

When Prosecutors Cheat

[Written in April of 2009, upon the dismissal of the case against Senator Ted Stevens of Alaska]

The more we learn of prosecutorial misconduct in Senator Stevens' trial, the more it resembles that of the Special Prosecutor in the 1974 Watergate trial of Bob Haldeman, John Ehrlichman and John Mitchell. In both cases:

- There were huge adverse implications for Republicans-- and prosecutors clearly connived to assure the cases were tried in the District of Columbia, with juries drawn from a voter pool that consistently provides 85% Democratic majorities;
- The lead prosecution witness had been at the heart of the criminal wrongdoing and was testifying against his former friends in hopes of obtaining leniency; and
- Prosecutors hid knowledge of their witness's prior inconsistent statements in clear violation of Supreme Court mandates.

There is one major difference in the Stevens case: indications of misconduct surfaced rather early on, because of an FBI whistle-blower, while those of Watergate are only now coming to light.

But the bottom line is clear: Federal prosecutors are only human—and seldom non-partisan. Given the opportunity to nail prominent public officials—especially from the other party--they will do everything within their power to obtain convictions—even if it occasionally means riding roughshod over defendants' rights. Assertions that “no man is above the law” ring hollow as the rule of law itself is knowingly corrupted.

Ted Stevens was the longest serving Republican Senator in history, having served since 1968. It appears the original investigation by Justice's Public Integrity Section involved the improper influence of Big Oil in Alaskan state politics. Senator Stevens name came up only tangentially, after one of their principal bribery targets, Bill Allen, then CEO of Veco Corp., volunteered information adverse to the Senator in hopes of obtaining leniency. Allen's value as a government witness increased immeasurably: Knocking off a senior Republican Senator, especially when Senate control might hang in the balance, was a target too tempting to pass up. Department guidelines designed to prevent indictments during election campaigns were cast aside and Stevens was indicted in the midst of his primary campaign.

In furtherance of their effort, the jury deck was stacked against Stevens: While the alleged wrongdoing occurred in Alaska (essentially, Allen's company making extensive improvements to the Stevens' family home in Girdwood for which he did not pay), charges were artfully recast as the improper filing of Senate disclosure forms--for the sole purpose of assuring the case would be tried in the District of Columbia. Alaskan jurors might respect their seven term Senator; but DC jurors, drawn from the nation's largest Democratic concentration, have long demonstrated an anti-Republican bias. Ask Scooter Libby: no prominent Republican has been acquitted by a DC jury at least since the Eisenhower Administration.

Actual prosecutorial wrongdoing then followed: Their case was weak from the outset, since it turned on whether Senator Stevens knew the improvements—alleged to total \$250,000—exceeded the \$160,000 he had been billed. Steven's defense was that he was in Washington almost all of the time, the construction had actually been supervised by his spouse, and he had specifically asked that he be billed

for Allen's company's work. It was a classic jury question: Who was lying, Allen, a convicted felon, or Senator Stevens, a crusty old Republican Senator?

This was not a hard question for a DC jury: it deliberated for less than a day before finding Stevens guilty on all seven counts. Not surprisingly, he lost his re-election bid a little over a week later—but by a thin 4,000 vote margin. In contrast, DC voters gave Obama an astounding 92.5% margin.

It seems rather clear that, but for his indictment and conviction, this is one Republican seat that would have been held by the GOP in 2008.

Two months after Stevens' conviction, an FBI agent made allegations of wrongdoing—and the case began to unravel: It seems that in his eagerness to be helpful, Allen's story had 'improved': when interviewed by the FBI on April 15, 2008, he had said he 'didn't recall' a conversation about billing—but at trial he testified in great detail. He also had initially estimated the value of his company's work at a figure that was far less than the one to which he testified at trial. The prosecution finessed these changes by not disclosing Allen's prior inconsistent statement to Stevens' defense counsel—a clear violation of the Brady Doctrine requiring that prosecutors disclose information in their possession that is favorable to the defendant.

How can this sordid tale be compared to Watergate? It, too, had huge political ramifications for Republicans—essentially postponing their growing influence—evidenced by Nixon's 61% re-election margin—for eight full years, until Ronald Reagan's great 1980 realigning victory.

That case, too, was tried in the District of Columbia. Given the massive adverse publicity from the Watergate scandal—from the Ervin Hearings, the House Judiciary Impeachment Inquiry, and the resignation and subsequent pardon of Richard Nixon—one might have concluded that a fair trial could not have been held one month later—at least not before a DC jury. But that would have meant giving up the certainty of conviction: Surveys introduced on appeal tended to show the jury pool in Baltimore or Richmond would have been half as likely to convict as a DC jury. Regardless, allegations of jury taint and bias were cast aside; the trial began one month following Ford's pardon. Virtually the entire case turned on one witness --John W Dean, former Counsel to the President, who had been at the heart of the criminal wrongdoing and was now accusing his former colleagues of being in on his cover-up. Who to believe? It was again no contest for a DC jury, which convicted Haldeman, Ehrlichman and Mitchell on all counts.

It took over three decades for the truth to begin to emerge, but prosecutors had done exactly the same thing as in the Stevens trial: faced with the knowledge that their principal witness would testify in a manner substantially different from what he had first told them, prosecutors hid this exculpatory information from defense counsel. Only recently has a memo surfaced that documents Dean's evolving story, actually noting that he only began to finger Haldeman and Ehrlichman after two full weeks of meetings with prosecutors—and first mention of any Nixon involvement came two full weeks after that. Dean's new revelations were characterized in the memo itself as, "thus changing dramatically from his previous stance."

If ever there was a memo that should have been shared with defense counsel, it was this Denny/Rient memo of November 15, 1973—which could easily have been used to impeach Dean's trial testimony. But it was kept hidden—and Haldeman, Ehrlichman, Mitchell were convicted, served their prison terms,

and went to their graves not knowing the Special Prosecutor knew all along that their star witness, in his efforts to save his own skin, had altered his story in substantive ways.

Prosecutorial misconduct undermines the rule of law we hold so dear, as well as the due process guarantees of our Bill of Rights. Where ever the principal prosecution witness is not only intimately involved in the alleged criminality itself, but has changed his story in an effort to gain leniency, there is great cause for skepticism. When such altered memories implicate prominent Republicans who are then tried in the District of Columbia, there is cause for great alarm.

Stevens' election defeat cannot be undone, but all charges against him have been dismissed, the prosecuting attorneys held in contempt, and an independent investigator appointed by the Court. We will have to await results; but if the allegations are true, the prosecutor's actions should be treated as criminal—and result in disbarment as well.

There also is more to come on the Watergate trials: Some lawyers still practicing today know of the shortcuts taken by the Special Prosecutor in obtaining those convictions—including highly improper private meetings with Judge Sirica and with Chief Judge Bazelon of the Court of Appeals. Perhaps they believe enough time has passed that such wrongdoing will never come to light—but they are mistaken: the final chapter on the Watergate scandal has yet to be written.

Geoff Shepard was a lawyer on Nixon's White House staff for five years, including participating in his Watergate defense. His book on the politics behind the Watergate scandal was published last year by Penguin Sentinel. A second book is forthcoming that will document the prosecutorial and judicial misconduct in the Watergate trials themselves.