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How the Government Breaks the Law

by Andrew P. Napolitano

It should be against the law to break the law. Unfortunately, it is not. In early 21st-century America, a dirty little secret still exists among public officials, politicians, judges, prosecutors, and the police. The government—federal, state, and local—is not bound to obey its own laws. I know this sounds crazy, but too many cases prove it true. It should be a matter of grave concern for every American who prizes personal liberty.

When I became a judge in New Jersey, I had impeccable conservative Republican law-and-order credentials. When I left eight years later, I was a born-again individualist, after witnessing first-hand how the criminal justice system works to subvert and shred the Constitution. You think you've got rights that are guaranteed? Well, think again.

Eternal vigilance is the price of liberty, particularly when it comes to the American criminal justice system. Nowhere else does the state have greater raw power over an individual's life, liberty, and property. And nowhere else are our constitutionally guaranteed rights and freedoms under such a relentless, subtle, and ultimately devastating attack.

The deck is grossly stacked in the government's favor. No wonder, as a recent New York magazine cover story put it, referring to the government's long winning streaks in criminal trials, "The Defense Rests—Permanently." No wonder that in 2003 fewer than 3 percent of federal indictments were tried; virtually all the rest of those charged pled guilty.

Being an American means having certain rights and liberties guaranteed by the Constitution and the Bill of Rights. That's what it has always meant, and that's what it will continue to mean in the troubled times before us.

Most of us take these guaranteed rights and liberties for granted. Most of us live comfortable lives that never bring us in conflict with the criminal justice system. But in many ways, that's a bad thing, for if you had seen the system as I did, you would never take your guaranteed rights for granted again.

Breaking the Law to Enforce the Law

As a judge, I once heard an infuriating case involving the owner of a small Italian restaurant, an immigrant from Italy who was visited by two well-dressed gentlemen who introduced themselves and asked for weekly payments of a hundred dollars. In return, they promised the restaurant owner that his garbage would be collected on time, he would not have any trouble with labor unions, he would not be the victim of any crime, and no competing restaurant

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Judge Andrew P. Napolitano, Fox News judicial analyst, discusses the Supreme Court's record on civil liberties at the annual Constitution Day conference of Cato's Center for Constitutional Studies on September 17. Federal Election Commission chairman Brad Smith and Judge Royce Lamberth listen.

Andrew P. Napolitano, senior judicial analyst for Fox News Channel, is the youngest life-tenured judge in the history of New Jersey. He is the author of Constitutional Chaos: What Happens When the Government Breaks Its Own Laws, *on which this article is based.*

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would open in his neighborhood.

He threw them out.

They returned unannounced about six times and every time their demands increased, eventually to a thousand dollars a week, each. After he rebuffed that demand, they said they'd be back the following week with guns, and he'd better get one. Terrified of this threat, and afraid as most immigrants are to involve the police, the restaurant owner borrowed a friend's gun.

When the two gentlemen returned and asked if he had a gun, the restaurant owner reached into a drawer, pulled out the gun, and pointed it at them. They immediately slapped handcuffs on him! Unbeknownst to him, they were New Jersey state troopers who were trying to either shake him down for money or coerce him into breaking the law.

His prosecution for carrying a gun was assigned to me, along with a similar case involving a nearby Italian bakery.

Before the cases began, I ordered the troopers to appear in my courtroom, to inquire if their schemes were self-directed or authorized by their supervisors. They refused to be so interrogated, whereupon the prosecutors asked me to dismiss both cases, which I did. The bakery owner was so delighted, he proclaimed in a classic Sicilian accent: "The Judga, he can eata for free for the resta his life!" I never took the owner up on his offer, but I appreciated his sentiments.

Torture and Psychological Abuse

Political ambition can be a powerful motivating factor for government abuse of our rights. Consider one of the cases that helped propel Janet Reno to national stardom. In 1984, Reno faced a serious challenger in her bid for reelection as Dade County's state attorney. In August of that year, Frank Fuster and his wife, Ileana Fuster, were arrested for sexually abusing more than 20 children who attended their home daycare center. Reno began the case by soliciting Laurie and Joe Braga, both billed as "child abuse experts" with no psychology training, to interview the children.

The Bragas used suggestive and misleading interview techniques to elicit false accusations from the children in the case. The children were brainwashed with fantasies of sexual abuse involving masks, snakes, drills, and other objects, and eventually came out of the interviews thinking they were victims.

Of all the children alleging sexual abuse against Fuster, Reno's office only presented physical "evidence" that one child was abused. The prosecution invoked a laboratory test suggesting that a child had tested positive for gonorrhea of the throat. However, the lab test that was performed is very unreliable and often gives false positives. Reno's agents tested for the family of bacteria to which gonorrhea belongs rather than specifically for gonorrhea; other bacteria that could have caused the false positive are harmless and are frequently found to live in children. Of course, the state ordered the lab to destroy the evidence three days later, thereby preventing the defense from challenging the state's "evidence."

Recognizing that the case against Fuster was weak, Janet Reno's final straw was to torture Ileana Fuster physically and mentally to the point where she could be coerced into implicating her husband.

Reno had Ileana isolated from the prison population and placed in solitary confinement, naked. Ileana described her treatment in a 1998 interview: "They would give me cold showers. Two people will hold me, run me under cold water, then throw me back in the cell naked with nothing, just a bare floor. And I used to be cold, real cold. I would have my periods and they would just wash me and throw me back into the cell."

Late one night, the naked Ileana, according to her lawyer, received a visit in her darkened solitary cell from an intimidating 6-foot-2 woman. The woman told Ileana that she knew that Ileana and her husband were guilty. "But how can that be? We are innocent," Ileana proclaimed. "Who are you?" "I'm Janet Reno," the woman said. Ileana repeatedly told Reno that she was innocent, and Reno kept repeating, "I'm sorry, but you are not. You're going to have to help us." Reno made several more solitary, nightly visits to the naked Ileana, each time threatening Ileana that she would remain in prison for the rest of her life if she didn't tell Reno what she wanted to hear.

Finally, Reno hired two psychiatrists from a company called Behavior Changers Inc., who met Ileana 34 times in a one-month period. These psychiatrists claimed to be able to help individuals "recover memories," but their technique was simply to hypnotize Ileana so that she could be brainwashed into believing that Frank Fuster was a child molester. The coercion eventually worked: with the psychiatrists present and with Janet Reno squeezing her hand, Ileana implicated her husband.

Ileana's trial testimony against her husband put the final nail in Frank Fuster's coffin. Reno won the conviction, her reelection bid, her name in the newspaper headlines, and a stepping stone to a position as the nation's chief law enforcement officer. However, Ileana Fuster has repeatedly retracted her confession and testimony, swearing that she and Fuster never abused any of the children, and that her confession was the product of brainwashing.

Yet, thanks to Janet Reno, an innocent Fuster remains incarcerated for 165 years without the possibility of parole.

Messing with Texans

It is unfair, unwise, and un-American for police to break the law in order to enforce it. A corrupt police officer in Tulia, Texas, a small rural town of about five thousand people, engaged in what one commentator deemed an "ethnic cleansing of young male blacks."

Thomas Coleman, an undercover narcotics officer, committed one of the worst police atrocities in recent years by arresting 46 people on July 23, 1999. Of those arrested, 39 were black, which amounts to approximately half of the town's adult black population. Many others were involved in the family or personal relationships with black Americans in an otherwise overwhelmingly white community. Coleman's previous law enforcement employers knew that Coleman himself had once been arrested for theft during an undercover operation, that he used racial epithets, and that he had a widespread reputation in the Texas law enforcement community as being unreliable and untrustworthy.

Nonetheless, on the basis of Coleman's testimony, 38 individuals arrested on that day were found to be guilty of drug dealing. Some were sentenced to up to 90 years in prison! Some were coerced into accepting plea bargains under the threat of lengthy imprisonment.

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What is most shocking is that the prosecution's only evidence against these defendants was the testimony of Coleman, the dirty cop. The testimony was uncorroborated: no witnesses or other police officers could confirm that Coleman bought drugs from these defendants. And Coleman could not offer any audio or video surveillance verifying his undercover drug purchases. Not even fingerprint evidence was introduced.

Coleman's testimony was based solely on notes he scribbled on his stomach and his leg. He did not keep a permanent notebook. At the time of their arrests, these 46 supposed drug dealers possessed no guns, no drugs, and no money. Coleman claimed to have purchased $20,000 worth of cocaine from these "dealers." Furthermore, some of the individuals who were arrested established that they were miles away from Tulia that day. A few of them neither worked nor lived in Tulia. All of the people arrested that day were either convicted by juries or pleaded guilty. In 1999, Texas attorney general John Cornyn—now a U.S. senator—named Coleman the outstanding law enforcement officer of the year.

The Tulia, Texas, debacle attracted national media attention and a coordinated, multidefendant habeas corpus campaign, coordinated by the NAACP and many law firms. About four years later, the Texas Court of Criminal Appeals exonerated the victims of Coleman's fraud. Coleman had previously acknowledged that the convictions were based on nothing more than his testimony. While he stated that he was "pretty sure" that all the defendants "deserved" to be behind bars, he admitted to several "mess ups" and stated that some of his own sworn testimony was "questionable." It is a rare anomaly that police abuses such as that perpetrated in Tulia, Texas, are overturned. You can't help but wonder how many wrongfully convicted defendants never had the luxury of seeing justice served. It shouldn't be a luxury.

Coleman currently faces trial for perjury, but the buck does not stop at Thomas Coleman. Coleman's activities were financed by the federal government's war on drugs, as he was part of the Panhandle Regional Narcotics Task Force. The Department of Justice encourages officers like Coleman to rack up as many arrests as possible, since the money is allocated to the task forces on the basis of number of arrests, not convictions. Because there is no distinction between high-quality and low-level arrests, the federal government creates an incentive for officers like Coleman to engage in sloppy investigations against low-level offenders, and against the innocent.

Rights No More

The war on terrorism has increased the need to protect vigilantly our civil liberties. In July 2003, the U.S. Department of Justice held a celebration at which it handed out honors and praises to federal agents and lawyers involved in the prosecution of the Lackawanna Six.

It should have handed out indictments instead, because those prosecutors—or at least some of them—violated their oaths to uphold the Constitution in order to coerce six soccer-playing young men from Lackawanna, New York, with no criminal records, into accepting long jail terms, well out of proportion to their alleged crimes.

The six—all Arab Americans in their early 20s, five of whom were born here—were charged in federal court in the Western District of New York with providing aid and support to a terrorist group, before September 11, by attending camps in Afghanistan, learning about weapons, and listening to Muslim clerics preach hatred toward the United States.

They were charged with listening to others—including, in the case of one of them, Osama bin Laden himself—talk about causing America harm and with training for some undefined jihad, even though they said that once they arrived and met the people in the camps, they wanted nothing to do with it. The government actually told a federal judge that since the clerics being heard by the six were preaching violence, the six had committed crimes of violence.

The court rejected that argument out of hand. After reviewing the evidence against the six, the judge wrote that these defendants—like all defendants—are guaranteed due process, and that federal courts should do more than just pay lip service to the guarantees of the Declaration of Independence and the Constitution; they should enforce them.

"We must never adopt an 'end justifies the means' philosophy," the judge wrote, "by claiming that our Constitutional and democratic principles must be temporarily furloughed or put on hold in cases involving alleged terrorism in order to preserve our democracy. To do so would result in victory for the terrorists."

But within mere yards of where this fair judge sat when he wrote those words, the government lawyers who once swore to uphold the Constitution were plotting to put it on hold.

According to a lawyer for one of the six—himself a former federal prosecutor—the government lawyers implicitly threatened the six during plea negotiations that if they did not plead guilty, if they did not speak up as the government wished, if they did not cooperate in their own prosecutions, if they insisted on their due process rights, the government would declare them to be enemy combatants.

In that case, the so-called defenders of the Constitution threatened, the six would have no due process rights, no trial, no lawyers, no charges filed against them, and they would receive solitary confinement for life.

There is no reported case in American history in which a court allowed a defendant to be told that his insistence on due process would result, not in prosecution and conviction, but in punishment without trial. It has always been the case that when entering a guilty plea—and when negotiating for that plea—the defendant's fears of punishment were limited to that which the law provides. Today, for the government to threaten that the punishment can be increased by fiat by the president after the crime has been committed is not only unconstitutional, it is tyrannical.

Liberty: Void Where Prohibited

It is only a warped view of American history, culture, and law that could seriously suggest that constitutional rights are discretionary—that any president can strip a person of his due process rights. Let's be clear: There is no Supreme Court case supporting or authorizing presidential enhancement of punishment, and the Justice Department knows that.

So if it is constitutionally impossible for the government to strip a person of his

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due process rights, why did the lawyers for the Lackawanna Six let their clients plead guilty and accept six-to-nine-year jail terms? Because they knew that the government had suspended rights before and gotten away with it. They knew that the president had actually declared three people to be enemy combatants and kept them locked up without charges and away from their own lawyers. And before the Supreme Court stepped in, he appeared to be getting away with it.

Protecting Freedom

Ultimately, the fate of American liberty is in the hands of American voters. Though we are less free with every tick of the clock, most of us still believe that the government is supposed to serve the people—fairly, not selectively.

There are some surprisingly direct ways to address the excesses I've described.

First, Congress and the state legislatures should enact legislation that simply requires the police, all other law enforcement personnel, and everyone who works for or is an agent of the government to be governed by, subject to, and required to comply with all the laws.

That would eliminate virtually all entrapment, and it would enhance respect for the law. If the police are required to obey the same laws as the rest of us, our respect for them and for the laws they enforce would dramatically increase, and their jobs would become easier. In short, it would be against the law to break the law.

Second, Congress and the state legislatures should make it easier to sue the federal and state governments for monetary damages when they violate our constitutional liberties.

The federal government and many states have rendered themselves immune (called "sovereign immunity") from such lawsuits if the lawsuit attacks the exercise of discretion by government employees. That is nonsense. You can sue your neighbor for negligence if his car runs over your garden or your dog. You can sue your physician if he leaves a scalpel in your belly. You should be able to sue the local police, state police, and the FBI under the same legal theories if they torment you, prevent you from speaking freely, bribe witnesses to testify against you, steal your property, or break the law in order to convict you.

If the Constitution is enforced selectively, according to the contemporary wants and needs of the government, we will continue to see public trials in some cities and secret trials in others; free speech suppressed on inexplicable whims; police targeting the weak and killing the innocent; and government lying to its citizens, stealing their property, tricking them into criminal acts, bribing its witnesses against them, making a mockery of legal reasoning, and breaking the laws in order to enforce them.

This is not the type of government we, the people, have authorized to exist, and it is not the type of government that we should tolerate. We can do better. If government crimes are not checked, our Constitution will be meaningless, and our attempts to understand it, enforce it, and rely on it will be chaotic. ■