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Blues and blood

Why does US attorney Michael Sullivan keep rewarding a wayward prosecutor with big-stakes public-corruption cases? Plus, remove that tattoo, son.

By HARVEY SILVERGLATE | September 6, 2006

Something is rotten in Beantown — and the stench is emanating from the local branch of the Department of Justice (DOJ). An assistant US attorney, who hid evidence and then lied about it, has been put on the prosecution teams in — ready for this? — the corruption and perjury trials of several local officials. As the number of federal judges who question this guy's trustworthiness grows, it seems, the more responsibility the DOJ hands him to prosecute corruption cases.

On August 10, the Massachusetts federal Court of Appeals affirmed a 2005 decision by Federal District Judge Mark Wolf, who had rebuked Assistant US Attorney Jeffrey Auerhahn for lying under oath in his overzealous and unethical prosecution of mobster Vincent "The Animal" Ferrara. (The feds made up the moniker to vilify Ferrara, who was on trial for the murder of Vincent Limoli. It's doubtful they'll come up with one for Auerhahn.) Auerhahn believed he had a prime witness against Ferrara in the mafia murder-and-racketeering case. But that witness, Walter Jordan (the brother-in-law of Ferrara's co-defendant Pasquale Barone), eventually recanted his testimony. Yet rather than acknowledge the dissolution of his case, Auerhahn hid Jordan's recantation from both Ferrara and his lawyer. Under intense pressure, Ferrara pleaded guilty to a crime he likely didn't commit, in exchange for a lesser sentence, only because he feared the jury would believe Jordan's testimony — which Auerhahn knew was false. In fact, it is highly likely that Ferrara was innocent of that murder, despite his admitted involvement in other mafia-related crimes.

After Judge Wolf fingered prosecutor Auerhahn for hiding and lying about the Jordan recantation, the Department of Justice and US Attorney Michael Sullivan could have suspended Auerhahn, at least temporarily, from his position as an active federal prosecutor. After all, Auerhahn's behavior was arguably criminal. They didn't. Instead, they appealed Wolf's decision

and kept Auerhahn in his position, as if it were business as usual. Not only that, but they then turned around and assigned the accused perjurer to the perjury prosecution of former Massachusetts House Speaker Thomas Finneran. "Freedom Watch" noted the irony: here was a prosecutor accused of committing perjury as well as other crimes while prosecuting a likely innocent defendant, now entrusted with a case involving a controversial political leader himself accused of lying (see "Animal Crackers"). We charged Sullivan with having "a severe case of cognitive dissonance," for displaying "unwavering support" of Auerhahn while waxing indignant about Finneran's alleged perjury on a minor matter during a deposition in a civil case.

The three-judge panel of the Court of Appeals was no kinder to Auerhahn than Judge Wolf had been. The panel even signaled its support for Wolf by calling him "the able judge" — a message likely aimed at Auerhahn's boss, Sullivan. Jordan's recantation, said the Court of Appeals, was "plainly exculpatory" and should have been turned over to Ferrara and his lawyer rather than used to trick Ferrara into pleading guilty to a crime for which the government lacked significant evidence. Auerhahn's conduct and the government's effort to cover it up "paint a grim picture of blatant misconduct," concluded the appellate panel, unanimously affirming Judge Wolf's order, which released Ferrara from the final nine years of his 22-year sentence.

But that hardly ends this woeful tale of prosecutorial malfeasance and hypocrisy. Just two days before the Court of Appeals ruling, Auerhahn appeared once again on the public stage — this time as a member of the federal-prosecution team of three Boston cops allegedly involved in a drug-trafficking scheme in Southern Florida.

So now we have a federal prosecutor, deemed an obstructer of justice and perjurer by four federal judges, pursuing not only the former House Speaker, but Boston police officers charged with corruption as well. Do as I say, not as I do. Indeed, if the Bush-administration Department of Justice's marching orders are never to admit error or wrongdoing, be it intentional or not — providing advice, say, on the legality of torture or on ways to justify official lies — it appears that the US Attorney's office in Boston is in lockstep, just doing its job.

Oh, and one more thing: it was announced last Friday that US Attorney Sullivan has been named acting head of the federal Bureau of Alcohol, Tobacco, and Firearms in Washington — a considerable promotion — and it appears likely that he will get the permanent post.

Forced tattoo removal?

At first glance, it seemed like little more than another ghastly instance of racial violence

deserving harsh punishment. In November 2002, Josiah A. Spaulding III — blue-blood son of the president of the Wang Center for the Performing Arts and grandson of a state Republican Party leader and founder of the Spaulding Rehabilitation Hospital — engaged in what Suffolk District Attorney Daniel F. Conley's office called a "vicious, unprovoked attack" on two black women. Spaulding, 23 at the time and in the company of skinhead friends, was alleged to have spewed racial epithets at two black teenage girls while beating them with a riot baton.

However, the resolution of the case proved anything but ordinary. When Spaulding stood trial before Suffolk Superior Court Judge Charles T. Spurlock this past July, the judge — himself a member of a prominent black family and the nephew of the first black woman to be elected a judge in the United States — acquitted him of the more serious civil-rights charges while convicting him of assault and battery with a dangerous weapon. Spaulding faced a maximum prison term of 10 years. The district attorney's office recommended two-and-a-half. Instead, Judge Spurlock imposed one of the most unusual sentences in memory: five years of probation, restitution to the victims, 200 hours of community service, visits to Beacon Hill's African Meeting House and Washington's Holocaust Museum, and — here comes the unusual part — the removal of Spaulding's racist Nazi tattoos.

Many letter writers and blogospherians were quick to label the Spaulding case another example of how American white elites buy their way out of legal trouble. Such a vicious, racially charged attack surely would have resulted in jail time had the white defendant come from a less privileged background, they argued. For example, on the Huffington Post blog Susan Madrak questioned whether "young men without such blue blood — or such very white skin — get the same understanding treatment." Had the outraged multitude known that the judge himself was black, they might rightly or wrongly have toned down their criticism. But in today's politically correct world, that information never got mentioned in the *Globe* and *Herald* stories, although it was obviously known to their news reporters. Only *Herald* columnist Alan Lupo, writing almost a week after the verdict's release, noted Spurlock's race.

Others who were critical of the sentence but more familiar with Spurlock obviously recognized the difficulty of accusing a black judge of coddling a white racist. District Attorney Conley called the sentence "wise and thoughtful." Boston attorney Wayne Murphy, lawyer for victims Stephanie Gemma and Maureen Pontes, said that while his clients were "disappointed," perhaps the sentence would "help the defendant fully appreciate the consequences of his actions upon others." When the Boston Globe finally got around to editorializing on the

sentence, on August 30, it suggested tepidly that the judge, whose race still went unmentioned, should issue a written opinion explaining "his judicial discretion or his creative instincts."

All this bowing and scraping before the throne of political correctness overshadowed another, equally striking aspect of the case — that the tattoo-removal portion of the sentence was almost certainly unconstitutional. The US Constitution allows for the punishment of illegal actions, and for at least the past century, the Supreme Court has been especially protective of freedom of thought, opinion, and conscience. That's why it is virtually unknown in this country for a person convicted of a crime to be forced, via sentencing, to recant something in his or her heart or mind.

The criminal law, in other words, can legitimately control people's actions, but not their thoughts and beliefs. Requiring a convicted criminal to remove a tattoo with an officially disfavored message (or, conversely, ordering him or her to sport an approved message) almost certainly runs afoul of the First Amendment.

So why did this judge, who obviously gave considerable thought to this high-profile case, impose such an unusual requirement? The likely answer is that although of questionable legal validity, the overall sentence was compassionate, sensible, and offered some sense of rough justice. It may even help the defendant get back on his feet; young Spaulding's criminal assault was apparently just the latest episode in a painful and visible downward spiral.

Ultimately, Spaulding's sentence seems to experiment with finding a humane, if uneasy, accommodation between the technical rigors of the law and the messiness of life. And, because of the hot-button role race plays in our culturally hyper-sensitive times, it may be that only a black judge could have engaged in this experiment and gotten away with imposing a sentence both markedly lenient and patently unconstitutional in a racially charged case. It is hard to know what Spaulding's case and its resolution say about our legal system or our culture, in part because the media, by ignoring central aspects of the case, has kept it from getting a full public airing.

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