

William Raspberry

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## When Law Enforcers Become Law Breakers

Suppose you were on an expense account that reimbursed you for local transportation in connection with your work. And suppose that, while the company rules clearly stated that false claims constituted a firing offense, the practice had been established that employees who used their own cars for local travel would, with the company's tacit understanding, put in for taxi fare.

Now suppose that a new business manager took over, found proof positive that you had filed just such a false claim a couple of years ago. Would that new business manager be justified in starting discharge proceedings against you?

Or would it make more sense—and more justice—for him to close the book on past transgressions and simply announce that, henceforth, the rules would be strictly enforced?

You may have guessed already that the subject is not expense accounts at all, but the government's prosecution of John J. Kearney, the retired FBI supervisor charged with illegal (though apparently routine at the time) investigative methods. If so, you'll also have spotted some major flaws in the analogy.

For instance, aside from whatever concerns the Internal Revenue Service might have about your expense account, the issue would be strictly between you and your employer. Kearney's alleged infractions involved not just him and the FBI, but also outsiders: the targets of the FBI investigations.

In addition, there are important differences in the impact of the two kinds of offenses. In the one case, you're talking about the matter of a few dollars that the employer didn't mind paying and that you didn't object to receiving. In the other case, you're talking about the possible imprisonment of persons who otherwise might have remained free. (Whether they deserved to be jailed is, under our system of justice, quite beside the point.)

But the essential point remains: Can it be fair to prosecute Kearney now for having done what FBI agents apparently had been doing for years, with the full knowledge, and tacit approval, of a number of Presidents and Attorneys General?

There can be no question that Kearney knew it was against the law to engage in warrantless wiretaps and mail openings—no matter how traditional those activities were and no matter

how notorious were the targets of his investigations, the violence-prone and elusive Weathermen.

But it is also beyond question that he was operating well within the rules of the game as it was then played and that he did what he did not for personal gain but for the public good, as he and the agency saw it.

What is the right thing to do now?

One possible answer is: nothing. So long as Kearney did not personally profit from his alleged illegalities, and so long as no innocent person was prosecuted or convicted as a result; doing nothing may seem a reasonable alternative.

But there is a well-established rule that illegally obtained evidence must not be used against a defendant, no matter how guilty; that the right to a fair trial includes the notion that the government will behave fairly. So another alternative is to do nothing to Kearney, but to release any person whose conviction could not have been obtained without the illegal investigatory techniques.

But if there is a loud public outcry over the prosecution of a conscientious law-enforcement agent, the uproar is deafening whenever clearly guilty defendants are let go for such "technicalities" as illicitly obtained (but undeniable) evidence.

The Chief Justice of the United States is solidly on record in favor of using reliable evidence, even when it is unlawfully obtained, to convict the guilty. His notion is that it is no punishment to a misbehaving law officer to let a guilty suspect go free.

His solution: punish the guilty suspect and, if his guilt is established as the result of a law officer's illicit behavior, then punish the law officer as well.

It makes great sense in theory. But the public outrage over the Kearney case makes clear how reluctant we are to punish official illegality.

A frequently heard rationale for dropping the Kearney prosecution (but changing the rules for the future) is that to do otherwise would seriously damage the morale of the FBI.

That has some appeal. But so does the rejoinder from a group of civil libertarians, including former Attorney General Ramsey Clark and former Supreme Court Justice Arthur Goldberg:

"What of the morale of a public that sees its law enforcers become law breakers—and then be given immunity?"