functions.

⁴⁰ Until the code of 1959, the investigating magistrate could start investigating flagrant crimes on his own initiative.

within the hands of the public prosecution service was rejected and the separatist supporters won.⁴¹ Among them, Cambaceres wrote tellingly:

by its very institution, the Public Minister is a party; for this reason, it belongs to him to prosecute, but for this reason, it would be contrary to justice to let him carry out investigation measures... The imperial prosecutor would be a little tyrant who would make tremble the city... all citizens would tremble if they would see in the same men the power to accuse them and this to collect what can justify this accusation. (Emphasis added)⁴²

In 1949, the Criminal Instruction Code was reformed. Observing that the investigating magistrate was not independent from the public prosecution service and that the prosecutor was extensively using the investigation of the police (*enquête de police*), H. Donnedieu de Vabres proposed transferring the fact-finding role of the investigating magistrate to the prosecutor, assisted by the judicial police.⁴³ He also suggested vesting the jurisdictional powers of the investigating magistrate in a newly-created “magistrate of the instruction”. Two main criticisms were aimed at these proposals: the prosecutor was even less independent (from the Executive power) than the investigating magistrate and distinguishing between investigative and jurisdictional functions was difficult.⁴⁴

More recently, the Commission Criminal Justice and Human Rights, known as “Commission Delmas-Marty” after the president of this commission, again recommended the suppression of the principle of separation of the functions of investigation and prosecution.⁴⁵ It acknowledged that one can wonder “whether it is really advantageous, in order to separate investigation and adjudication, it is advantageous to confound in the

⁴¹ The separation was, however, imperfect since the investigating magistrates were under the authority of the Attorney General, and the prosecutor held the power to designate the investigating magistrate, who would be in charge of a matter (as well as to replace him pending an investigation).

⁴² Locre, *The civil, commercial and criminal statutes of France or comment and supplement of French codes*, t. XXV, Treuttel and Wurtz, Paris, 1827-1832, p. 123 et seq.

⁴³ H. Donnedieu de Vabres, *The reform of the preparatory investigation*, R.S.C., 1949, p. 499 *et seq.*

⁴⁴ J. Michaud, *The Janus of the Judiciary*, R.S.C., 1974, p. 666.

⁴⁵ This Commission was formed based upon the order of the Minister of Justice of October 19, 1988; it issued its final report in June 1990.

hands of the public prosecution the functions of investigation, prosecution and accusation?" It answered that:

a system which would distinguish institutionally jurisdictional function and investigation on the first hand, *investigation and prosecution, on the other hand*, can be conceived in the abstract. In practice, it is neither doable, nor even desirable. Its logical outcome would be indeed, either to leave to the police alone to lead the investigations, or to have the police's action directed, on an equal basis, by the defense and public prosecution service. The two hypothesis (close to the accusatory model) bounce harshly against the spirit and the tradition of the French judicial system and they risk not to integrate themselves: it seems tough to accept, in the French legal conception, as much that the investigations are taken away from the supervision of a magistrate, than *the direction of the investigations is entrusted, on an equal footage, to one party, the defense, which represents private interests, and an institution, the public minister, which is in charge of the general interest*. Another choice must consequently be made... (Emphasis added).⁴⁶

Consequently, a re-allocation of powers has been proposed, which included a provision that the public prosecution service would prosecute and be in charge of the investigations.⁴⁷ Again, this proposal to overrule the principle of the separation of the prosecution and the investigation was rejected.

Nowadays, although no provision of French domestic law asserts it as such, the principle of the separation of the prosecution and the investigation underlies many articles of the French Code of Criminal Procedure (*e.g.* Arts. 31 and 49 *inter alia*). Article 6.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which provides that "in the determination of ... any criminal charge against him, every person is entitled to a fair and public hearing within reasonable

⁴⁶ Final Report, The preparation for the trial of criminal matters, Paris, La Documentation Francaise, 1991.

⁴⁷ Other elements of the suggested reform were:

- the judge exercises the jurisdictional powers: he authorizes any measure which hurts the fundamental rights of the person (he decides the placement in prevention detention or placement under judicial control); he controls the regularity of the preparation proceeding, he makes the jurisdictional decisions (transfer for trial);
- the rights of the defense are increased.

time by a independent and *impartial* tribunal established by law....” is considered as its main contemporaneous normative source.

This brief overview of two centuries of French legal history shows that the investigating magistrate exists *to be* a neutral fact-finder.

- The Substance of the Duty of Neutrality of the Investigating Magistrate

The obligations resulting from the duty of impartiality of the investigating magistrate include the following:

-...he must have no pre-conceived idea about the outcome of the proceeding. He must construct work hypothesizes and check them, or also explore all leads in the matter, but its sole religion must be evidence. Experience shows that matters built only upon a reasoning end almost always in non-guilty verdicts;

- ...he must respect the principle of contradiction, by interrogating the person placed under judicial examination about all the elements of the file be them in the sense of guilt and in the sense of innocence;

- ...he must be fair in his search for the truth. He must go to the end of things without concession, but without relentlessness against the involved people. The investigating does not settle his own conflicts and does not impose any morals. He informs only one file that others... adjudicate.⁴⁸

In practice, the French investigating magistrate is free “to perform, according to the law, all of the investigation acts *he judges* useful for the truth to appear” (Art. 81).

The repertoire of the available investigation acts is the following:

- hearing witnesses and confronting them (as needed, coercive orders to bring and/or arrest the witness are issued by the magistrate)

- going to the crime scene in order to make any necessary factual observations or in order to do searches (Art. 92);

⁴⁸ J.-P. Zanoto, *Ibid.*

- doing any other necessary searches and seizures;
- he can at any place within his jurisdiction to carry out investigation acts (Art. 93).
- requesting expert opinions;
- intercepting the mail, listening to phone conversations.

These investigative measures can be carried out by the investigating magistrate himself on his own initiative or by the police or any other third party expert, at the request of the investigating magistrate (*commission rogatoire*).

The parties to the proceeding--that is, the prosecutor, the alleged criminal defendants when they are placed under judicial examination, or the civil plaintiff--can also request the investigative magistrate to perform some investigative measures. The investigating magistrate may refuse by providing a motivated decision.

The investigating magistrate does not receive orders from the parties, or from anyone else, including the chamber of the investigation which controls his action. In particular, when the chamber of the instruction overturns an order by the investigating magistrate's refusal to carry out an investigative measure, it cannot order the investigating magistrate to carry out the act, even if this is the implicit consequence of the order. This is the price of his neutrality.

At the time of the revision of Article 81 in 1999/2000, the concern that "such reminder in the law [NB: the duty to investigate both guilt and innocence] would unfortunately not make [the principle] efficient in the daily judicial practice" was,

however, immediately voiced.⁴⁹ This challenge is at the center of the debate over the reform of the institution of the investigating magistrate currently in France.

b. The Debate about the Virtue of Neutrality of The Investigating Magistrate

Guy Canivet, then first president of the French Supreme Court [*Cour de Cassation*], declared himself “the expression “investigate *à charge et à décharge*” is a delusion.”⁵⁰ In more blunt language, it is asserted that “nowadays, the investigation is mostly done in the sense of the guilt.”^{51, 52}

The criticisms are numerous and take various forms. First, it is alleged that the task of conducting an investigation both in the sense of guilt and innocence is impossible.

Jean Veil, a prominent criminal lawyer, declared that:

the formula [in Article 81] is absurd because contrary to human nature: this is Penelope who de-knit[unraveled] during the night what she knitted during the day. How an investigator whose conviction built up along the time, could psychologically look efficiently for hints which will wipe out his conviction and ruin his work? Only God could achieve this ideal. One must admit that the task of the investigating magistrates is superhuman, which exonerates them from any possible mistake.^{53, 54}

⁴⁹ Discussions in the Senate referenced in Footnote 35.

⁵⁰ Article in *Le Monde* dated April 13, 2006. It can be read at www.lemonde.fr.

⁵¹ Mr. Tourret’s declaration in Report n° 1468 of the Commission of the Constitutional Laws, the Statutory Law, and the General Administration of the Republic (n° 1079) about the Bill Reinforcing the Protection of the Presumption of Innocence and Victims’ Rights, issued on March 11, 1999, available online at http://www.assembleenationale.fr/11/rapports/r1468-02.asp#P1618_330152

⁵² See as well the opinion of the Senator Hubert Haenel during the debate of the bill, which became the aforementioned Statute of 15 June 2000 about the presumption of innocence in the Senate on March 15, 1999.

⁵³ Article in *Le Monde* dated May 25, 2004. It can be read at http://www.veilpartners.com/Images/Upload/Presse_Outreau.pdf.

⁵⁴ See also Georges Fenech, member of Parliament, who advocates strongly for the suppression of the investigating magistrate, in part because he allegedly would not investigate in charge and in discharge.

Second, it is argued that *because* he is both an investigator and a judge, the investigating magistrate would investigate primarily in the sense of the guilt. Prof.

Delmas-Marty wrote:

[t]he inquisitorial procedure has the advantage of entrusting the role to a public authority to investigate in charge and in discharge. The problem arises when this role is vested in an investigating magistrate: as an investigator, he must make hypotheses as to the guilt, and then revert to a neutral referee. It does not work.⁵⁵

Renaud Van Ruymbeke, investigating magistrate, opined:

[o]ne must suppress the investigating magistrate. Why? Because he wears a double hat. He is both an investigator and a referee – an intellectual contradiction. On one side, he must develop the investigation, on the other side, he must draw the conclusions from it, decide to transfer or not the persons before the court. [...] This is the problem of the inquisitorial system: the individual who will adjudicate also conducts the investigations, asks the questions, etc. In the adversarial system, it is the reverse, that is the referee, the judge, is not authorized to ask questions, in order to preserve its neutrality. It is the Anglo-Saxon system and I am favorable to it. [...] [To the question of what would be the role of the Public Prosecution Service in an adversarial system] the Public Prosecution Service would investigate itself....⁵⁶

This trend of opinion has been “caricatured” for an audience of laymen in an online debate as follows:

[the investigating magistrate] is both a judge and a hunter, or as said Badinter, Maigret⁵⁷ and Solomon. These two functions are incompatible. Nobody would understand that on a soccer field [NB: telling example for a nation of soccer] the referee hit the ball...^{58, 59}

⁵⁵ Article in *Le Monde*, Mireille Delmas-Marty: “One Must Reinforce the Prerogatives of the Investigating Magistrate” dated December 23, 2005.

⁵⁶ R. Van Ruymbeke, in *Le Monde* dated January 19, 2006, “One Must Abolish the Investigating Magistrate.”

⁵⁷ The “Commissaire Maigret” is a famous policeman, a fictional character in France by the police fiction writer Georges Simenon. The books were turned into a blockbuster TV series.

⁵⁸ Daniel Soulez-Larivière, in *Le Monde*, http://abonnes.lemonde.fr/web/imprimer_element/0,40-0@2-3226,50-733813,0.html.

⁵⁹ See Commission Delmas-Marty, Report of June 1990 to confirm that this view is prevalent in France: “[t]he concern not to confuse, in the hands of the judge, powers to investigate and adjudicative functions lead to allocate in all cases to the public prosecution service, prosecuting party, the conduct of the investigations, under the control of the judge.”

The Final Report of the Outreau Commission summarized the conclusion drawn from this situation: “[the] incompatibility between the exercise of jurisdictional functions and investigative functions would be the source of the current judicial practice which would be that judicial investigations are done quasi-exclusively “in the sense of the charge”.⁶⁰

Third, to the extent that it can be considered a reason separate from the factual observation itself, it is sustained that the investigating magistrate sides with the public prosecution service. Guy Canivet pointed out that “[i]n the *affaire d’Outreau*, one cannot not wonder about the influence of the prosecution service on the orientation of the investigation”⁶¹ One journalist recently summarized the situation as follows:

...the daily practice shows us to what extent the judges, following a non-confessable tropism and despite their formal status, have the propensity to follow the requisitions of the Public Prosecution Service without checking them. For instance, orders of placement under accusation before a jury [*ordonnance de mise en accusation devant la cour d’assises*] issued by investigating magistrates and reproducing, to the coma, the inaccuracies or even the tone of the requisitions – often improper for an impartial judge – are legion. Is it because of a lassitude in front of the work burden, blind trust in a classmate [NB: prosecutors and investigating magistrates are trained in the same school], identity of opinion with a lack of caution in the writing style, individual dismissal or protection of a career prospect in the public prosecution service?.⁶²

Nonetheless, the investigating magistrate has believers. For example, the Final Report of the Outreau Commission utilizes results: 20% of the criminal investigations closed in 2003 ended with an order of no-bill; “[t]herefore, it is inaccurate to assert that investigations are conducted only in the sense of the guilt.”⁶³ A somewhat related context argument is that often, the suspect is guilty, so it is quite logical that investigations appear to confirm the charge.

⁶⁰ p. 338

⁶¹ G. Canivet, *Ibid.*

⁶² Dominique Coujard, article in *Le Monde*, “Judges and Prosecutors : an Important Proximity,” April 19, 2006.

⁶³ p. 340.

Some practical arguments are also made. Thus, to talk about an investigation done exclusively in the sense of the guilt does not make much sense. Before performing an investigative act, the judge (or the judicial police officer delegated) does not necessarily know what information will be revealed by that measure. Likewise, Pascal Clement, the Minister of Justice, also explained to the public who believe that the investigating magistrate questions only in the sense of guilt, never in the sense of innocence, that “the practical truth is that an investigative magistrate puts down in writing what favors the accused, but obviously he asks you questions only where there is a problem, so you have the feeling when you are indicted that the investigate magistrate rules in favor of guilt, but this is not fatally true. There is also the appearance which is sometimes misleading.”⁶⁴

Prof. J. Pradel disagrees with the allegation of the incompatibility of investigating and jurisdictional functions: “[i]n reason first, one does not understand well the relationship between the functional gathering assigned to this magistrate and his propensity to act in the sense of the guilt, and one understands even less since he is the best positioned judge to make decisions since he knows the file better than a magistrate of the investigation.”⁶⁵

Finally, a statement given by French investigating magistrate, Philippe Courroye, recently appointed as the Prosecutor of the Republic for the court of Nanterre, when challenged about this promotion, shed more light on the accusation of connivance between the public prosecution service and the investigating magistrates; he declared

⁶⁴ Interview on the French radio “Europe1” on January 20, 2006 available on the Ministry of Justice website at <http://www.justice.gouv.fr/actualites/outreau/interveurope1-200106.htm>

⁶⁵ J. Pradel, *The Investigating Magistrate: Reform Or Suppression, Justice, Reforms and Stakes, Cahiers Francais*, n° 334, La Documentation Francaise, 4th Quarter 2006.

stated that “the image of an lonesome investigating magistrate must come to an end, as he works in team with the police and the public prosecution service“.⁶⁶

The questionnaire prepared for this thesis asked investigating magistrates what their opinion was regarding the above debate (see Chapters 4 and 5).

c. The Blurry Alternative

No matter which camp is right, what is the alternative *with respect to* this obligation to investigate both in the sense of the charge and against the charge is left blurry in the French debate. More precisely, rarely does anyone take a position on which posture should be expected from the public prosecution service, the U.S.-inspired proposed substitute for the investigating magistrate. One author has highlighted this situation: “[t]he partisans of its abolition [the investigating magistrate]... are actually quite moot about the institution which could replace it.”⁶⁷

One can read online blogs stating the clear proposal “to the prosecutor, the investigation in the sense of the charge, with the means of the judicial police. To the lawyers, the investigation against the charge, with the possibility to propose investigation measures which would go in favor of the defense.”⁶⁸ Although to my knowledge, no proponent of the reform has dared making that clear statement, it appears indeed to be one possible logical inference from the criticism that the task assigned to investigating magistrates to search for evidence of innocence and guilt is impossible. Such a conclusion also naturally stems from the public belief that prosecutors are partial towards

⁶⁶ Article in *Le Monde*, “The Judge Courroye Does Not Want to Receive Independence Lessons from Anybody,” March 1, 2007.

⁶⁷ Fabrice Defferrard, *The Refound Investigating Magistrate*, Dall. 2006, n° 1, p. 1908-1909.

⁶⁸ <http://bloghorree.berrendonner.org/wordpress/2006/01/29/le-juge-dinstruction-ce-surhomme/>

ascertaining guilt; this is even more true in the U.S. legal system (see below). Finally, in relation to the French model of neutral investigation and the proposed reform advocating a prosecutor-investigator, a description of the U.S. system along the following lines is very often proposed:

“[t]his system implies that two inquiries are done in parallel: beyond the additional financial cost that it triggers, what happens to the elements proving the charge found by the defense? And these against the charge discovered by the accusation? One can surely bet they will be hidden by [the parties] to the judge who will adjudicate the matter because of the fear that the upcoming ruling will be less favorable.⁶⁹

Such an opinion reflects the fact that it is believed that the French prosecutor, like his U.S. counterpart as it is understood, would investigate to support the charge.

In turn, however, Mr. Fenech’s bill to suppress the investigating magistrate exposes the fact that the police would carry out investigations *both in the sense of guilt and innocence*.⁷⁰ The bill is silent about the prosecutor. Since the police are under the authority of the public prosecution service, the requirement of impartiality is in all likelihood also applicable? to the prosecutor.

These two opinions illustrate how the issue is subdivided:

- is it proposed that the prosecutor is not bound to investigate both in the sense of the charge and against the charge? (Scenario 1) *or*

- is the duty of the investigating magistrate to seek out both incriminating and exculpatory evidence to be transferred on the head of the prosecutor? (Scenario 2).

The absence of choice between these two scenarios is the most common position. Unfortunately, it cannot be revealed in this paper other than by referring the reader to the

⁶⁹ French Association of Investigating Magistrates, *Shall One Abolish the Investigating Magistrate*, article dated September 15, 2006, accessible online at http://www.afmi.asso.fr/ref_detail.php?num=32.

⁷⁰ Bill n° 2659 aforementioned.

above quotes, which often refer to the prosecutor as an alternative to the investigating magistrate after claiming that the latter cannot be neutral, but they also do not state what the prosecutor *should* be.

The impact of the respective positioning of the investigating magistrate and the prosecutor on the guidance of the pre-trial criminal investigation is nonetheless a material determination to make based on the three following considerations:

- (i) the perceived importance of the neutrality of the investigating magistrate;
- (ii) the claim that such a requirement of impartiality in the conduct of the investigation is illusory.
- (iii) the general opinion that prosecutors have a propensity to incriminate more than to undo the charge.

At most, few commentators, after describing in the abstract the two possible scenarios– thus confirming that no choice for one or the other is suggested by the proponents of the reform – note the logical deficiency of Scenario 2. The flaw consists of claiming simultaneously that the investigating cannot investigate both in the sense of guilt and innocence, but implying that the prosecutor could, is noted. The Parliamentary Commission with respect to the *affaire d’Outreau* itself held:

[n]othing allows postulating that the criticisms addressed to the investigating magistrate as to the partiality of his investigations are not transposable to the investigations conducted by public prosecution services and the police. Whether they chose the adversarial procedure (Anglo-Saxon countries, Italy) or adopted a mixed system (Germany), foreign judicial systems are not protected from judicial errors of large scope. [A list of judicial wreckages in other countries, established on the basis of answers to questionnaires circulated by the Commission, follows]. (Emphasis added).^{71, 72}

⁷¹ p. 341

⁷² See also Philippe Conte, *The Rotten People of the Republic. About the “Affaire d’Outreau”*, JCP Ed. G. n° 1-2, January 11, 2006, p. 19; Gabriel Roujou de Boubée, *Reform? Yes – Overthrown? No*, Dall. 2006, n° 11, p. 740 *et seq.*

Mr. Devedjian elaborated on this line of thinking that:

it is not reasonable [NB: to suggest that the prosecutor investigates both to support the charge and establish innocence] since it confuses the roles: *one cannot entrust the accusation and the defense to the same institution without seriously infringe the principle of the contradiction*. Of course, members of the public prosecution service are reasonable and conscientious people but their culture and their vocation is to discover, confront and prosecute the guilty. (Emphasis added).⁷³

Within this context of vagueness in which the conventional wisdoms about French investigating magistrates and French and U.S. prosecutors strongly influence the debate, this paper aims at determining what kind of investigators prosecutors could be in comparison to investigating magistrates. The review of French and U.S. normative sources and law review articles about the posture of the French and U.S. prosecutors in the criminal procedure structure, outside the framework of the reform of the investigating magistrate, was to be completed prior to embarking on the empirical research itself. The results of this literature review follow.

2. The Prosecutor: a Partisan?

“I learn to crown it all that *the king’s prosecutor* to whom he [Desfontaines denouncing some Voltaire’s book] went to *is my declared enemy, and seeks all around something to loose me*.” (Voltaire).⁷⁴

This statement by Voltaire stands strongly against prosecutors as fact-finders, accusing them of partisanship. This section explores the reality of such bias in French doctrine.

⁷³ <http://www.patrickdevedjian.fr/articles/1000015>

⁷⁴ In French, “J'apprends pour comble de malheur et d'humiliation, que le procureur du roi auquel il [Desfontaines dénonçant quelque ouvrage de Voltaire] s'est adressé est mon ennemi déclaré, et cherche partout de quoi me perdre.” Voltaire, Lettres a M. le Comte d'Argental of Feb. 12, 1939.

The prosecutor is the main party in a criminal trial (thus, even when the public prosecution was not started on his own initiative but by the victim (as victims can instigate public prosecution in France)). His essential function is to prosecute criminals, that is, to seek the conviction and sentencing of people having violated the criminal laws in court. He starts such public action but does not adjudicate upon it, so he is a party, not a judge. He is “the” adversary. As a consequence, unlike judges and jurors, his participation cannot be challenged; he cannot be stricken out for any reason (Art. 669, al. 2).

More precisely, the Public Prosecution is the “accusation”. The European Court of Human Rights suggested the following definition for this concept of Article 6 § 1: “the official notification, issued by the competent authority, of the reproach to have committed a crime” (ECHR, 27 February 1980, *Deweert v. Belgium*, § 46: Serie A n° 35). There is no doubt that prosecutors of the Republic qualify as the referred competent authority issuing the accusation.

Since the prosecutor is one party facing another, it seems logical that he is an advocate for his side against the other. Professor Serge Guinchard confirmed: “In French law, the prosecutor not being a member of the court [ruling upon the case], but the prosecuting authority, he can be partial, according to the criminal chamber of the Supreme Court (*Cour de cassation*). He must even necessarily have an idea about the guilt of the person he is prosecuting.”⁷⁵ The Criminal Chamber of the French Supreme Court itself holds that “the guarantee to an independent and impartial tribunal targets only judges and not the representative of the accusation or this of the defense”.⁷⁶ The now

⁷⁵ S. Guinchard & J. Buisson, *ibid*, p. 329.

⁷⁶ *Crim.* 6 December 1996, Bull. 187; *Petites Affiches*, 25 aout 1997, note S. Jossierand.

common formula is the following: “the public prosecution service not deciding upon the merits about the accusation in a criminal matter, the challenge based on partiality cannot be sustained.”⁷⁷ The solution is the same both under Article 6.1 of the European Convention on Human Rights, guaranteeing the right to an impartial tribunal and Article 662 of the French Code of Criminal Procedure, which authorizes parties to ask for a change of judicial decision-maker in case of legitimate suspicion against it.^{78 79 80}

But the prosecutor is not an ordinary party: he acts on behalf of the public for its defense. The French word *Procureur* comes from the Latin *Procurator*, which means the one who takes care of another, who administers;⁸¹ the prosecutor is thus acting in court not in his own name, but in the name of someone else, namely the King (*Procureur du Roi*) under the Ancient Regime (before the 1789 Revolution), the Republic (*Procureur de la République* is the title of the common public prosecution authority in France) ever since, that is the general public; the prosecutor appearing in the French Supreme Court is revealingly called the *Procureur General*.

Derived from their public service duty to achieve justice, prosecutors have very different responsibilities from those given to the counsel of a criminal defendant. The Conference of Prosecutors General of the Council of Europe prescribes that they must “exercise their functions in an equitable, *impartial*, *objective*, and pursuant to applicable

⁷⁷ Crim. 10 December 1986, D. 1987, somm. 85, obs. Pradel; 10 December 1990, Bull. n° 370; 19 March 1998, Bull. n° 106. see also 23 November 1966, D. 1967, somm. 19.

⁷⁸ For case law under Art. 662: Crim. 7 April 1976, Bull. n° 107; 27 January 1993, Bull. n° 49.

⁷⁹ For case law under Art. 6: Crim. 6 January 1998, Bull. n° 1 disregarding the fact that the prosecutor was the godfather of one of the accused.

⁸⁰ But this case law is either about situations of alleged personal partiality, which clearly does not relate to the topic of this thesis, or when dealing with cases of alleged functional partiality remains limited to hypotheses where the same prosecutor appears at different stages of a criminal matter. The question of the possibility of a pro-prosecution bias is never considered.

⁸¹ Source: The treasure of the French language Online (*Trésor de la Langue Française Informatisé*) website at <http://atilf.atilf.fr/dendien/scripts/tlfiv5/advanced.exe?8;s=267435840>;

law, independent manner.”⁸² The French Constitution also provides that they are guarantors of the individual freedoms under Article 66 of the French Constitution of October 4, 1958,⁸³ in their capacity as members of the Judiciary. In this respect, the difference with U.S. prosecutors is important, as the latter are members of the Executive branch. The oath taken by prosecutors upon designation is the following: “I swear to carry out my functions well and earnestly, to keep religiously the secret of the deliberations and to always behave as a dignified and *loyal* magistrate.” (Emphasis added).⁸⁴

The analysis of the special party status of French prosecutors conducted by the European Court and Commission of Human Rights about Article 6 § 1 is interesting. In a case of *Reinhardt and Slimane-Kaïd v. France*, 31 March 1998, France was condemned for its breach of the equality of arms and the adversarial principles of Article 6 § 1 with respect to some features of the intervention of the public prosecution service before the French Supreme Court⁸⁵ This case has been highly criticized in France and overruled by the French Supreme Court, because it arguably misunderstands the role of the public prosecution service before the Supreme Court;⁸⁶ it is still worth citing since its reasoning must at least be true for the Prosecutor of the Republic:

⁸² Council of Europe, Conclusions of the Conference for the Prosecutors General of Europe, 2000-2006, issued on June 14, 2006 and referring to the Budapest Guidelines adopted on May 31, 2005, available at www.coe.int/prosecutors, p. 26.

⁸³ Art. 66 : “[...] The judicial authority, keeper of the individual freedom, insures the respect of this principle pursuant to the conditions provided by the law.”

⁸⁴ Article 6 of the Order n° 58-1270 of December 22, 1958.

⁸⁵ The Court disapproved of the practice whereby, with a view to the hearing, the advocate-general is given the reporting judge’s reports and draft judgments, but the accused are not. It was found that it was not established that the advocate-general’s submissions were communicated to the applicants in a timely manner.

⁸⁶ The French Supreme Court has held repeatedly that “[t]he role of the attorney general [...] in front of the Supreme Court is not to sustain the accusation against the accused, but to make sure that [the matter] has been adjudicated pursuant to the law.” Crim. 18 December 1996, Bull. n° 475; 6 March 2001, Bull. n° 58.

The Commission considered that the opinion of Principal State Counsel's Office at the Court of Cassation *could not be regarded as neutral viewed from the standpoint of the parties to the proceedings*. By recommending that an accused's appeal be allowed or dismissed, the representative of Principal State Counsel's Office *becomes objectively speaking the accused's ally or opponent*. (Emphasis added).

The same formula had first been used in *Borgers v. Belgium*,

Nobody doubts of the objectivity with which the public prosecution service serving in the supreme court carries out its duties [...]. However, its opinion cannot be held to be neutral with respect to the parties in the supreme court proceeding: by recommending the admission or the rejection of the recourse of an accused, the magistrate of the public prosecution service *becomes its objective ally or its adversary*. (ECHR 30 October 1991, §§ 26, Serie A n° 214-B).

Thus, since hypothetically, the prosecutor is prosecuting the accused in the early stages of a criminal trial – that is, a position equivalent to recommending the rejection of the recourse – the language to be used to qualify him could be a “non-neutral objective opponent.”

The reality may, however, not accurately reflect the theory. Thus, the Outreau parliamentary commission concluded that the public prosecution in this matter had revealed itself being “accusatory at any price.”⁸⁷

Without undermining the conclusions of the Outreau Commission, the empirical research conducted for this thesis seeks to inform this point from the perspective of the prosecutors and investigating magistrates.

Because the U.S. model is taken as a point of reference in the French debate about the reform of the investigating magistrate (since such institution does not exist in this country), U.S. prosecutors have been interviewed as well. Some literature review provided the necessary background information, as described in the next section.

⁸⁷ Outreau Commission's Final Report, p. 141.

B. The Reference Adversarial System: the United States

The U.S. criminal structure is viewed in France as entirely adversarial, including at the preliminary fact-finding stage. Thus, the Attorney General before the French Supreme Court himself described that “in this system [NB: the Anglo-Saxon accusatory system], the Defense can complete on its own counter-inquiries and complementary investigations to combat the results of these conducted by the Public Prosecution Service... The French Public Prosecution Service, contrary to its foreign counterpart, is not only accusatory...”⁸⁸ Although such an opinion does not express it explicitly, but illustrates the general understanding, it charges U.S. federal prosecutors with partiality towards the finding of guilt.

This section examines the actual implications of the party affiliation of U.S. federal prosecutors. I begin with a description of their functions in the pre-trial phase; the reader may, indeed, be surprised that the U.S. federal prosecutors, who are charging authorities, are offered as a comparison with the investigating magistrate.

1. Description of the U.S. Pre-trial phase

The U.S. federal prosecutor can prosecute any case which, in his judgment, warrants such action, subject to the limitations on his authority to prosecute imposed by the D.O.J. and the Criminal Division.⁸⁹ Formal criminal charges are of two sorts: indictments and information. The indictment must be requested by the U.S. Attorney from the Grand Jury, which is a group of 16 to 23 citizens, each time they have decided

⁸⁸ M. Dorwling-Carter, *ibid.*

⁸⁹ These limitations can be the request for notification, consultation and prior approval. “[They are discussed throughout the United States Attorneys’ Manual, with a centralized listing contained in 9-2.400.” (USAM, 9-2.030). Statutory limitations on the authority of the U.S. Attorney to prosecute also exist.

to charge a felony. (Criminal Procedure Manual, at 205).⁹⁰ The indictment is issued when the prosecutor has demonstrated to the Grand Jury that there is *probable cause* to believe that the putative criminal defendant committed a specifically-identified Federal offense; in the alternative, the Grand Jury returns a so-called “no-bill.” (see Wright, *Federal Practice and Procedure*, Criminal Section 110).

To avoid any confusion, it is emphasized here that this standard is lower than the level of proof that the prosecutor must meet for the jury or the judge to render a verdict of guilt at trial, and does not suffice to overturn the presumption that the defendant is innocent; such a presumption exists until the defendant is found guilty beyond a reasonable doubt.

Before reaching that point where the prosecutor seeks an indictment, facts proving such a charge must be collected. Investigations are most commonly referred to a U.S. attorney by a Federal investigative agency, such as the Federal Bureau of Investigation (F.B.I.),⁹¹ or by a state or local investigative agency. The U.S. Attorney, as the chief federal law enforcement officer in his district, can reciprocally request the appropriate federal investigative agency to investigate alleged or suspected violations of federal law. [...]

The Grand Jury may be used by the U.S. Attorney to investigate alleged or suspected violations of federal law. They indeed offer the possibility to the prosecutors to use coercion through subpoenas, pursuant to Rule 17 of the Federal Rules of Criminal

⁹⁰ Informations are issued by the prosecutor himself. Complaint is a third mode of starting prosecution. Although the complaint is primarily used to prosecute minor and petty offenses, it may be relevant to the thesis to the extent that prosecutors make also complaints for felonies when an arrest is made prior to the filing of an indictment or information. However, its vitality is exhausted, in such cases, following the preliminary proceedings. Note that Federal officers do not always need a warrant to arrest a person.

⁹¹ The Drug Enforcement Administration, the Immigration and Naturalization Service, the Customs Bureau; the Bureau of Alcohol, Tobacco and Firearms and the Secret Service are other sources of referrals.

Procedure. However, it must be noted that the D.O.J.'s policy is that "[b]efore issuing a grand jury subpoena, prosecutors should consider what evidence has already been collected through other means and whether a voluntary request, contractual obligation, inspector general subpoena, civil investigative demand or other compulsory process is available to obtain the information sought. Those methods may be just as effective as a grand jury subpoena in obtaining information, but their use may avoid grand jury secrecy issues." (USAM, § 9-11.254).

The investigation before the grand jury takes mainly two forms: witness testimonies and documentary evidence. The witnesses appearing before a grand jury are categorized between "target", "subject" and third party informants. "A "target" is a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant. [...] A "subject" of an investigation is a person whose conduct is within the scope of the grand jury's investigation." (USAM, § 9-11.151).

"When a target is not called to testify [...] and does not request to testify on [his] own motion [NB: *see* below], the prosecutor, in appropriate cases, is encouraged to notify such person a reasonable time before seeking an indictment in order to afford him or her an opportunity to testify before the grand jury [...]. Notification would not be appropriate in routine clear cases or when such action might jeopardize the investigation or prosecution because of the likelihood of flight, destruction or fabrication of evidence, endangerment of other witnesses, undue delay or otherwise would be inconsistent with the ends of justice." (USAM § 9-11.153).

The testimony of the target before the grand jury is, however, often desirable. In this case, the federal prosecutors must first try to obtain a voluntary appearance. If such a voluntary appearance cannot be obtained, the target can be subpoenaed in order to be questioned about his involvement in the crime under investigation (*See United States v. Wong*, 431 U.S. 174, 179 n. 8 (1977); *United States v. Washington*, 431 U.S. 181, 190 n. 6 (1977); *United States v. Mandujano*, 425 U.S. 564, 573-75 and 584 n. 9 (1976); *United States v. Dionisio*, 410 U.S. 1, 10 n. 8 (1973)), with the approval of the grand jury and the U.S. Attorney; in determining whether to approve a subpoena for a “target,” are taken into consideration: the importance to the successful conduct of the grand jury’s investigation of the testimony or other information sought, whether the substance of the testimony or other information sought could be provided by other witnesses; and whether the questions the prosecutor and the grand jurors intend to ask or the other information sought would be protected by a valid claim of privilege. (USAM § 9.11.150). Under Rule 17(g) of the Federal Rules of Criminal Procedure, a failure by a person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court.

Very important is the fact that grand jury proceedings are secret. Fed. R. Crim. P. 6(e)(2)(B).

2. The Posture of the U.S. Federal Prosecutor

a. A Minister of Justice

The seal of the Department of Justice includes the *Latin* motto: “*Qui Pro Domina Justitia Sequitur*” which is believed to refer to the Attorney General (and thus to the Department of Justice), “*who prosecutes on behalf of justice (or the Lady Justice)*.”⁹²



Source: <http://www.usdoj.gov/jmd/ls/dojseal.htm>

Likewise, the Department of Justice states on its opening webpage that its mission is the following:

[t]o enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek *just* punishment for those guilty of unlawful behavior; and to ensure *fair and impartial* administration of justice for all Americans. (Emphasis added).

There is a longstanding recognition in the United States that the prosecutor is a “minister of justice,” not merely an advocate, with obligations towards the defendant. In the famous *Berger v. United States* case (1935), the U.S. Supreme Court held that:

[the prosecutor] is the representative... of a sovereign whose interest... in a criminal prosecution is *not that it shall win, but that justice shall be done*. (295 U.S. 78). (Emphasis added).

Professional rules enforce that obligation of ethics and competence. Thus,

- the ABA Standards for Criminal Justice Standard 3-1.2 (b) provides that:

⁹² <http://www.usdoj.gov/jmd/ls/dojseal.htm#foot24>

[t]he prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions.

And 3-1.2 (c) “The duty of the prosecutor is to seek justice, not merely to convict.

- The ABA Model Rules of Professional Conduct, comment 1 to Rule 3.8 (2006)

states that:

[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. [...] ⁹³

- The New York State Bar Association Lawyer’s Code of Professional

Responsibility, Ethical Consideration 7-13(3) (2002), which is “inspirational in character and represent the objective towards every member of the profession should strive”⁹⁴

states that:

The responsibility of a prosecutor differs from that of the usual advocate; it is to seek justice, not merely to convict. [...] With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to the prosecutor, that tends to negate the guilt of the accused, mitigate the degree of the offence, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he or she believes it will damage the prosecutor’s case or aide the accused.⁹⁵

However, the Disciplinary Rules 7-103 [§1200.34] which follows and is the sole *mandatory* provisions reproduces the aforementioned language describing the obligation of the prosecutor with respect to evidence, but for the last sentence.⁹⁶

- The Nat’l Prosecution Standards, Standard 1.1 (1991): “The primary responsibility of prosecution is to see that justice is accomplished.”⁹⁷

⁹³ http://www.abanet.org/cpr/mrpc/rule_3_8_comm.html.

⁹⁴ Preliminary Statement of the Code of Professional Responsibility available at <http://www.nycbar.org/Ethics/LawyersCodeOfProfessionalResponsibility.pdf>.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

Thus, like the French prosecutors, in the U.S. the goal of a prosecutor, who is a minister of justice, is to seek the conviction of guilty persons and not to put the innocent in jail.

To guarantee fairness and due process to the defendant, some specific obligations are imposed on the prosecutor to make sure that guilt is decided upon the basis of sufficient evidence, which requires finding and weighing exculpatory evidence.

b. The U.S. Federal Prosecutor and The Finding of Exculpatory Evidence

- Direct duty to the defendant

The prosecutor has the obligation to *disclose exculpatory evidence after indictment*, i.e. during the pre-trial discovery phase (*Brady v. Maryland*, 373 U.S. 83 (1963) and *United States v. Bagley*, 473 U.S. 667 (1985)). This includes impeachment evidence for the prosecution witnesses. Rule 16 of the Federal Rules of Criminal Procedure enacts this state of the law.

The ABA Standards for Criminal Justice goes further.⁹⁸ It provides a unique language not about disclosure but about investigating: para. 3-3.11 titled “Disclosure of Evidence by the Prosecutor” states that:

“(a) A prosecutor should not *intentionally* fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which *tends to* negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.

(b) A prosecutor should not fail to make a reasonably diligent effort to comply with a legally proper discovery request.

⁹⁷ http://www.ndaa.org/pdf/ndaa_natl_prosecution_standards.pdf

⁹⁸ See about the Department of Justice’s position on the ABA Standard for Criminal Justice, U.S. Attorneys’ Manual, title 9, para. 9-2.101 “The American Bar Association Standards for Criminal Justice have not been adopted as official policy by the Department; however, since the courts utilize the Standards in determining issues covered by them, it is recommended that all United States Attorneys familiarize themselves with them. The ABA Standards for Criminal Justice, Table of Standards, Second Edition can be found in the Advance Sheets of the Federal Reporter, Third Series.”

(c) *A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.*" (Emphasis added).

Some individual state ethics have adopted that last line, such as the D.C. Rules of Professional Conduct R. 3.8d. In a report about Prosecutorial Ethics Rule issued in May 2005, the Professional Responsibility Committee of the Association of the Bar of the City of New York proposed to introduce in the New York Code or the Model Rules a new article entitled "Prosecutor's obligation to the factually innocent.", which has not been adopted as of today.

- Indirect duty: Presentation of the Criminal Matter to the Grand Jury

The counsel for the defendant plays no role in the Grand Jury except to silently to offer advice should the client be called as a witness. Otherwise, defense counsel is not even allowed in the Grand Jury room. ... The right to confront the witnesses against him and to testify in his own defense do not apply in Grand Jury proceedings.⁹⁹

In this context, the responsibility of the prosecutor regarding the representation of the defendant's standpoint is all the more important to determine.

In *United States v. Williams*, 112 S.Ct. 1735 (1992), the U.S. Supreme Court held that the Federal courts' supervisory powers over the Grand Jury does not include the power to make a rule allowing the dismissal of an otherwise valid indictment, where the prosecutor failed to introduce substantial exculpatory evidence to a grand jury. However, it is the Department of Justice's policy that the prosecutor discloses to the grand jury, before seeking an indictment, "*substantial evidence that directly negates the guilt of the*

⁹⁹ M. Cassidy, *Toward A More Independent Grand Jury: Recasting and Enforcing the Prosecutor's Duty to Disclose Exculpatory Evidence*, 13 Geo. J. Legal Ethics 361.

subject of the investigation” when the prosecutor is personally aware of that evidence (USAM, § 9-11.233). (Emphasis added).¹⁰⁰

Again, the ABA Standards for Criminal Justice go further: para. 3-3.6(b) provides that “No prosecutor should knowingly fail to disclose *to the grand jury* evidence which *tends to* negate guilt or mitigate the offense”¹⁰¹.

Moreover, although the Grand Jury proceeding is often said to be inquisitorial – , some adversarial features can be identified. Under a paragraph titled “Requests by Subjects and Targets to Testify Before the Grand Jury,” the D.O.J. explains that “[i]t is not altogether uncommon for subjects or targets of the grand jury's investigation, particularly in white-collar cases, to request or demand the opportunity to tell the grand jury their side of the story. While the prosecutor has no legal obligation to permit such witnesses to testify, *United States v. Leverage Funding System, Inc.*, 637 F.2d 645 (9th Cir. 1980), *cert. denied*, 452 U.S. 961 (1981); *United States v. Gardner*, 516 F.2d 334 (7th Cir. 1975), *cert. denied*, 423 U.S. 861 (1976)), a refusal to do so can create the *appearance of unfairness. Accordingly, under normal circumstances, where no burden upon the grand jury or delay of its proceedings is involved, reasonable requests by a “subject” or “target” of an investigation, as defined above, to testify personally before the grand jury ordinarily should be given favorable consideration, provided that such witness explicitly waives his or her privilege against self-incrimination, on the record*

¹⁰⁰ The provision adds that “[w]hile a failure to follow the Department's policy should not result in dismissal of an indictment, appellate courts may refer violations of the policy to the Office of Professional Responsibility for review.”

¹⁰¹ See about the Department of Justice’s position on the ABA Standard for Criminal Justice, U.S. Attorneys’ Manual, title 9, para. 9-2.101 “ The American Bar Association Standards for Criminal Justice have not been adopted as official policy by the Department; however, since the courts utilize the Standards in determining issues covered by them, it is recommended that all United States Attorneys familiarize themselves with them. The ABA Standards for Criminal Justice, Table of Standards, Second Edition can be found in the Advance Sheets of the Federal Reporter, Third Series.”

before the grand jury, and is represented by counsel or voluntarily and knowingly appears without counsel and consents to full examination under oath. *Such witnesses may wish to supplement their testimony with the testimony of others. The decision whether to accommodate such requests or to reject them after listening to the testimony of the target or the subject, or to seek statements from the suggested witnesses, is a matter left to the sound discretion of the grand jury.* When passing on such requests, it must be kept in mind that the grand jury was ***never intended to be and is not properly either an adversary proceeding or the arbiter of guilt or innocence.*** See, e.g., *United States v. Calandra*, 414 U.S. 338, 343 (1974).” (Emphasis added). Likewise, under a paragraph titled “Presentation of Exculpatory Evidence”, the D.O.J. explains that it is its policy that ***“when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person.”*** [...] [A] failure to follow the Department's policy should not result in dismissal of an indictment [but professional responsibility may be incurred].”

In a more general statement, the D.O.J. itself declares: “[i]n dealing with the grand jury, the prosecutor must always conduct himself or herself as *an officer of the court* whose function is to ensure that justice is done and that guilt shall not escape *nor innocence suffer*. The prosecutor must recognize that the grand jury is an independent body, whose functions include not only the investigation of crime and the initiation of criminal prosecution but also the *protection of the citizenry from unfounded criminal charges*. The prosecutor's responsibility is to advise the grand jury on the law and to

present evidence for its consideration. In discharging these responsibilities, the *prosecutor must be scrupulously fair to all witnesses and must do nothing to inflame or otherwise improperly influence the grand jurors.*” (Emphasis added) (U.S. Attorneys’ Manuel, Title 9, Section 9-11.000, Grand Jury, § 9-11.010: Introduction).

These normative sources and guidelines of the action of prosecutors obviously depict an idealized picture of what a prosecutor should do.

c. The acknowledgment of prosecutors’ potential bias towards finding guilt in the U.S. literature

This thesis does not pretend that wrongful convictions do not occur in the United States. There is extensive literature on the issue of prosecutorial misconduct and the reasons for it, which extend beyond the scope of this thesis. Nonetheless, investigative misconduct, especially by the police (*e.g.* false confessions, mistaken identification, etc) and failure to disclose exculpatory evidence are on the list and are worth mentioning as they tend to confirm that there may be such a thing as prosecutors’ propensity to find guilt.¹⁰²

Even more directly related to this research are doctrinal descriptions of the prosecutors’ so-called “tunnel vision,” which is non-existent in French law reviews to my knowledge. “Tunnel version” has been defined as the natural human tendency, to which we are all susceptible, that lead actors in the criminal justice system “to focus on a suspect, select and filter evidence that will build a case for conviction, while ignoring or suppressing evidence that points away from guilt.”¹⁰³ Professors Findley and Scott have

¹⁰² Other factors are, primarily, the defects of the screening process (role of grand jury and preliminary hearing) and the ineffective assistance of counsel. See L. Griffin, *The Correction of Wrongful Convictions: a Comparative Perspective*, 16 Am. U. Int’l. L. Rev. 1241.

¹⁰³ D. Martin, *Lessons about Justice from the Laboratory of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. Rev. 847, 848 (2002).

studied the sources of such tunnel vision.¹⁰⁴ First, there are innate cognitive “biases,” such as confirmation bias, hindsight bias and outcome bias. Second, and more related to the core of this research, they claim that institutional pressures on prosecutors bolster the tunnel vision phenomenon. Thus, they explain that the public pressures prosecutors to convict the guilty, creating a “conviction psychology” – an emphasis on obtaining convictions over doing justice. They share that empirical data has shown that the more experience the prosecutor has, the more likely he or she is to express an interest in obtaining convictions over an interest in doing justice. They further explain that prosecutors are convinced of the righteousness of their assessments of guilt, but that such an assessment can be flawed by the information provided to them (problem of absent or hidden data, and already-biased police investigations) as well as by the absence of inconsistent feedback (most cases settle through plea bargaining, cases tried mostly end with convictions, non-guilty verdicts interpreted as a miscarriage of justice, not as finding of innocence).^{105, 106}

¹⁰⁴ K. Findley, M. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis. L. Rev. 291.

¹⁰⁵ The authors also discuss particularities of rules of criminal procedure which are of no direct interest of this research.

¹⁰⁶ S. Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, Howard Law Journal, Vol. 49, No. 2, 2006; S. Fisher, *In Search of the Virtuous Prosecutor: A conceptual Framework*, 15 Am. J. Crim. L. 197; B. Green, *Why Should Prosecutors Seek Justice?* 26 Fordham Urb. L. J. 607.

CHAPTER 4: THE OPINIONS OF THE INSIDERS: DATA COLLECTED THROUGH INTERVIEWS OF INVESTIGATING MAGISTRATES AND PROSECUTORS

This chapter describes the raw data collected through the interviews I conducted. The information is organized by the national source of the findings – U.S. or French – and by sample, primarily based on the profession of the interviewee (prosecutors or investigating magistrates, as well as professors. (For further details see Chapter 2: Methodology).

As a preliminary remark, what is striking about the substance of the interviews are the commonalities, that is, the overall consensus about the addressed issues across the interviewed groups, or at least within the same group. Thus, be the interviewee a prosecutor or an investigating magistrate, be she French or American, the declarations made in each interview were largely consistent with those of the others. A marginal fraction of the sample dissented.

A second guideline for the reader is that the interviewees claimed that the conventional wisdom opinions are wrong.

First, all but one French investigating magistrates disagreed with the charge that magistrates cannot seek out both incriminating and exculpatory evidence.

Second, prosecutors both in France and in the United States made the same claim with respect to their own capabilities. All but one expressed the opinion that their posture of charging authority does not make them biased towards a finding of guilt. The investigating magistrates have largely validated that claim. Only a few of the interviewees expressed some doubt, which did not appear to go beyond an intuitive

feeling, as no precise examples of the impact of the party affiliation of the prosecutor could be offered.

Third, none of the French interviewees was able to qualify the alleged virtue of neutrality as a clear added value of the French investigating magistrate. In particular, prosecutors explained that they do call in investigating magistrates because of legal limitations imposed on their own scope of action, or because of their lack of independence from the Executive branch. Investigating magistrates appeared to be aware of that situation. The U.S. prosecutors confirmed that finding by declaring that their work would not be impacted whatsoever by their being bound by a provision equivalent to Article 81 of the French Code of Criminal Procedure. Most interviewees in France concluded that the abolition of the position of investigating magistrate was an option.

A third note before the substance of the interviews is revealed in detail is that my interviews with U.S. prosecutors led nonetheless to identifying unexpected material differences in the operation of the French and the U.S. models of pre-trial investigation.

A. American Sources

U.S. Attorneys' primary role is not to investigate. Before exploring the impact of the posture as the prosecuting party of the U.S. federal prosecutor, this empirical research assessed whether and to what extent they are involved in the investigation of complex criminal matters. The detailed results of the nine interviews conducted with U.S. federal prosecutors follow, including the findings of significant differences with the French model.

1. Preliminary Check: the Investigative Role of U.S. Federal Prosecutors

All U.S. federal prosecutors interviewed indicated, although each case is different/unique, they are highly involved in the investigatory preparation period for trials of complex matters. This, of course, applies only when they initiate the investigation. When the case is brought by an investigative agency, hypothetically, the investigation has already been partially completed.¹⁰⁷ Many prosecutors shared in their interviews that in this scenario, the amount of investigatory work they handle is commonly dependant on two factors: the nature of the matter – how complex it is – and/or the quality of the agent (this term was most often employed in the singular), that is often synonymous with his experience.¹⁰⁸

In the case of white-collar crime or other complex matters, *cooperation* between prosecutors and agents had been unanimously described as the recurrent situation (“[we are] a lot involved [...] we work hand in hand;”¹⁰⁹ “we are very involved in the fact-finding [and] [...] [prosecutors and agents can be] team players,”¹¹⁰ “prosecutors are helping the agents and agents are helping the prosecutors”¹¹¹); even when the investigators are experienced and as a consequence familiar with what the prosecutor will need to prosecute a case (e.g. an investigator may spontaneously prepare spreadsheets identifying embezzlement flows),¹¹² prosecutors “collect facts.”¹¹³

¹⁰⁷ One prosecutor emphasized that the point in time when the agent presents a case to a U.S. Attorneys’ Office is up to the former: such a call in may take place early on in the investigation, or later when the investigation of the investigative agency is complete or almost complete (Interview # 3).

¹⁰⁸ Interviews # 2, #3, #8 and #14.

¹⁰⁹ Interview #21.

¹¹⁰ Interview #14.

¹¹¹ Interview #19.

¹¹² Interview #8.

¹¹³ Interview #21 summarizing the general opinion of the U.S. federal prosecutors interviewed.

The first reason mentioned by all the prosecutors regarding their involvement in the fact-finding is the reach by the agents of the limits of what they can do independently: the investigation of complex crimes often requires the use of coercive investigation measures, that is the investigation is performed without the consent of the person holding the sought-after information, such as searches at the crime scene, subpoenas for the production of documents to third parties, and subpoenas to appear before the grand jury for non-cooperating witnesses.¹¹⁴ The investigative agency alone cannot decide to carry out such measures; in fact, authorization from a magistrate or the grand jury is a prerequisite, which can only be requested by the prosecutor.¹¹⁵

Beyond this specific situation of a legal need for the prosecutor's participation in the investigation, the prosecutors interviewed explained that in complex matters, U.S. federal prosecutors explained that the file compiled by the investigative agency may be incomplete as per their analysis and require supplemental information. Based on this assumption, they will either request the agent to carry out additional investigation measures, with precise instructions about what to check, and possibly take part in these measures themselves.

Most U.S. prosecutors acknowledged that the agents remain the primary fact-finders and that agents carry out most actual investigation measures.¹¹⁶ One even described the fact that he hardly ever takes part in the completion of the measures, but his case was special since/because he was prosecuting international drug crimes with facts investigated mostly abroad (with impact on the U.S. territory). Nevertheless, he is often involved indirectly when asking for investigations of foreign or U.S. investigative

¹¹⁴ Interviews #2, #3, #8, #17, #19

¹¹⁵ Prosecutor in interview #2 emphasized that very few investigative agencies have subpoena powers.

¹¹⁶ Interviews #6, #8, #14, #17, and #19.

agencies and discussing with them how to proceed, He also analyses the information collected by others, leading him to conclude that, in that sense, he “investigates” as well.^{117 118}

The lack of time and resources were recurrently mentioned as reasons for delegating work to agents (“[when bank records or emails must be reviewed, agents take the lead, but “we try to do it as well. [...] they collate the relevant documents and then we review them”).¹¹⁹ But this is not the only criterion for the involvement of prosecutors or lack thereof in carrying out specific investigation measures.

U.S. federal prosecutors explained that they “put hands on” to “understand what is happening.”¹²⁰ Thus, they cannot perform their duties without acquiring sufficient knowledge of the facts, especially when the issues are highly technical (e.g. reviewing stacks of financial accounts). They also seek first-hand knowledge over relying on the investigative agency’s findings and analysis when the evidence is key. In others words, the materiality of the evidence will largely determine the degree of involvement of the prosecutor in a specific investigation measure.¹²¹ One of them gave the following examples: when a witness is so important that the prosecution could not proceed testifying at trial without him, the prosecutor will attend his deposition by the agent;¹²² this has been confirmed to be especially true if the prosecutor must avoid making himself a witness.¹²³ In turn, agents will usually complete background information determinations alone, such as verifying the control procedures existing in a company,

¹¹⁷ Interview #17.

¹¹⁸ This interviewee actually declared that in domestic matters, prosecutors generally do not investigate, but this opinion is contradicted by the other interviews I conducted.

¹¹⁹ Interview #14.

¹²⁰ Interview #14.

¹²¹ Interviews #2 and #8

¹²² Interview #8.

¹²³ Interviews #2 and #14.

since this information will probably not be contested.¹²⁴ This is also true for some witnesses' depositions as well: the prosecutor may ask the agent to hear one witness out of his presence; prior to the deposition, the prosecutor and the agent will discuss the content expected to be derived from the deposition and the strategy in the matter.¹²⁵ Two other opportunistic reasons have been offered by prosecutors for not taking part in the depositions of some important witnesses. One mentioned that because she is a woman and very young, she can face credibility issues when questioning successful male executives much older than she.¹²⁶ Less peculiar was the advantage of a less contentious setting when the deposition is completed by an agent alone. One prosecutor said, however, that when the witness is "lawyered up," he will attend the deposition (assuming that the witness is important as stated above).¹²⁷ One prosecutor mentioned that she may conduct a deposition entirely on her own.¹²⁸

When asked when they are involved in the fact-finding whether they have the lead on the investigation, all prosecutors replied in the line of "in practice, yes".¹²⁹ After insisting that they have no supervisory authority over the special agents,¹³⁰ who are "co-equals,"¹³¹ and that *cooperation* prevails between prosecutors and agents – a prosecutor and an investigator may have built a long cooperative relationship over different matters. U.S. Attorneys expressed the that agents comply with the instructions they receive from

¹²⁴ Interview #8.

¹²⁵ Interviews #2 and #19.

¹²⁶ Interview #2.

¹²⁷ Interview #14.

¹²⁸ Interview #2.

¹²⁹ Interview #3 where the prosecutor also declared tellingly "agents could refuse I suppose... in practical terms, they will carry out [the requested measure]."

¹³⁰ Interviews #14 and #17.

¹³¹ Interview #3.

them, as the case may be after first arguing their opposing views.¹³² A former prosecutor said that from the time the prosecutor accepts the case presented by the agent, he is “entirely in charge of the investigation;”^{133, 134}

Several prosecutors emphasized that they are the ones with the decision-making power and that this is a compelling reason why agents involve prosecutors in their factual investigation (“we don’t accept facts as they present them”).^{135, 136} Only one prosecutor seemed to think of a hypothetical situation in which disagreements were overcome with difficulty, underlining that “we cannot force them to do anything”.¹³⁷ Rather than “lead,” the expression “guidance” or “advice” have been used to describe the relationships between agents and the prosecutors.¹³⁸ The prosecutors simply know better what additional investigation is necessary for charges to be filed¹³⁹

This means that even when the prosecutor does not take part herself in carrying out an investigation measure, the agent doing so reports to her right after the interview of a witness, for instance. In other terms, “[prosecutors] follow the investigation closely.”¹⁴⁰

2. Orientation of the Investigation

In substance, I interrogated federal prosecutors about their posture regarding the conduct of the investigation in comparison to the purportedly “neutral” French

¹³² Interviews #2 and #3.

¹³³ Interview #6.

¹³⁴ Likewise, Interviewee #6 declared “the investigation is handled under the supervision of the prosecutor.”

¹³⁵ Interview #21.

¹³⁶ Also interviews #3 and #19.

¹³⁷ Interview #14. One can wonder whether the pretty young age of the prosecutor explains a lack of authority in relationship with more experienced agents.

¹³⁸ Interviews #8 and #17.

¹³⁹ Interviews #3, #14, and #21.

¹⁴⁰ Interview #2.

investigating magistrate – I gave them some background information first. More precisely, I wondered whether they sought out as much evidence of guilt as for innocence, along the lines of Article 81 of the French Code of Criminal Procedure. Some reassurance about the non-judgmental purpose of my questions was given to encourage candid answers.

With respect to the scope of their investigations, all of the federal prosecutors whom I interviewed claimed the qualities of thoroughness and completeness. Most of them first set the context for this claim. Interestingly indeed, many of the interviewed prosecutors made a preliminary spontaneous declaration, following the same pattern, which consisted of three points:

- their ethical duty to seek justice;
- their exceptional position incomparable to that of a defense counsel;
- their obligation to turn over exculpatory evidence.

So first and systematically, prosecutors reminded me that their mission is to ensure justice, that is to prosecute the guilty and “to protect the innocents”¹⁴¹ (“[w]e do not have an agenda other than pursuing justice,”¹⁴² “[prosecuting an innocent] is the biggest and most humiliating mistake a prosecutor can do,”¹⁴³, “our greatest duty is to do what is just.”¹⁴⁴) A variant was “[we do] not only [seek] that our side wins.”¹⁴⁵ In relation thereto, prosecutors often referred to their discretionary power in explicit or implicit terms and insisted that if there are insufficient charges, they have the ethical duty

¹⁴¹ Interview #17. Interviewees #8, #14, used the negative form “not to prosecute innocents”

¹⁴² Interview #8.

¹⁴³ Interview #17. Interview #14 also insisted that “you do not want to make mistakes”.

¹⁴⁴ Interview #3.

¹⁴⁵ Interviews #3 and #21.

to decline prosecution.¹⁴⁶ Interestingly, the expression “to seek the truth” was more rarely used to describe the prosecutor’s mission.¹⁴⁷

Second, they differentiated themselves from the attorneys for the criminal defendants. While they must promote justice, the latter seek to avoid their client’s conviction-- whatever is required to reach that goal within the limits of the law. Thus, I was told “[w]e do not simply try to win the case [...] [defense counsels in turn] have no duty but [to further] their client’s interest”¹⁴⁸ or “in private practice, you are paid to follow the agenda of your client.”¹⁴⁹ As a result, they declared that prosecutors have “higher ethical obligations.”¹⁵⁰ “The party opponent on the other side of the v. is the United States of America, and it is a big deal [...] you talk about freedom [...] you have all the machinery of the Government to put you in jail.”¹⁵¹ One prosecutor found it to be informative that he is not assigned any quota of cases to prosecute, that statistics of prosecution are not kept for the purpose of encouraging prosecution.¹⁵² Third, they pointed to their obligation to turn over exculpatory evidence, referring to the *Brady* and *Bagley* cases.¹⁵³

This being said, they explained that, in essence, *to carry out their mission*, they “investigate thoroughly,”¹⁵⁴ which implicates to seek out both incriminating and exculpatory evidence: “[a]s a practical matter, you do want to know everything.”¹⁵⁵

¹⁴⁶ Interview #6.

¹⁴⁷ Interviews #3 and #19.

¹⁴⁸ Interview #6. Interviewee #21 likewise declared that “defense counsels have a different role. They do not seek the truth, [they are bound] solely to their clients’ interests.”

¹⁴⁹ Interview #8.

¹⁵⁰ Interviews #17, #19

¹⁵¹ Interview #14.

¹⁵² Interview #8.

¹⁵³ Interviews #2, #3, #6, #8, #14, #17, #19, #21.

¹⁵⁴ Interview #21.

¹⁵⁵ Interview #6. “You want to know everything” was an expression also used by Interviewee #14.

“[There is] no benefit in going forward being ignorant. [...] You want to know these unfavorable facts;”¹⁵⁶ “[i]f you have exculpatory evidence [out there] [...] you want to know, you want to track it down;”¹⁵⁷ “you do not know the strength of your case unless you know the strength of the other side;”¹⁵⁸ “a good prosecutor investigates all things which help the defendant;”¹⁵⁹ “The prosecutor wants to hear a person who may be harmful [...] [he will be] better prepared for trial,”¹⁶⁰ “we are not going to leave stones unturned.”¹⁶¹

In particular, most prosecutors emphasized that whenever the defendant alleged some defense, they check whether such claim is accurate.¹⁶² Often, later in the interview, they qualified that broad statement somewhat by explaining that they check what appears to them “to lead to *real* exculpatory evidence” (Emphasis added)¹⁶³; likewise, I was told “I pursue all the leads that, *I believe*, lead to exculpatory evidence. I want to do my job right” (Emphasis added)¹⁶⁴.

To verify the truthfulness of this claim of objectivity, I asked prosecutors whether the defense counsel typically submitted evidence they had not retrieved themselves. Opinions were divided on this point. For example, four prosecutors indicated that in most cases, “little to no evidence on guilt/innocence”¹⁶⁵ is produced by the defense.¹⁶⁶ One prosecutor went so far as to say “if the defense brings in evidence, I did not do my job

¹⁵⁶ Interview #2 and #6.

¹⁵⁷ Interview #14.

¹⁵⁸ Interview #3.

¹⁵⁹ Interview #3.

¹⁶⁰ Interview #8.

¹⁶¹ Interview #21.

¹⁶² Interview #19.

¹⁶³ Interview #17.

¹⁶⁴ Interview #21.

¹⁶⁵ Interview #2.

¹⁶⁶ Interviews #2, #3, #19 and #21.

right.”¹⁶⁷ He then confirmed that “it is rare that the defense finds out anything material [for the finding of guilt or innocence].”^{168, 169} Another recapitulated as follows: “[t]he defense often relies on our investigation because of the way we do it.”¹⁷⁰

One of these prosecutors was careful to limit the significance of this finding by stressing that in white-collar criminal matters, material facts are rarely in dispute, and the debate focuses on the presence of *mens rea*, that is, the criminal intent.^{171, 172}

Four prosecutors disagreed with this finding, saying that defendants bring in evidence. They primarily pointed to situations in which the evidence produced by the defendant was documentation that they could not have located themselves in the first place. Two scenarios occur. First, the prosecutor may not have as easy access to the records as the defendant who has better resources, also formulated in terms of “defendant’s greater ability... to find relevant [documentation]”¹⁷³ (*e.g.* in a criminal case of securities fraud, the former CEO of a large company may have previously faced civil lawsuit and may hold relevant information as a consequence, and also simply because of his connections in the company).¹⁷⁴ Second, because of the lack of contextual information, prosecutors explained that they may not have figured out the lawful explanation presented by the defendant’s counsel for the apparently criminal acts.¹⁷⁵

Claims of alibi fall under this last category. In some cases, the prosecutor may have

¹⁶⁷ Interview #3. Interviewee #3 likewise said "

¹⁶⁸ *Ibid.*

¹⁶⁹ Interviewee #3, however, expressed the view that the defense may bring evidence relevant to the sentencing, like evidence about character.

¹⁷⁰ Interview #19.

¹⁷¹ Interview #2.

¹⁷² Interview #8 confirmed this factual observation: “[In most cases, there is] a clear paper trail [of the wrongdoings]”.

¹⁷³ Interview #6.

¹⁷⁴ Example given in Interviews #14. The same factor was described in Interview #6.

¹⁷⁵ Interviewee #19 estimated that “in a lot of cases, the defense does not have anything to say that we have not investigated” and as a consequence has been put in the first category here above; nonetheless, he admitted that “in some cases, they can surprise us, [for instance with] their notice of alibi.”

identified the factual obscurity, however, been unable to solve it; in others, he may not have thought about it at all.¹⁷⁶ The two limitations on the prosecutor's investigation often overlap. They both result from the fact that, while the prosecutor is second-guessing, the defendant knows what actually happened and has primary access to exculpatory evidence. One prosecutor offered the following vivid picture of their fact-finding research efforts, which illustrates the two limitations: "*we search from behind... the criminals found a way to conceal the fraud... a lot of time we play catch-up, try to figure how they did something [...]. They may have issued a fake document. [...] For instance, you may not understand exactly how they cashed checks not written in their account. [...] [You may suspect that a bank teller was part of the way... you can force people to be truthful [...] we are stuck with the answer they give us.]*"¹⁷⁷

Three prosecutors belonging to the two opposing opinion groups (respectively, two and one) concurred when revealing the fact that the defendant produces evidence on their character (qualified as a "collateral issue" by one of them). One said expressly that such evidence is not material for the finding of guilt or innocence and only impacts the sentencing,^{178, 179} while another opined that by appearing to have a good character, the defendant is hoping to create a doubt in the mind of the jurors as to his guilt.¹⁸⁰

I also asked prosecutors whether they can draw a line between investigating the matter thoroughly, which includes, as per the above analysis, finding exculpatory evidence, and actively seeking evidence in the sense of the innocence. Specifically, I

¹⁷⁶ Interviews #8 (example of explanation for payments constructed as a bribe by the prosecutor, but for which the defense offers another unthought-of of exculpatory explanation). Also Interviews #14 and #17.

¹⁷⁷ Interview #8.

¹⁷⁸ Interview #3.

¹⁷⁹ Interviewee #2 appeared to share that view since he indicated that in most cases, the defense brings little or no evidence.

¹⁸⁰ Interview #17.

drew their attention to the difference in language between the USAM and state prosecutor practice guidelines (see above Chapter 3, B.).

One former prosecutor admitted that U.S. federal prosecutors are not bound “by a general principle to search affirmatively in every place.”¹⁸¹ Interestingly, he conveyed the idea that federal prosecutors do not have to generate/obtain materials from other sovereigns, including state authorities. Only one U.S. federal prosecutor declared explicitly that his obligations do not go so far as to seek actively exculpatory evidence.¹⁸² All the other prosecutors did not amend their previous answers further in response to my insistence on the action word *actively*. One strongly denied that prosecutors do not actively seek exculpatory evidence.¹⁸³

However, four prosecutors said that their daily practice conforms with the language of the state prosecutor’s practice guidelines, even though the USAM does not provide explicitly for the obligation *not* to refrain from seeking exculpatory evidence (“this is silly, it is something unnecessary to say”).^{184, 185}

On the occasion of this question, some prosecutors insisted spontaneously that the defense must conduct its own investigation (“the defense would be negligent not to double check... they must still continue to investigate... unless the witness is sure we have him”)¹⁸⁶, that the defendant counsel is the one having the affirmative obligation to locate additional exculpatory evidence, if any.¹⁸⁷ One prosecutor summarized, “we cannot do all the investigation on behalf of the defendant [...] we do not have the

¹⁸¹ Interview #6.

¹⁸² Interview #8

¹⁸³ Interview #21.

¹⁸⁴ Interview #19.

¹⁸⁵ Also Interviews #14, #17 and #21.

¹⁸⁶ Interview #3.

¹⁸⁷ Interview #6.

resources to track down every piece of information towards innocence [...]. I am not going to do the defendant's job."^{188, 189}

In more detail, prosecutors declared that "we ask him [the defendant] to come in and tell us what [he] thinks [...] [i]f it starts to take shape, it becomes more and more [necessary for] the defendant to prove his innocence. At some point, I cannot find more evidence. It is to the defendant's counsel to do it."¹⁹⁰ In other terms, all these declarations insisted on the adversarial nature of the U.S. system.

Finally, few prosecutors expressed an opinion on their posture with respect to the abstract concepts of impartiality/neutrality/objectivity. "We are very interested [in protecting the innocents] [but] [...] we are not neutral, we want to prove guilt, [...] we focus on building up a case, we are primarily responsible for proving facts;"¹⁹¹ "we take [our discretionary power to prosecute or not] very seriously and try to find guilt [based on an investigation looking for] guilt and innocence, [...] obviously, we are not quite as impartial."¹⁹² "The appearance [may be] that we try to seek to win. We are one of the sides of two, one side deciding whether to even file the charge... then you get to play... we can lose."¹⁹³

¹⁸⁸ Interview #14.

¹⁸⁹ I devised a new question to follow up on these spontaneous answers to be used when no equivalent declaration was made. I asked whether the interviewee would conduct the investigation any differently if he were the defense counsel in the same matter. It was not successful as no substantial explicit information was obtained from it. Interview #19 declared that "[t]he defense often relies on our investigation because of the way we do it." but immediately added that the defense counsel' objective is different to defend the client's interests, no matter what. Interview #21 refused to compare himself to a defense counsel, making the same point as Interviewee #19 and insisting the defense counsel do not have the same investigative tools, such as subpoena or the informational leverage held by prosecutors in their relationship to potential witnesses. These answers did not address the issue the question was targeting.

¹⁹⁰ Interview #14.

¹⁹¹ Interview #14.

¹⁹² Interview #2.

¹⁹³ Interview #3.

As a supplement to the description of their own work, several prosecutors opined on the defense counsel's perspective over the fact-finding. Thus, I heard that the defense is in all likelihood "more interested" in finding proof of innocence;¹⁹⁴ another prosecutor used the expression "more energetic."¹⁹⁵ Another prosecutor affirmed that more than proving innocence, defense counsel will pursue introducing doubt in the mind of the jurors.¹⁹⁶

Asked as a final question whether the enactment of a French-inspired statutory provision requiring them to investigate in the sense of guilt and of innocence would change the way they performed their job, U.S. federal prosecutors unanimously replied "no".¹⁹⁷ One summarized that "[prosecutors have] the same mandate towards guilt and innocence"¹⁹⁸

Almost all prosecutors were careful to say that they cannot exclude the fact that there are "bad apples,"¹⁹⁹ that "some prosecutors may be overzealous"²⁰⁰ and that their view is "fairly optimistic."²⁰¹

All the prosecutors expressed the fact that they play the role of a "check" on the investigative agents' work. Very often, they said that the agents tend to be satisfied with less evidence than they do and admitted to being possibly somehow more biased towards guilt than towards innocence. They described that they may need to slow down the process. All prosecutors, however, offered explanations linked to the person of the agent in this situation: "it happens a lot with younger agents. They may not see the benefit of

¹⁹⁴ Interview #14.

¹⁹⁵ Interview #8.

¹⁹⁶ Interview #17.

¹⁹⁷ Interviews # 3, #8, #17, #21.

¹⁹⁸ Interview #6.

¹⁹⁹ Interviews #3, #14

²⁰⁰ Interview #17.

²⁰¹ Interview #3.

talking to someone who is not helpful. They [may not] understand the importance of [talking to certain people], [...] [which does not mean that the agents acted in an improper [manner]].”²⁰² All the prosecutors acknowledged, however, the high quality, including neutrality, of the work of some agents. In other words, prosecutors declined to accuse the agents of any institutional bias. One prosecutor offered the interesting following explanation: agents change positions every 2-3 years, that is more often than prosecutors. They tend to feel that the work is done when an indictment is issued, which supposes that there is “probable cause” that a crime has been committed, whereas the prosecutor is concerned about being able to prove the suspected crime in court what requires him to meet the “beyond reasonable doubt” standard of proof.²⁰³

3. Collateral Material Findings

I call *collateral findings* those that I made and developed in the course of the interviews, but which were not sought at the beginning of my research. They are relevant in the comparison of the fact-finding work carried out by U.S. federal prosecutors and that done by French investigating magistrates, although they related only indirectly to the posture of the prosecutors in the conduct of their investigations.

First, almost all of the U.S. federal prosecutors interviewed declared that they hardly ever interrogate the defendant before his indictment.²⁰⁴ If legal mechanisms to do so exist, they are rarely used.²⁰⁵ In other terms, the investigation is conducted without input on the alleged criminal activities from the defendant himself. The reason given for

²⁰² Interview #8.

²⁰³ Interview #17.

²⁰⁴ Interviews #2, #8, #19, #21. Only interviewee #23 expressed that he usually tries to interrogate the target of the investigation before pursuing indictment.

²⁰⁵ Interview #17.

such a choice is that defendants would not like it anyway. However, they explained that the target or subject of an investigation may initiate contacts with them when the latter discovers through third party sources, for instance, that other employees of the same company were invited to interview with a prosecutor.²⁰⁶ They also reported that they may talk to an investigated person when the latter can provide information on other “bigger fishes.” These two caveats do not minimize the finding, very unique to the U.S. system, that most prosecutors themselves do not value the opinion of the defendant to inform their investigation.

A second collateral finding made through this research is that at the point the defendant gets involved, *i.e.* from his indictment, the U.S. federal prosecutors’ file is close to being ready for trial. Thus, all prosecutors explained that they seek indictment not only when they believe there is probably cause that a crime has been committed by the targeted person, as per the standard of proof to be shown to the Grand Jury, but when they believe it beyond a reasonable doubt, as per the standard of proof to be shown to the trial jury or court.²⁰⁷ In other words, when the defendant starts his own investigation of the matter, the prosecutors is pretty much done with his. This gap in chronology is something very specific to the U.S. criminal procedure organization, which has no comparison in French law where the indictment usually takes place a significant time prior to the decision to transfer the case for trial, giving to the defense the opportunity to make inputs in the investigation if he wants to and thus influence the intellectual focus of the investigating magistrate.

²⁰⁶ Interviews #14, #21.

²⁰⁷ *E.g.* Interview #6, #19, #23.

Third, several U.S. prosecutors have acknowledged that they may reach a point of conviction at which they will ask the putative defendant claiming his innocence to bring elements which will create doubt in the prosecutor's mind. Through this negative phrasing, they meant to stress that this is not an impediment to the presumption of innocence.²⁰⁸

B. French Sources

Interestingly, French law professors were largely sharing the public opinion about the lack of neutrality of the investigating magistrates and the prosecutors, while these two latter groups proved the conventional wisdom opinions to be wrong. This section presents the data collected in this order.

1. French Law Professors

About the accusation that the investigating magistrate investigates only in the sense of the charge, two professors reflected the public opinion: “The system is currently schizophrenic. [The investigating magistrate], as an investigator, must imagine work hypothesizes... [and also, as a neutral, decides] the transfer [NB: of the defendant] before a trial court. It is a very difficult situation, but not impossible. The very good investigating magistrates can manage to do it.”²⁰⁹ “In theory, the investigating magistrate investigates both in the sense of guilt and of innocence. In practice, he acts in the sense of guilt... Because of the decision-making power, it is very difficult to investigate against the charge. One gets to like playing the hunter... One does not want to give value to the one against whom one investigates... who is often not very clean. One has been too long

²⁰⁸ Interview #6, #19, #23.

²⁰⁹ Interview #1.

in contact of crocks.. One has no envy to investigate against the charge... It is rare to be willing to issue a no-bill.”²¹⁰

One professor disagreed offering caveats: “[the investigating magistrate receives] a file [NB: from the prosecutor and to investigate further], which means that there is something. [He is asked] to confirm the indicia of guilt... The good investigating magistrate must be able to escape from one lead...It is true that [in the course of the investigation], one acquires ideas. One must not let oneself imprison with one lead....” This professor also pointed that in 10% of the cases, the investigation ends with a no-bill, inferring from that fact that investigating magistrates do not systematically side with prosecutors. ”²¹¹

As to the impact of the party status of prosecutors, two professors sustained that some bias exists. “Yes, the public prosecution service investigates in the sense of the guilt... The preliminary inquiries are rather done with a repressive mindset.” “It is still the accusation... they prosecute, request [sentences].”²¹² “Nothing would forbid [to impose] neutrality, objectivity to the prosecutors.”²¹³ “The investigating magistrate is more independent. The prosecutor because he prosecutes is still somewhat engaged. It is tough to imagine that it is the same... Several perspectives are needed. One needs one man independent from the public prosecution service and from the executive branch.... The public prosecution service is not quite at ease [to investigate both in the sense of guilt and innocence]; he is the charging authority.”²¹⁴

²¹⁰ Interview #7.

²¹¹ Interview #20.

²¹² Interview #7.

²¹³ Interview #7.

²¹⁴ Interview #20.

One however – not the same one as above – corrected that the prosecutor would investigate both in the sense of guilt and innocence. She noted however that indeed “[t]he public prosecution service will not do better than the investigating magistrate... It is difficult for an investigator whoever he is to investigate both in the sense of the charge and against the charge.”²¹⁵

These external opinions having being revealed, one is now ready to read what French investigating magistrates and prosecutors think about the suggested reform and the assumptions justifying it for its proponents.

2. Investigating Magistrates

I started by asking investigating magistrates whether they can investigate both towards proving the charge and establishing innocence. There was no consensus. Five of the six interviewed investigating magistrates confirmed that it is not an impossible task;²¹⁶ in responding to the related common accusation that they investigate only to prove guilt, one investigating magistrate reacted strongly: “that is totally wrong. [...] This image of the investigating magistrate has nothing to do with the reality”²¹⁷ These magistrates pointed out that such efforts to take a double/dual perspective over a criminal matter is indispensable for them to carry out their mission, which is to uncover the truth (see Art. 81 of the French Code of Criminal Procedure)²¹⁸:

[The investigating magistrate is] not a judge getting the matter ready for trial [*juge de la mise en état*]. You are not a simple spectator [replying to requests to complete investigation measures]. You pursue the truth. [...] What is expected from me is [to tell] whether the crime has been committed. [Such duty]

²¹⁵ Interview #1.

²¹⁶ Interviews #9, #12, #16, #18, #22.

²¹⁷ Interview #12

²¹⁸ Interviews #9, #12 and #16.

necessarily [triggers an investigation] in the sense of guilt and innocence. You are engaged to issue [NB: at the close of the investigation] a transfer order, a ruling order where the charges are discussed. Hypothetically, you have examined everything.²¹⁹

One magistrate insisted that the investigating magistrates do not investigate in the sense of guilt and innocence at the same time; there are “phases” in which the investigation is conducted towards the demonstration of guilt and others in which the magistrates seek evidence of innocence.²²⁰ Another investigating magistrate denied suffering from schizophrenia.²²¹

He concluded that meeting the obligation to investigate both in the sense of guilt and innocence requires methodology and relates to deontology.²²² Another magistrate also expressed the fact that education is key, and he revealed that the imperative of neutrality of the investigating magistrate and the principle of the contradiction has only recently been perceived as essential in the training of the investigating magistrates.²²³

The investigating magistrate dissenting with his colleagues declared that if not impossible, investigating towards guilt and innocence is “intellectually very tough.”²²⁴ “[The investigating magistrate inherits a file from the police or the public prosecution service because there are not enough pieces [of evidence]. [The investigating magistrate’s action] takes place in the prolonging the action of the public prosecution service.”²²⁵ He elaborated on the proximity between the prosecutor and the investigating

²¹⁹ Interview #12. Using similar terms, Interviewee #16 declared that “one does not go without the other [investigating in the sense of guilt and innocence... in order to reveal the truth]” and Interviewee #9 “what matters it to obtain the truth, this initiative towards the truth. This is why one must be able to investigate both in the sense of guilt and of innocence. [...]”

²²⁰ Interview #16.

²²¹ Interview #9.

²²² Interview #16.

²²³ Interview #9.

²²⁴ Interview #13.

²²⁵ *Ibid.*

magistrate (see below). He also confirmed the opinion in the public debate that being both an investigator and a referee is somehow contradictory.

Interrogated about the alleged difficulty of deconstructing a line of reasoning previously built up, one magistrate denied it, pointing to the important number of no-bill orders closing investigations and explaining that at some point, charges may seem to exist and after gathering further information, finally appear not to be demonstrated.²²⁶ This magistrate attributes whether an investigating magistrate feels bound by his previous findings, or free to depart from them to the magistrate's personality.²²⁷ Another magistrate talked about the "plasticity of the mind" as the quality required from the investigating magistrate: "[...] the matter is moving. [...] By nature, it will evolve. I must not have pre-judgment ideas although I need the main axes of research. [...]it is first a mindset, a sort of aphesis."²²⁸ Another magistrate admitted that along the course of the investigation, a mind conviction arises about the crimes committed and their authors, without meaning, however, that the investigating magistrate can no longer pursue his mission to investigate towards proving innocence; on the contrary, he reiterated that the investigating magistrate, being placed in between the crossed perspectives of the defense and the prosecutor, is led to adopt a more neutral standpoint.²²⁹

Related opinions are that it is not impossible to categorize evidence between incriminating evidence and exculpatory evidence.²³⁰ The same judge also emphasized that an investigation measure initiated purposefully to prove innocence may end

²²⁶ Interview #16.

²²⁷ *Ibid.*

²²⁸ Interview #18.

²²⁹ Interview #9.

²³⁰ Interview #9.

constituting incriminating evidence; he gave the example of the claim of an alibi which is revealed to be untrue.²³¹

Investigating magistrates expressed the fact that they make decisions whether to conduct additional investigation measures based on their assessment of the relevance to their ultimate goal, which is to uncover the truth. One magistrate explained that “defendants’ counsels resort to dilatory measures. Requests for investigation measures are refused, not taking the defense’s perspective into consideration, but because the measures requested do not aim at revealing the truth²³² ... but just to delay the proceeding.”²³³ “When the defense asserts something, one must check. If, however, it looks phony, one is not going to spend three years to check it.”²³⁴ “[If one refuses to carry out an investigation measure requested by the defendant], one must provide grounds for that denial, and this denial order can be appealed”²³⁵

The next series of questions focused on the relationships between the investigating magistrates and prosecutors. In response, one investigating magistrate vigorously denied allegations of a lack of impartiality against his institution:

We are not at the boot of the public prosecution service. I have issued a very important number of non conforming orders [non conforming with the requisitions of the prosecutor]. Things cannot be seen in a Manichean manner. We do not systematically side or oppose the public prosecution service. It depends on the prosecutor: [if he is pro-charge], or whether he bases his prosecution on a complete inquiry. If the prosecutor conceives his role in this manner and not as the armed arm of the Executive, demonstrates guilt, grounds [his accusation on witness testimonies, expertise, then we have a common vision.²³⁶

²³¹ Interview #16.

²³² Interview #12.

²³³ Interview #18.

²³⁴ Interview #16.

²³⁵ Interview #16.

²³⁶ Interview #12.

Other investigating magistrates rebutted the existence of any “connivance” or “alliance” between the investigating magistrate and the prosecutor.²³⁷

Another stressed that nevertheless, mechanisms must exist to preclude the investigating magistrate from falling into this trap, thus, admitting the existence of a risk. He detailed that he had in mind the informal exchanges which take place between the prosecutor and the investigating magistrate, which should be made official, formalized.²³⁸

Another interviewee likewise noted that he does not understand the defiance of some investigating magistrates towards prosecutors, which can only damage the investigation.²³⁹

One magistrate expressed doubts about the “purported” neutrality of members of his institution describing the close ties with the public prosecution service: “The investigating magistrate and the prosecutor entertain privileged relationships. They belong both to the same corps [the Judiciary]; they come from the same school [cross paths exist from one profession to the other]; they address each other as “tu.” The defense counsel is somewhat excluded from this relationship. There is not a perfect equality between the prosecution and the defense.”²⁴⁰

As a follow-up question, I asked French investigating magistrates whether differences in opinion with prosecutors are frequent. If so, can these disagreements be explained by the fact that the prosecutor placed the charge and that, in turn, the investigating magistrate is neutral. I suggested that such divergences can happen at the start, pending or close of the investigation (see Chapter 2). All magistrates reported

²³⁷ Interviews #9 and #18.

²³⁸ Interview #9.

²³⁹ Interview #18.

²⁴⁰ Interview #13.

hypothetical disagreements, that could happen at these suggested stages of the investigation. Two refused to ascribe these disagreements expressly to some propensity towards guilt on the part of the prosecutors;²⁴¹ two seem to acknowledge the existence of such a pro-charge bias, but in blurry and sometimes contradictory terms so that it was difficult to conclude that they wanted to make that point.²⁴² One investigating magistrate explained that disagreements can result from disagreements among individuals, or divergences in appreciating the criminal matter; he subdivided the latter category between (i) situations in which the prosecutor and the investigating magistrate construct the law differently, (ii) situations in which the prosecutor receives instructions from his hierarchy [NB: question of the independence] and (iii) situations in which the prosecutor pursues more general objectives of criminal policy (*e.g.* the prosecutor may consider that such crime should not be prosecuted because of its impact on the public order).²⁴³ One investigating magistrate pointed out that contrary to the ordinary assumption, it sometimes happens that the prosecutor requests a no-bill order and that the investigating magistrate, over that pro-defendant analysis of the prosecutor, refers the case to the court for trial.²⁴⁴

In a third part of my interviews, I reached the core of my research, asking opinions about the proposal to transfer the investigative powers of the investigating magistrate to the prosecutor. I insisted that I was expecting answers to assess the comparative value of a neutral judge or a charging authority as investigator. This assertion was necessary because all of the answers drifted towards discussing the separate

²⁴¹ Interviews #16 and #13.

²⁴² Interviews #9 and #12 (see aforementioned citation punctuated with footnote 175).

²⁴³ Interview #18.

²⁴⁴ Interview #13.

question of the current lack of independence of the prosecutors from the executive branch. Therefore, I asked the interviewees to try to reason based on the hypothesis that the prosecutor is independent from the Executive branch if this condition was a prerequisite for them as a basis for any reform.

Again, at first opposing camps appeared, but those initially reluctant to the idea amended their replies in the course of the interviews so as to make their opposition much less ardent.

One investigating magistrate declared that if the public prosecution were to be made independent from the Executive branch, then the investigating magistrate and the prosecutor are duplicates [*font double emploi*]. [...] As long as the public prosecution service is a party, s/he will be suspected of partiality. [...] If the investigating magistrate's independence is transferred to the prosecutor, [the investigating magistrate is not necessary as it now operates]."²⁴⁵ This magistrate justified the fact that prosecutors represent the interest of the public and do not seek to obtain the conviction of innocents. He observed that investigations are started by prosecutors out of a need (because the matter is complex), more than merely because the prosecutors value the investigating magistrate's neutrality.²⁴⁶

In conclusion, he pointed out that "some investigating magistrates in France are less objective than some prosecutors, more repressive, more accusatory."²⁴⁷

Among those open to a change was a magistrate who started by saying that "to have an exterior intervener is a rather sane process [rather than having on one side] the police [which] will do everything to make the matter work by presenting the facts in an

²⁴⁵ Interview #13.

²⁴⁶ *Ibid.*

²⁴⁷ Interview #13.

ambiguous manner, and a defendant who does the same.” but ended opining that “it does not matter if it is called *prosecutor* or *investigating magistrate*. The important issue is that [the investigation is done] by an independent institution. Otherwise, it is the open door to any abuses: to make the inquiry stand or to hush up a matter. [...] Public prosecution service’s decisions result from instructions. [...] It is normal because he is linked by its status to the Minister of Justice.”²⁴⁸ Pushed further to consider the hypothesis in which the prosecutor would be independent, this magistrate appeared inclined to agree that charging and investigating functions can be accumulated (“If the public prosecution is independent, why not?”) He indeed insisted that prosecutors are not “crazy” and will not send matters which cannot be sustained to trial. He added that in 90% of the cases in which the investigation is already in the hands of the prosecutors, things work quite well, although in flagrant cases, he has seen matters that should not have been sent to trial. Again, he blamed that more on the police than on prosecutors.

Another investigating magistrate using the same line of reasoning first stated “[t]he obligation to investigate in the sense of guilt and innocence is his [the investigating magistrate’s] sole legitimacy [...]. The obligation to investigate in the sense of guilt and innocence is essential and obvious. A completely exposed matter must be brought to the judges. It seems [to the interviewee] that this is best done [by the investigating magistrate].”²⁴⁹ Then he was asked, “is the public prosecution service known for investigating both in the sense of guilt and innocence? Where are the guarantees?”²⁵⁰ He answered that the investigating magistrate is the institution which guarantees the rights of the people the best because [among reasons], he has the obligation to investigate both in

²⁴⁸ Interview #16.

²⁴⁹ Interview #12.

²⁵⁰ Interview #12.

the sense of guilt and of innocence.”²⁵¹ Finally, in responding to the question whether the prosecutor could investigate both in the sense of guilt and innocence, he answered “yes” presuming that the prosecutor is not linked to the Executive, to politics.

One magistrate, even after being invited to assume that the prosecutor is independent, sustained his doubts: “Will the prosecutor be able to maintain himself in neutrality? His arm is the police which works most often toward proving guilt. This is why there is the investigating magistrate. [...] What matters it to obtain the truth, this initiative towards the truth. This is why one must be able to investigate both in the sense of guilt and of innocence. [...] This supposes that the investigating magistrate is a person exterior from the accusation.”²⁵² This magistrate elaborated further with respect to the conflict he sees between conducting the action of the police and prosecuting on one side, and being in charge of the investigation on the other side. He added that “from conversations with the members of the public prosecution service, one sees clearly that they are on the accusatory side.”²⁵³ He finally talked more freely declaring that “whatever his independence, the prosecutor will remain the charging agent [...] [for whom] it is impossible to picture himself in the position of the defense.”²⁵⁴

At the opposite end of this range of opinion is this investigating magistrate who explained that he favors maintaining the investigating magistrate because – connecting systematically the two reasons – on the one hand, the lack of independence of the prosecutor from the Executive branch and on the other hand, the prosecutor’s role as the charging authority. Although it remained impossible for him to express an explicit

²⁵¹ Interview #12.

²⁵² Interview #9.

²⁵³ Interview #9.

²⁵⁴ Interview #9.

opinion regarding the impact of the prosecution functioning separately from the question of the impact of the prosecutor's ties with the executive branch, based on the above and his other declarations, he seemed to believe that such an impact is real. Thus, he declared that "prosecutors cannot investigate both "*a charge et a décharge*" because they are the charging authorities." At the very start of the interview, he indicated that "the prosecutor is a party in the trial, it cannot be denied, they are in charge of the application of the law [...] but the judge has a more important neutrality." Throughout the interview, he kept insisting on the fact that the public prosecution service is both hierarchical (question of the independence) and the "agents of prosecution". Based on other declarations of this investigating magistrate, my understanding is that this investigating magistrate meant that the prosecution functions to influence the work of prosecutors to the extent that their job entails implementing criminal policy: "[After describing the necessary plasticity of the mind of the investigating magistrate to carry out his duty to investigate both in the sense of guilt and innocence], I do not think the prosecutor does not have the same mindset [...] but he is acting within the context of his criminal action."²⁵⁵

All investigating magistrates made spontaneous declarations about the defense.

First, they expressed the fact that "lawyers, parties are not interested at all in the truth. The accused has the right to lie;"²⁵⁶ "the defense tries to reel in the fish."²⁵⁷

Asked about the involvement of the defense in the fact-finding, investigating magistrates argued that lawyers have all the means to force the investigating magistrate to investigate innocence. They can request investigation measures; they can produce

²⁵⁵ See also above his declarations about reasons for disagreements between investigating magistrates and prosecutors.

²⁵⁶ Interview #12.

²⁵⁷ Interview #16.

documents; they can appeal in front of the investigation chamber.²⁵⁸ Some investigating magistrates observed that in practice, lawyers are mainly passive in the investigation and do not seize these opportunities to input information into the investigation. One explained this as a cultural problem, e.g. lawyers focusing on the preparation of the trial hearing, while they should understand that they must prepare the case at the stage of the investigation.²⁵⁹

However, the investigating magistrates clearly stated that they will never tell the defendant that to them, the criminal charge appears to have been demonstrated and that it is up to the defendant to argue the contrary.²⁶⁰ This would reverse the burden of proof which rests on the prosecutor.²⁶¹ They admitted, however, that conversations on the applicable law²⁶² and/or the tangible materials in the investigation file²⁶³ can occur with the defense in complex matters. Some lawyers spontaneously produce evidence.²⁶⁴ The investigating magistrate may request an opinion on the law when the question is unusual and debated.²⁶⁵

Likewise, one magistrate stressed that the added value of the French system is that the investigating magistrate puts the means of the public force at the disposal of the parties whatever their financial situation.²⁶⁶

Most investigative magistrates shared the view that a critical eye is necessary when police files are reviewed. “The police agents look at matters from a repressive

²⁵⁸ Interview #12.

²⁵⁹ Interview #9.

²⁶⁰ Interview #16.

²⁶¹ Interview #18.

²⁶² Interview #16.

²⁶³ Interview #18.

²⁶⁴ Interview #18.

²⁶⁵ Interview #16.

²⁶⁶ Interview #9.

angle. They are charging agents and it springs out in their approach of the case. We would put them in a contradictory situation. [...] They will go systematically in the sense of the accusation”²⁶⁷ “[prosecutors and investigating magistrates] have a more global vision of a matter [...] the police [and especially the peace keepers] tends to have a more immediate vision.”²⁶⁸

3. Prosecutors

Regarding cases in which they have the discretion to bring in the investigating magistrate,²⁶⁹ all prosecutors conceded explicitly or implicitly that they transfer the investigation to an investigating magistrate *only* when they do not have the choice *not* to do so (*e.g.* “I bring in the investigating magistrate only at the last extremity”).²⁷⁰

Two prosecutors explained that they call in the investigating magistrate when the matter is complex (*e.g.* drug trafficking). As a result, the investigation will indeed take a long time and/or require either burdensome investigative measures, such as expert opinions (for instance, on the damage suffered by the victim, or to analyze financial statements) or phone wiretapping over a long period of time.²⁷¹ One prosecutor declared significantly that “we cannot do everything.”²⁷² In other words, the added value of the investigating magistrate comes down to the fact that “he has fewer matters;” consequently, he has a more continuous and direct relationship with the agents.²⁷³

²⁶⁷ Interview #9.

²⁶⁸ Interview #18.

²⁶⁹ An investigation must by law be started for serious crimes such as murder. White-collar crime offences do not fall into this category; they are considered felonies.

²⁷⁰ Interview #11.

²⁷¹ Interviews #4 and #11.

²⁷² Interview #4.

²⁷³ Interview #11.

In responding to the follow-up question regarding if they had more personnel able to carry out the work completed by investigating magistrates, they would no longer need to delegate, they answered “yes.”²⁷⁴ Interestingly, one prosecutor did not, however, mention the complexity of a matter as a reason to involve an investigating magistrate. On the contrary, he explained that “investigation bureaus” exist within the public prosecution service which can handle high-profile cases.²⁷⁵

Second, prosecutors seek the assistance of investigating magistrates due to/as a result of legal limitations in their own scope of actions. Two prosecutors mentioned coercive measures which can be authorized *only* by a court judge.²⁷⁶ One prosecutor pointed to international judicial cooperation since some countries refuse to cooperate with the public prosecution service and demand only a court judge for interlocutories.²⁷⁷

Third, and uniquely, one prosecutor interestingly indicated that he calls in an investigating magistrate when the matter requires a confrontation between the accuser and the defense. He added “I dream of being able to interact with the defense in an official manner. It is not possible nowadays.”²⁷⁸

Prosecutors confirmed that they occasionally disagree with investigating magistrates about the conduct of an investigation with respect to the investigative measures to be completed (other hypotheses of disagreements at the start include whether to investigate or not when the investigation has been initiated by the civil plaintiff, and at the close of the investigation: whether to transfer the alleged criminals to court for trial). Asked whether such differences of opinion can be explained by the respective postures of

²⁷⁴ Interview #4, #11

²⁷⁵ Interview #5.

²⁷⁶ Interviews #4 and #5.

²⁷⁷ Interview #5.

²⁷⁸ Interview #5.

the investigative magistrate - a neutral magistrate – and the prosecutor – the charging authority – one interviewee replied, “all explanations are possible.”²⁷⁹ Another prosecutor affirmed/claimed that disagreements are very rare.²⁸⁰ They may be related to the characters facing each other or the “sensibility” of a matter.²⁸¹ He reported that very often, the investigating magistrate appropriates the requisitions drafted by the prosecutor at the close of the investigation.²⁸² A third prosecutor, on the contrary, admitted that a prosecutor may contradict an investigating magistrate as a consequence of his prosecution functions. However, he immediately observed that it sometimes/often happens that the investigating magistrate believes in the guilt of a putative criminal defendant, while the prosecutor recommends an order of no-bill.²⁸³ He then denied the allegation that prosecutors and investigating magistrates side together to conduct an investigation towards guilt. He explained that the claim of connivance results from the two professions’ proximity (in particular as they benefit from the same training). Nevertheless, he emphasized that to carry out an investigation, the prosecutor and the investigating magistrate must cooperate (the prosecutor deciding on expanding the limits of the investigation to new facts found by the investigating magistrate)²⁸⁴

Asked to compare themselves to an investigating magistrate with respect to the latter’s duty to investigate guilt and innocence, two prosecutors replied that “they are purported to conduct the fact-finding both towards proving guilt and establishing innocence”²⁸⁵ or “[n]ecessarily our mission is also to investigate against the charge, like

²⁷⁹ Interview #4.

²⁸⁰ Interview #11.

²⁸¹ Interview #11.

²⁸² Interview #11.

²⁸³ Interview #5.

²⁸⁴ Interview #5.

²⁸⁵ Interview #4.

the seated Judiciary. [...] Inquiries must be conducted towards finding evidence of innocence”²⁸⁶ They provided two reasons. First, they justified the fact that “they seek to establish the truth.”²⁸⁷ They observed that if they do not, the criminal putative defendant will be found not-guilty,²⁸⁸ or the court will request additional investigative measures to be completed.²⁸⁹

Second, these two magistrates insisted on their status as magistrates. “We are [like investigating magistrates, magistrates. [...] We have a duty of loyalty to the tribunal [as opposed to lawyers who represent a client.”²⁹⁰ This prosecutor also pointed to the fact that “[t]he first judge in a case is the prosecutor [...] he takes a decision at the close of the police inquiry.”²⁹¹ Likewise, another prosecutor insisted that they are magistrates and “protectors of the individual freedoms [as per a decision of the French Constitutional Council [*Conseil Constitutionnel*]].”²⁹² He referred me to the expression “quasi-agents of adjudication” employed by the Attorney General, , Mr. Nadal, in a speech in January 2007 before the French Supreme Court to describe the prosecutors using such formulations which, according to him, shocked the audience and the public . This incident was very revealing for this interviewee, who repeated on several occasions that prosecutors take part in the action of adjudicating. For him, to work in favor of innocence is of the essence of his functions.²⁹³ He elaborated by explaining that when he takes requisitions in a serious criminal matter before the criminal court jury [*Cour*

²⁸⁶ Interview #11.

²⁸⁷ Interview #4.

²⁸⁸ Interviews #4 and #11.

²⁸⁹ Interview #4.

²⁹⁰ Interview #4.

²⁹¹ Interview #4.

²⁹² Interview #11.

²⁹³ *Ibid.*

d'Assises], he argues that criminal charges exist based on evidence; if evidence showing guilt exists, he will ask for a finding of not-guilty.²⁹⁴

Still, this prosecutor nuanced his answer by declaring twice “Of course, we are partial.” He elaborated, “...we sustain the accusation, which means we retain arguments proving the guilt, but if there is evidence of innocence, [we will request] a not-guilty finding [...] There is a conceptual confusion”. He gave the following example: in substance, if you have a succession of prosecutors in the same matter, some coherence is preferred. If your predecessor had decided to prosecute, you cannot totally ignore his decision. But it happens still that a finding of not-guilty is requested.²⁹⁵

This being said, he stressed that independently from this posture, he is able to distinguish between issues, that he carries out the same intellectual reasoning as the investigating magistrate., because above all, he is a magistrate²⁹⁶ He talked about “conceptual confusion” about the role of prosecutors. Thus, to summarize, one can retain the two following declarations together “[prosecutors] do not have the plain independence or neutrality as a judge.” but the prosecutor offers “a form of neutrality.”²⁹⁷

A third prosecutor expressed himself in a very different tone, therefore, his declarations are worth reporting at length and separately. First, he observed that investigating in the sense of guilt and innocence requires contradicting oneself. For him, it is a difficult task. He agrees with the opinion that it is very difficult for an the investigating magistrate to be both the director of the investigation and the judge. He insisted that “[the investigating magistrate] necessarily [grows] an intellectual

²⁹⁴ Interview #11.

²⁹⁵ Interview #11.

²⁹⁶ Interview #11.

²⁹⁷ *Ibid.*

construction about what the nature of the matter is and then you become a prosecutor, rather investigating in the sense of the charge”.²⁹⁸

Second, after reminding me, like his two colleagues, that prosecutors are magistrates who are guarantors of individual liberties, he stressed that “the prosecutor is a party in the trial, he is the sole claimant supporting the public action [against the criminal] [...] [In front of the investigating magistrate, the prosecutor is] a party like the defense and the civil plaintiff.”²⁹⁹ He deduced that “the prosecutor is not totally impartial, even if he must be objective [...] He decides pursuant to his own soul and conscience; he requests the application of the criminal law.”³⁰⁰ He elaborated that being *impartial* means “not to be attached, in one’s action, to a cause, a taken side, an unfavorable environment” while being objective signifies “to be a stranger to any circle of influence.” Consequently, for him, the public prosecution service, from the time it estimates that a crime has been committed and decides to prosecute, he is not totally impartial and he will act as a party at the hearing.

Asked about the consequences in terms of the conduct of the investigation, this prosecutor indicated, in essence, that the prosecutor from the starting requisition (*réquisitoire introductif*) is of the opinion that there is a need to investigate. As a result, the public prosecution service would principally pursue his thesis. As the case may be, a control judge will ask him to carry out investigative measures towards proving innocence. I wondered whether he meant that this mechanism would function only as a correction mechanism in the case of failure. He confirmed that the prosecutor would be expected to carry out such measures spontaneously. He added that prosecutors would be

²⁹⁸ *Ibid.*

²⁹⁹ Interview #5.

³⁰⁰ *Ibid.*

required to be objective, which means looking at all the parameters of the case to forge their conviction. More emphatically, he declared that the prosecutor would not be imposed a duty to investigate guilt and innocence in the terms of Art. 81 of the French Code of Criminal Procedure. He explained that “it is not in the very essence of the prosecutor to be a referee. [...] He is somehow one when he decides to prosecute and for that purpose, considers the alternative [...], [and he must do so objectively], which means not serve partisan interests. [...] The prosecutor cannot be the judge. [...] The judge must not take sides. [...] This is not the role of the public prosecution service”.³⁰¹

Asked about their opinions in the debate over the continuance or suppression of the investigating magistrate, prosecutors were divided. One prosecutor strongly expressed being in favor of its disappearance, assuming that first the public prosecution service is made totally independent from the Executive branch; he asked a telling question “why is there an obligation to open pretext investigations.”³⁰²

Another prosecutor would rather retain the investigating magistrate. He declared that “in delicate matters, he is happy to transfer the case to an investigating magistrate to avoid receiving instructions”, he talked about the “tranquility” of the investigating magistrate, stating expressly that he does not like using the word “independence” (apparently because it would imply he lacks himself independence, which is too strong of a description of what the reality is).³⁰³ He added “that the prosecutor is still not a judge;

³⁰¹ Interview #5.

³⁰² Interview # 5

³⁰³ Interview #11.

it is good to have the perspective of a judge”.³⁰⁴ One prosecutor did not express a strong opinion for either side of the debate, declaring “it may not be a bad thing”.³⁰⁵

In all events, the minimum acknowledgment by these two latter prosecutors was that “the functions of the investigating magistrate are extremely close to these of the prosecutors.”³⁰⁶ Likewise, interviewee #4 declared “our roles are very similar.”

Again, opinions veering towards the neutrality were disclosed. “Our presence with respect to the police is indispensable [...] [the police is somehow biased].”³⁰⁷ One prosecutor opined that he would tend to agree that he works as a check of the work of the police, but he insisted that there are some officers of the judicial police who are able to take distance from the local police. He declared “I do not feel a policeman myself [even if he has a control role].”³⁰⁸

³⁰⁴ *Ibid.*

³⁰⁵ Interview #4.

³⁰⁶ Interview #11.

³⁰⁷ Interview #4.

³⁰⁸ Interview #11.

CHAPTER 5: CONCLUSIONS

A. Final Remarks about the Perspective Taken in this Study

On May 6, 2007, the French people will choose a new President of the Republic. On April 22, 2007, they pre-selected two candidates: Ms. Ségolène Royal and Mr. Nicolas Sarkozy. As of now, both appear to favor retaining the institution of the investigating magistrate. Their opinions account for the debate on this topic as it exists today in France, bearing the flaws and logical deficiencies identified in this thesis.

On one side, Ms. Royal simultaneously values the *neutrality* of this magistrate and questions the fulfillment of such a quality in reality:

The criminal investigation is today criticized because the investigating magistrate, is in the most heavy matters, but also in his daily practice, drowning under the volume of files, without sufficient points of reference and insight, and because he must be together the investigator and the referee of his own investigation. The investigating magistrate must consequently *find back* the legal, material and human means to be *at equal distance from the victims, the indicted persons and the accusation*, to have the serenity without which justice is blind...³⁰⁹ (Emphasis added).

In turn, though Mr. Sarkozy has settled for not discharging investigating magistrates of the fact-finding in criminal trials as long as they carry out such work in teams,³¹⁰ this represents a minimum reform position. His political party, the *Union pour un Mouvement Populaire* (U.M.P.), indeed, envisaged in its *Convention about Justice: the Right to Trust* held in May 2006 and presided over by Mr. Devedjian, to be in all likelihood appointed as the Minister of Justice if Mr. Sarkozy is elected, that the

³⁰⁹ Official website of Ms. Segolene Royal, Candidate to the French Presidential Election, <http://www.desirsdavenir.com/index.php?c=synthese&id=74>

³¹⁰ See his propositions about Justice at <http://www.u-m-p.org/propositions/index.php?id=juge> Interviewee #20, a French law professor, also reported that during the *Meetings of Saintes*, an annual meeting of the most well-known personalities of the French judicial circle, Mr. Patrick Devedjian, considered to be appointed Minister of Justice if elected, confirmed that the investigating magistrate would not be suppressed; my efforts to back up this source have not been successful, but it is surely reliable.

investigation will be transferred to the prosecutors under the control of investigating magistrates.³¹¹

In short, Ms. Royal implies that the investigating magistrate sides with the prosecutor to investigate in the sense of the charge, while he is expected to be neutral, as per the ordinary charge alleged against this institution; Mr. Sarkozy's allies suggest replacing the investigating magistrate with the prosecutor, *without explaining which posture would be expected from the prosecutor* in comparison to the neutrality of the investigating magistrate.

This innovation of this research study has been to focus *exclusively* on this issue of the direction given to a preliminary criminal investigation by the investigator, *separately* from other dimensions of the envisaged reform.

Thus, criticisms leveled against the French investigating magistrate are systematically merged together, with some left unaddressed specifically in the proposed alternative model – to entrust the public prosecution service with all criminal investigations. As an example, with respect to the argument that the investigating magistrate acts too frequently in isolation, it is rebutted that team work characterizes public prosecution services. However, while the investigating magistrate is accused of primarily investigating to support the charge, the accusers do not indicate what the prosecutor would do instead.

³¹¹ Proposition currently accessible at <http://www.conventions-ump.org/site/proposition.php?idconvention=11> and a detailed report for the Convention is available at http://www.conventions-ump.org/site/upload_fichier/dossiers_conventions/dossier_justice.pdf. See, however, Mr. Sarkozy's speech at this Convention at http://www.u-m-p.org/site/index.php/ump/s_informer/discours/convention_pour_la_france_d_apres_mercredi_3_mai_2006 saying "*at the minimum, one must gather investigating magistrates in poles...*"

It may be argued that each feature of the investigating magistrate need not be transposed, replaced by something else, or expressly abandoned in a system where the prosecutor would investigate. Hence, since the duty to investigate both in the sense of guilt and innocence is presented as a major characteristic of the French investigating magistrate and the impossibility of such task is among the strongest justifications for his demise, it seems legitimate to ask what would logically come next? In others words, this is about informed consent: to eventually vote on a replacement system, the replacement system must be fully transparent, in particular here with respect to the direction of fact-finding that would be given by prosecutors. The answer may just be for the sake of clarification, but it is a material clarification that needs to be made. This is the contribution this thesis intended to make.

This research question designated its informants. Who better than the people behind the concerned institutions themselves could help in determining how differently or similarly an investigating magistrate and a prosecutor can collect evidence than the investigating magistrates and prosecutors themselves? The other innovation of this thesis has been to use the U.S. system in which there are only prosecutors as a point of reference. French law professors and U.S. lawyers have been another great resource to provide some contextual insight.

B. Inputs for the Reform of the French Criminal Structure

1. Assumptions Blurring the Debate Claimed Untrue and Subsequent Clarification of the Proposed Reform

Based on the most frequent answers made in the interviews conducted for this research, it appears that:

- it is untrue that investigating magistrates cannot carry out their duty to investigate both in the sense of guilt and innocence, but also

- it is untrue that prosecutors cannot do as well as a fact-finder.

This represents the claims of six French investigating magistrates and twelve French and U.S. prosecutors.

Obviously, it may be disputed by defense counsels if they are interviewed on the occasion of further empirical research. In fact, one can legitimately observe that the investigating magistrates and prosecutors were unlikely to admit that they do not work in an objective manner and suffer from “tunnel vision.” Still, the purpose of this research was to offer the opportunity for the accused public authorities to expose their “take” on their respective achievements in terms of the collection of evidence. As a result, the interviews conducted have shown that prosecutors and investigating magistrates have largely the *same perception of their daily practice*, independently from what third party people believe.

In all events, supposing that defense counsels would opine that the investigating magistrate and prosecutors turn away from evidence of innocence, it would need to be refined by determining whether such a finding does not apply *equally to both professions*, with possibly only differences of degree. Many of the reasons for the tunnel vision syndrome developed about U.S. prosecutors can be transposed to the French investigating magistrate. It is the care for cognitive deficiencies; as far as institutional pressures are concerned, the investigating magistrate surely also feels the expectations of the police, the victim, the prosecutor and the public to identify the guilty; admittedly, his mission is

to be a neutral, but alleging that he does not have to resist exterior force to transfer an indicted person for trial would be naive.

Therefore, if one accepts for now the claims made by investigating magistrates and prosecutors, these findings inform and impact the French debate over the reform of the investigating magistrate as follows:

- since the charge that investigating magistrates cannot seek out both incriminating and exculpatory evidence has been proven wrong by the content of the interviews conducted for this research, this argument should no longer be made *to justify the abolition of this institution*.

- conversely, since prosecutors appear to conduct pre-trial criminal investigations with the same attention to both incriminating and exculpatory evidence as investigating magistrates do, then it should not longer be asserted in the French debate that the investigating magistrate should be retained *because he is neutral*. To be clear, this thesis does not claim that there are no other reasons for preferring to retain the French investigating magistrate, but at least, the efforts of France to maintain the investigating magistrate for the consideration of his impartiality appear to be quite pointless.

- in turn, there is no reason for the proponents of the reform not to state clearly that prosecutors, like investigating magistrates, would be required to seek out both guilt and innocence. In other words, the doubt that the prosecutor may investigate only towards guilt should be dissipated, as it is not justified.

To cast that finding in the law, some language will have to be found. Can one say that the prosecutor is acting in a neutral manner? Or is he better described as impartial? Some definitions are useful here to find suitable wording –although it is obvious that the

significance of “labels” should not be overstated. Using the theoretical concept of impartiality may not be appropriate for a prosecutor since he is a party.

Thus, the French Academy in the 8th version of its dictionary of 1932 (the 9th version is being completed) defined “impartiality” by reference to the adjective “impartial”, which is already defined in the 9th incomplete version as “one who is not partial, who is without prevention or bias, who tries to be equitable”; partiality in the 8th version was defined as “the disposition of one person to favor another, an opinion rather than another one, preference towards this person and contrary to justice.” “Objectivity” is a possible alternative concept. The French Academy defined it by reference to the adjective “objective”, which receives several meanings in the 9th incomplete version of the dictionary, including “this whose judgment is impartial; which is exempt from any bias, any preconception” and “which represents an object as it is in reality independently from any impression or personal construction.” Neutrality is the final possible concept; to be “neutral” means for the French Academy, 9th version of the dictionary “this who refrains from taking side in a conflict [...]” and by extension, “this who is exterior to a discussion, a debate, which does not express his opinion between two persons, two opposing parties”; “neutral” comes from the Latin *neuter, neutra, neutrum*, meaning “neither of the two, nor one nor the other.”

These definitions show that impartiality and objectivity largely overlap semantically to reject the influence of *bias, prejudice towards one side*. A tentative separation between the two might be to say that *impartiality* is backward looking, *i.e.* absence of bias at the starting point of observation, and objectivity is more a continuous quality over time, *i.e.* the absence of prejudice over a period of time, but this distinction is

probably artificial and hard to apply in real life. *Neutrality* clearly distinguishes itself, however, to describe the fact *not to take side* in a debate between opposing parties.

Based on this overview of the available qualification options, expressly imposing on the prosecutors-investigators an obligation of impartiality and objectivity in the conduct of their investigations appears to be the most sensible proposal. In this respect, this thesis proposes to expand the concept of *organizational impartiality*, usually understood as encompassing the situation in which the judge has already heard a case, to the absence of partiality, or lack of objectivity, in the orientation of the authority's work *because of its posture within the judicial pantheon*, and in the case under examination, the absence of partisanship in the conduct of a pre-trial criminal investigation due to prosecuting role.

In reality, one could go further and propose a duty of neutrality during the period preceding the decision of transfer for trial of the criminal matter.

This question of the virtue of the prosecutor being advanced, the legislator should, concurrently with the conservative recent reform promoting the institution of the investigating magistrate by creating poles of the investigation, that is, teams of investigating magistrates rather isolated judges, concentrate on the next step, which is the possible reform of the public prosecution service. The Outreau Commission, indeed, concluded that “if [it] subscribes to the suppression of the sole judge that is the investigating magistrate, it does not mean that it is favorable to the suppression of the investigation, as long as it would be conducted by a collegiality.”³¹² The Statute n° 2007-291 of 5 March 2007 tending to reinforce the balance of the criminal procedure adopted this recommendation, creating “investigation poles” that is, a group of three investigating

³¹² Final report, p. 343.

magistrates to which each investigation will be assigned; this reform will enter into force on January 1, 2010.³¹³ Such reform may be consistent with the French tradition, but this study has shown that such efforts to preserve an historical choice against the prosecutor to separate investigation and prosecution is largely pointless.

France should instead engage in a large debate about whether it wants to keep its prosecutors related to the Executive branch, but also more basically, why it is a problem that prosecutors are related to the Executive branch, while it is accepted in the United States. This issue remains to be explored.

The choice of a prosecutor-investigator would, of course, require to imagining external safeguards to protect the defendant, such as the right to access the prosecutor's file, or the right to appeal before a controlling court. This was outside the scope of this research, which focused on the approach of prosecutors and investigating magistrates, but it is a suggestion to supplement this research.

Still, taking the standpoint of the public authorities in charge of the pre-trial phase of a criminal matter into consideration, this empirical research has spotted some material differences between France and the U.S.

2. Differences Between the Two Systems that Matter

Three important findings have been made in the course of my interviews with U.S. federal prosecutors.

First, U.S. prosecutors have acknowledged that they may reach a point of conviction at which they will ask the putative defendant claiming his innocence to bring

³¹³ Published in the Official Journal of March 6, 2007. Accessible online at <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=JUSX0600156L#>.

elements which will create doubt in the prosecutor's mind. In turn, French investigating magistrates explained that they never request the defendant to present material evidence.

Second, the place granted to the criminal defendant in the pre-trial phase is different in the United States. U.S. prosecutors have explained that (i) they rarely talk to the defendant before the indictment and (ii) at the point of indictment, they usually have reached conviction beyond a reasonable doubt that the indicted person is guilty of the charged crime. These two circumstances result in the situation in which the prosecutor's investigation is almost complete when the defendant is implicated. In France, it is inconceivable to indict someone without questioning her first. The time between the indictment and the transfer to court for trial is also usually significantly long and the defendant is able to make some inputs into the investigation during that period, while the analytic process of the investigating magistrate is still pending and likely to result in a decision of transfer for trial or a no-bill order.

Third, all French interviewees express in one way or the other the value of having several perspectives from different professions over one criminal matter. Such a concern has not been expressed by U.S. prosecutors who appear to be confident about the quality of their work and less worried about the existence of checks and balances.

Such differences between the U.S. and the French systems, coupled with the existence of marginal dissenting opinions to the general findings made in this study, are important for France to consider if it wants to move forward to adopt an adversarial approach. These collateral findings in France would very likely be considered as warning lights of risks to fall into one-sided investigations, as well as a threat to the presumption of innocence. Although they are not viewed as such by the American

prosecutors themselves, caution is advised as France would surely not be willing to have its pre-trial fact-finding phase of a criminal matter evolve as described in the U.S..

C. Conclusion

France is right to look for inspiration abroad for its criminal procedure reform. This thesis indicates that the investigating magistrate is an obsolete institution at least to the extent that his neutrality is supposed to be its added value in comparison to the prosecutor. The alleged propensity of prosecutors towards seeking only evidence of guilt has not been demonstrated by the empirical research conducted; on the contrary, they have proven to be fair to the defendant.

These conclusions clarifies the proposal to replace the investigating magistrate with a prosecutor in the fact-finding phase and allows to shift focus on other justifications for the reform. The insight over the U.S. experience, as revealed in this thesis, is useful to highlight the main differences in the operation of the two systems as they will appear material to France, which highly values the involvement of the putative criminal defendant and other controlling parties.

Appendix

Table 1

A tentative breakdown of the two procedural structures, based on normative sources, follows to help the reader.

	Investigating Magistrate	French Prosecutor	U.S. Prosecutor
Start of Involvement	Request to investigate made by the <i>prosecutor</i> , or Complaint by the victim	Referral by the police, or own initiative	Referral by investigating agencies, or own initiative
Degree of Involvement the Fact-Finding	lead	Sets the limits of the investigation Can request investigative acts Can take part in investigative measures Permanent access to the file	Control of investigative agencies' work Cooperation with them as needed With leadership in complex matters
External Help for Investigation	Rogatory letters to the judicial police, or any other third party experts	Judicial police, which is under the prosecutor's supervision, until an investigating magistrate is designated Investigating magistrate	Investigating agencies Grand Jury when coercion is needed
Charging Power	None, though judicial determinations may appear as decisions of a <i>prosecutorial</i> nature	Launches the investigation Pending the investigation, requests to carry out certain investigation measures At the close of the investigation, requests to send to trial or not	Exclusive (though the Grand Jury may be seen at holding the charging power)

Discretion	Not official, but lots of margin of action in the conduct of the investigation and judicial determinations made (see below)	Yes (principle of the opportunity of the prosecution)	Yes (principle of the opportunity of the prosecution)
Quasi-Judicial Determinations	Indictment Order of transfer or of no-bill	none	Request to investigate made to the investigating Request to indict made to grand jury Information Declination of prosecution
Screening/Control	Judge of the Freedoms and the Detention (only for placement in detention and release refusal) Chamber of the Investigation in case of appeals	Investigating Magistrate Hierarchy	Grand Jury Court Hierarchy
Relation with Criminal Defendant	Neutral Permanent access to file from the indictment Mandatory hearing of defendant before indictment Right of defendant to request the carrying-out investigation measures	None in principle (except indirectly when the prosecutor decides to request an investigation against one named person; when the prosecutor takes part in the investigation in relation to one specific defendant; guilty plea negotiations)	Adversarial Obligation to communicate exculpatory and impeachment evidence and some other sources from the indictment (FRCrimP 16); Possible informal contacts at the initiative of the prosecutor or the defendant; D.O.J.'s policy to allow the defendant to appear and produce documents in the grand jury if it requests so; Guilty plea

			negotiations
End of Involvement	Order of transfer to the trial court (or no-bill)	Conviction or non-guilty verdict OR guilty plea when possible	Conviction or non-guilty verdict OR guilty plea

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