

Postscript to the Starr investigation

Newspaper documents abuses by federal prosecutors

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12 May 1999

A standard element of the media apologetics for the Office of Independent Counsel during its protracted investigation into the Clinton White House was the claim that the methods of Kenneth Starr were really nothing to get excited about. All federal prosecutors routinely engage in such tactics, however undemocratic it might appear to browbeat witnesses, pressure mothers to testify against their daughters, leak secret grand jury information, etc.

One newspaper reporter, however, Bill Moushey of the *Pittsburgh Post-Gazette*, has explored this issue further, by examining the actual record of federal prosecutors. The result was a series of 10 articles which documented the systematic abuse of prosecutorial power in federal cases in which the defendants, unlike President Clinton, could not afford a battery of well-paid and highly skilled defense lawyers.

The series, entitled "Win at all costs: Government misconduct in the name of expedient justice," was based on a study of prosecutorial misconduct lawsuits filed across the US over the last decade. Moushey concludes: "Hundreds of times during the past 10 years, federal agents and prosecutors have pursued justice by breaking the law. They lied, hid evidence, distorted facts, engaged in cover-ups, paid for perjury and set up innocent people in a relentless effort to win indictments, guilty pleas and convictions

"Rarely were these federal officials punished for their misconduct. Rarely did they admit their conduct was wrong. New laws and court rulings have encouraged federal law enforcement officers to press the boundaries of their power while providing few safeguards against abuse."

The *Post-Gazette* series documents abuse in nine stages of the federal criminal process. It examines government sting operations, discovery violations, perjury, inmates buying and trading testimony to prosecutors for reduced sentences, federal agents manufacturing cases, grand jury abuse and sentence entrapment.

Government sting operations were only legalized by Congress in 1974. These were the very early days of the law-and-order campaign that became inseparable from the right-wing shift of the ruling class over the last 25 years. A sting enabled the government to set up illegal businesses to catch high-level criminals in the act. While there were safeguards to protect potentially innocent victims incorporated into the original legislation; those safeguards have fallen into desuetude.

The most notorious use of the government sting was against the maverick automaker John DeLorean. With his car company--which he boasted would challenge the Big Three--on the precipice of bankruptcy, the government lured DeLorean into participating in a cocaine deal that he thought might save his company. After the sting

and a lengthy trial in 1986, DeLorean was acquitted. The jury felt that the government had not captured a criminal; rather, they had entrapped a desperate man into a criminal scheme that he never would have otherwise been a party to except for the government sting.

Often, when high-profile stings don't catch high-profile criminals, prosecutors redirect the sting to target low-level, innocent people in order to justify the operation. Moushey recounts a number of such cases where innocent people were ruined and sent to jail for long sentences this way.

Some sting operations have sinister political motives. The series briefly mentions a sting that could have provoked bloodshed between supporters of Malcolm X and the Nation of Islam. Malcolm X's daughter, Qubilah Shabazz, was arrested in 1995 for planning to murder the leader of the Nation of Islam, Louis Farrakhan, and this was the outcome of a government sting. Michael Fitzpatrick, a government informer in New York who had gone to school with Shabazz, was paid \$45,000 to deliver evidence of her assassination plot. Fitzpatrick lured Shabazz to Minneapolis with romantic overtures and then planted the idea of killing Farrakhan in her mind, according to court records.

The Supreme Court ruled in the 1963 *Brady* case that prosecutors have to turn over to the defendant exculpatory evidence and evidence that might impeach witnesses against the accused.

Withholding this evidence was ruled to be a violation of the Constitutional guarantee of equal protection of the laws under the Fourteenth and Fifth Amendments.

The *Brady* mandate is honored only in the breach today, and prosecutors are able to withhold vital discovery material with impunity. Bennett Gershman, a former New York state prosecutor who is now a professor of law at Pace University, writes in his 1997 book *Prosecutorial Misconduct*, "Brady violations account for more miscarriages of justice than any other violation."

Ramsey Clark, the attorney general under Lyndon Johnson, criticizes this practice because of the devastating effect it has on low-income defendants who cannot pay for lawyers to pursue these cover-ups. "It is really tragic," says Clark, "how we grind up poor people in these situations."

According to Moushey, "Perjury has become the coin of the realm in federal law enforcement.... People's homes are invaded because of lies. People are arrested because of lies. People go to prison because of lies. People stay in prison because of lies, and sometimes bad guys go free because of lies.

"Lying has become a significant problem in federal court cases

because the rewards to federal law enforcement officers can be so great and the consequences minimal. Perjurers are seldom punished; neither are the law enforcement officers who ignore or accept their lies."

Moushey's investigation found hundreds of cases where federal officers and prosecutors tolerated or encouraged perjury. This widespread and unpunished practice by federal prosecutors might come as a startling revelation to anyone who was foolish enough to give credence to the congressional diatribes about perjury during the impeachment trial of Bill Clinton.

While the House managers railed against perjury as threatening the very foundations of the rule of law, Moushey's investigation makes it abundantly clear that perjury *is* one of those foundations. The attitude of Congress and the courts toward perjury depends upon who is using the perjured testimony against whom.

Moushey details the practice of inmates selling lies in return for deals to reduce their sentences, a practice called "jumping on the bus". The prospect of sentence reduction is so coercive in eliciting false testimony from inmates and so corrupting to the notion of a fair trial that the 10th Circuit Court held in the summer of 1998, in the case of *U.S. v. Singleton*, that such testimony is unreliable and impedes a defendant's right to due process of law.

Federal prosecutors were so opposed to any limitation on their ability to trade sentence reduction for incriminating testimony that they chose to challenge the 10th Circuit ruling and several bills to overturn the ruling were filed in Congress. Under this pressure, the 10th Circuit ruling was reversed early this year.

Moushey's investigation "found that inmates in federal prisons routinely buy, sell, steal and concoct testimony then share their perjury with federal authorities in exchange for a reduction in their sentences. Often these inmates testify against people they have never met. They corroborate crimes they've never witnessed. Prosecutors win cases. Convicts win early freedom. The accused loses.

"Federal agents have been accused of helping move the schemes along by providing convicts some of the information. For years, inmates have warned federal authorities about the practice. One inmate (in the Miami Federal Correctional Institute), Ramon Castellanos, offered to go undercover to trap those who buy and sell testimony. Another, Romiro Molina, wrote the FBI, the Drug Enforcement Administration, Attorney General Janet Reno and even President Clinton. 'What has become of innocent until proven guilty?' Molina wondered in one of his letters. 'What has happened to the truth in justice? What are we doing with the law, bending it to be convenient and to whatever advantage necessary?'"

One part of the series concerns the abuse of grand juries by manipulative prosecutors. Moushey writes, "The American justice system has made it simple for federal prosecutors to use a grand jury to win an indictment against almost anyone. But it has made it nearly impossible to punish them when they abuse that right."

Federal prosecutors have enormous power when they convene a grand jury. They determine who to indict, what the charges will be, what witnesses will be called or recalled, and whether to grant leniency to witnesses who might testify against the defendant. There are very few restrictions on the evidence a prosecutor can present; they can present rumors. A defendant has no right to be present or to have their attorney present at grand jury proceedings.

In 1992, the Supreme Court further strengthened the hand of prosecutors by ruling they had no obligation to present "substantial exculpatory evidence." Justice Stevens described increasing

prosecutors' power as "inconsistent with the administration of justice," but he was in the minority.

Grand jury secrecy supposedly exists to protect the reputation of the accused, who is not represented there. After the unpunished leaking by the Starr grand juries, this is an attenuated protection. Instead, secrecy works as an effective device to conceal the machinations of the prosecutor.

Under the headline, "With their backs to the wall, prosecutors bring out their dirtiest tricks," Moushey describes how prosecutors use their power to promise leniency or a reduced sentence, and then renege on their promise.

Federal prosecutors disregard the ethics code that is supposed to bind all attorneys. The Justice Department does not enforce their regulatory function over prosecutors, and judges have lost the power to oversee prosecutorial abuse due to laws like the federal mandatory sentencing guidelines passed in 1987. Thus the power of the prosecutors grows, and they have become virtually unpunishable. In turn, prosecutors have increasingly adopted an anything goes attitude.

As Arnold I. Burns, deputy attorney general under Ronald Reagan and currently a member of an attorneys' task force seeking to reform the grand jury system, has said, "With them [the mandatory sentencing guidelines], the prosecutor has more and more power. In fact, he has all the power."

One manifestation of this power is the victimization of defense attorneys who are too energetic or successful. Under the so-called Thornburgh Rule, a Justice Department regulation named in honor of the Bush administration attorney general, federal prosecutors are instructed to ignore the code of ethics adopted by the state bar in the state where they operate.

Federal prosecutors are thus exempted from such strictures as the provision--common in almost all state ethics codes--that a person represented by an attorney cannot be contacted by a prosecutor except through that person's attorney. This facilitates making a deal with the accused against his or her defense attorney.

The Thornburgh rule combines with the mandatory sentencing guidelines passed in 1987 to give a powerful weapon for prosecutors against defense attorneys. Moushey explains, "So one of the few ways a defendant can win a reduced sentence is to snitch on someone else in exchange for a recommendation from prosecutors for a reduced sentence. And what easier target for a desperate informant than his lawyer?" Defense attorney John Wesley Hall, Jr. from Little Rock, Arkansas commented in an interview for the series: "I'm scared. Every time I talk to a guy I'm worried that he is wired."

The rationale for the Thornburgh rule is that federal prosecutors are subject to the Justice Department's Office of Professional Responsibility. But this agency, as Moushey found, fails to investigate, control or punish prosecutorial abuse. Exhibit A: the OPR has been investigating the modus operandi of Kenneth Starr for more than a year, but has brought no charges against him.

The full text of Bill Moushey's series can be accessed at:
<http://www.post-gazette.com/win/>



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