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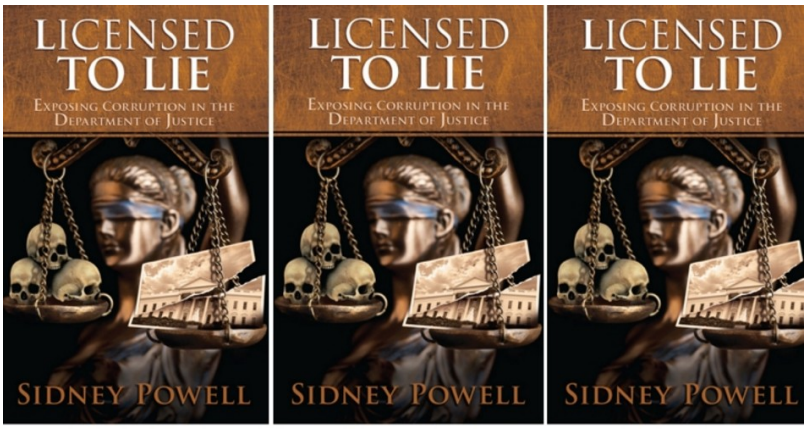
Illegally Prosecuted



Licensed to Lie: Exposing Corruption in the Department of Justice, by Sidney Powell, Dallas, Texas: Brown Books, 436 pages, hardcover.

A skillful prosecutor, it has been said, could indict a ham sandwich. Yet even the ill-fated sandwich might have a better chance at trial than a real defendant when federal prosecutors misrepresent statutes, withhold or distort evidence, and intimidate witnesses, as Sidney Powell has chronicled in *Licensed to Lie: Exposing Corruption in the Department of Justice*. A former federal prosecutor herself, Powell draws on her later experience as an appellate lawyer to describe cases of prosecutorial misconduct leading to, among other things, the destruction of one of the nation's top five accounting firms, the wrongful conviction of four Merrill Lynch executives, and the unseating of a U.S. senator.

Powell hammers away at prosecutors who withhold or suppress evidence and the judges who let them get away with it. Both the canons of the legal profession and the 1963 Supreme Court decision in *Brady v. Maryland* require the government in criminal cases to share with defense counsel any evidence favorable to the defendant. In his foreword to Powell's book, Alex Kozinski, chief judge of the Ninth Circuit Court of Appeals, explains the reasoning behind the Brady rule:

Government agents usually have unimpeded and exclusive access to the crime scene, so they can easily remove and conceal evidence that might contradict the prosecution's case. Police also generally talk to witnesses first and can pressure them to change their story to confirm the prosecution's theory of the case. Prosecutors can, and often do, threaten to charge witnesses as accomplices or co-conspirators if they testify favorably for the defense. As a result, potential exculpatory witnesses invoke the Fifth Amendment to avoid getting themselves into trouble.

Death to Andersen

The government also has exclusive access to grand jury proceedings, except on rare occasions when defense lawyers are permitted, solely at a prosecutor's discretion, to make presentations before an indictment is considered. The Justice Department task force investigating the Enron scandal in 2002 won a grand jury indictment against the Arthur Andersen accounting firm for destroying "literally tons" of Enron-related documents in shredding machines running "24 hours a day." Yet the company saved all the documents, "electronically and otherwise," Powell writes, and the company stopped the shredding

once it had been served with a subpoena.

"Before it was issued the subpoena, Andersen had no legal duty to maintain any drafts, duplicate, irrelevant materials or documents," Powell writes. "No law or regulation said it had to do so." What's more, Powell said, the prosecution cobbled together language from two different statutes to "create a crime," formally charging Andersen with obstruction of justice by citing a witness tampering statute. By indicting the entire company rather than the individuals involved, the prosecutors administered a virtual "death sentence" to Andersen before the trial even began. No one would hire a firm under criminal indictment. By the time a unanimous Supreme Court overturned the company's conviction in 2011, Arthur Andersen, a firm that had employed 85,000 employees serving 2,300 publicly traded firms worldwide, had been out of business for years.

Merrill "Lynched"

In the trial of Enron Chairman Ken Lay and CEO Jeff Skilling, the prosecution offered the defense FBI forms that Powell describes as "composite" reports that had been "cut and pasted and otherwise edited repeatedly." When four Merrill Lynch executives were put on trial for allegedly conspiring in an illegal buyback arrangement on a transaction with Enron, the thousands of pages of grand jury transcripts, FBI reports, and witness interviews were reduced to a 19-page summary for the defense.

"The government claimed it had no exculpatory material," Powell writes, and "Judge [Ewing] Werlein routinely denied the defense motions or simply ignored them." By naming more than 100 "unindicted co-conspirators," the task force left witnesses unwilling to talk to defense lawyers, lest they be indicted themselves. For those already indicted, the pressure was even greater. Former Enron Treasurer Ben Gilsan entered a guilty plea, but refused to testify before the grand jury. When he reported to prison, he was put right away in solitary confinement, in what Powell describes as "a bug-infested cage with only a slit for light." After three weeks in solitary and five months in prison, Gilsan became a star witness for the prosecution.

All four of the Merrill Lynch executives were found guilty of conspiracy and wire fraud, with one of them also convicted of perjury and obstruction of justice. Their appeal to the Fifth Circuit Court and the emergence, years later, of the exculpatory evidence the task force had all along provides much of the drama in Powell's book and gives further credence to its title.

Bagging a Senator

Matthew Friedrich, former head of the Enron Task Force, was in command of the criminal division of the U.S. Justice Department when the Public Integrity (PIN) Section began its "Polar Pen" investigation into allegations of public corruption in Alaska. Knowing a publicity-rich opportunity when he saw one, Friedrich took over the PIN investigation of Alaska's popular Senator Ted Stevens, a 40-year incumbent and the longest serving Republican in U.S. Senate history. Stevens was a candidate for reelection in 2008 when, just four weeks before the September primary, Friedrich held a press conference to announce a grand jury indictment. The influential senator was accused of the felony offense of accepting gifts without reporting them to the Senate Ethics Committee. VECO Corporation founder and CEO Bill Allen testified the company did $250,000 worth of renovations on Stevens' Gridwood Alaska home, but billed the senator for only $165,000. A handwritten note from Stevens, requesting the bills for the remainder of the work, was dismissed by the prosecution as a mere "cover" to conceal a gift of

$85,000 from a wealthy constituent.

The Washington, D.C., jury returned a guilty verdict on October 27, 2008. Now a convicted felon, Stevens lost the election a week later to Democrat Mark Begich. The verdict began unraveling nearly two months later, however, when a young FBI agent on the Stevens case filed a complaint with the Justice Department's Office of Professional Responsibility. Agent Chad Joy's charges included an inappropriate relationship between Allen and Mary Beth Kepner, the FBI's lead agent on the case. He also revealed that prosecutor Nick Marsh sent key witness Rocky Williams back home to Alaska, ostensibly for health reasons, without telling defense lawyers. Williams, VECO's lead employee on the remodeling project, had been subpoenaed to testify for the defense. Prosecutors kept Joy's complaint under wraps, Powell tells us, before disclosing it to the defense a week after the deadline had passed for filing post-trial motions.

In February 2009, U.S. District Court Judge Emmett Sullivan held three members of the prosecution team in civil contempt for withholding evidence from the defense. A new team of Justice Department attorneys, appointed to examine the files, made a startling discovery in notes from interviews with Bill Allen before the indictment came down. Prosecutors had the VECO chief on the stand testifying to $250,000 of repairs, though the notes indicated he had told them months earlier that the work was worth no more than $80,000 — less than half of what Stevens had paid.

The revelations, like the indictment of Stevens, were a political bombshell. Responding to the negative publicity, Eric Holder, then the new attorney general, announced he would do what everyone knew the trial judge was about to do anyway: He would dismiss the case against Stevens. At a hearing on that motion, an angry Judge Sullivan declared: "In my 25 years on the bench, I've never seen anything approaching the mishandling and misconduct that I've seen in this case.… Whether you are a public official, a private citizen or a Guantanamo Bay detainee, the prosecution, indeed the United States government, must produce exculpatory evidence so that justice *shall* be done."

In the years since, Powell contends, little has changed at what she labels in a chapter heading, the "Department of *In*Justice." Despite Holder's promise to clean up the mishandling of prosecutions, key figures involved in the suppression of evidence in the cases Powell describes have not only been spared retribution, but have either been promoted within the government or have moved on to lofty positions in prestigious law firms.

Senator Stevens died in a plane crash in 2010. Alaskan Senator Lisa Murkowski (R), is the lead sponsor of the Fairness in the Disclosure of Evidence Act, a bill to establish in law the Brady rule announced by the Supreme Court more than half a century ago. Powell encourages support for the measure, but adds it's not enough to stop what Judge Kozinski has called "an epidemic of Brady violations abroad in the land." Powell's eye-opening account should awaken both the general public and the legal profession to the dangers to life and liberty when government lawyers let the pressure to win at all costs and the desire for career advancement compromise the meaning of justice.

"Unless and until these prosecutors are convicted in the court of public opinion, or disbarred," writes Powell, "these very powerful and politically connected lawyers are licensed to lie."

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