Judges vs. U.S. Attorneys

As doctors were the first group to stop smoking, judges are the first to recognize that many of the current Wall Street trials are mostly prosecutorial abuse. At least, that's the lesson we draw from the sentences they've been issuing when prosecutors finally get a conviction or, more commonly, a plea bargain.

Prosecutors demanded a jail sentence for Salim "Sandy" Lewis, for example, but New York Federal Judge Mary Johnson Lowe said no. Another federal judge refused to order any punishment under the infamous RICO counts brought against officials of Princeton/Newport. We await learning what Judge Lowe, who also had to sit through three GAF trials, will do with James Sherwin, convicted the third time around. Or how Pierre Leval will punish Robert Freeman for "Your Bunny has a good nose."

The case against Sandy Lewis is a perfect example of the thin gruel federal judges found they were offered by Rudolph Giuliani and his successors. Mr. Lewis's crime essentially was having the wrong motive for arranging the purchase of a stock. In 1986, Mr. Lewis promised to reimburse his broker for any trading losses incurred while buying Fireman's Fund stock the afternoon before a public offering. Mr. Lewis had his broker buy 410,000 shares, which prosecutors said boosted the share price by as much as 12.5 cents, to close at $38 instead of $37⅞.

This tiny price move had no effect on the offering, where the only issue at the underwriters' pricing meeting was the size of the offering, not the price. Fireman's Fund was owned by American Express, Mr. Lewis's sometime business associate. But prosecutors could not find any harmed investor, instead invoking the prosecutorial last refuge of "the integrity of the market."

Why did Mr. Lewis order this trading? Not to make money, he says, but instead to nudge the price up a jot to punish short sellers who were engaging in a now-illegal practice that he had long opposed as unethical. He was a leading critic of the practice of "shorting the syndicate." This is selling a security short knowing you can cover the short sale with stock bought under a scheduled offering. The SEC made shorting the syndicate illegal in 1988, but by then Mr. Lewis had made the fateful decision to take matters into his own hands with the Fireman's Fund transactions.

Mr. Lewis acted out of pique with a practice he opposed; his intention was to *lose* money. He had no reason to think what he did amounted to a crime. In their sentencing letters to Judge Lowe, two former SEC chairmen, Harold Williams and Roderick Hills, said this was at most a technical infraction that should have been dealt with civilly through the SEC's regulatory process, but never prosecuted as a crime. Yet the full weight of the Justice Department was brought on Mr. Lewis to force him into a plea bargain.

The reason this was a criminal case is almost certainly to vindicate earlier plea bargains with Boyd Jefferies and Ivan Boesky. Boesky was a real crook, who traded information about takeovers for cash, bribing insiders to forsake their fiduciary duties. But prosecutors let him continue trading, bargaining a light sentence against information on bigger fish. He fingered broker Jefferies for technical securities violations. Mr. Jefferies followed suit, telling Esquire, "If they're going to bring me down for something like this, I'm going to bring down a lot of other people with me." So Mr. Jefferies took a punishment of community service on the golf links at Aspen, partly in return for fingering Mr. Lewis, who had done his brokerage through Mr. Jefferies.

Confronted with all this, Mr. Lewis agreed to a plea bargain over the advice of his lawyers. Weighing all this Judge Lowe gave Mr. Lewis probation, a fine and the wish, "You should be sentenced in such a way so that your talents will not be wasted." This came too late to prevent the forced liquidation of S.B. Lewis & Co., one of Wall Street's more dynamic small firms.

Now, judges are the last line of protection only against cases that never should be brought. They can't always see that justice is done. Poor Lisa Jones, who said she couldn't recall information on trades that may or may not have been a crime, drew 18 months in jail, fully half the sentence of megacrook Boesky. The new federal Sentencing Guidelines create new high-minimum punishments for white-collar cases, which will limit the amount of damage control judges can practice.

Attorney General Thornburgh should notice that the people forced to follow these cases the closest—New York's federal judges—have begun to show their exasperation. He's in charge of the first line of defense, supervising U.S. attorneys to make sure they don't engage in abusive prosecutions.