

FREEDOM WATCH

Boomerang

Bush's assault on civil liberties comes back to haunt him

by Harvey Silverglate

This is a morality play in two acts — one of those delicious tales of hypocrisy and poetic justice that bring home the lesson civil libertarians try, usually with little success, to teach: the outrageous things we do under the guise of stopping a greater evil will inevitably come back to get us.

Act One. It is November 6, 1991, in the majestic courtroom of the US Supreme Court. Assistant Solicitor General Paul J. Larkin Jr., representing the Bush administration, is arguing that the Court should affirm the child-pornography conviction of Keith Jacobson.

For several years, federal investigators directed a sting operation against Jacobson, trying to entice him into buying child porn. And for several years, Jacobson, a Nebraska farmer, resisted. Finally, though, he could resist no longer — and he was promptly arrested and convicted. The Reagan/Bush judges on the US Court of Appeals affirmed his conviction, and Jacobson took his case to the Supreme Court.

When Justice Byron White asks Larkin whether he is "suggesting that the govern-

ment didn't need some reason to target the defendant," Larkin replies without hesitation: "I can defend the proposition that no reasonable suspicion is required" before a sting is undertaken.

The Supreme Court, in a ruling handed down on April 6 of this year, agreed, although it ended up ruling in Jacobson's favor by deciding the case on narrower grounds than Larkin's "no reasonable suspicion" assertion. By a five-to-four majority, the Court found that the Constitution cannot tolerate the government's taking concerted steps to induce an innocent citizen to commit a crime that the government can then prosecute him for.

Even though the Nixon/Reagan/Bush Supreme Court has made a mess of the earlier Warren Court's broader prohibition against entrapping a hesitant citizen, the facts in the Jacobson case were too much for five of the current justices. They ruled that in this particular case it was clear that Jacobson did not have the required "pre-disposition" to commit a crime, since his actions derived entirely from the government's actions.

But the Court refused to use the oppor-

tunity to adopt a more sweeping principle urged upon it by Jacobson's lawyer, George H. Moyer Jr. — that the government, to run a sting operation, must show it had a "reasonable suspicion" that justified its singling out the target for investigation in the first place.

In other words, the Bush administration lost the Jacobson battle but won the war. The feds are still allowed to target a hapless citizen in order to tempt him or her into committing a crime — even without a firm basis for believing that the target is crooked and is therefore likely to take the bait and flunk the test.

Act Two. This past Tuesday's *New York Times* reported that Jim Oberwetter, the Bush/Quayle-campaign chairman in Dallas, is hopping mad about being the subject of an FBI sting. The sting was aimed at testing whether there was any truth to Ross Perot's allegation that the president's campaign operatives were running a "dirty tricks" operation against him.

After Perot reports the Republicans are spying on him and his family, the FBI sends an undercover agent to Oberwetter. The agent offers to sell Oberwetter an audio tape and documents he'd supposedly stolen from Perot's office. Oberwetter refuses, and even reports the effort to the FBI. The FBI concludes Perot's allegation is probably false, since Oberwetter passed the test.

Oberwetter, once he learns about the sting, is furious. "These people had no probable cause to come calling on me," he told the *Times*. "Outrage is a word that understates my feelings."

Oberwetter is so exercised over being stung that he complains directly to President Bush, who congratulates his Dallas campaign chief for having passed the test, and adds that although he is too busy now with the campaign, he will review the FBI's conduct after the election.

Of course, someone — whether it be

the administration, the Congress, or the courts — should have done something about the FBI's conduct in sting cases long ago. The government's role in creating and then "solving" crime has been a national scandal for decades. Regardless of who wins the White House, one would hope that the Department of Justice and its investigative arm, the FBI, will undergo as broad a sweep as it is deep.

In other words, throw the bums out, and then do something to change the law so that the same cesspool does not develop again.

Actually, we may not have to wait too long for some relief from these repressive law-enforcement techniques, thanks to a series of recent developments reminiscent of a Keystone Kops routine:

- The FBI some time ago began investigating the Justice Department for possible obstruction of justice in the Iraqi loan scandal involving an Italian bank.

- Probably in retaliation, the Department of Justice announced it was investigating FBI Director William Sessions for suspected personal use of FBI phones and planes.

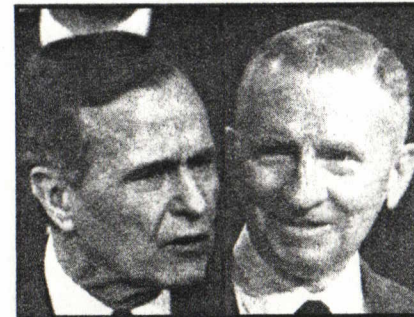
- CIA Director Robert Gates chimed in to announce that his agency's conduct in the Iraqi loan case would be investigated (sort of) by the CIA's in-house inspector general.

- Meanwhile, Attorney General William Barr, after refusing a congressional demand two months ago to appoint an independent counsel, has named a retired Republican federal judge, Frederick Lacey, to look into the Justice Department's actions in the Iraq case. And it may be just a matter of time before an independent counsel gets appointed after all.

For the Bush administration, 12 years' worth of sleaze and repression is finally being turned back upon itself.

If everyone being investigated ultimately is done in by everyone else, the republic might be safe for the next four years regardless of who wins the presidency. □

PHOTOS BY AP/WIDE WORLD



STUNG: Bush's policies opened the door for Perot's antics.