

## CIVIL LIBERTIES *By Harvey A. Silverglate*

# Lying is part of FBI's job

**T**HE DAY before Los Alamos National Laboratory physicist Wen Ho Lee was fired on suspicion of mishandling sensitive national security atomic secrets and even of passing them along to the Chinese Communist government, FBI agents conducted a lengthy interrogation of the since-indicted, 60-year-old, Taiwan-born scientist. During the course of this interrogation, the subject of Mr. Lee's Department of Energy-administered polygraph exam came up.

According to reporters for the *Washington Post*, who obtained a transcript of the tape-recorded session, FBI agents misled Mr. Lee into believing that he had failed the lie-detector test when in fact, the test administrators had judged him as having clearly told the truth. The tactic was aimed, of course, at making Mr. Lee feel that the FBI was in possession of evidence of his guilt and hence that he might just as well confess to his misdeeds.

Mr. Lee's attorneys cited the transcript and the test results as proof of the FBI's duplicity in trying to build what the defense lawyers claim is a phony—and indeed, race-based—national security prosecution.

Readers of the newspaper might have gasped at the gross duplicity in the agents' questioning techniques, but if Mr. Lee's lawyers complain to the court, their pleas are likely to fall on deaf ears. The federal judiciary long ago abandoned any notion that duplicity is an unworthy tactic in the government's dealings with its citizens.

The old *McNabb/Mallory* doctrine, which derived from two mid-20th-century Supreme Court cases, reposed in federal courts general supervisory powers over the administration of federal criminal justice but has now become a quaint anachronism. *McNabb v. U.S.*, 318 U.S. 332 (1943); *Mallory v. U.S.*, 354 U.S. 449 (1957).

Indeed, the Supreme Court has already held that law enforcement officers may lie to or trick suspects into giving confessions. Drug prosecutions and convictions have long been sustained in the face of undercover agents' duplicity in persuading targets to sell them illegal drugs, so long as the agents' importunings fall just shy of coercion or entrapment.

It is now routine for federal laws prohibiting the distribution of child pornography on the Internet to be enforced almost exclusively by federal agents sitting at their computer terminals, day in and day out, pretending to be consumers of such materials and urging or even pleading with lonely and disturbed souls to share their cache of pictures.

### One-way street

What makes these techniques at all remarkable? It is not so much the news that the government sometimes lies to its citizens when trying to ensnare those who are viewed as involved in crime or are prone to be involved if sufficiently induced. Rather, it is that a clear double standard is tolerated: It is a serious felony for a citizen to lie to a federal agent, even if not under oath.

Title 18, Sec. 1001, of the U.S. Code is the infamous "false statements" statute, which is commonly used as a weapon to prosecute a target against whom the government finds itself unable to prove a more serious, substantive criminal case.

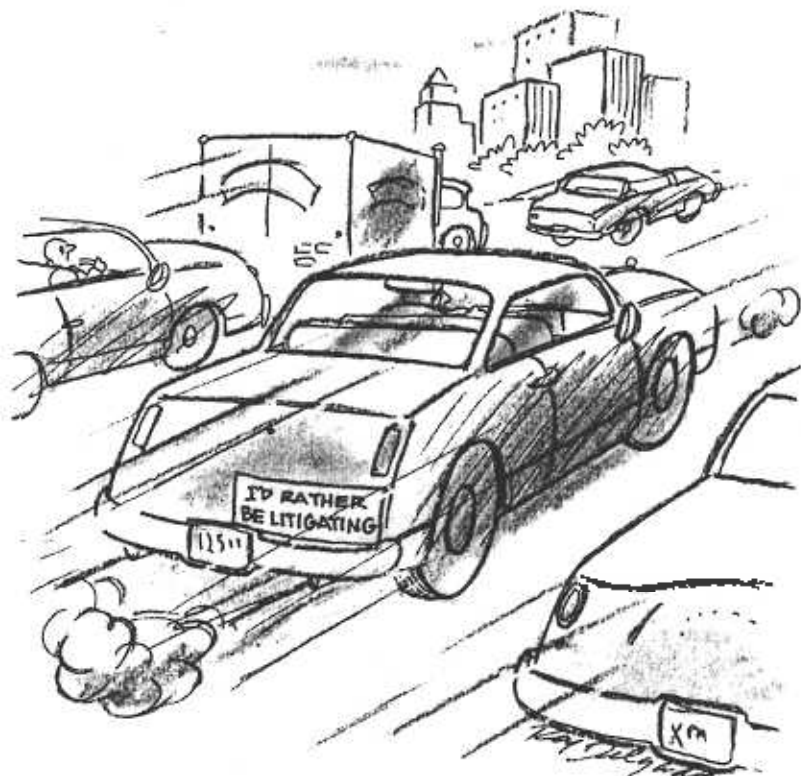
Thus, for example, former Secretary of Housing and Urban Development Henry Cisneros was indicted in 1997 for lying to FBI agents who interviewed him on the occasion of his nomination by President Clinton to the Cabinet post. The lie concerned

the amount of money he had paid to a staff member who was also his mistress. Mr. Cisneros had disclosed the affair and some payments but had simply under-reported the amount. He pleaded guilty to a single count of lying to the FBI and was given a \$10,000 fine.

This double standard is finding its way into a number of areas of criminal investigation. Various tricks have been approved by state and federal courts, for example, to obtain DNA samples from a suspect in order to match them to bodily fluids or tissue found at a crime scene. One-way duplicity is disturbing to civil libertarians who believe that in a free society, a citizen who is not under oath should be allowed to lie to an investigator if the investigator may lie to the citizen. If there is to be any double standard at all, they argue, the government should be held to the stricter standard, given that the Bill of Rights restricts governmental rather than private activity, in order to protect liberty.

The late Justice Robert Jackson said in dissent in a 1947 Supreme Court opinion, "It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street." *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. at 387-388. **NLJ**

## LAW AND LAUGHTER



Mr. Silverglate is a bi-monthly *NLJ* columnist and a partner at the Boston firm of Silverglate & Good.