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Because Ideas Have Consequences

Rigging the Scales of Justice

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BOB BARR serves Georgia's seventh congressional district in the United States House of Representatives. First elected in November 1994, he served previously with the CIA and as the United States Attorney for the Northern District of Georgia. In the Congress, Representative Barr has advocated regulatory reform, tax relief, a strong national defense, and a balanced federal budget. He wrote and led the successful effort to enact the Defense of Marriage Act in 1996. In 1998 he led the successful drive to rename Washington National Airport in honor of former President Ronald Reagan. More recently, he initiated the impeachment complaint against President Clinton and served as one of the House managers in the Senate trial. Congressman Barr is an Assistant Majority Whip and a member of the Republican Policy Committee. He holds seats on three important House committees: Judiciary, Banking, and Government Reform, on which he serves as vice chairman of the Subcommittee on Criminal Justice, Drug Policy, and Human Resources.

Representative Barr's remarks were delivered at Hillsdale's Center for Constructive Alternatives seminar, "The Rule of Law and the Permanent Campaign," on campus in September 1999.

Imagine the results if baseball umpires were hired and paid by only one of the teams on the field. The corrupt umpires would make decisions to keep their employers happy. But the virtuous officials wouldn't have it much better. Every time they made an honest call, it would be questioned by fans, players, and coaches turned cynical by a flawed system. Even worse, their honesty would make them the target of the team that paid their salaries.

The Department of Justice is similar, with one hugely significant difference. The only things at stake in a ball game are points, pride, and profits. The stakes in our justice system are property, reputations, lives, and the very survival of our republic. Corruption is not a victimless crime.

When I left the Department of Justice in 1990, our umpires—an Attorney General and a nationwide

team of U.S. attorneys, assistant U.S. attorneys, and a cadre of investigators—were professionals of unquestioned integrity. They included two Attorneys General (Ed Meese and Dick Thornburgh) who not only allowed—but encouraged—me to prosecute and jail a sitting Congressman who was a prominent member of our President's own party, because he lied under oath.

It is breathtaking to consider how much things have changed in one short decade. Last year, the person lying under oath was the President himself. Not only did Justice fail to respond; the Department actively protected him.

Once, the hallmark of the Department was the integrity and independence of its United States attorneys. Indeed, it was this independence that over the years has even driven some to complain that United States attorneys run "independent baronies."

Justice Department lawyers, especially United States attorneys, exercise power based largely on prosecutorial discretion. The exercise of prosecutorial discretion used to be a relatively simple task. The federal criminal code was clear and short. Decisions to prosecute were relatively simple. If the

evidence was there that a major violation had occurred, the United States attorney proceeded. The system was understood by all and enjoyed broad credibility.

Now, in an age of pervasive and vast legal and regulatory power, much has changed. After a century of furious legislative activity, there are so many laws on the books that it is possible to prosecute practically anyone for practically anything. Still, prosecutorial discretion is—or should be—the process that ensures our jails are full of drug dealers, not people who remove the tags from their mattresses.

Because it is impossible to enforce all laws, the men and women who decide which cases to bring, decide which laws are enforced and which laws are ignored, are the arbiters of what moral code (our criminal laws) to enforce. They are society's umpires, and their work signals to every citizen in our society whether we live in a nation ruled by laws—or by personalities. The building blocks of society—law, justice, freedom—rest on their shoulders.

This discretion is not subject to judicial review, and it is very resistant to legislative oversight. It is one of the easiest and most powerful executive prerogatives to exercise and one of the most difficult to check or even monitor. For this reason, throughout our nation's history, the United States Department of Justice has placed a high priority on avoiding any kind of political influence on prosecutorial discretion.

Because prosecutorial discretion is the precise place where the rubber of laws meets the road of society, it represents the most important point of attack for a corrupt or self-centered executive seeking to politicize the Department of Justice. In the pre-Clinton Department of Justice, the appearance alone of political influence over prosecutorial decisions would have ignited a firestorm of inquiries and their consequences.

All this dramatically changed when President Clinton took office in 1993. He decided it was time to send a message to the Department of Justice and to our entire government through the Department of Justice. He could have sent around a couple of memos. Or, if he really wanted to make an impact,

issued an executive order. That and some new political appointees were what most Justice employees expected.

No such luck. Eager to let Washington and the nation know of his arrival, the President shocked the legal world by firing all 93 United States attorneys en masse, as one of his first actions as President.

Nothing like this had ever happened to the Department before. It was a move so crass in its political motivation, and so swiftly and brutally executed, that no one could ignore it. The message was simple: toe the party line, or we'll replace you with someone who will. The mob would be proud.

Since then, the Department hasn't stopped making a public example of any employee with the integrity to think law first and politics second. When career prosecutor Charles LaBella was hand-picked by Attorney General Janet Reno to head a campaign finance investigation, and then had the audacity to offer an objective legal opinion different from the political one sought by the Attorney General, his advice was ignored and his federal career was quickly scuttled. As a matter of law, LaBella's opinion was airtight. Indeed, Reno herself appointed special prosecutors for violations of law that seem minute in comparison to the wholesale auctioning of an election to foreign countries perpetrated by the Clinton Administration.

FBI Director Louis Freeh had the guts to back LaBella's judgment. Of course, removing an FBI Director is a bit more challenging than squashing one Justice lawyer. Ever since Freeh's recommendation, the Clinton Administration has lain in wait. Now, the revelation that Justice covered up evidence of the

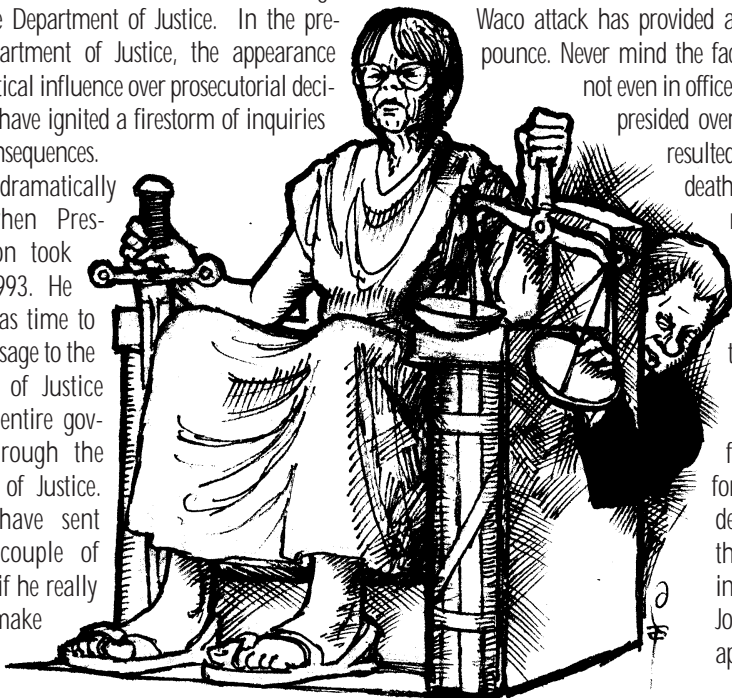
Waco attack has provided an opportunity to pounce. Never mind the fact that Freeh was

not even in office when Janet Reno presided over the assault that

resulted in the April 1993 death of 80 American

men, women, children, and babies in Waco.

Never mind that Freeh, not Reno, was reportedly the driving force behind plans for an independent investigation that culminated in former Senator John Danforth's appointment.



By sending federal marshals to seize evidence from the FBI, Reno publicly hung her own director out to dry. In a seamless political ballet, President Clinton leapt to praise Reno's "determination" to "get to the bottom" of Waco, while pointedly stinging Freeh with silence. In the days following, Clinton loyalists in Congress continued the dance by taking to the airwaves and pinning blame on Freeh.

Political hacks doubtlessly admire the speed with which the White House turned lemons into lemonade by using its own blunders to undercut a powerful enemy. Those of us who care about the rule of law take a much dimmer view.

Other enemies of the regime have also earned the enmity of Justice. When Government Reform and Oversight Committee Chairman Dan Burton was the subject of flimsy allegations by a Democratic lobbyist in the press, the Department leapt into action and started investigating him within three days. Two weeks later, the Department had already empaneled a grand jury to hear testimony from Burton's accuser. As a matter of law, the Burton case was ridiculous. However, Justice's goal was a political one, not a legal one. The chairman was temporarily distracted, his credibility was damaged, and the Committee's investigation was impeded. Mission accomplished, again.

Independent Counsel Kenneth Starr was the target of an even more concerted obstruction effort. At every opportunity in that process, the Attorney General worked to block his investigation by asserting bogus claims of privilege so frivolous that they were roundly rejected all the way up the judicial food chain to the U.S. Supreme Court. Failing in that effort, Justice moved to discredit Starr by investigating him for leaks that clearly originated with the Clintons' defense team at 1600 Pennsylvania Avenue. The Department of Justice had become the President's personal defense law firm, the largest and most costly in history.

In addition to obstructing the work of the Independent Counsel she appointed, Janet Reno's Justice Department has obstructed the work of her own FBI when it wandered into politically sensitive areas of investigation. The most prominent example of this is Reno's denial of an FBI wiretapping application for Wen Ho Lee, the nuclear scientist suspected of passing top-secret information to the Communist Chinese.

To me and others who have worked at Justice, this move was unprecedented. FBI wiretap applications for national security are never denied by the Attorney General. Approval of such applications by Justice is typically a rubber-stamp process

because they must also be approved by a Foreign Intelligence Surveillance Act court before they can be implemented.

According to experts, this is the only such denial that has ever occurred. The results of Justice's failure to prevent Wen Ho Lee from passing classified information to the Chinese are obvious. Not only our criminal law, but our national security itself, may have been seriously damaged.

The politicization of the Department is not limited to the Criminal Division. A decade ago, the assertion that the Antitrust Division would become a hotbed of politics would have been greeted with open laughter. After all, antitrust law has traditionally been the province of lawyers' lawyers, people who love the technical world of law and wouldn't think of dirtying their hands in politics.

No one is laughing now. Today, Antitrust is engaged in unrestrained and legally incoherent bashing of one of America's most prominent capitalists, Bill Gates. The technology sector represents the best American ideals. Our western frontiers have been replaced by new electronic frontiers that offer a historic opportunity to maximize freedom, privacy, choice, and knowledge. Antitrust chief Joel Klein, infected with Washington's fixation on regulating technology, has pointed the clumsy blunderbuss of federal antitrust power at the chests of those most responsible for making the fruits of the information age available to the average American.

The Department's political forays into other areas of civil law have been no less restrained. Attempts by Justice and other departments to launch crusades against tobacco companies, gun manufacturers, and health care providers have been every bit as zealous and legally flawed. The new test of whether an industry should be the target of a lawsuit is not the facts or the law. All that matters is whether the company or its product is politically unpopular or can be made to appear so. Under this view, Justice may as well stop hiring lawyers and start hiring pollsters.

The really troubling thing about this theory is that it rejects the wisdom of our founders that one of government's most important tasks is to protect a politically unpopular minority from unfair attacks by the majority. If current policy had been prevalent in the 19th century, the Attorney General would have been filing suits against abolitionists on behalf of slave owners.

The infection of the Department has not stopped at Main Justice. Even the Department's law

enforcement agencies have been politically abused. For example, under the Citizenship USA program, the Vice President directed the Immigration and Naturalization Service to naturalize massive numbers of foreigners, many of whom had criminal histories in their native countries. Gore's hope was that the new citizens would vote for the President who orchestrated their citizenship. In this case, political abuse of the immigration system endangered the lives of American families by putting criminals on our streets.

To be sure, Congress shares some blame for the politicization of the Department of Justice. As former Attorney General Edwin Meese reminds us, it is Congress that has spent the past several decades federalizing crimes that should be the province of the states. In the process, two things have happened. First, Justice has acquired the statutory power and enforcement resources to engage in political games. Second, the Department has the incentive to engage in political grandstanding to justify existing authority and strengthen its pleas for even more laws and funding, which Congress is frequently eager to grant in order to appear "tough on crime." Every major terrorist act, or every event that might possibly be a terrorist attack, provides a vehicle for more Department of Justice power with no real regard for whether it is necessary or proper.

Furthermore, ill-advised laws like the Independent Counsel statute have helped turn the legal process into a political one. From Teapot Dome to Watergate, the Department did a generally good job of handling sensitive political matters. Then, after Watergate, Congress told the Department it could not be trusted to handle politically tough cases. In many ways, this became a self-fulfilling prophecy. The Department of Justice has now become the very kind of politicized agency post-Watergate reforms were designed to prevent.

In my opinion, however, the greatest failure of Congress in recent years has been our failure to conduct effective, consistent, and aggressive oversight of the executive branch generally and the Department of Justice specifically. When executive branch employees make decisions without any real

public and congressional scrutiny, and without fear of any meaningful follow-up, political games become par for the course.

For example, when we subpoenaed the Freeh and LaBella memos urging the appointment of an Independent Counsel on campaign finance, Janet Reno refused to turn them over. Not only did she refuse to allow congressional review, she failed to offer any coherent explanation for refusing.

That left Congress with a choice: hold Reno in contempt or live with her decision to thumb her nose at the legislative branch. Lacking courage, Congress chose the latter, even after our Government Reform Committee passed a resolution holding the Attorney General in contempt. This failure told every official who would withhold information or lie to Congress that there would be no consequences for doing so. In this envi-

ronment, it is not at all surprising that federal law enforcement officials have blatantly and continually lied to Congress on Waco and other matters.

Of course, we are all too familiar with the blind eye the Department of Justice turns to White House operatives, who violate federal privacy laws by rummaging through FBI files and smearing those in Congress who dared to hold a President accountable for impeachable offenses.

The failure of Congress to protect people with the courage to blow the whistle on corruption has also been enormous. When Linda Tripp was illegally smeared with confidential government personnel information, Congress offered only lukewarm words of support. Allowing Tripp and others like her to suffer the unchecked wrath of the administration will ensure critics' silence in the future.

At best, these and other failures have emboldened Justice officials to play politics. At worst, they have helped fuel the process.

As college students once learned, a basic trait of American governance is our tendency to enshrine everything in black-letter law. Our law libraries are bursting at the seams with the detailed rule books we've written for ourselves. However, the character of the people and institutions enforcing the rules is as important as the words themselves, a fact clearly understood by the Founding Fathers.

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