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D.C. hearing still unscheduled on Swartz

David Frank

In the wake of the **Aaron Swartz** suicide, the U.S. House Committee on Oversight and Government Reform was expected to ask tough questions about the way U.S. Attorney Carmen M. Ortiz's office handled the case.

Swartz, a 26-year-old Internet activist, killed himself on Jan. 11, two months before he was scheduled to go on trial on charges that he illegally downloaded millions of academic documents from an MIT computer.

When U.S. Rep. Darrell Issa, who chairs the oversight committee, accused Ortiz of engaging in an overzealous prosecution, it was expected that a hearing date would be scheduled soon. However, there is still no word on a date.

Becca Watkins, deputy communications director for the committee, said only the following week's schedule is publicly available and that the Swartz matter is not included on next week's agenda. She would not comment on when or if she expects the Swartz hearing to occur.

She also would not say whether Ortiz will be called to testify.

---- INDEX REFERENCES ---

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Massachusetts Lawyers Weekly

February 14, 2013

U.S. Attorney Carmen M. Ortiz under fire

David E. Frank
David Boeri

Less than four years into her tenure as U.S. attorney, Carmen M. Ortiz has found herself under the uncomfortable lens of a national microscope.

Ortiz's performance and fitness for the job are being questioned by a growing list of critics, which now includes congressmen, judges, lawyers and former federal prosecutors.

Her reversal of fortune came hard on the heels of the Jan. 11 suicide of an Internet activist. **Aaron Swartz's** death - which occurred two months before the 26-year-old was due to go on trial on charges that he illegally downloaded millions of academic documents from an MIT computer - created a firestorm that prompted more than 52,000 people to sign a White House petition calling for Ortiz's ouster.

It also led members of the House Judiciary Committee to accuse Ortiz of prosecuting a "ridiculous and trumped up" case.

Sometime in the next few weeks, Ortiz is expected to go before the House Committee on Oversight and Government Reform to answer tough questions about the way her office handled the Swartz case, a prosecution that has already done much to tarnish the image of the woman The Boston Globe named its "Bostonian of the Year" in 2011.

That honor, based in large part on the public corruption convictions of Boston City Councilor Chuck Turner and former House Speaker Salvatore F. DiMasi, raised her public profile to the point that she was rumored to be a possible contender for U.S. Senate or governor of Massachusetts.

Then Swartz hanged himself in his Brooklyn, N.Y., apartment.

In a meeting with staffers just days later, Ortiz said it had been the worst week of her life, according to several sources.

But for all the publicity surrounding the Swartz matter, a number of lesser-known cases handled during Ortiz's reign have fallen under the radar. An investigation conducted jointly by Lawyers Weekly and WBUR has found other prosecutions that parallel the Swartz case and that Ortiz's critics say raise similar concerns about her hands-off leadership style, overzealousness, judgment, and use of discretion at the grand jury and trial levels.

"My concern with Carmen is that she is letting the assistants run her as opposed to her running the assistants," said Tracy A. Miner, who chairs the white-collar defense group at Mintz, Levin, Cohn, Ferris, Glovsky & Popeo in Boston.

"It's her responsibility to make the final call on whether to file a charge, because she was appointed and she is the ultimate decision-maker in that office," Miner added. "She should not be simply delegating that authority. And I don't think there is any question that that's happening more with her than [her predecessors]."

In a Feb. 13 interview, Ortiz responded to the criticism against her and the office she runs, though she declined to answer questions about the Swartz prosecution because of the upcoming congressional hearing.

She addressed head-on the remarks by Miner, noting that she has met one-on-one with her to discuss some of her cases.

"The fact that Tracy would say that the AUSAs are running amok or running me, I find that offensive and … a bit preposterous," she said. "And while I like to run this office as a team, I think people respect my authority and everyone knows that when I need to make a decision, I make the decision."

Michael J. Sullivan, who preceded Ortiz as U.S. attorney, said criticism about her leadership style does not match up with the Ortiz who worked under him as an assistant for eight years.

"Carmen Ortiz is no shrinking violet," said Sullivan, who now practices in Boston. "I think she can stand up to the best of them in that office … but I'm just not close enough to the office to opine whether or not that is happening."

Over the past few years, judges have come down on Ortiz's prosecutors repeatedly, either by granting Rule 29 motions for acquittals or issuing opinions that are highly critical of the conduct of the U.S. Attorney's Office. (See sidebar below.)

For lawyers, the trend raises serious and troubling questions.

"Maybe it's a coincidental bubble of bad results, but this pattern of cases, I think, would raise a question in most anyone's mind about whether it's really time to do some inventorying of what the office is all about and about the quality of the product coming out of there," said Springfield lawyer John P. Pucci, an AUSA from 1984 to 1994, which included a four-year stint as a supervisor.

Pucci, who served on the selection committee that recommended Ortiz for the post, said it is fair to hold her feet to the fire.

"She sought the position. She sought the power. And with it comes the responsibility," he said

Ortiz, meanwhile, disputes that her office has been on the losing end of an unusual number of Rule 29 motions and called the sample of cases reviewed for this story too small.

"We do hundreds and hundreds of cases. We indict over 400 cases a year, and then we have all the pending cases in the pipeline," she said. "To tell me that, in these handful of cases that resulted differently, considering the hundreds of cases that we handle, I don't see that as a real pattern."

John Nelson

Tracy Miner was not always an Ortiz critic. Like Pucci, she served on the 12-lawyer selection committee appointed by U.S. Sen. Edward M. Kennedy that recommended Ortiz as one of three finalists for the job.

But Miner said Ortiz's run as U.S. attorney has proven to be a "disappointment" due in part to her lack of prior supervisory experience as an AUSA and Middlesex County prosecutor.

"She had a good reputation as a line agent, but it didn't translate up," Miner said. "Carmen does not make independent decisions."

A former federal prosecutor who worked alongside Ortiz for several years and did not want to be identified for fear of reprisal said Miner's assessment is spot on.

"She is totally hands off and defers to her staffers more than any other U.S. attorney I have seen," the lawyer said of Ortiz. "There are some [AUSAs] who have been in the office for a long time who have developed these little fiefdoms and are basically able to push her around. That's just wrong for a whole host of reasons."

One of those reasons, according to Miner, is that line prosecutors have an incentive to return indictments to keep their numbers up and often lack perspective when assessing the strengths and weaknesses of their own cases. It is the job of the U.S. attorney and her hand-picked supervisors to question the decisions of the AUSAs and to set the tone for the office.

"You can ruin someone's life by just charging them," Miner said. "Was there a gain to the defendant or a loss to the government? Is this a crime society cares about? Not all crimes are created equal."

It was precisely that judgment Miner found lacking in the case of one of her clients, John Nelson. Ortiz's office charged Nelson, a lawyer, with 23 counts of wire fraud and six counts of unlawful monetary transactions in 2010.

"There was no question that fraud was going on, and mortgage fraud is something we should go after," Miner said. "But instead of taking the hard case against banks, [the U.S. Attorney's Office] tried calling the banks the victims and they picked the closing attorney" to indict.

It was clear from the documents that the prosecution against Nelson could not be supported, according to Miner. But she said speaking with the prosecutors in the case was like talking "to a wall" - a phrase a number of others interviewed for this story (including some of the lawyers involved in the Swartz matter) used to describe the experience of dealing with Ortiz's office.

The Nelson case went to trial last September, with the Quincy practitioner facing the possibility of a lengthy prison sentence.

During cross-examination, Miner asked the government's cooperating witness to identify the other participants involved in the alleged scheme, by first and last name.

"He wasn't going to rat on his friends. He told me in front of the jury: 'That's my world, honey,'" Miner recounted. "I looked at the jury and thought: You know what? They're not going to believe a word this man says."

Miner never got to find out what the jurors believed. Before the case reached them, U.S. District Court Judge Joseph L. Tauro granted a rare Rule 29 motion for acquittal. What made the ruling even more surprising was that it was based on a credibility finding, with Tauro concluding that no rational jury could believe the witness.

"For a judge to say the witnesses are so bad no one can believe them is extraordinary," Miner said. "That's the only case I've ever seen."

Ortiz said Miner's recollection of the case is off and that Tauro never specified his grounds for granting the motion.

Regardless, the notion that a prosecutor would spend nearly two years preparing a case for trial and still put a witness like that on the stand is mind boggling, said Pucci, a self-described "very close observer" of the U.S. Attorney's Office for more than 25 years.

"Part of the preparation is anticipating those questions, putting them to the witness, getting the answers, and understanding how they play out and fit into your case," Pucci said. "If the witness in prep won't answer the questions, you've got a significant problem on your hands, and you got to solve it. But the solution isn't to go to trial and let him get on the stand and refuse to testify. That's not justice, and that's not the answer to that problem."

Stryker Biotech

Like the Nelson case, the 2012 prosecution of Stryker Biotech raised questions about trial prep at the U.S. Attorney's Office.

The government alleged that Stryker, a Hopkinton-based medical device company, and several of its salesmen had defrauded seven surgeons.

Stryker's lawyer, Brien T. O'Connor of Ropes & Gray in Boston, told jurors in his opening last January that the government's legal team had committed a "gross injustice" by failing to interview even one of the doctors prior to trial.

"Ladies and gentlemen, they may not have talked to [them], but we did," O'Connor said at the start of what was expected to be a six-week trial. "And because of that, you're going to get to hear [their] side of the story."

It never got to that point.

In a case that is still being talked about by members of the state's tightly knit federal criminal defense bar, the trial fell apart the day after O'Connor's opening. Susan G. Winkler, chief of Ortiz's Health Care Fraud Division at the time, dismissed all but one misdemeanor count against the company.

O'Connor, a former federal prosecutor himself, declined to comment for this story, but he told Lawyers Weekly last year that the case was unlike any other.

"I honestly never expect to see what happened here ever happen again in my lifetime," he said. "You had a case that had been worked up for over three years by the government, where there had been a ton of back and forth over every little detail. Yet it all came crashing down right at the start, in part because the prosecutors left themselves open and very vulnerable by not doing their homework."

Two months later, Winkler was replaced as chief. An internal email sent to Ortiz's prosecutors stated: "After seven remarkably successful years as chief of the health care fraud unit, Susan Winker has decided to return to what she loves best about her work here. Prosecuting complex, challenging cases as a line AUSA."

Northeastern University School of Law Professor Daniel S. Medwed said it is shocking that a federal case could get out of the grand jury, let alone go to trial, without the prosecutor speaking to the alleged victims. The episode raises concerns about whether there are adequate checks and balances in the office, he added, something many critics of the Swartz prosecution noted as well.

"One of the jokes in New York is that they would indict a ham sandwich," Medwed said. "Well, here in Massachusetts, it seems a federal jury doesn't even need the protein. It seems it would take only a couple of loaves of bread, given how flimsy and un-nutritious these cases were."

Ortiz said that when the Stryker case was brought to her attention, she acted quickly to rectify the matter - a point on which many of the defense lawyers involved in the case agreed.

"I made what I thought was a very difficult decision, but a fair and right decision, which was to dismiss the charges,"

she said. "I could have [said], and I think others in my seat would not have been wrong to say, 'Let the jury decide.'"

Lauren Stevens

Before Stryker Biotech, there was Lauren Stevens, an in-house attorney for GlaxoSmithKline accused of obstructing a Food and Drug Administration inquiry into whether the company improperly introduced an off-label drug into interstate commerce.

Ortiz's office alleged that Stevens, who was represented by O'Connor, made false statements and withheld information in her dealings with the FDA.

The case against Stevens was initially dismissed based on an improper instruction provided to the grand jury. Ortiz's lawyers responded by re-indicting and moving for trial in Maryland.

But in a strongly worded decision, U.S. District Court Judge Roger W. Titus granted a Rule 29 motion, concluding that Stevens never should have been charged. Titus added that attorney-client privileged documents turned over by a magistrate judge in Boston were improperly provided to the prosecution.

"I take my responsibility seriously," the Maryland judge said. "I practiced law for a long time and made a number of Rule 29 motions. … In my seven and a half years as a jurist I have never granted one. There is, however, always a first."

Ortiz said her office knew the case was challenging but has no regrets in bringing it.

"We felt that, given this was a lawyer in the company who had given false information, ... we should bring this," she said. "I think that case should have gone to the jury, and then we would have had a better understanding as to what would've happened in that proceeding."

But Stetson University Law Professor Ellen S. Podgor, who has written about the Stevens case, said Ortiz's decision to go after an in-house lawyer for something short of a large-scale fraud was concerning.

"This case took everybody aback in the sense that why were they prosecuting this and going after a corporate counsel?" she said. "I considered it to be something like a discovery violation that should be resolved in the civil arena."

Solomon L. Wisenberg, a Washington, D.C., lawyer who served as an independent counsel in the Whitewater/Lewinsky investigation, said the Stevens case caught his attention when he learned that U.S. Attorney Rod J. Rosenstein in Maryland refused to sign the indictment.

"It's Massachusetts attorneys, but they are bringing it in Maryland for whatever reason," Wisenberg said. "And for the U.S. attorney in Maryland, who is extremely well respected, to not sign it said quite a bit to me."

A Rosenstein spokeswoman said the office had nothing to do with the Stevens case and referred requests for comment to the U.S. Department of Justice. A DOJ spokesman declined to confirm whether Rosenstein refused to sign the indictment.

Wisenberg, a former chief of the Financial Institution and Health Care Fraud Unit in the U.S. Attorney's Office for the Western District of Texas, said part of Rosenstein's hesitation stemmed from the fact that Stevens is a lawyer who was operating on the advice of counsel and providing information to the government on a voluntary basis, not under subpoena.

"Those were signs that should have given somebody pause that was thinking of indicting her, that this was not a winner of a case," Wisenberg said. "The fact that the powers that be in Massachusetts didn't arrive at that conclusion is quite telling, particularly in light of the questions being raised in Swartz."

David Boeri is a Senior Reporter for WBUR.

Sidebar: U.S. Attorney's Office takes heat from bench

For prosecutors, losing a Rule 29 motion for acquittal is like a baseball player hitting into a triple play.

But U.S. Attorney Carmen M. Ortiz and her team of prosecutors have not only been on the losing end of a striking number of such motions, they also have the dubious distinction of being hammered in some harshly written opinions from the federal judiciary.

Just days after Ortiz was called into question for her handling of the **Aaron Swartz** case, U.S. Magistrate Judge Judith G. Dein denied a government bid to seize a Tewksbury motel under the Civil Asset Forfeiture Reform Act.

In ruling in favor of the motel, Dein found that prosecutors had failed to present sufficient proof to meet their burden. Then she went on to accuse Ortiz's lawyers of "stretching the evidence" and engaging in a "gross exaggeration" of the case.

George W. Skogstrom Jr. of Braintree, one of the lawyers for the motel, faults the prosecution for the unwavering position it took in the case.

"Regardless of the evidence we came up with or how many times, they just seemed to plow forward," he said. "They just wouldn't back off. … This case should have ended shortly after it was brought. … These assistant U.S. attorneys come to work and they go home to their families and they just don't think of the consequences of their actions on the people. The question we kept asking is: 'How can they proceed?' The banality of evil is one reason why they would proceed."

Dein's 59-page decision pales next to U.S. District Court Judge Douglas P. Woodlock's ruling in the case of Lorraine Henderson.

An official with the U.S. Customs and Border Protection, Henderson was charged in 2008 by then-U.S. Attorney Michael J. Sullivan for allegedly hiring an illegal alien to clean her townhouse. The government accused Henderson of encouraging and inducing the Brazilian woman to remain in the U.S.

"She's supposed to be deporting aliens, not hiring them," the head of Ortiz's Public Corruption Unit told reporters at the time.

In building its case against Henderson, the government made it clear to the Brazilian woman that it could deport her, offering her the opportunity to stay in the country if she agreed to wear a recording device to try to ensnare Henderson.

Instructed to tell Henderson she was in the country illegally, the cleaning lady went on to ask Henderson what she should do.

In the secretly recorded conversation, Henderson allegedly said: "If you leave, they won't let you back. … You can't leave, don't leave."

Henderson's Boston lawyer, Francis J. DiMento, said at the time that "[s]imply to tell the alien, 'Don't leave the country until you've filed your application to become legal,' is not an act; it's simply verbiage that doesn't amount to a crime."

Nevertheless, a jury convicted Henderson in March 2010.

Woodlock scorched the prosecution for trying to crush the defendant in what amounted to a pedestrian crime.

Last October, he granted a motion for new trial. Calling the case "overkill," Woodlock said he was puzzled by the "dogged consistency" with which the prosecution pursued the matter.

The judge noted that he received a "highly unusual" letter from one of the jurors after the trial, in which it was suggested that the government had exploited Henderson "for publicity and political reasons" over her lack of prudence in the "hiring of a cleaning lady."

Woodlock found that a parallel misdemeanor provision in the law treats even more significant conduct "as de minimis," not meriting criminal sanctions.

"The Office determined to exercise its considerable discretion … to initiate this unusual prosecution under a felony statute designed to address conduct so serious that it provides a predicate for application of the blunderbuss Racketeering Influenced and Corrupt Organizations ('RICO') statute," he wrote. "The current administration of the [USAO] appears content to permit the case to continue."

Ortiz declined to discuss the Henderson case because it is pending before Woodlock. But in an adversarial system, she

said, there are going to be times when lawyers and judges do not see eye to eye.

Northeastern University School of Law Professor Daniel S. Medwed said the Dein and Woodlock rulings are noteworthy.

"It's incredibly striking to have seasoned, reasonable judges say that 'I have never seen this' and go so far as to put it in a public document," he said. "It does suggest where there is smoke there is fire."

Two years prior to the Henderson case, U.S. District Court Judge Nancy Gertner had harsh words of her own for Ortiz's lawyers.

In granting a motion for new trial in the arson suit of Jimmy Hebshie, Gertner found that the prosecution put on "over the top" evidence that went unchallenged by ineffective counsel for the defense.

Even after Gertner issued her order in November 2010, it was not until June 2011 that Ortiz agreed to drop the case, said Hebshie's appellate counsel, Jeanne M. Kempthorne, who worked with Ortiz in the U.S. Attorney's Office for several years.

"It was just horrible," Kempthorne said. "It took the government six months after Gertner ruled to give up on their retrial and appeal. They threw in the towel only when I threw at them the Speedy Trial Act."

The prosecution's conduct was so appalling that Ortiz should apologize to Hebshie, Kempthorne added.

"When we were about to begin the evidentiary hearings on the motion for new trial, I wrote an email to the prosecutor and said, 'You know, I've never done this before, but are you guys really going through with this?'"

The email fell on deaf ears, the Salem lawyer said. The case plodded along for another year while her client remained behind bars.

"[Ortiz] is supposed to be the adult in charge, and she wasn't in that case," Kempthorne said. "I have been appalled, and I feel that I owe it to Jimmy Hebshie to say so. This isn't about friendship. This is about Jimmy Hebshie and what was done to him."

Ortiz said six months is hardly an unreasonable amount of time for the government to make a decision. And she attributed Kempthorne's comments to a zealous advocate defending her client.

"I believe I did the right thing," Ortiz said. "She should be applauding us."

---- INDEX REFERENCES ---

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Massachusetts Lawyers Weekly

February 12, 2013

Uncertainty remains after U.S. Supreme Court passes on CFAA case

Correy E. Stephenson

The U.S. Supreme Court's denial of certiorari in a Computer Fraud and Abuse Act case leaves employment lawyers in the 1st Circuit and beyond with continuing uncertainty.

Employers frequently add a CFAA claim to suits against former employees that take confidential information from company computer systems.

But federal courts across the country have split on just how broadly the act should be interpreted.

The CFAA provides for criminal and civil penalties against an employee who "knowingly and with the intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value."

The 1st U.S. Circuit Court of Appeals has granted employers the right to sue under the act when employees have authorized access but use it for non-job-related purposes, while others, such as the 9th Circuit, have narrowly interpreted the law to require an actual hacking of the computer system.

Raising the hopes of employment lawyers nationwide, a 4th Circuit case sought certiorari before the Supreme Court, hoping to end the circuit split.

But in January, the justices denied review, leaving employment lawyers with continuing uncertainty.

"This is a big deal for employment lawyers," said Brian P. Bialas of Foley Hoag in Boston.

Until the Supreme Court agrees to decide the issue, Bialas added, "the ball is definitely in the employer's court in the

1st Circuit."

Circuit split widens

For multiple reasons, the CFAA is a valuable tool for attorneys representing employers. In addition to establishing federal jurisdiction, the CFAA lets victorious plaintiffs recover damages such as the cost of hiring a computer forensic firm to investigate the employee's activities, Bialas said.

And the act provides for injunctive relief, which can allow employers to stop a former worker from taking information to a new employer or using it for his own benefit.

The law comes into play when an employee leaves a job or is terminated and attempts to take information with him.

While an employee typically is authorized to access company documents on an internal document management system, "if she does so not in the course of her employment but rather for the purpose of viewing information that might be helpful for her next employer or some other improper purpose, then [the CFAA] can be triggered," said John R. Bauer, a partner at Robinson & Cole in Boston.

For example, Bauer said, an employer would consider financial information, a formula or a client list confidential.

"Even though the person has literal authorized access to the documents, the access is used not for the purpose of fulfilling job responsibilities," he said, adding that an alleged breach of the company's computer use policy can - in some jurisdictions - provide the basis for a CFAA claim.

In the 1st Circuit, an employer has been allowed to bring suit against a former employee for accessing data in violation of a confidentiality agreement. The decision in stands with similar decisions from the 5th, 8th and 11th circuits, where courts have also allowed employers to allege violations of the CFAA when the employee breached a confidentiality or computer use agreement.

A case from the 9th Circuit stands in stark contrast.

In an en banc decision issued last year, a criminal action against an employee who had authorization to access his employer's database but used his log-in credentials to download source lists, names and contact information to start his own business was dismissed.

Even though the employee in U.S. v. Nosal violated a company policy that prohibited the disclosure of confidential information, the panel held that the statute did not apply. The CFAA requires unauthorized access to computer data or computer hacking, the 9th Circuit said.

Last July, the 4th Circuit agreed, holding in WEC Carolina Energy Solutions LLC v. Miller that the CFAA does not impose liability on authorized workers who breach computer user policies.

Noting the widening circuit split, the company petitioned the high court for review, which was declined by the justices in January.

Employers: Establish a policy

The Supreme Court's denial of cert leaves attorneys representing employers in Massachusetts standing on solid ground.

To protect a company, make sure to have a data or computer use policy in place, Bialas advised, and "include a provision about confidentiality to use as a basis for a CFAA claim."

However, the jurisdictional split "creates a problem for employers who have employees in multiple states," Bauer said.

The employer "might be able to bring an action against an employee in one state but can't take action against an employee in another state for doing the exact same thing," he said.

For now, employees - and their new employers - face potential lawsuits with the existing 1st Circuit CFAA caselaw.

But attorneys agreed that the circuit split will be resolved, whether by the Supreme Court or via an update to the legislation.

The CFAA has received the attention of federal lawmakers recently after the suicide of **Aaron Swartz**, a computer prodigy who had been criminally charged under the law. With the statute under consideration, a tweak to clarify the breadth of its application in civil employment suits is possible, Bialas noted.

If not, "the Supreme Court would certainly be the easiest way for a lot of people to get some clarity," he added hopefully.

---- INDEX REFERENCES ---

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Massachusetts Lawyers Weekly

January 24, 2013

Commentary: A lesson in the wake of the Swartz tragedy?

Marsha V. Kazarosian

Aaron Swartz believed he was fighting an unjust law, and so he fought that law with an act of disobedience.

Both Henry David Thoreau and Dr. Martin Luther King felt the same way. Unfortunately, Swartz was not emotionally equipped to handle what both Thoreau and Dr. King were ready, willing and able to accept, and that was the consequences of his actions.

Now it may be hard for some to justify the specter of 35 years in prison for Swartz's alleged actions. No one was killed, and even the "victim" of his alleged crime, academic publisher JSTOR, apparently didn't want to press charges.

On the other hand, some would say that the law is the law, and upholding the law is the job of the U.S. attorney.

But despite the understandable outrage at what may appear to be the heavy-handed use of the great prosecutorial powers of the U.S. Attorneys' Office, to blame Carmen Ortiz for Swartz's death is almost as overreaching as what some would view as the unfortunate prosecution of the matter.

But there may be a lesson in the wake of this tragedy.

Prosecutors have a great responsibility, but they also wield a great and awesome power. With great power and responsibility should also come great compassion, and that is sometimes lost in the prosecutorial message.

There should always be room for compassion, there should always be room for understanding, and discretion should always be exercised with humanity. That is true even for prosecutors who believe that certain measures are necessary to be tough on crime. We are all human beings, and we were given the ability to find the balance in things. We can think, we can discern, we can distinguish.

Perhaps then, in keeping with those very ideals, the U.S. attorney's rationale is entitled to further exploration, instead of angry denouncement. We are not privy to it, just as we are not privy to what Swartz considered with his counsel. That makes us uniquely unequipped to rush to judgment.

But regardless of where this leads us, there can be no dispute that to wield a law blindly like a sword, with little consideration of circumstances or repercussions, demeans us all.

Carmen Ortiz is not to blame for **Aaron Swartz's** death. But we are all to blame if we condone prosecution and reaction, without compassion. It is justice that is supposed to be blind, not the people who uphold it.

---- INDEX REFERENCES ---

COMPANY: JSTOR

NEWS SUBJECT: (Crime (1CR87); Legal (1LE33); Violent Crime (1VI27); Social Issues (1SO05); Death Penalty (1DE04); Murder & Manslaughter (1MU48); Government Litigation (1GO18); Criminal Law (1CR79))

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Commentary: The Swartz suicide and the sick culture of the DOJ

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Some lawyers are joking when they refer to the Moakley Courthouse as "the House of Pain." I'm not.

The ill-considered prosecution leading to the suicide of computer prodigy **Aaron Swartz** is the most recent in a long line of abusive prosecutions coming out of the U.S. Attorney's Office in Boston, representing a disastrous culture shift. It sadly reflects what's happened to the federal criminal courts, not only in Massachusetts but across the country.

It's difficult for lawyers to step back and view the larger picture of the unflattering system from which we derive our status and our living. But we have an ethical obligation to criticize the legal system when warranted.

Who else, after all, knows as much about where the proverbial bodies are buried and is in as good a position to tell truth to power as members of the independent bar?

Yet the palpable injustices flowing regularly out of the federal criminal courts have by and large escaped the critical scrutiny of the lawyers who are in the best position to say something. And judges tend not to recognize what to outsiders are serious flaws, because the system touts itself as the best and fairest in the world.

Since the mid-1980s, a proliferation of vague and overlapping federal criminal statutes has given federal prosecutors the ability to indict, and convict, virtually anyone unfortunate enough to come within their sights. And sentencing guidelines confer yet additional power on prosecutors, who have the discretion to pick and choose from statutes covering the same behavior.

This dangerous state of affairs has resulted in countless miscarriages of justice, many of which aren't recognized as such until long after unfairly incarcerated defendants have served "boxcar-length" sentences.

Aaron Swartz was a victim of this system run amok. He was indicted under the Computer Fraud and Abuse Act, a notoriously broad statute enacted by Congress seemingly to criminalize any use of a computer to do something that could be deemed bad.

As Harvard Law School Internet scholar Lawrence Lessig has written for The Atlantic: "For 25 years, the CFAA has given federal prosecutors almost unbridled discretion to bully practically anyone using a computer network in ways the government doesn't like."

Swartz believed that information on the Internet should be free to the extent possible. He entered the site operated by JSTOR, a repository of millions of pages of academic articles available for sale, and downloaded a huge cache. He did not sell any, and while it remains unclear exactly how or even if he intended to make his "information-should-be-free" point, no one who knew Swartz, not even the government, thought he was in it to make money.

Therefore, JSTOR insisted that criminal charges not be brought.

U.S. Attorney Carmen Ortiz obscured that point when announcing the indictment: "Stealing is stealing, whether you use a computer command or a crowbar, whether you take documents, data or dollars," she said, failing to recognize the most basic fact: that Swartz neither deprived the owners of the articles of their property nor made a penny from his caper.

(Ironically, shortly before Swartz's suicide, JSTOR recognized the intellectual and moral force of the prodigy's point of view, and it announced that thenceforth it would provide a portion of its articles free of charge as a public service. The organization's very existence, after all, depends heavily on public funding. Swartz had made his point, but he paid a heavy price, because Ortiz's office could not discern the difference between Swartz's victimless actions and the use of a crowbar to steal for profit.)

Swartz was unwilling to plead guilty. He did not view himself as a felon. Indeed, many experts on the CFAA have powerfully argued that he did not violate any reasonable interpretation of the statute, and defense counsel had a highly respected electronics expert prepared to testify why that was so.

But the government kept bludgeoning Swartz by threatening him with dire consequences in the absence of a plea. Hence, while the original indictment contained four counts with a maximum sentence of 35 years, a superseding indictment brought just four months before his suicide upped the ante to 13 counts.

Of course, the government, which told Swartz's lawyers that prosecutors would recommend seven to eight years in the event of a conviction after trial, announced its willingness to recommend "only" six months if he would plead. With such a deal, the government would avoid the possibility of an embarrassing loss.

But trial was risky for Swartz, as well as expensive. (Swartz's partner, Taren Stinebrickner-Kauffman, reported that he was very concerned that the trial would bankrupt his family.)

While it is impossible to know the reasons for Swartz's suicide, one would have to be naïve or dishonest to fail to recognize the role played by the pressures ratcheted up by Ortiz's office.

Such pressures help explain why fewer than 5 percent of federal criminal cases in Massachusetts are taken to jury trials, a phenomenon that has concerned U.S. District Court Judge William Young, who observed in Bertoff v. United States of America that "[e]vidence of sentencing disparity visited on those who exercise their Sixth Amendment right to trial by jury is today stark, brutal, and incontrovertible … ."

After days of silence in the face of mounting criticism and a petition to Washington that, as of this writing, gathered 46,844 signatures seeking her dismissal, Ortiz finally responded. Her initial non-responsive statement said: "We want to respect the privacy of the family and do not feel it is appropriate to comment on the case at this time."

When that evasion provoked widespread anger and derision, Ortiz issued a statement on Jan. 16 admitting that "there was no evidence against Mr. Swartz indicating that he committed his acts for personal gain." She recognized that his alleged conduct "did not warrant the severe punishments authorized by Congress." Yet she defended her office's having brought a blunderbuss indictment.

It seems never to have occurred to Ortiz, nor to the career prosecutors in her office in charge of the prosecution, Steven Heymann and Scott Garland, that there is something wrong with overcharging, and then raising the ante, merely to wring a guilty plea to a dubious statute.

Nor does it occur generally to federal prosecutors that there's something wrong with bringing prosecutions so complex that they are guaranteed to bankrupt all but the wealthiest.

These tactics have become so normal within the Department of Justice that few who operate within the bowels of this increasingly corrupt system can even see why it is corrupt. Even most journalists, who are supposedly there to tell truth to power, no longer see what's wrong and even play cheerleader.

Perhaps most disturbing was the prosecutorial callousness reported by Boston Globe columnist and non-cheerleader Kevin Cullen. One of Swartz's earlier lawyers told Cullen: "I told Heymann the kid was a suicide risk. His reaction was a standard reaction in that office, not unique to Steve. He said, 'Fine, we'll lock him up.'" The lawyer concluded: "I'm saying they were aware of the risk, and they were heedless."

Ortiz has been mentioned as a candidate for governor or even the U.S. Senate. That political career is likely over before it begins. Many who have seen through her callous behavior are computer literate and know how to spread a message.

However, the culture of the U.S. Attorney's Office will continue undisturbed - unless the bar refuses to tolerate that the federal courthouse has become a place of torment rather than a palace of justice.

An ironic postscript to the Swartz tragedy: MIT and the U.S. Secret Service conducted the video surveillance of the closet at MIT that discovered Swartz's downloading. He was charged by the Middlesex County District Attorney's Office with breaking and entering in the daytime. Lawyers familiar with the case have told me that it was anticipated that the state charge would be continued without a finding, with Swartz duly admonished and then returned to civil society to continue his pioneering electronic work in a less legally questionable manner. Tragedy intervened when Ortiz's office took over the case to send "a message."

In an earlier era, federal authorities reacted more as state authorities still do. Tim Wu reports in The New Yorker ("How the Legal System Failed **Aaron Swartz** - and Us," Jan. 14) that one can compare Swartz "to two other eccentric geniuses, Steve Jobs and Steve Wozniak."

In the 1970s, Jobs and Wozniak "hacked A.T. & T.'s telephone system to make free long-distance calls, and actually sold the illegal devices (blue boxes) to make cash."

When Jobs and Wozniak tired of making free phone calls, they built a computer, and the rest is history.

"The great ones almost always operate at the edge," Wu concluded.

But with the DOJ unable to differentiate real criminals from overzealous bright kids, we are incarcerating, if not killing, our national future. The bar should be in the forefront of warning Congress, the news media and the public that the DOJ and the federal courts, in Boston and elsewhere, are out of control.

Harvey Silverglate is a Boston criminal defense lawyer and writer. He is the author, most recently, of "Three Felonies a Day: How the Feds Target the Innocent." updated in paperback in 2011.

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