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■ WHITE-COLLAR ARRESTS ■

No more 'perp walks'

By Joel Cohen SPECIAL TO THE NATIONAL LAW JOURNAL

THE ARREST POWER is designed to secure a defendant's presence in court. Nothing less—or more. No one could hope to persuade an aggressive prosecutor that his "statement" in arresting a suspect (rather than allowing him to surrender), will not also have at least some strategic value for a criminal investigation beyond merely securing a defendant's court appearance.

A 6 a.m. arrest of a dazed suspect by gun-toting agents may simply declare to the criminal world that this prosecutor means business; it also tells the suspect that he must quickly cooperate. Or, this tactic may make real to his confederates that "the train is leaving the station."

The potential advantage of a bold arrest is certainly there—not to mention a prosecutor's desire, not admitted in polite society, to please hard-working agents who want to "cuff 'em where they live, and not let their Ivy League mouthpieces call the shots."

It would also be impossible to persuade prosecutors that they don't have the perfect "right" in every jurisdiction to effect arrests with warrants founded on complaints alleging probable cause (frequently employed to gain cooperation), or upon grand jury indictments. That "right" stands, too, even where the defendant's attorney has urged the prosecutor to let him surrender under circumstances of the prosecutor's choosing.

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The prosecutor's power to arrest remains intact even if he or she admits that a particular defendant, especially a white-collar one—a dirty word nowadays—poses no risk of flight or other danger. It is his or her institutional right to be arbitrary on how to proceed—even though few white-collar defendants flee.

In 1987, at the height of then-U.S. Attorney Rudolph Giuliani's insider trading war, he had three Wall Street investment bankers handcuffed and arrested at their desks. When one demanded an immediate trial, Giuliani had the case dismissed (without prejudice) to avoid a speedy trial violation, since the government wasn't ready for trial. Much later, two pleaded guilty to relatively minor charges. The third case was never pursued, but a reputation was ruined. This abusive exercise of the arrest power is still remembered.

Today, on Giuliani's old turf, we see a pattern forming of splashy arrests. Witness the recent front-page arrests of ImClone's Sam Waksal and Adelphia's John Rigas, among others, although voluntary surrenders were urged by their lawyers in meetings with prosecutors.

The recent splashes around the nation surely jibe with the battle cry for aggressive prosecutions aimed at Wall Street, echoed by the president—who appoints U.S. attorneys—and Congress. But the law enforcement practices that stand the test of time are those that demonstrate balance, fairness and good judgment despite the public's cry to arrest the crooks even if they wear white collars.

New York District Attorney Robert Morgenthau, widely regarded as incorruptible, has never seen the need to use arrests when conventional wisdom points to voluntary surrender (weighing risk of flight, community danger and a reliable counsel to enforce the surrender obligation). The prosecutor's press conference can proceed in timely fashion without the "perp walk."

Giuliani's former securities enforcement deputy once bragged to the *New York Times* that Wall Street crooks are no different than the Mafia and should be thus treated.

It wasn't true then, and it's not now. If those recently charged with significant white-collar offenses are guilty, they should be vigorously prosecuted. And if our system works, they'll be convicted in short order.

A vigorous investigation is only enhanced when a suspect knows that his prosecutor will deal with him and his lawyer with fairness, responsibility and sound judgment—the hallmarks of good prosecutors nationwide. And the experienced criminal lawyer can read his client the riot act whether he is arrested or surrenders.

Prosecutors, who previously had to resist gung-ho federal agents, must now resist the blood lust of corporate crime victims, editorialists and politicians. The bully pulpit now being used to hasten the arrest of corporate criminals belongs to the president alone. The prosecutor's duty is to prosecute the guilty, without being influenced by cries of expedience and vengeance. NLJ