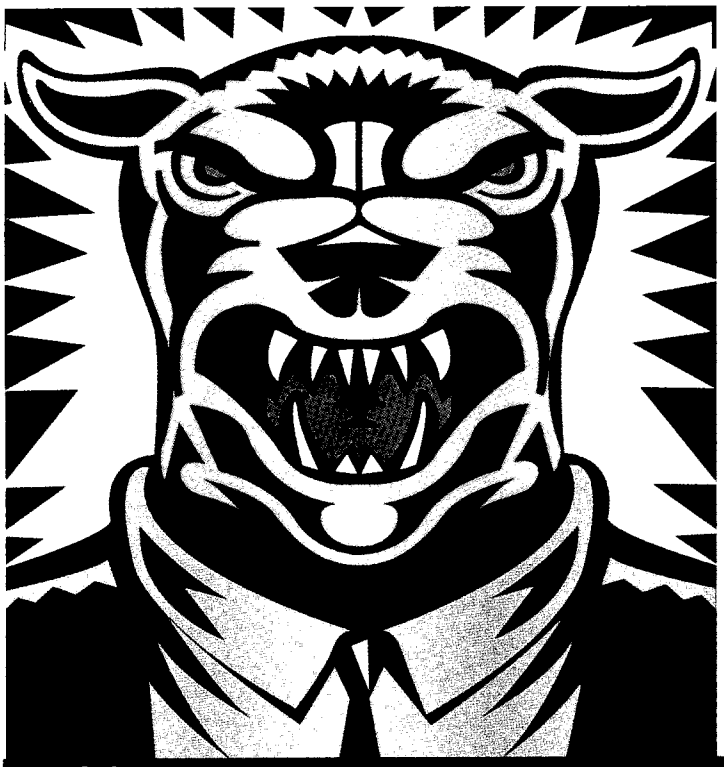

By Harvey Silverglate and Andrew Good

STARR TEACHERS

"If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm — in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself."

These words will strike many as an apt description of the way that Independent Counsel Kenneth Starr has pursued President Clinton. But they were uttered nearly six decades ago by Robert Jackson, who went on to an illustrious career as a Supreme Court Justice and an American prosecutor at the Nuremberg War Crimes Tribunal. At the time, he was President Franklin Roosevelt's attorney general, and he was addressing the ordinary federal prosecutors under his command. He was alluding to tactics that have since become common, practiced with a boldness that grows as federal judges communicate ever more clearly that they will neither supervise federal prosecutions (as they once did) nor remedy prosecutorial misconduct.

Intense media coverage of recent investigations by the Office of the Independent Counsel has resulted in widespread astonishment at the sort of abusive prosecutorial tactics that Jackson decried. In response, independent counsels have protested that they are merely doing to their lofty targets what the Justice Department regularly does with impunity to lesser ones — that is, they are following accepted DOJ procedures. Late last year, Starr's spokesman, Charles Bakaly III, told *Legal Times*, "However unpleasant these techniques, they are part of what federal prosecutors do. . . . We followed longstanding practices and policies."

Bakaly was speaking the truth. But if the use by independent counsels of tactics that are common among Justice Department prosecutors is cause for well-founded public concern, the proper response cannot be merely to reform or do away with the independent counsel statute. Rather, the criticism of Starr and other indepen-

dent counsels points to the need for much more sweeping changes in the way all federal prosecutors operate.

Overzealous Investigations

A key Justice Department tactic in overzealous investigations, emulated in Starr's stalking of Clinton, is to pursue one's quarry by going after a chain of people toward the end of which are individuals who, by virtue of their current or former relationship with the ultimate target, are in a position to provide seemingly credible, incriminating testimony. A basic premise of such investigations is that, unless an intermediate target is threatened with ruin and imprisonment, he will have no incentive to provide testimony that suits the prosecutor's needs.

The most serious problem with this approach, of course, is that a witness who is placed under sufficient pressure to corroborate the prosecutor's firm belief in the ultimate target's guilt may have a hard time resisting the urge to compose as well as sing. A collaboration between prosecutor and witness then proceeds, wherein the witness learns, by a process sometimes subtle and sometimes not so subtle, what he must say to stay out of prison. Often a witness does not have to deviate too far from the literal truth to satisfy his handlers, since there are many federal offenses for which legally sufficient evidence of guilt consists of nothing more than what a target is alleged to have said. An enormous variety of rather common undertakings in political and commercial life can be transmogrified into federal crimes simply by virtue of the target's intention, which, in turn, may be demonstrated by something he is alleged to have said to someone who later became a government witness. Conspiracy, for example, is a favorite weapon in the government's arsenal, because the crime is committed merely by the target's agreement with an associate that the latter should violate a law. Securities fraud is another such weapon, since a savvy stock investment becomes insider trading if the investor, already suspected or accused of some crime, credibly attributes his stellar results to an overly informative conversation with a targeted corporate officer. Similarly, an innocent error on a net worth statement filed in support of a loan application becomes a federal bank fraud if an associate of the borrower recalls a conversation in which the borrower happened to mention an asset value lower than the figure used on the statement. The comment proves knowledge and intent, which are required elements for most felony prosecutions.

Sausage Making

With such recollections, a little fish reeled in by a prosecutor can wriggle off the hook by helping to ensnare a seemingly bigger fish. If the bigger fish is already on the prosecutor's sonar, so much the better. We have firsthand experience with these tactics, as do most prosecutors and defense lawyers, nearly all of whom operate under a tacit agreement to refrain from speaking publicly about how the system works. Prosecutors believe the public would not understand the need for such tactics. Prospective witnesses and their lawyers share with prosecutors an interest in keeping hidden the subtle *pas de deux* — innocuously dubbed "plea discussions" or "immunity negotiations" — that results in the intermediate target's agreement to become a witness. Law enforcement thus joins sausage making and legislating as processes that should not be observed too closely.

This tradition of discretion helps explain Kenneth Starr's barely concealed disgust with the behavior of Monica Lewinsky's former lawyer, California malpractice specialist William Ginsburg. Ginsburg's highly publicized and undisguised offers to have his client provide helpful testimony against the president in exchange for immunity from prosecution for perjury pulled away just enough of the curtain to alert the public to the enormous pressures placed on witnesses to "cooperate." Since it was no secret what Starr thought Clinton did, it was not difficult for a witness to figure out what to say to obtain immunity or avoid a perjury indictment.

The same strategy was followed in a case in which our firm participated in the mid-1980s. U.S. Attorney William F. Weld (who later became governor of Massachusetts) launched his political career by engaging in a highly publicized investigation into the administration of Kevin H. White, then the mayor of Boston. Weld attributed his inability to turn up evidence of White's corruption not to the possibility that White might not have been corrupt but rather to a conspiracy of silence among lower-echelon city officials and businessmen with lucrative city contracts.

Weld's assistants began a systematic effort to "climb the ladder" at City Hall, with the goal of eventually reaching high officials who could testify to corrupt dealings or conversations with the mayor himself. They targeted, as the perfect witness, our client Theodore V. Anzalone, a Boston lawyer who from the earliest days of the White administration had held a variety of important posts, including the unofficial position of the mayor's most effective fund-raiser. Adequately squeezed, Weld and his staff believed, Anzalone would give them Kevin White.

The prosecutors got their big chance with George N. Collatos, a low-level city hall operative who was reputed to be always ready for a profitable opportunity. In 1981, when a city contractor complained to the FBI that Collatos, then an employee of the Boston Redevelopment Authority, was trying to shake him down, the bureau wired the contractor, who then paid a $12,500 bribe to Collatos in a monitored transaction. Collatos was convicted of extortion and sentenced to three years in prison.

Three months later, Collatos was hauled before a federal grand jury, granted immunity from further prosecution for past acts, and questioned about corruption in the White administration. He was indicted for perjury when he denied soliciting and receiving financial contributions for White's 1979 reelection cam-

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paign. Collatos pleaded guilty. Weld's assistant prosecutor told the sentencing judge that Collatos' refusal to implicate higher-ups "demonstrated his need for rehabilitation." The prosecutor made it clear that, after sentencing, Collatos would be called yet again before the grand jury. The sentencing judge, W. Arthur Garrity, sentenced Collatos to an additional two years in prison, while indicating that he could get a reduction if he cooperated with Weld's office. "I saw the handwriting on the wall," Collatos wrote in a remarkable 1984 article for the now-defunct *Boston Observer*, "so I decided to take Garrity up on his order."

Despite the fact that Collatos was found to be "deceptive" during an FBI-administered polygraph exam, Weld's office obtained an extortion indictment of Anzalone based on Collatos' testimony. Collatos claimed that he obtained an $8000 "political contribution" from a city contractor and dutifully turned the cash over to Anzalone for the White reelection campaign. It was a perfect example of the ease with which a malefactor can become a star witness rather than a long-term prisoner. If the money had stuck to Collatos' palm, he would head to prison, but if he had passed it along to Anzalone, he would be a free man. Six months after he began cooperating, Collatos was released on parole.

The government did not get what it bargained for, however. Behind the backs of his handlers, Collatos made the mistake of trying to gain money as well as liberty from his new role. He sought a secret meeting with Anzalone, at which Collatos threatened to repeat at Anzalone's upcoming trial what he admitted would be false incriminating testimony, unless Anzalone paid him $200,000. Unbeknownst to Collatos, Anzalone had wisely notified his lawyers of the meeting with Collatos in advance. We arranged for the conversation to be monitored by two witnesses hiding under a trap door below the restaurant table where Collatos and Anzalone met (we were unable to surreptitiously record the meeting, because in Massachusetts such taping is lawful only when done by government agents). Informed of Collatos' secret threats to lie if not paid, Anzalone's jury acquitted him.

'Misprision of a Felony'

The government, unhappy with the surprise defense witnesses who emerged from the restaurant cellar, initially threatened the witnesses and us with prosecution for obstruction of justice and the ancient but little-known crime of "misprision of a felony" (the latter offense is committed when a citizen witnesses a felony and fails to report it to the government, although the courts generally have required a bit more active obstruction than merely withholding information). When the prosecutors came to their senses after their superiors in Washington became aware of the widely reported disaster, they dropped these charges and instead indicted Collatos once more — this time for his perjury in the Anzalone trial. He was convicted and sentenced to two years.

The government finally gave up trying to turn Collatos into a government witness against Anzalone. Collatos, alas, had attained a degree of criminality and unreliability, springing from an apparent inability to tell the truth, that at long last disqualified him from meeting the very low threshold of probity and credibility that one needs to be a valued and rewarded government witness. Having no hopes of applying pressure on Anzalone to compose and sing a song of mayoral corruption, the feds gave up their pursuit of him and hence of Mayor White.

This sort of scenario is commonplace in federal prosecutions, so it was natural for Kenneth Starr and his deputies to swing "cooperation" deals with the likes of convicted former Arkansas judge David Hale and admitted felon and former Clinton business partner James McDougal (who died last year). It did not matter that neither of them implicated Clinton in the Whitewater swindle of McDougal's federally-insured Madison Guaranty Savings and Loan Association until after being convicted of a felony and sentenced to prison.

Nor did it make a difference that McDougal's estranged wife, Susan, was loudly proclaiming her refusal either to accept Starr's offers or to accede to his threats seeking her testimony. She claimed she knew nothing criminal that Clinton had done, that her husband was an inveterate liar willing to sell his soul in exchange for Starr's leniency, and that she would (as she did) go to prison for contempt rather than play the role that Starr had designated for her. When imprisonment for "civil contempt" failed to loosen her tongue, Starr's office took advantage of an unfortunate legal loophole that allows uncooperative witnesses to be punished a second time, notwithstanding the constitutional protection against double jeopardy. This time he had her indicted for criminal contempt and obstruction of justice.

Starr's effort to bludgeon former Associate Attorney General Webster Hubbell into testifying against the Clintons also seems unlikely to elicit the truth. Early in Starr's investigation, Hubbell pleaded guilty to charges of stealing from the Rose Law Firm in Little Rock, a theft that victimized Hillary Clinton, then his law partner, and the firm's clients. That guilty plea makes the Clintons look more like Hubbell's victims than his criminal accomplices. It also makes it plain that, when it was in his interest to do so, Hubbell acted dishonestly. Notwithstanding Hubbell's demonstrated lack of probity, Starr wants him to become his witness against the Clintons in the Whitewater investigation and is attempting to destroy him for refusing to do so. To be sure, Starr's suspicion that Hubbell's recalcitrance has been bought through a scheme to obstruct justice is understandable. While imprisoned for his thefts from the Rose Law Firm, Hubbell received consulting fees from an offshore source of Clinton campaign funds, the Riady family, and from Revlon (the same company that offered a job to Monica Lewinsky on Vernon Jordan's recommendation). Hubbell also received a sizable advance from a book publisher in exchange for a promised manuscript.

By charging Hubbell's wife, Starr copied the Justice Department's common tactic of exerting pressure on potential witnesses by indicting people close to them. His prosecutors reportedly used the same tactic with Monica Lewinsky, threatening to charge her mother with obstruction of justice. In our practice, we have seen federal prosecutors take this approach several times, with prominent clients such as Michael Milken (who pleaded guilty in exchange for dismissal of charges against his brother) as well as less famous people. Despite the threat to his wife, Hubbell, like Susan McDougal, continues to insist that he has no incriminating information about the Clintons.

When a witness testifies in a way that might exculpate the target, prosecutors can be vengeful. Julie Hiatt Steele insisted that Kathleen Willey, who accused the president of groping her, had asked her to lie and that her earlier statements supporting Willey's story were false. As a result, Steele has been indicted for obstructing justice and making false statements to a federal agent. (Unbeknownst to many citizens, it is a felony to lie to any federal official, under oath or not, and typically it is the official's version of what was said that pros-

ecutors credit.) Steele, a single mother of an eight-year-old, faced years in prison. She understood that, like Lewinsky, Hale, and Jim McDougal, she would receive immunity only if she would change her story and tell the "truth" as the prosecutors see it.

It is unclear, of course, whether Susan McDougal, Webster Hubbell, and Julie Hiatt Steele, or James McDougal and David Hale, have told the truth. What is clear is that the techniques used by prosecutors to influence witnesses cast doubt on the government's ability to uncover the facts.

In the warped vision of federal prosecutors, only their brand of witness tampering is compatible with proving the truth and assuring that justice is done. Under existing law, only prosecutors have unfettered power to decide what testimony is worth buying and how much the public should pay for it in the form of immunity, money, and liberty. Only prosecutors have the power to threaten and actually prosecute witnesses who insist that the facts do not conform with the government's version of the truth. When prosecutors have so much power to influence evidence through rewards and intimidation, the danger they pose to truth and justice is clear.

This concern was at the heart of a remarkable ruling last year by a three-judge panel of the U.S. Court of Appeal for the 10th Circuit. *U.S. v. Singleton*[1] involved the federal witness bribery statute that begins, "*Whoever* . . . directly or indirectly, gives, offers, or promises anything of value . . ." (Emphasis added.) The judges concluded that "whoever" means that the statute applied not only to bribes by private actors but also to enticements by agents of the government, including offers of leniency. "If justice is perverted when a criminal defendant seeks to buy testimony from a witness," they wrote, "it is no less perverted when the government does so." The decision caused an uproar among prosecutors, and in early January it was reversed upon rehearing by nine other judges on the court, and *certiorari* was denied.[2] These judges apparently had grown so inured to the government's witness tampering that they could not imagine how the criminal justice system could function without it.

Sometimes, despite all the pressure it can bring to bear, the government still cannot elicit testimony to back up a particular charge. If, after years of effort, the activities that prompted an investigation cannot be proven to be criminal, the overzealous prosecutor can imagine only one explanation: the target must have obstructed the investigation by tampering with witnesses and suborning or committing perjury. The scope of the inquiry then expands to cover the target's activities during the investigation.

Therein lies the answer to a frequently asked question: Why has Starr's investigation lasted more than four years and cost more than $40 million, with no end in sight? A federal investigation need not have a foreseeable end. Even if the suspected crimes that triggered the investigation can no longer be prosecuted because of the statute of limitations, new crimes of obstruction come into the prosecutor's sights, and the clock begins to run all over again.

Perjury Trap

If, as happened in Starr's investigation of Clinton, no prosecutable case can be made against the target for pre-investigation crimes, or for obstructing the investigation of those crimes, there is always another avenue: the perjury trap. An intense investigation of virtually anyone will usually find something that the target will lie about to protect either a loved one or himself. Starr knew that, as with many other people, the thing the president was

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Starr Teachers

(Continued from page 31)

most likely to lie about was his sex life. Having heard the famous telephone tape made by Clinton paramour Gennifer Flowers, the independent counsel knew that the president was a flawed human being with a propensity to lie (and to advise others to lie) about sex.

In the nether world of prosecutorial logic, a federal investigation of the Monica Lewinsky matter was justified by the gossamer connection between the president's alleged efforts to cover up his complicity in the Whitewater bank fraud — a charge that has never been made, much less proven — and his easier-to-prove efforts to conceal his sex life from Paula Jones' lawyers. All that remained was for the prosecutors to call the president before a federal grand jury, and the jaws of the perjury trap would slam shut. The only possible escape was for the president to rely on a tortured legal parsing of sexual relations to protest his innocence of perjury during his deposition in the Jones suit and, in the face of the semen-stained dress, to admit his sexual involvement with Lewinsky. Whether his attempted escape from the perjury trap set for him by Starr constituted a high crime or misdemeanor justifying his removal from office became the subject of his impeachment and his trial in the Senate.

The perjury trap was used in a somewhat different fashion by federal prosecutors during their investigation of former Boston Mayor Kevin White. In Boston, as in many cities, real estate developers often fall prey to city inspectors who extort money through their power to delay or deny needed permits. Paying small cash bribes to city officials is usually not a violation of federal law. But William Weld's prosecutors hoped that if they entrapped a real estate developer into paying illegal tribute to one of these predatory inspectors, he might lie about it when questioned by the federal grand jury. At that point, they figured, they'd have enough leverage over the developer to force him to divulge evidence about graft involving the mayor.

The feds easily caught a minnow: a building inspector extorting graft from a small-scale developer. Threatened with prison, the building inspector quickly agreed to wear a wire for the feds while shaking down a large-scale developer who needed permits for a housing project. The crooked inspector readily issued a permit to install a foundation for the project but then refused to allow the developer's construction crews, which were standing idle at the building site, to erect anything on the foundation. The developer, who later became our client, instantly understood what was wanted; he paid $1000 to the inspector, who recorded the event on an FBI-supplied tape recorder. Weeks later, the federal prosecutors called the developer before the grand jury. Fearing that he'd never get anything built in Boston if he told the truth, the developer lied when asked whether he'd ever paid a bribe to a city official. Though he pleaded guilty in federal court to a related charge, the developer never provided the sort of testimony that the perjury trap was designed to elicit, because he had nothing incriminating to say about the mayor.

Since the law books today are filled with an even greater assortment of crimes than they were when Robert Jackson was attorney general, a federal prosecutor has an almost certain chance, not just a "fair" one, of being able to pin some violation of law on virtually any citizen. In Jackson's era, one spoke of the feds "throwing the book" at their target. Nowadays, targets can be investigated for violating any one of thousands of laws and regulations filling an entire library of fine print and undefined arcana. This body of law is so vast and scattered that, according to a February report from an American Bar Association panel chaired by former Attorney General Edwin Meese III, "there's no conveniently accessible, complete list of federal crimes."

Federal laws now criminalize many activities that the average person would not necessarily view as immoral or anti-social, much less felonious. This is true in such fields as antitrust, campaign finance, currency transactions, customs and export laws, environmental protection, firearms, Medicare and Medicaid, patents, copyright and trademark infringement, securities, and taxation, to name just a few. For example, a 1993 case in the First Circuit involved a New Hampshire man in the midst of an acrimonious divorce who made small cash deposits in his business partner's bank account to make it more difficult for his wife's lawyer to locate his assets. He and his partner were prosecuted for violating the federal law against money laundering, even though that statute is aimed at transactions designed either to conceal the criminal origin of money or to evade taxes. The government conceded that the man had earned the money legitimately and had reported the income on his tax returns. Nonetheless, he and his partner were convicted for money laundering, verdicts that were thrown out on appeal.

Crime Unknown at the Time

The pervasive web of federal laws governing many areas of private and public activity provides federal prosecutors with a rich supply of often vague words and phrases to bend and blend and string together in ever more creative ways to establish that a targeted individual has committed a felony. People whose activities may be covered by these complex laws often either do not know about the laws or do not understand them to prohibit activities deemed unlawful by the government. The target will sometimes find himself under investigation or prosecuted for doing something that he had no reason to believe was illegal. Indeed, by redefining long-accepted meanings of words and phrases used in federal laws, prosecutors are able to charge the target with violating crimes that were entirely unknown at the time he acted.

Independent Counsel Donald Smaltz's case against former Agriculture Secretary Mike Espy illustrated this approach. Smaltz was appointed to investigate whether Espy's acceptance of gifts and travel from companies whose businesses his department regulated constituted not just violations of ethical rules (Espy was forced to resign) but felonies. The law that most nearly fit the facts is the one that prohibits federal officials from "accepting anything of value personally *for or because of any official act* performed or to be performed by such official or person." (Emphasis added.)

Smaltz spent years and millions of taxpayers' dollars trying to generate evidence that the blandishments Espy accepted were linked to "any official act" but came up empty. One might think that, if the facts did not fit the definition of the crime, Smaltz would have declined to prosecute. Instead, he aped Justice Department tactics, prosecuting Espy by retroactively redefining the crime to fit the facts.

Smaltz took the position that the statute should apply to gifts motivated by the receiving official's status or position, regardless of whether there was any intent to affect or reward "any official act." Fortunately for Espy, this theory was first tested in Smaltz's prosecution of Sun-Diamond Growers of California for its

gifts to him. Sun-Diamond's conviction was thrown out on appeal because, at Smaltz's urging, the judge had instructed the jury that no link had to be proven between the gifts and any official act by Espy. The U.S. Court of Appeals for the District of Columbia Circuit concluded that Smaltz was prosecuting Sun-Diamond and Espy for a non-existent crime. Smaltz went ahead with the Espy trial anyway, and Espy was acquitted by the jury.

You need not be a Cabinet official to be prosecuted by the Justice Department for committing an offense invented after the fact. We represent two businessmen in two different industries who have suffered this fate.

One of these men is the principal executive and owner of Fiber Materials Inc. (FMI), which sells equipment used to manufacture heat-resistant carbon-carbon. The export of such equipment is subject to Commerce Department regulation because sometimes it is "specially designed" to produce weapons-grade carbon-carbon, a substance used in missile warheads and rocket nozzles. Alternatively, the equipment may be "dual use," capable of producing either weapons-grade carbon-carbon or less rarefied products used to make brake pads for aircraft and other non-military products. Since the beginning of the Cold War, arms control regulations have banned the export of "specially designed" equipment without a shipment-specific license but have permitted the export of "dual use" equipment, subject to a less restrictive general-destination license.

In 1988, FMI shipped to an Indian defense research institute equipment that included a control panel everyone agreed was dual use. Retrospectively, the Commerce Department worried that the control panel might contribute to India's arms race with Pakistan and China. Rather than change the regulations to embargo future shipments of similar dual-use equipment, the government prosecuted FMI based on a new interpretation of the law. The prosecutors convinced the trial judge to instruct the jury that, despite years of the Commerce Department's consistent and contrary usage, the phrase "specially designed" referred to dual-use equipment, thus assuring convictions for failure to obtain a special export license. A sentence still has not been imposed four years after the trial, and the verdict remains under legal attack based on a steady stream of evidence that the government changed the meaning of "specially designed" only after the shipment occurred, for the sole purpose of prosecuting FMI.

Our other direct experience with retroactive criminalization involves "safe and effective," the keystone phrase of Food and Drug Administration (FDA) regulations. The FDA approves drugs and medical devices for sale and distribution only if they are "safe and effective under the conditions of use and warnings against unsafe use in the approved labeling." Hence the FDA requires manufacturers of drugs and medical devices to tell their customers, whether they are health-care providers or patients, to "use only as directed."

The C.R. Bard Company manufactured and marketed a catheter used to improve blood flow through arteries clogged by heart disease. The FDA approved the catheter as "safe and effective" even though the manufacturer disclosed a small (1.7 percent) risk that the device could fail and injure patients if the warnings against unsafe use were not followed by physicians. Sure enough, although with less frequency than predicted, the device failed when physicians ignored the warnings against unsafe use. To better protect patients, C.R. Bard made changes to the catheter which had no effect on its safety or effectiveness under the approved conditions of use but which made it more resistant to failure when the instructions were not followed.

FDA regulations required approval of any change that affected safety or effectiveness. In the absence of notice to the contrary, C.R. Bard had every reason to believe that the phrase "safety and effective" referred to "the conditions of use and warnings against unsafe use in the approved labeling." Since the changes had no effect when conditions and warnings were heeded, the company thought it could make the beneficial changes without waiting for agency approval.

The FDA and the Justice Department nevertheless indicted C.R. Bard and several of its executives, one of whom we represent, for making the changes without approval. As publicly-traded companies frequently do even in dubious cases, the manufacturer pleaded guilty and paid a huge fine. Threatened with imprisonment, the executives all went to trial. Contrary to the position that the FDA had taken in several prior cases, the government argued that the law forbids any unapproved change that affects safety and effectiveness, even if the effect is relevant only when the conditions of use are ignored. Three of the executives were convicted and sentenced to 18 months in prison. They are free during their appeal, which is based partly on their claim that it is fundamentally unfair to punish them for violating a law that meant one thing before the fact and another after.

Injustice Inevitably Flows

A basic insight at the heart of our republic is that injustice inevitably flows from conferring uncontrolled power upon any agency of government and, even more so, upon any individual in government. The public is awakening to the fact that independent counsels exercise such power. Although run-of-the-mill federal prosecutors have to answer more directly to superiors in the Justice Department and are not quite as free to spend whatever it takes to convict their targets, they use the same tactics as the independent counsels with even less public accountability, since they are not subject to as much scrutiny. Amending or eliminating the independent counsel statute might make life fairer for Cabinet secretaries and presidents, but it will not redress the gross imbalance that has been created between the power of federal prosecutors and the rights of ordinary citizens.

NOTES

1. 144 F.3d 1343 (10th Cir. 1998).
2. U.S. v. Singleton, 165 F.3d 1343 (10th Cir. 1999), *cert. denied.*,__ S. Ct. __, 1999 WL 185874 (No. 98-8758).

POSTSCRIPT: Media exposure of the independent counsel's abusive tactics led to conviction-resistant juries, as the ultimate protection against prosecutorial abuse. First, Susan McDougal's lead trial counsel, Mark Geragos, skillfully made prosecutorial abuse the centerpiece of her defense. Julie Hiatt Steele courageously appeared as a defense witness at McDougal's trial and recounted her experiences as a victim of prosecutorial abuse. McDougal's jury hung on the criminal contempt charges and acquitted her of obstruction of justice. Next, Julie Hiatt Steele's jury hung on all counts against her of obstruction of justice and making false statements. Finally, Starr agreed to a no-jail plea bargain with Webster Hubbell, who pleaded to a felony § 1001 count and a misdemeanor tax-evasion charge, and dropped all charges against Hubbell's wife, and their tax advisers. Proposals to revise rather than kill the Independent Counsel statute have attracted little support so the power to abuse has been returned in full to the DOJ. The lesson is that the public, including politicians and jurors, will respond unfavorably to prosecutorial abuse if it is effectively exposed in the media.

In *U.S. v. Sun-Diamond Growers of California*, 199 S. Ct. 1402 (1999), the Court unanimously rejected the Independent Counsel's interpretation of the gratuity statute.