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Bureaucrats of the Departments of Attorney General and Environmental Quality Attempt to Seize Unbridled Power over a Hapless "Criminal" Citizenry

by

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When Frank Kelley's seemingly eternal tenure as Michigan attorney general (1961-1998) came to a merciful end, knowledgeable observers fervently hoped that his successor would introduce radical changes in a department of state government which had woefully abused the trust of the citizens over many years. Under Kelley the Department of Attorney General had become a powerful, if well camouflaged, protection-racket and political-enforcement machine, wielding influence in Lansing comparable to that which had been exerted in Washington by J. Edgar Hoover's FBI. Kelley's highly publicized investigations, especially of judicial corruption[1] and of alleged consumer fraud[2] and environmental crimes,[3] sacrificed innocent citizens and an occasional high-profile fall-guy while protecting the well-connected from prosecution[4] and fostering the interests of powerful individuals and corporations. In the process Kelley accumulated compromising information which permitted him to extort, blackmail or destroy virtually everyone of political influence in the state.[5]

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1 Presented, in late 1986, with evidence of pervasive judicial corruption, Kelley used the putative suicide of S. Jerome Bronson, a judge on the Michigan Court of Appeals, as justification for closing an investigation which would have implicated numerous judges, prominent attorneys and others involved in the judicial system.

2 An excellent example is an investigation of alleged fraud by auto-transmission repair facilities, undertaken in the mid 1980s after General Motors entered into a consent decree with the Federal Trade Commission. Kelley's investigation was funded and directed by GM in order to mitigate its liabilities by intimidating independent repair shops. Kelley was later sued for libel after he leveled baseless charges against several companies. Although the Court of Appeals would have permitted the suit to go to trial, the Supreme Court held that Kelley's defamatory statements were made in the course of his official duties and that he was thus immune from suit.

3 While ignoring the environmental depredations of firms such as John Runco's Oakland Disposal (which contaminated a lake in Oakland County, while Runco hid his assets to avoid liability) and Anthony Soave's City Management (which assisted in camouflaging Runco's assets and developed a mile-square landfill in a wetland, primarily for Canadian trash), Kelley initiated still-continuing legal action against wetlands-habitat creator Richard Delene, characterizing Delene as the state's "foremost environmental criminal."

4 Despite evidence of entrenched corruption at Michigan Technological University, Kelley refused to initiate an investigation even after the corruption was highlighted in the Detroit Free Press. When forced by several legislators and the state auditor general to authorize a criminal investigation, Kelley terminated the inquiry with prosecutions of two university functionaries for minor misdemeanors, despite evidence of active involvement by high-level political appointees in the defrauding of the university of millions of dollars.

5 In the interest of full disclosure, the present author was a target of Kelley's abusive exercise of power. Instrumental as a university dean in revealing the corruption discussed in the preceding footnote, in 1990 he was elected to the Michigan House of Representatives and successfully forced the initiation of Kelley's investigation. Kelley responded by levying groundless charges of "double-dipping," alleging that the author was paid simultaneously by the legislature and the university. While Kelley failed to press any charges, effectively retracting his allegations, those allegations played a critical role in the author's defeat, by fewer than 100 votes, when he again sought election to the House several years later.

Unfortunately, Kelley's successor, Jennifer Granholm, immediately lauched an ultimately-successful campaign for governor, and she had no time to clean the Agean stable which the office of the attorney general had become. In fact, she appears to have found the Kelley machine, which she kept in place, useful to her gubernatorial quest, and, after her election as governor, she acted to protect that machine from any house-cleaning which her Republican successor, Mike Cox, might attempt.

That the Kelley machine survives and continues to engage with impunity in its founder's abusive practices is evident in an astounding criminal prosecution initiated in 2002.

The Factual Setting

In the late 1990s wildlife biologist and environmental consultant Gregg Stoll acquired a block of property on Gulliver Lake, in the Upper Peninsula's Schoolcraft County. Stoll then went through all of the statutorially-required steps to divide the tract into several individual lakefront lots.

In principle, Stoll might have applied to the Department of Environmental Quality for wetlands permits for the construction of homes on all of the lots, as other property developers have done. However, because the precise wetlands-fill requirements would depend on the specific construction plans of the eventual purchasers of the lots, it was more common, and efficient, to defer the permit applications until the properties were sold. But, before actively marketing the lots Stoll did review the entire development with the DEQ's local wetlands officials.

As the lots were purchased, generally on land- or purchase-contracts contingent on the approval of wetlands permits, Stoll, in his consultant capacity, filed wetland permit applications on behalf of the purchasers. Considering the lots effectively sold, Stoll viewed the purchasers to be the constructive owners of the properties and thus left blank a line on the form requesting the identity of the owner when the property in question was not owned by the applicant.

In the meantime, as a consultant on an entirely unrelated project Stoll had come into conflict the the DEQ's senior wetlands regulator in the Upper Peninsula. Determined to end Stoll's consulting career, the regulator had gone so far as to seek a personal protection order from the Circuit Court in Marquette County, claiming that she felt "threatened" by Stoll. When the Court refused to grant the order, the DEQ field agent informed the developer who had retained Stoll that he would have difficulty obtaining his permit if Stoll continued to be involved in the permit process. The developer terminated Stoll's employment, and the permits were quickly granted.

At about this time, in a meeting to review Stoll's Gulliver Lake applications, the senior regulator announced that she was implementing a new "personal policy" which would end lake-front development in the Upper Peninsula and that all of Stoll's outstanding applications would be denied. The regulator was outraged when Stoll protested the application of this personal policy to the governor's UP representative and asked for an investigation.

His consulting practice in shambles due to the overt animosity of the regulators (which they freely communicated to current and prospective clients) and his lakefront lots unsaleable because of the regulators' announced intention to deny any wetlands permit applications, Stoll filed a civil suit against the regulators. Immediately thereafter the DEQ initiated a criminal investigation of Stoll, focusing on the wetlands permits for which he had applied on behalf of prospective purchasers of his lakefront lots.

After a failed attempt by the Attorney General to have Stoll's civil suit dismissed and only when the AG had to produce for depositions the DEQ employees being sued, criminal charges were filed. Anticipating that he would be charged with a technical misdemeanor violation of the wetlands protection act, Stoll was stunned when he and two lot-purchasers were charged with 14-year felonies under the 1931 uttering and publishing statute, which applies to "[a]ny person who shall utter and publish as true, any false, forged, altered or counterfeit record, deed, instrument or other writing mentioned in" the following list: "any public record, or any certificate, return, or attestation of any clerk of a court, public register, notary public, township clerk, or any other public officer, in relation to any matter wherein such certificate, return, or attestation may be received as legal proof, or any charter, deed, will, testament, bond, writing obligatory, letter of attorney, policy of insurance, bill of lading, bill of exchange, promissory note, or any order, acquittance of discharge for money or other property, or any waiver, release, claim or demand, or any acceptance of a bill of exchange, or indorsement, or assignment of a bill of exchange or promissory note for the payment of money, or any accountable receipt for money, goods, or other property."[6] This charge rested on, and only on, Stoll's failure to identify himself as the arguable owner of the lots for which permits were requested, i.e., on the fact that one line on the application form was left blank.

The prosecuting assistant attorney general [AAG] initially filed the charges in Luce County, in the Upper Peninsula, where the cognizant DEQ field office is located. However, in an act of impermissible forum shopping, under the fig leaf that the applications had been sent to Lansing for assignment to the field office the AAG quickly dismissed the Luce County charges and refiled in Ingham County (Lansing), presumably with the anticipation that he would confront more favorably disposed judges and jurors.[7]

Thus, Stoll found himself facing trial 400 miles from home. Defended by environmental attorneys with little experience in criminal law, Stoll was bound over for trial after a brief preliminary examination. A trial court motion for dismissal was summarily rejected by the judge (who thereupon retired), and the case was set for trial.

Stoll then retained an attorney with substantial criminal experience. Convinced that the charges were improper, the attorney negotiated a "conditional guilty plea" which would permit an immediate review of the charges by the Michigan Court of Appeals. Should the appellate courts uphold the charges, Stoll can withdraw the plea and go to trial before a "jury of his [Lansing] peers" (and risk a 14-year sentence if found guilty.

The Abusrdity of the Charges

It is absurd on its face to charge a person with a crime punishable by 14 years in prison for leaving blank one line on complex bureaucratic form. But, of course, this is an assessment of rationality, not of law.

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6 MCL 750.249, citing MCL 750.248.

7 During Kelley's long tenure as attorney general, it was common knowledge in Lansing that Kelley personally vetted all judicial candidates tacitly endorsed by the Ingham County's Democratic Party (tantamount to election). The deference of that county's judiciary to the attorney general was particularly important to Kelley because of the number of laws which permit action (civil or criminal) to be brought in "the seat of government" (Ingham County) rather than in the county specified by the general venue rules (usually the county in which the offense was committed). The judge to which Stoll's case was initially assigned was no exception.

Even as a matter of law, however, the charges levied against Stoll and his codefendants by the Attorney General are indefensible. Specifically, a number of established precedents and principles of statutory construction would be weakened or jettisoned, including (but not necessarily limited to):

a. "It is a basic rule of statutory construction that a statute specific in language and enacted subsequent to a general statute covering the same subject matter constitutes an exception to the general statute if there appears to be a conflict between the two statutes."[8] While it will be argued that the conduct for which the Stoll defendants are charged does not fall within the purview of "uttering and publishing," even if it did, they should have been charged under under the wetlands protection act: "A person who violates this part [Part 303 of Act 451 of 1994, a recodification of Act 203 of 1979] is guilty of a misdemeanor, punishable by a fine of not more than $2,500.00."[9] Clearly, the wetlands act, adopted in 1994 (or, arguably, 1979) postdates the uttering and publishing statute, enacted in 1931 (the substantive language of which dates back, at least, to 1838).

b. "Where broadly defined words are grouped with terms of specificity, the general words are interpreted as belonging to the same class as the narrowest in the list."[10] Uttering and publishing (MCL 750.249) applies to "[a]ny person who shall utter and publish as true, any false, forged, altered or counterfeit record, deed, instrument or other writing mentioned in" MCL 750.248, specifically "any public record, or any certificate, return, or attestation of any clerk of a court, public register, notary public, township clerk, or any other public officer, in relation to any matter wherein such certificate, return, or attestation may be received as legal proof, or any charter, deed, will, testament, bond, writing obligatory, letter of attorney, policy of insurance, bill of lading, bill of exchange, promissory note, or any order, acquittance of discharge for money or other property, or any waiver, release, claim or demand, or any acceptance of a bill of exchange, or indorsement, or assignment of a bill of exchange or promissory note for the payment of money, or any accountable receipt for money, goods, or other property." In this context, a "public record" cannot be interpreted to mean any public record; rather; all of the enumerated classes of "record, deed, instrument or other writing" relate to items which could be utilized to establish rights (or the discharge of rights) to "money, goods, or other property."

It is in this light that the Michigan Supreme Court observed, "Forgery may be defined as the making of a false document, including a check, with the intent to deceive in a manner which exposes another to loss."[11] If, for the sake of argument, it were admitted that Stoll submitted a "false, forged, altered or counterfeit" application for a wetland permit, this would not "expose another to loss" in the sense of any of the specific instruments identified in MCL 750.248; at

8 People v LaRose, 87 Mich. App. 298 , 274 N.W.2d 45 (1978), citing State Highway Comm'r v Detroit City Controller, 331 Mich 337, 358; 49 NW2d 318 (1951), People v McFadden, 73 Mich App 232; 251 NW2d 297 (1977), People v Bachman, 50 Mich App 682; 213 NW2d 800 (1973), lv den 392 Mich 776 (1974), People v Rodgers, 18 Mich App 37; 170 NW2d 493 (1969).

9 MCL 324.30316(2). The MDEQ rules implementing the wetlands act specifically prohibit "obtaining a permit by misrepresentation or failure to fully disclose relevant facts in the application" (Rule R281.923(7)b), and MCL 324.30316(2) applies to any person "who violates this part" (and its implementing rules), not only to those who violate the specific prohibitions enumerated in MCL 324.30304.

10 People v. Vasquez, 465 Mich. 83, 631 N.W.2d 711 (Mich. 2001), concurring opinion by Kelly citing Sands Appliance Services, Inc v Wilson, 463 Mich 231, 242; 615 NW2d 241 (2000).

11 In the Matter of Loyd, 424 Mich. 514 March 21, 1986, 384 N.W.2d 9, citing .MCL 750.248; MSA 28.445; People v Susalla, 392 Mich 387, 392-393; 220 NW2d 405 (1974).

most it exposes "the people" to some loss of statutorily protected wetland habitat if (and only if) a permit were awarded which would otherwise have been denied, and even this, it is argued below, should not have been the case.

In short, under the doctrine of ejusdem generis ("[o]f the same kind, class, or nature"[12]), a wetlands permit application cannot be interpreted as a "public record" for purposes of the uttering and publishing statute.[13]

c. "Where the language of a statute is obscure or of doubtful meaning, the courts in construing it may, with propriety, recur to the history of the times when it was passed and of the act itself in order to ascertain the reason as well as the meaning of its provisions and it may also consider all conditions and circumstances surrounding its enactment in the light of the general policy of previous legislation on the same subject."[14] Citing the foregoing, the Supreme Court observed: "In their original [1838] form, [the uttering and publishing sections] read essentially the same as they do today. Both statutorily dealt with essentially the same items proscribed by these sections today."[15] While the Court employed this analysis to explicate the differences between those instruments covered by the forgery and uttering and publishing statutes,[16] on the one hand, versus those identified under counterfeiting,[17] on the other, it also serves to distinguish a wetlands permit application from those instruments designated as uttering and publishing. It is difficult to believe that an 1838 legislature could even fathom the proliferation of filings, applications and permits required by contemporary government, much less that it would have intended to classify these modern documents with those which it enumerated under forgery and uttering and publishing and as significantly more heinous than those enumerated under counterfeiting.

d. "[P]enal statutes are to be construed in light of the evil to be cured. In the case of our forgery and uttering and publishing statutes, this evil consists of hindrances and impediments to the free transferability and negotiability of commercial paper and other written instruments upon which society has come to rely in the operation of its everyday affairs."[18] The court here was explaining the justification for the differences in penalties stipulated for uttering and publishing (14-year felonies), on the one hand, versus those stipulated for counterfeiting (a five-year felony). But, again, the class of instruments identified as uttering and publishing is distinguishable from the plethora of filings and applications similar to a wetlands permit application, for which penalties vastly more severe than those for counterfeiting would be prescribed if the prosecution's theory were to be accepted.

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12 Black's Law Dictionary (6th ed).

13 Notably, when confronted with a prosecution argument that, for purposes of uttering and publishing, a police report is a public record, the Court of Appeals observed: "It appears that the prosecution wants us to rubber-stamp its position as legal precedent when no actual controversy is before us. Therefore, we decline to further review this issue." People v Thomas, 182 Mich. App. 225, 452 N.W.2d 215 (1989).

14 Genesee Trustee Corporation v Smith, 102 F2d 125, 126 (CA 6, 1939), citing The Delaware, 161 U.S. 459, 474, 16 S. Ct. 516, 40 L. Ed. 771 [1896]; Platt v Union Pacific Railroad, 99 U.S. 48, 67, 25 L. Ed. 424 [1878].

15 People v Hall, 391 Mich. 175, 215 N.W.2d 166 (1974).

16 MCL 750.248 and MCL 750.24.

17 MCL 750.250, MCL 750.251 and MCL 750.253.

18 People v Hall, 391 Mich. 175, 215 N.W.2d 166 (1974).

e. "To hold that one false statement in a whole litany of facts would make an entire report a forgery would be illogical."[19] While the Court of Appeals made this statement with reference to a police report (embodying a false statement, used to justify the securing of a search warrant), for which a charge of uttering and publishing was dismissed, it would appear to apply with even greater force to a wetlands permit application. Thus, even if one were to grant that failure to complete a line on a form constituted a false statement, that false statement would not render the application a "false, forged, altered or counterfeit record" subject to prosecution for uttering and publishing. To reiterate, the state's only complaint with the applications is that one line is blank; apart from this the applications were sufficiently accurate that the DEQ had issued two prior permits based upon substantively identical applications.

In addition to these issues of statutory interpretation and precedent, the following considerations dictate that the charges brought against the Stoll defendants be found improper:

- The permit application's request for the identity of the owner of the subject property when the applicant is not the owner is itself vague, subject to interpretation and, therefore, insufficient to support an unambiguous finding of falsity, intentional or unintentional, and certainly insufficient to justify prosecution for uttering and publishing. As the Supreme Court has emphasized,[20] there exists no unitary property "right," but rather a bundle of rights which may be variously apportioned. In the instant case the issue arises in the context of a land-purchase contracts, under which both the vendor and vendee can be said to possess some property rights, current or prospective, contingent on the performance or nonperformance of the land-contract vendee.

- Prosecution for uttering and publishing requires "intent to injure on defraud." However, it is difficult to perceive in what manner the failure to record an (ambiguous) owner of a parcel of property would contribute to infliction of an injury or fraud. In general, injuries or frauds to victims of acts proscribed as uttering and publishing represent unjust enrichment to the perpetrator. Unjust enrichment of the perpetrator (and the infliction of any injury or fraud) would result only if the award of a wetland permit were contingent on not identifying the putative owner, i.e., only if the permit would have been denied if the putative owner had been identified. However, nowhere in the wetlands act is the Department of Environmental Quality authorized to deny a permit simply on the basis of the identity of the owner, and to do so would represent an impermissible ad hominem application of the Department's authority, violative of the Constitution's mandate of "fair and just treatment": "The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed."[21] There may well be reasons for the wetlands act and the Department's application form to request this information, but denial of an otherwise justified permit cannot be among them.

- If the legislature had intended to subject a wetlands applicant to liability under uttering and publishing, it could have done so explicitly. Since it failed to do so, if a decision of the Attorney General to charge under these provisions of law is upheld by the courts, this will represent an intrusion of the executive and judicial branches of government into a domain reserved exclusively to the legislature.

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19 People v Thomas, 182 Mich. App. 225, 452 N.W.2d 215 (1989).

20 St. Helen Shooting Club v. Mogle, 234 Mich. 60 (1925).

21 Const. 1963, Art. I, § 17.

Conclusion

It is difficult to believe that the appellate courts will not dismiss the charges which the Attorney General has levied against Gregg Stoll and his codefendants. If the courts permit this prosecution to proceed, the defendants will be at the mercy of a Lansing jury, while the rights and liberties of the citizenry will have been subverted by the arrogant bureaucrats of the Attorney General's office and of the other departments of state government whose power to "punish" innocent citizens will have been greatly enhanced. The citizenry's only protection from "The People of the State of Michigan" will be alacritous action by the legislature. In the absence of action by the appellate courts or the legislature, we may all be destined for the new Michigan gulag.

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