

THE BOSTON PHOENIX

Cabral's sharp aim: What will *you* do when the FBI comes calling?

BY HARVEY SILVERGLATE

At first glance, it looked like a battle between the spider and the fly: the United States attorney, armed with the federal purse and an arsenal of notoriously vague criminal laws, versus the then-embattled Suffolk County sheriff, the first woman to hold that macho post. As time wore on, it began to look more evenly matched. But in the end, Sheriff Andrea Cabral, along with her lawyer, Walter Prince, pulled off an unlikely, well-deserved victory when US Attorney Michael Sullivan and his assistant prosecutor John T. McNeil closed down a two-year hunt for Cabral's scalp, one that seemed to implicate her in a history of brutality at the Suffolk County House of Correction. Thanks to Cabral's chutzpah, it turned out to be a David and Goliath story.

To hear the *Boston Globe* tell it, however, Sheriff Cabral and her staff somehow got away with obstructing a legitimate federal investigation. That point of view shouldn't come as a surprise, given the local newspaper of record's long history, reaching back several decades, of indulging the antics of federal prosecutors. But the *Globe's* Cabral-Sullivan story, which was based on skewed reporting, shouldn't be allowed to stand. It's time to set the record straight and to make clear why we should be scared by its implications for each and every one of us.

JAILHOUSE BLUES

It's no secret that for many years there's been a pattern of prisoner abuse by guards in Suffolk County's jails and correctional institutions. The situation got dangerously out of hand under the disastrous reign of Cabral's predecessor, Richard J. Rouse, who served as Suffolk County sheriff from 1996 to 2002. A former state legislator, Rouse resigned amid a torrent of negative media coverage and the release of a commission report detailing rampant deficiencies in the House of Correction under his watch. Then-governor Jane Swift appointed Cabral to Rouse's vacated position in December 2002, and slightly less than two years later Cabral won the election for Suffolk County sheriff after a bruising September 2004 primary. Cabral presented herself as a long-overdue reformer willing to assert the sheriff's authority over the notoriously out-of-control guards and to end the charnel-house abuses.

At the time, Cabral — black and female — may have seemed an unlikely choice to assert control, notwithstanding her prior experience as a Suffolk County assistant district attorney, where she served as chief of district-court prosecutions for nearly four years, and as an attorney in the office of the state attorney general. It turned out that Cabral's velvet glove hid an iron fist. Little did she know, however, that she'd have to use her strength not only against recalcitrant guards, but also against out-of-control FBI agents and federal prosecutors.

Cabral and her top staff decided to enforce rules requiring employees of county penal institutions to report, rather than to ignore or cover up, instances of prisoner abuse or suspicious injury brought to their attention. An early test of Cabral's resolve came when her staff learned that a nurse, Sheila Porter, working for a company contracted to provide health services to the jail, was acting as an informant for the FBI, but had apparently failed to satisfactorily document and report an instance of suspected prisoner mistreatment to the departmental office in charge of investigating prisoner abuse, the Sheriff's Investigative Division (SID). As a result, Nurse Porter was barred from entering the jail. (She could not be fired directly, since she worked for a contractor hired by the Sheriff's Department, but barring her from access to the jail effectively ended her employment there.)

When they learned that the sheriff had ordered Porter barred from the jail, the FBI and the US Attorney's Office, unbeknownst at first to Cabral and her staff, launched a criminal investigation of the sheriff and her higher-ups, in 2003. How could this happen? By a strange and circuitous route. In 2002, in the wake of a series of corporate scandals, Congress rushed to enact the now-infamous Sarbanes-Oxley Act (named for its leading congressional sponsors). The law, which many viewed as a well-intended if overzealous effort to reinforce corporate accountability, included a provision making it a felony, punishable by 10 years' imprisonment plus a fine, for anyone who "knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offence." US Attorney Sullivan's translation: Cabral fired Porter not because the nurse had failed to properly document and report possible evidence of prisoner abuse, as required by county and state regulations, but because the sheriff's office had learned that Porter was acting as an FBI informant.

Given Cabral's reputation as a reformer intent on ending prisoner abuse in the county's jails, and the prosecutor's later concession that Porter had indeed made a decision "not to document the information received from the inmate in the medical record" (although he somehow deemed that decision "appropriate" under the circumstances), it should have been immediately obvious to the feds that the sheriff was almost certainly more concerned with Porter's *failure to help the sheriff's office root out abuse* than with Porter's talking to the FBI. At the very least, the ambiguity of the situation made a criminal prosecution a dead letter from the start. Yet the FBI and federal prosecutors are extremely sensitive about anything even remotely resembling a challenge to their authority. This sensitivity has been particularly acute since the FBI and the local federal prosecutor's office found themselves, over the past couple of decades, enmeshed in an enormous scandal concerning the feds' unlawful conspiracy with

James "Whitey" Bulger and his fellow hoods. That unholy alliance drew skepticism and, later, outright dissent from elements of the state law-enforcement cadre who ceased trusting the feds in organized-crime investigations because of federal leaks of sensitive information to mobsters. The resulting tensions, and federal oversensitivities, have never fully abated. Endowed over the past quarter-century with a veritable arsenal of vague and broad laws (including, most recently, Sarbanes-Oxley), self-important federal prosecutors have been willing to harass average citizens and even state law-enforcement officers, including the sheriff of Suffolk County.

THE TALE OF NO

The Porter brouhaha resulted in a meeting, on June 16, 2003 — between Cabral, two of her staffers, and members of Sullivan's office — ostensibly to discuss ways county and federal authorities might cooperate in remedying prisoner abuse at the jail. Instead, according to a seven-page letter written to McNeil by Cabral's lawyer Walter Prince, Cabral and her staffers were informed bluntly by Assistant US Attorney Stephen G. Huggard that he had already designated the sheriff's department as a target of a federal obstruction-of-justice investigation for barring Porter from the jail. Most people, when informed of their target status by a federal prosecutor, back down completely; in Cabral's position, they would have immediately relented on Porter's employment status and virtually allowed the feds to take over supervision of the jail. Or, if that proves unacceptable to the feds, they try to cut a deal for a more lenient charge or lesser sentence, combined with the targeted official's resignation from office. Cabral, however, defied what has become the playbook here and across the country for the past quarter-century, and proceeded on the entirely proper assumption that she and her department had done nothing wrong. This obviously did not sit well with the folks occupying the spacious prosecutors' suite at the federal courthouse, and they continued the investigation, looking for any shred of evidence, other than the word of self-interested witnesses, that might support their case against Cabral. (By this time, Porter had filed a civil lawsuit against the sheriff seeking money damages.)

Based on revealing letters exchanged between McNeil and Prince between September 28 and October 7, 2005, here is essentially what the battle was all about: Porter had been funneling information to the feds even before Cabral became sheriff. When Cabral took over the office, she read the riot act to her underlings: all signs and reports of prisoner abuse had to be reported to her and her staff, she declared, with no more cover-ups, no blue wall of silence. Period. This directive extended to the jail's medical personnel, who might come across either tales of abuse that had to be included in confidential reports to a supervisor, or signs of physical injury that they were required to include in inmate medical records for purposes of treatment as well as documentation. When Cabral learned that Porter had failed, in the sheriff's view, to adequately document and report what she had observed, she ordered Porter barred from the House of Correction.

A long and tortured federal investigation ensued. Cabral, not one to be intimidated, appeared voluntarily before the federal grand jury to testify. Though a subject of a criminal investigation

has the constitutional right to invoke the Fifth Amendment privilege against self-incrimination and refuse to testify even when she believes she is innocent, Cabral talked and talked and talked. She even waived the attorney-client privilege, opening up for federal inspection all communications between the Sheriff's Department and its general counsel, Anne Powers. Such cooperation by a target of a federal criminal investigation, is virtually unheard of — unless the person has entered into a plea bargain.

The sheriff's efforts to terminate the investigation went beyond supplying testimony and waiving privileges. She authorized her staff and her attorney to negotiate with the feds to change the sheriff's written policies on reporting evidence of abuse and other problems. But these efforts broke down when the US Attorney's Office insisted that Sheriff's Department employees be relieved from state regulations forcing them to report abuse to the sheriff as well as to the feds. Cabral had no problem with a simultaneous report to both state and federal authorities, but she insisted that the Sheriff's Department, which had the job of running the jail, had to be informed of abuse, even if the feds were as well.

The investigation pushed forward — until finally Prince sat down and wrote a detailed complaint to the Department of Justice's Public Integrity Section in Washington, which has jurisdiction to investigate and discipline wayward federal prosecutors. It was obviously no coincidence that within just a few months after Prince filed his complaint, the Boston US Attorney's Office closed down its long-running witch hunt of Cabral's Sheriff's Department. Noticeably stung by Cabral's resistance and Prince's going over the heads of Boston prosecutors and agents, Assistant US Attorney McNeil wrote a three-page letter, dated September 28, 2005, to Prince, setting forth a remarkably self-serving version of the events leading up to the closing of the Boston investigation. It is extremely unusual for a prosecutor to write such a letter when an investigation is closed without an indictment; normally the target's lawyer is informed with a one-line note or a phone call. But McNeil explained that he was writing the letter in this case because "it has become clear over the last several months that Sheriff Cabral's view is that this investigation has been motivated by some personal or political hostility toward her." Therefore, wrote the prosecutor, "a more detailed explanation of the course of our investigation and our decision is in order."

McNeil went on to claim that he was unable to indict either Cabral or any of her subordinates because there was not "proof beyond a reasonable doubt" that they were actually guilty of obstructing the investigation. He also made clear that the evidence did not "exonerate" the sheriff. "Indeed," McNeil wrote, "we believe that your client or others in the top chain of command likely ordered other employees of the Sheriff's Department to bar Ms. Porter because she had disclosed information to the FBI." But there was just not enough evidence, he concluded, to meet the high standard that would be necessary to obtain a conviction at trial. McNeil concluded with a none-too-veiled threat: "if new evidence comes to light or circumstances otherwise so warrant, this letter shall not preclude this office or a grand jury from reopening this matter." Presumably, dangling the federal Sword of Damocles over Cabral's head would serve to shut her up and thus avoid further embarrassment to the feds. McNeil did not specify, after all, what other "circumstances," besides "new evidence," might cause him to

reopen the investigation. Vagueness continued to be the hallmark of the federal assault on Cabral's authority.

Ordinarily a federal prosecutorial target who receives a "no prosecution" letter licks his or her wounds and retreats to a neutral corner of the ring. But both Cabral and Prince recognized McNeil's letter for what it was: an attempt to spin the whole two-year ordeal in a manner that made the feds look good at Cabral's expense. Prince smelled a rat. In a detailed seven-page reply hastily hand-delivered a week later, he wrote: "[Your letter] appears to be written for consumption and use by parties other than my client. Therefore, I cannot let it go unanswered."

Sure enough, McNeil's letter became public when Porter's lawyer Joseph Savage — a former federal prosecutor who Prince's letter hints took on Porter's case because of Savage's friendly relationship with the US attorney's office — filed it in Porter's civil suit against Cabral. Were it not for Prince's quick reply, McNeil's version of events would be the only version out there. As it is, Prince's suspicion about the intent of McNeil's letter was borne out when Shelley Murphy of the *Boston Globe* wrote a prominent December 1 story (SHERIFF IS SAID TO RESIST AN INQUIRY) virtually parroting McNeil's missive, despite the fact that the *Globe* by that time had been given a copy of Prince's reply. Murphy devoted only two sentences to the contents of Prince's detailed rebuttal. Indeed, the reading public would not have grasped the fruitless, vindictive, and abusive nature of McNeil's investigation, had *Boston Herald* columnist Peter Gelzini not written a column (PLENTY BEHIND US ATTORNEY'S BATTLE VS. SHERIFF) that appeared the next day. "For 28 months," wrote Gelzini, "US Attorney Michael J. Sullivan held the threat of indictment over Suffolk County Sheriff Andrea Cabral's head. But when the time came for the feds to put up or shut up, Maximum Mike's office chose to shut up."

THE POWERS THAT BE

Sheriff Andrea Cabral's frightening tale suggests that every citizen is at risk of being accused of committing a felony — thanks to virtually unfettered prosecutorial power that has only expanded with the enactment of Sarbanes-Oxley. But none of us will know it until the FBI comes knocking. It might take the ambitions of a Michael Sullivan — who was elected to the state legislature in 1990, where he served three terms, and who is rumored to be considering higher office — to trigger abuse of the powers available to the feds. Or it might take legal-career ambition: assistant prosecutors normally make their reputations from getting conviction notches on their belts and then go on to jobs at large law firms. Or such overreaching might be driven by ordinary hubris: the feds' mere desire to flex a little muscle simply because they can.

As any student of history knows, the motives for irresponsible grabs at power are endless and often mysterious. But we do know this: the FBI and the federal prosecutors who work with them can now use dangerously vague and overly broad statutes — provided by a heedless Congress and rarely reined in by the courts — to harass any one of us. Not only new statutes, such as Sarbanes-Oxley and the laws against "material support for terrorism," but older standbys like the federal "anti-fraud" statutes are so vague that common citizens can't figure out when they've crossed the invisible line. The next target might not have Sheriff Andrea

Cabral's resources and guts, or Attorney Walter Prince's determination and skill. Not every innocent citizen can play David to the federal Goliath.

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