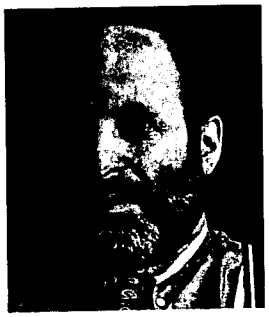

INFORMAL OPINION

The Need For A Clean Sweep At The Department Of Justice

By Harvey Silverglate

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The Department of Justice (DOJ) under the Reagan and Bush presidencies has become one of the most dangerous and more corrupt organizations in the nation. However, unless something quite drastic is done by the Clinton administration and, in particular, by Attorney General Janet Reno, not much is likely to change. What is needed, it would seem, is a clean sweep of the career lawyers, administrators, and bureaucrats in the DOJ such as does not, in the ordinary course, accompany a change in the occupant of the White House.

Unlike the Central Intelligence Agency (CIA), there are no serious proposals afoot simply to do away with the DOJ. Sen. Daniel Patrick Moynihan (D-NY) has suggested that the CIA be abolished and that its essential activities be distributed among other existing agencies. This is probably the only way to really extirpate, root and branch, the covert, conspiratorial, secret government part of that agency that manages to function without any real oversight by Congress, the courts, and the American people, and which seems to outlast administration after administration. As President deKlerk of South Africa has learned recently with respect to the secret right-wing cabal within that country's military establishment, once such an organization gets out of control, even the president or the nation's chief law enforcement officer cannot be assured that he or she knows what's happening, much less control his ostensible underlings.

However, while I'm not prepared to make quite so radical a proposal as abolition of the DOJ (unlike the CIA, it's not clear that its activities could easily be distributed among other agencies), and while I'm willing to give Reno an opportunity to bring the Justice Department under some form of control and make it once again serve rather than subjugate the nation and the Constitution, it is clear that many egg shells will need to be broken in order to make this particular omelette right. Indeed, I doubt that the new Attorney General will be able to accomplish the needed reforms — particularly reform of the DOJ's lawless and fascistic "corporate culture" — unless she has the guts to not only begin ignoring the advice of the DOJ lifers (or "career professionals" as they seem to prefer to call themselves), but to dismiss most of them. Most or all of the United States Attorneys should go as well, including many of their assistant prosecutors. While common wisdom says that the fish rots from the head down, it seems that the problems at the DOJ are not limited to the top echelons; hence, it's likely that cutting off (or changing) the head will not save the body.

Why is such a drastic remedy called for?

The answer is found in a review of the dismal record of the DOJ in the past dozen years. This is something that most criminal defense lawyers are all too familiar with, but when one steps back and looks at the broader picture, it is breathtaking despite the familiarity. While the DOJ has had its dark moments during earlier administrations — the reigns of Attorneys General Mitchell and Kleindienst during the Nixon years come to mind — the Reagan and Bush years have seen not only a deepening of the culture of corruption and abuse of power, but a concomitant acquiescence in such conduct on the part of the federal judiciary. This is what makes this most recent DOJ descent so dangerous.

The DOJ, with the approval of a statist Supreme Court (where, alas, a clean sweep will likely take a full generation or more, given the Justices' life tenure), has destroyed, rather than enforced, the fabric of American law so laboriously constructed in the first 200 years of the life of the republic. The message to go on this rampage came down from the various Attorneys General appointed by two presidents who were cynical when it

came to bashing constitutional rights and elemental fairness and justice in the name of fighting all manner and kind of perceived social evils — from abortion to violent crime, from sexually explicit material to whistleblowing and leaking about secret or improper government operations, from illegal immigration to organized crime, from bank and securities fraud to the use and sale of recreational drugs, from political corruption to money laundering, from organized crime to — alas — illegally modifying legally-purchased weapons and holing up in a religious commune in Waco, Texas. Indeed, the Justice Department has been obsessed with seeming to wage war against every type of perceived evil, with the sole exception of investigations of its own and the administration's destruction of the fabric of our liberties.

The militarization of the law enforcement agencies — witness the "war on drugs," the "war on white collar crime," the "war on organized crime," and so forth — has resulted in the development of an equally warlike mentality within all ranks of the DOJ, including among its lawyers. And, of course, it is all too obvious that, as the saying goes, all's fair in love and war.

As a consequence of the policies set loose by the DOJ and approved by a supine federal judiciary, the following legal atrocities, among many others, have been allowed to mar the Land of the Free and the Home of the Brave:

• A Mexican physician was kidnapped three years ago by DOJ-hired bounty hunters to stand trial in California for allegedly injecting stimulants into a captured American undercover drug enforcement agent stationed in Mexico as part of this country's imperialistic effort to bring the ill-considered and destructive "War on Drugs" to foreign soil. The injections were supposedly aimed at keeping the agent awake for torture and questioning. Despite protests from Mexico and domestic and international organizations devoted to the rule of law, Dr. Humberto Alvarez Machain was tried in U. S. District Court for a crime allegedly committed on foreign soil. The doctor was, however, acquitted by order of Judge Edward Rafeedie in Los Angeles for lack of evidence, despite a large cast of disreputable witnesses who had been threatened, cajoled, and bribed by federal prosecutors to give incriminatory testimony. Evidence adduced early in the proceedings revealed that Dr. Machain's abductors were offered a $50,000 reward plus expenses by the DEA (Drug Enforcement Administration and its parent, the DOJ) for the doctor's successful return to the U.S., but by the time of trial the testimony revealed that in fact the DOJ had paid its witnesses considerably more. (If this isn't bribery of witnesses, what is?) It was also learned that the prosecutors knew that there was a witness available who claimed that it was another doctor, not Machain, who injected the American agent, but that the DOJ kept the witness' existence a secret, content to allow a possibly innocent man to be convicted in order to redress the death of an undercover agent and, presumably, prevent a new brouhaha over the kidnapping. The case is over, the doctor is back in Mexico, but the stain of this lawless kidnapping and this "Big Brother" assertion of the extraterritorial reach of American law on the once-good name of American justice will not easily be expunged.

• Equally questionable was the method used to obtain the presence of former Panamanian strongman Manual Antonio Noriega to stand trial in Federal District Court in Miami — supposedly for drug trafficking, but more likely for daring to refuse to continue taking orders from the DEA and the CIA after many years as a reliable, if somewhat repellant, ally in the wars against drugs and World Communism. President Bush launched an undeclared (and hence unconstitutional) war on Panama in order to arrest the general — perhaps the most expensive and destructive (of lives and property, not to mention of international law) arrest in American history. (Launching a war in Panama to arrest a CIA apostate makes even the assault in Waco to arrest a religious zealot with a taste for weaponry appear almost reasonable by comparison.) Noriega, convicted in an unfair trial (his funds were largely frozen, thereby limiting his ability to pay lawyers and investigators to defend him), and declared a "prisoner of war" by the trial judge, sits in federal prison probably for the rest of his life (unless, one supposes, he agrees to testify, whether truthfully or not, against Fidel Castro). Nor should it be ignored that in this case the DOJ paid big bucks to its witnesses, and forgave these witnesses their numerous admitted felonies, just in order to get Noriega. Had the *defense* lawyers engaged in such corrupt practices, they would be behind bars now for bribery, extortion, obstruction of justice, and subornation of perjury.

• In 1987, the DOJ was found guilty of wrongdoing in the lawsuit involving a small Washington computer software company, Inslaw, which had argued that the DOJ itself had stolen its proprietary product in an attempt to drive the company out of business. A federal bankruptcy judge found that the Justice Department used "trickery, fraud and deceit" in taking the company's property, but this ruling was eventually reversed by the U.S. Court of Appeals, which more and more in recent years has sought to protect the government rather than do justice for citizens. Nonetheless, former Attorney General Richard Thornburgh has taken heat for the fact that nothing much happened until the company's high-profile and well-respected lawyer, former Massachusetts Attorney General and DOJ honcho Elliott Richardson brought a lawsuit and began to scream about the affair, and then-Attorney General Barr acquiesced by appointing a special counsel to investigate the matter. However, to date no criminal charges have resulted from this investigation. Yet the stench remains.

• And then there's the still-unfolding "Iraqgate" scandal, which (I agree with *The New York Times* columnist William Safire) should result in the serious investigation and perhaps indictment of several DOJ lawyers. When federal prosecutors lied to U. S. District Judge Marvin H. Shoob at the trial of Christopher Drogoul, branch manager of Banco Nazionale del Lavoro in Atlanta, on a charge of fraud for arranging large unsecured loans to Iraq without the knowledge — the DOJ argued — of the bank's Rome headquarters, the judge smelled the rat and pulled the plug. An almost comical scenario followed, in which high DOJ officials blamed the CIA, and the CIA blamed the DOJ, for the coverup. Bush's patsy, Attorney General William Barr, a deserving heir to the tattered mantle of the likes of his infamous predecessors Ed Meese and Dick Thornburgh, decided that the appointment of an independent counsel to look into the affair was unnecessary. When that failed to quell the uproar, Barr appointed his own patsy, former federal judge Frederick Lacey — a Republican with a reputation as a reliable and loyal apparatchik — who conducted his own "investigation" (complete with blinders) and declared the whole stinking garbage

heap to smell sweet as roses. It remains for the new Attorney General to pick up the pieces and sort things out. The betting here is that a real investigation will show that the government was willing to frame a possibly innocent branch manager in order to hide the fact that, far from the manager's acting on his own to defraud the bank by making the loans to Iraq, the bank's management in Rome approved of the covert effort to fund Saddam Hussein's military build-up, all with the encouragement and knowledge of the CIA. In short, this may yet turn out to be another secret foreign policy adventure run out of the basement of some government building in Washington, in which the DOJ was enlisted as a reliable ally in the effort to limit the subsequent damage once the plan fell apart.

• The DOJ managed to convince the Congress in 1984 to enact legislation eliminating the presumption, embodied in the Eighth Amendment to the Constitution, that persons accused of crime are entitled to be released on bail that is not "excessive," unless and until they are tried and convicted. Large numbers of federal defendants consequently are jailed upon being accused. Statistical studies have shown that jailing a defendant before trial substantially increases his or her chances of being convicted. Those few detainees who are acquitted end up having served their sentences anyway — awaiting trial. This little exercise in the kind of preventive detention so near and dear to the hearts of totalitarian tyrants was justified by the DOJ — and, in 1987, this line was actually bought by a majority of the members of the Reagan Supreme Court — on the theory that while it would be unconstitutional to impose "excessive" bail, it was OK to just impose *no* bail and simply imprison the defendant instead! Orwell, were he alive, would be proud to know that *1984* arrived just about on time (even a little bit early, in fact).

• A rash of trumped-up child pornography cases in which harmless citizens with an interest in child porn are targeted by federal postal inspectors to receive child porn mailed by federal agents, and who are then arrested, prosecuted, and often imprisoned for receiving what their government sends them in order to "test" their sexual preference proclivities. The DOJ actually went so far in a recent case that even the Reagan/Bush Supreme Court voted 5-4 to overturn the conviction of one victim, Keith Jacobson. (Justice Clarence Thomas provided the crucial fifth vote, showing unusual — for him — solicitude for the rights of a criminal defendant. Perhaps, having himself been accused at his confirmation hearing of having an active interest in pornography, he had some extra sympathy for Jacobson. Shades of "Long Dong Silver"?) The Court found that the government failed to prove that Jacobson was predisposed — independent of the government's solicitation of him over the course of 26 months — to purchase child porn through the mails (or by any other means). Almost no federal child porn defendants, however, are as lucky as Jacobson was.

• Criminal defense lawyers who have been retained by clients to protect them from DOJ officials seeking to put them in prison for long periods of time, have been threatened with indictment and subpoenaed to give evidence against their own clients, despite the attorney-client privilege that for hundreds of years, in this country and under its predecessor English legal system, has assured every citizen of the right to have a confidential relationship with legal counsel. As William W. Taylor III said, when he testified on behalf of the hardly-radical American Bar Association before the Conyers Committee on Government Operations in 1990: "We used to think of prosecutorial discretion as the decision whether to charge. Now we think about prosecutorial discretion as to the decision whether to subpoena an attorney for a client in an ongoing piece of litigation... ."[1]

• As part of the campaign to intimidate defense lawyers, the DOJ's 7000 or so lawyers, with the aid of the army of FBI (Federal Bureau of Investigation) agents, have convinced rubber-stamping federal magistrates and judges to issue search warrants resulting in the agents' seizure of client files in lawyers' offices, including records of wholly innocent clients. Such Gestapo tactics would have been unthinkable two decades ago. Now some federal judges nary blink an eye as they rubber-stamp the prosecutors' warrant applications.

• More recently, the Justice Department promulgated a new set of regulations purporting to give DOJ prosecutors the power to ignore ethical rules and constraints imposed on all lawyers by state courts and bar disciplinary agencies. There was a frantic effort by the DOJ higher-ups, including then-Assistant Attorney General Robert Mueller III of the Criminal Division, to make the regulations effective before the Clinton administration took office. Even though the higher-ups recognized that their days were numbered, this effort was aimed at placating lower-echelon "career prosecutors" at the DOJ who felt they were protected by their lower status from being fired by the new Attorney General, and who were pressuring the higher-ups to leave them this dandy fascistic legacy. If for no other reason (and there are many), this cynical lame-duck ploy demonstrates why the broom at the DOJ must sweep from top to bottom, for the *whole* fish has become rotten, not just the political appointees at the top.

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The parade of horribles could go on and on. The Securities and Exchange Commission (SEC) refused to issue regulations defining "insider trading," and yet insider trading indictments have been a high priority for the Justice Department for years. The cash transaction reporting and money laundering laws and regulations are such that they are at least as much a trap for the innocent unwary as for the arch criminal — an invitation to abusive and selective prosecutions by the DOJ. And whole treatises are now being written about the nightmarish abuses in the area of asset forfeitures.

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These examples are only the tip of a very large iceberg, demonstrating that the Department of Justice has lost its moorings. Radical surgery is needed. While it is always dangerous to generalize and thereby to sweep the good along with the bad, the DOJ during the Reagan/Bush era has been so uniformly hostile to citizens' constitutional rights and so prone to engage in corrupt conduct itself, that one is nervous at the proposition that there might be survivors of a sweep by the new Attorney General. Surely all those at the top must go. As for the line prosecutors at the bottom of the pyramid and the administrative and supervisory lawyers in the middle, in order to stay, they should be forced to demonstrate that they can overcome the corrosive impact of the DOJ's culture and history of the 1980s. If they are as unlucky as many federal defendants seeking to remain on bail pending trial, the burden will be placed on them to demonstrate that they are not dangerous to the community.

The Champion

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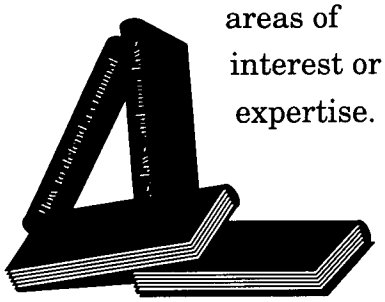

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What Attorney General Reno needs to determine is whether these DOJ careerists, imbued as they have been with the corrosive culture at the DOJ, can resist the temptation to abuse their power, and that they can live up to the motto carved in granite on the rotunda wall at the Department of Justice building in Washington: "The United States wins its case whenever justice is done one of its citizens in the courts." What she ought *not* to do is to take the advice of any Justice lifers as to how she should conduct a massive review of the Department's personnel and policies. The likelihood is that she'd get no better advice and "options" here than she received at Waco. ■

Note

1. *See* the Conyers Committee report, *Federal Prosecutorial Authority in a Changing Legal Environment: More Attention Required,* Report 101-986 (101st Congress, 2d Session), 1990, at 4. This report is well worth reading.