

# FREEDOM WATCH

## Clean sweep

### Why Clinton's AG should purge the Justice Department

by Harvey Silverglate

**T**he Department of Justice and the Central Intelligence Agency have much in common. Both are large bureaucracies. Both operate mainly in secret. And both are thoroughly corrupt, unaccountable, and dangerous to the liberties and lives of the American people.

At the CIA, corruption is endemic. The spy agency has been synonymous with sleaze since its creation, during the early Cold War era. But Justice, despite ups and downs over the country's first two centuries, avoided falling into total disrepute until recently — specifically, until the presidencies of Ronald Reagan and George Bush.

There's another difference as well. Right now, Congress is considering a proposal by US Senator Daniel Patrick Moynihan (D-New York) simply to do away with the CIA and distribute its few essential activities among other agencies — thus breaking, once and for all, its covert branch, which is unaccountable either to Congress or to the courts. Although Moynihan's proposal is unlikely to get very far, at least it's being debated.

No such easy solution presents itself for the problem of how to end the reign of ter-

legal immigration to organized crime, from banking-and-securities fraud to the use and sale of recreational drugs, from political corruption to money-laundering.

Equally dangerous has been Justice's participation in various coverups meant to hide unlawful foreign-policy ventures of the Reagan and Bush administrations — ventures that were carried out behind the backs of Congress, the news media, the public, and even other established agencies of the executive branch.

When a good prosecutor builds a criminal case, she or he does so by accumulating evidence — not by hectoring, threatening, or lying. With that in mind, what follows is an indictment of the Department of Justice and of its Boston outpost, based on a careful combing of the public record. These legal atrocities — some widely reported, some not — are just a few of the pieces of evidence Attorney General Baird should consider as she sets about restoring her department to its rightful role as a defender, rather than an abuser, of constitutional liberties.

#### ► Legalized kidnapping.

Three years ago, bounty hunters hired by the US government kidnapped

the Justice Department — had offered the bounty hunters a \$50,000 reward, plus expenses, if they could bring the doctor to the US. More outrageous was the revelation that Justice had paid its witnesses even larger sums of money in exchange for their testimony against Alvarez. Many of the witnesses were also promised that criminal charges against them would be dropped or reduced if they cooperated.

But perhaps most telling was this: prosecutors kept secret the existence of a witness who was prepared to testify that it was another doctor, not Alvarez, who injected the American agent. Apparently, the government deemed it more important to claim revenge in the death of one of its agents — and to prevent a new brouhaha over the kidnapping — than to protect the rights of a suspect who was quite possibly innocent.

The case is over, and the doctor is back in Mexico. But this lawless kidnapping and the assertion that the reach of American law extends past its borders has created a stain on the once-good name of American justice that will not easily be expunged.

► **Long-distance injustice.** Equally questionable was the method used to obtain the presence of former Panamanian strongman Manuel Antonio Noriega to stand trial in US District Court in Miami — supposedly for drug trafficking, but more likely for daring to refuse to continue taking orders from the DEA and the CIA after many years as a reliable, if somewhat repellent, ally in the war on drugs and the battle against communism.

President Bush launched an undeclared (and hence unconstitutional) war on Panama to grab Noriega, resulting in perhaps the most expensive and bloody arrest in American history. Noriega, convicted in an unfair trial (his funds were frozen, thereby limiting his ability to

pay lawyers), sits in federal prison, probably for the rest of his life.

As in the Alvarez case, Justice paid witnesses — \$1.5 million to six of them — and forgave these witnesses their numerous admitted felonies, just to get Noriega. In fact, 20 of the witnesses against Noriega were convicted drug dealers — including a founder of the Medellín drug cartel.

► **Official thievery.** In 1987, a federal bankruptcy judge ruled that the Justice Department used "trickery, fraud and deceit" in cheating a small software company, Inslaw, out of its creation. The ruling came in response to a lawsuit Inslaw had filed that accused Justice of stealing the product in an attempt to drive the company out of business. According to some independent investigators, the federal government wanted to sell the software to American allies — along with a secret modification that would allow the US to keep track of some of their intelligence activities.

The ruling against the Justice Department was reversed by the US Court of Appeals, which increasingly has allowed itself to become a compliant tool of the government. But the Inslaw affair won't go away.

The company's high-profile lawyer, former US (and Massachusetts) attorney general Elliot Richardson, brought another lawsuit, and Attorney General William Barr appointed a special counsel to investigate. Not surprisingly, no criminal charges have resulted. Yet the stench remains.

► **Saddam's bankers.** Then there's the still-unfolding Iraqgate scandal, which — as *New York Times* columnist William Safire has pointed out — probably should result in the indictment of several Justice Department lawyers.

US District Judge Marvin Shoob smelled a rat when federal prosecutors claimed that Christopher Drogoul, Atlanta-branch manager of Banco Nazionale del Lavoro, See *FREEDOM*, page 16

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designate, will have to show she has the guts to perform a nearly clean sweep not only of Justice Department lawyers and administrators in Washington, but of the various local US attorneys' offices — including Boston's. Only through such a purge will she be able to bring her department under some form of control. Even though common wisdom holds that the fish rots from the head, the problems at Justice are not limited to the top echelons; hence, it's likely that cutting off the head will not save the body.

In Boston, US Attorney John Pappalardo and most of his assistants should get the axe soon after Clinton's inauguration. Baird should demand that everyone on Pappalardo's staff submit his or her resignation, with each individual being given an opportunity to remain employed by explaining how his or her official conduct helped strengthen the constitutional rights and values essential to the maintenance of a free society. It is a test few of them will be able to pass.

Why is such a drastic remedy called for?

The answer emerges from a review of the Justice Department's dismal record in the past dozen years. Although the department had its dark moments during earlier administrations — under Attorneys General John Mitchell and Richard Kleindienst during the Nixon presidency, for instance — the Reagan and Bush years have been marked not only by a deepening of the culture of corruption and abuse, but also by a concomitant acquiescence to such conduct on the part of the federal judiciary.

The Justice Department, with the approval of a statist US Supreme Court — where, alas, a clean sweep will likely take a full generation, given the justices' life tenure — has destroyed much of the fabric of American law, so laboriously constructed in the first 200 years of the republic.


This rampage was led by the various attorneys general appointed by two presidents who cynically bashed constitutional rights and elemental justice in the name of fighting all kinds of perceived social evils — from abortion to violent crime, from pornography to government leaks, from il-

*Gia Barresi assisted in the preparation of this piece.*

stand trial in California. The physician was charged with injecting stimulants into a captured American under cover drug-enforcement agent. The agent, who was later murdered, had been stationed in Mexico as part of this country's imperialistic effort to bring the ill-considered "war on drugs" to foreign soil. The injections were supposedly aimed at keeping the agent awake for torture and questioning.

Despite protests from Mexico and domestic and international organizations devoted to the rule of law, Dr. Humberto Alvarez Machain was hauled into federal court for actions that took place on foreign soil. US District Judge Edward Rafeedie, however, refused to play along — he ruled the kidnapping was illegal and threw the case out. The Supreme Court then said it didn't matter how the defendant had ended up in Rafeedie's court, and ordered the trial to proceed. At that point, Rafeedie acquitted Alvarez for lack of evidence.

Early in the proceedings, it was learned that the Drug Enforcement Agency (DEA) — a division of



**ZOE BAIRD, the attorney general-designate, inherits a department permeated with corruption and official thuggery.**

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arranged large unsecured loans to Iraq without the knowledge of the bank's Rome headquarters. The judge did the right thing and pulled the plug on Drogoul's fraud trial.

An almost comical scenario followed, in which high Justice Department officials blamed the CIA, and the CIA blamed Justice, for the coverup of the Rome headquarters' involvement in Drogoul's actions. Bush's patsy, Attorney General Barr, decided there was no need to name an independent counsel. But after vainly hoping the affair would simply go away, Barr bent to public pressure by appointing his own patsy, former federal judge Frederick Lacey — a Republican with a reputation as a loyal apparatchik — who investigated and declared the whole stinking garbage heap to smell sweet as roses.

It remains for Attorney General Baird to pick up the pieces and sort things out. The betting here is that a real investigation will show the government was willing to frame a possibly innocent branch manager to protect the bank's management in Rome, which approved of the covert effort to fund Saddam Hussein's military buildup with the encouragement and knowledge of the CIA. The Bush administration, after all, finds it highly embarrassing that Saddam went from America's favorite dictator to the reincarnation of Adolf Hitler over a span of about three days.

This may yet turn out to be another secret foreign-policy adventure run out of the basement of some government building in Washington, in which the Justice Department was enlisted as a reliable ally in the effort to limit the subsequent damage once the plan fell apart.

► **Go to jail.** In 1984, Justice managed to persuade Congress to enact legislation eliminating the presumption, embodied in the Eighth Amendment, that people accused of a crime are entitled to be released on bail that is not "excessive." Large numbers of federal defendants consequently are jailed upon being accused.

Statistical studies have shown that jail-

ing a defendant before trial substantially increases his or her chances of being convicted. Those few detainees who are acquitted end up having served their sentences anyway — awaiting trial.

Justice justified this little exercise in preventive detention, a concept near and

dear to the hearts of tyrants, on the theory that though it would be unconstitutional to impose "excessive" bail, it was okay to deny bail and simply imprison the defendant. And in 1987, a majority of the Reagan Supreme Court actually bought that argument.



**JUSTICE BETRAYED:** For 12 years, Reagan (top) and Bush subverted the AG's office for their own cynical political needs.

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► **Porn again.** For an example of circular injustice, consider the rash of trumped-up child-pornography cases that has been unleashed. Federal postal inspectors identify harmless citizens with an interest in kiddie porn by poring over mailing lists seized in raids, scanning computer bulletin boards, and reading classified ads. The inspectors then mail dirty pictures to said citizens, after which they are arrested, prosecuted, and often imprisoned for receiving what their own government sends them.

The Justice Department actually went so far in a recent case that even the Reagan/Bush Supreme Court voted, five to four, to overturn the conviction of one victim, Keith Jacobson. Justice Clarence Thomas provided the crucial fifth vote, showing unusual — for him — solicitude for the rights of a criminal defendant. Shades of "Long Dog Silver," perhaps? The Court found that the government failed to prove that Jacobson was predisposed — independent of the government's solicitation of him over the course of 26 months — to purchase child porn through the mail (or by any other means).

Almost no federal child-porn defendants, however, are as lucky as Jacobson was, including, locally, U. Lane Bateman, a teacher at Phillips Exeter Academy, in Exeter, New Hampshire. His life was wrecked in a frenzied orgy of disinformation, including unsubstantiated reports of sexual abuse of students. Bateman was convicted of possession of child pornography, and may yet get a prison term when he is sentenced early next year.

► **Lawyers under siege.** Criminal-defense lawyers have been subpoenaed and threatened with indictment if they refuse to give evidence against their own clients, despite the attorney-client privilege, an ancient tenet that assures every citizen of the right to have a confidential relationship with legal counsel.

As part of their campaign to intimidate defense lawyers, Justice lawyers and agents of the FBI (part of the Justice Department) have persuaded federal magistrates and judges to issue search warrants against attorneys, resulting in the agents' seizure of client files in lawyers' offices. Such Gestapo tactics would have been unthinkable two

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decades ago. Now federal judges barely blink an eye as they rubber-stamp the prosecutors' warrant applications.

More recently, Justice promulgated new regulations the department contends give its prosecutors the power to ignore ethical rules and constraints imposed on all lawyers by state courts and disciplinary agencies. Top Justice officials, including Assistant Attorney General Robert Mueller III (who was Weld's right-hand man while Weld was US attorney in Boston, from 1981 to '86), are engaged in a frantic effort to make the regulations effective before the Clinton administration takes office.

The pressure for this free pass on ethics is coming mainly from career prosecutors, who figure they're too far down the political food chain to be fired by the Clinton administration, and who want Bush's Jus-



PHOTOS BY ALAN MOSE (1), WELD AND AP/WIDE WORLD

two weeks — who'd arrived at Logan Airport. The pretext was that these people, many of them vacationers, were needed to testify against the tour operator, who was allegedly trying to get two immigrants into the country who intended to overstay their visas.

Federal Judge Magistrate Marianne Bowler, before she was forced by day-after-day front-page coverage in the *Boston Globe* to consult the Bill of Rights, did little to end this charade. Many of those jailed didn't even appear in court until their eighth day in custody, and some of them were uncomfortably handcuffed while in the courtroom, even though none was charged with a criminal offense.

When Bowler ordered the Malaysians discharged and allowed them to return home, Pappalardo held a disingenuous press conference at which he stated "Calling them tourists is like calling John Gotti a businessman." Pappalardo also declared his office completely free of blame for the failure to contact the Malaysian consulate promptly upon the detainment of the tour

eral Baird must extend her purge well below the upper echelons of Justice's offices in Washington.

In Massachusetts as well as in Washington, a succession of federal "get tough on crime" prosecutors has run roughshod over citizens' rights, thus proving the warning of Benjamin Franklin: "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."

The prosecutors on the local dishonor roll range from Reagan's first appointee, William Weld, who served Attorney General Edwin Meese both as US attorney here and as assistant attorney general in Washington before leaving Meese's sinking ship, to Bush's last, Pappalardo.

The bill of indictment against the Boston branch of the Justice Department includes the following:

► **Vacation from hell.** Earlier this year, Justice encouraged agents of the Immigration and Naturalization Service (INS) to arrest and hold in custody 24 innocent Malaysian tourists — most for more than



**LOCAL ZEROES:** from Weld (top) to Pappalardo, Boston's federal prosecutors have carried out the Reagan/Bush anti-liberty agenda.

whose only interest is supposed to be in telling the truth."

However, the Court of Appeals, which by that time had lost its constitutional bearings, issued a mealy-mouthed opinion allowing the government to present the witnesses at trial. The appeals panel stated disingenuously: "While we share the concern and uneasiness of the district court over the coercive potential of these plea agreements, we believe that the traditional safeguards . . . should adequately protect Dailey's rights."

Of course, during the '80s, the Court of Appeals eviscerated many of those traditional safeguards by, for example, allowing changes in the rules of evidence that favor the prosecution and imposing restrictions upon a defendant's ability to prove to a jury that government witnesses have, in effect, been bribed.

► **Listening in.** In 1982, Weld and his top deputy, Mark Wolf (now a federal judge), acting in conjunction with federal drug agents (including Edward K. O'Brien, who later was convicted and served a sentence for trafficking in cocaine), sent an informant who presented himself as a potential defense witness — and possible defendant — into my law firm's office to sit in on a confidential legal strategy meeting and report back to the prosecutors.

The government documents we later found disclosed that the agents and some of the prosecutors were interested in seeing whether we would present a perjurious defense, including a false affidavit from this so-called witness.

This egregious violation of the lawyer-client relationship was papered over by US District Judge Robert Keeton (who, alas, had taught me when I was a student years earlier at Harvard Law School — talk about disappointment in one's mentor) and by an equally compliant Court of Appeals.

The appeals panel, though refusing to reverse the conviction or even take action against the prosecutors, suggested in a footnote that henceforth, "in order to avoid charges of prosecutorial abuse," prosecutors should obtain a judge's permission before dispatching an agent to a defense strategy meeting.

In other words, the message was not that prosecutors should avoid trampling the

Sixth Amendment, which guarantees the citizen the right to the effective assistance and confidential representation of legal counsel. Rather, prosecutors should get a judge to approve the intrusion — which most federal judges these days can be reliably counted on to do — to avoid being charged with abuse.

Mueller, who headed Weld's criminal division at the time, argued the case personally before the Court of Appeals, underscoring how important Justice believed it was that its prosecutors not be rebuked for their atrocious conduct.

► **No evidence.** Noted Boston criminal defense attorney Joseph Baiiro was indicted during the brief reign of US Attorney Jeremiah O'Sullivan on a charge of con-

other client), a possible conflict of interest became a felony.

Cintolo's conviction was meant to teach a lesson to lawyers who represent alleged mobsters that such representation is not without personal risk. The message got through: Cintolo served a prison sentence and was disbarred.

► **Ethics-free zone.** The department's current effort to implement a rule allowing federal prosecutors to circumvent state-imposed ethical constraints, discussed above, was foreshadowed by a situation in Massachusetts that arose in 1986-'87.

The state's Supreme Judicial Court adopted a rule requiring all prosecutors, including the feds, to seek the permission of a judge before issuing a subpoena to a lawyer

*Justice during the Reagan/Bush era has been so uniformly hostile to citizens' constitutional rights and so prone to engage in corrupt conduct that Attorney General Baird should allow few, if any, incumbents to keep their jobs.*

spiracy to launder money. He was put through hell until, at his trial, Judge Edward Harrington, himself a prosecutor prior to the Reagan era, declared there was not even enough evidence to send the charges to a jury.

Baiiro went free and continues to practice law, but the message got through to the Massachusetts criminal-defense bar anyway: the Justice Department rules not by law, but by terror — so watch your back.

► **Risky business.** Attorney William Cintolo was convicted in 1985 for obstruction of justice, in part for giving his client advice that he had a right to invoke the Fifth Amendment's privilege against self-incrimination rather than testify before a federal grand jury investigating the Angiulo organization. Although any lawyer worth his salt would have advised exactly as Cintolo did, the court and the government concluded that because Cintolo was also representing the Angiulos (a fact not hidden from his

for information or documents about the lawyer's client. This rule was promulgated in response to a Reagan era national epidemic of federal subpoenas to lawyers for information about clients, which threatened to turn lawyers into agents of the state.

When Daniel Klubock, counsel to the state's Board of Bar Overseers (now a state district court judge), announced he would enforce the rule against federal prosecutors, Justice, along with US Attorney Weld, sued to enjoin Klubock. US District Judge Rya Zobel, in a cogent and courageous opinion, shot down the Justice Department, and a hotly divided Court of Appeals, split down the middle, affirmed Zobel by default.

It was, in part, this narrow victory for the Constitution that Justice officials now seek to reverse with their new rule making effort, confident, perhaps, that by now Bush has added enough of his appointments to the federal courts to ensure that the result of a new test case would come out in the

bureaucratic cover-your-ass performance.

► **Testimony for sale.** In 1984, US Attorney Weld's assistant prosecutors tried to persuade the federal courts to accept the testimony of three witnesses who were accomplices in a marijuana-smuggling venture in Maine and who had, thereafter, entered into plea bargaining agreements with the government. The defendants: Kevin Dailey, who was subsequently convicted and sent to prison, and Salvatore Michael Caruana, who is a fugitive.

According to the plea agreement, the specific prison terms to be recommended by the prosecutors "depended principally upon the value to the Government of the defendant's cooperation."

US District Judge Joseph Tauro tried to put his foot down on this official bribery of witnesses. He ordered the testimony of the witnesses excluded from the trial, reasoning that the rewards given them should not depend upon their success in bringing about the conviction of the defendants: "We cannot tolerate the imposition of that type of subjective pressure on witnesses,

government's favor. They're probably right.

► **Trial by leak.** The ongoing prosecution of defeated Congressman Nicholas Mavroules is a lesson in how a prosecution should not be conducted.

Government leaks for months before and after the indictment destroyed Mavroules's reputation and made it considerably harder for him to defend himself before his constituents or in court. When Mavroules's lawyer, former Massachusetts attorney general Frank Bellotti, asked US District Judge David Mazzone to convene a hearing to determine who in the US attorney's office might have illegally leaked confidential grand-jury information, Mazzone declined — even though the federal judiciary has been quick to crack down on defense lawyers who leak.

In numerous other ways, as well — including threatening to hit Mavroules with a second indictment, and steering the case away from a judge known to be less tolerant of government overzealousness than some other judges — the case is a showcase for just about every trick and manipulation Justice has developed to pursue political figures of whom it disapproves.

These examples are only the tip of a very large iceberg, demonstrating that the Department of Justice and the local US attorneys' offices have lost their moorings. Radical change is needed.

Though it is always dangerous to generalize and thereby sweep the good along with the bad, Justice during the Reagan/Bush era has been so uniformly hostile to citizens' constitutional rights and so prone to engage in corrupt conduct that Attorney General Baird should allow few, if any, incumbents to keep their jobs.

Surely all those at the top must go. As for the prosecutors at the bottom of the pyramid, they should be compelled to demonstrate that they can overcome the corrosive impact of the department's culture and the history of the '80s — that is, that they can resist the temptation to abuse their power, and that they can live up to the motto carved in granite on the rotunda wall at the Department of Justice building in Washington.

THE UNITED STATES WINS ITS CASE WHENEVER JUSTICE IS DONE ONE OF ITS CITIZENS IN THE COURTS. □