

PODIUM

CIVIL LIBERTIES *By Harvey Silverglate*

Prosecutors Tread Where Defenders Daren't Go

THERE IS A LESSON in the recent and very public pas de deux between Independent Counsel Kenneth W. Starr, seeking the testimony of Monica S. Lewinsky against President Clinton and others, and Ms. Lewinsky's lawyer, William H. Ginsburg. The lesson is that a double standard enables prosecutors to get away with ugly tactics that, engaged in by private citizens, would mean trouble. This has become a topic of public concern because of the refreshingly open (some would say naive) manner in which Mr. Ginsburg, a medical malpractice lawyer, has represented Ms. Lewinsky.

Mr. Starr's office has made it no secret that it would like to obtain Ms. Lewinsky's testimony that the president not only engaged in sex with her, but that he or his minions suggested she lie. Mr. Ginsburg has not been shy about communicating to Mr. Starr, via national television, that he will make his client available, provided the immunity package is attractive.

According to early news accounts, Mr. Ginsburg was initially offering Ms. Lewinsky's testimony that there was sex but no attempt to induce perjury. This was reportedly not sufficient for Mr. Starr's purposes; Ms. Lewinsky had to go all the way.

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This scenario seems dreadfully ordinary to practitioners who handle federal criminal cases, but this time the public was let in on the "dirty little secret" about how prosecution testimony is "shaped." Mr. Starr, with considerable power over this 24-year-old ingenue, was pressing his advantage to get testimony he wanted. Immunizing her and then compelling her testimony "blind" was not enough.

Private parties using such tactics would almost surely be seen as attempting bribery, extortion or obstruction of justice. Prosecutors tend not to tolerate in ordinary citizens tactics that are commonplace at the Department of Justice and in U.S. attorneys' offices. A case in point is being played out in Boston.

Old Habits Die Hard

In the course of a bitterly fought legal battle between generations of the family that owns the \$1.8 billion Demoulas "Market Basket" supermarket chain, the FBI and the Boston U.S. attorney's office have commenced a grand jury investigation of lawyers and private investigators representing the losing side in a recently completed, jury-waived trial conducted before highly respected Massachusetts Superior Court Judge Maria I. Lopez.

One of the more visible targets of the investigation is Gary C. Crossen, now a partner at a Boston law firm, but previously head of the criminal division of the

U.S. attorney's office. The claim is that Mr. Crossen and his team—in an effort to dig up dirt on Judge Lopez, vacate her judgment against their client and get her disqualified from further proceedings—crossed the line. If so, it appears that their crime, if any, was to forget that Mr. Crossen, the private lawyer, was no longer a federal prosecutor.

The heart of the allegation is that Mr. Crossen and colleagues went after Paul M. Walsh, a former law clerk to Judge Lopez, to get him to provide information indicating that Judge Lopez was biased. They allegedly tricked the naive Mr. Walsh into disclosing information he supposedly had learned about Judge Lopez when he was her clerk. The ruse reportedly involved meetings between Mr. Walsh and self-described headhunters, during ostensible job interviews in jurisdictions where it is lawful to record conversations surreptitiously. Tapes were made of Mr. Walsh's less-than-flattering comments about the judge.

As Mr. Walsh later reported to the FBI after Mr. Crossen informed him of the ruse, Mr. Crossen and some cohorts let Mr. Walsh know he had better cooperate or face ruin. The FBI wired Mr. Walsh and sent him back for further negotiations. On the basis of those tapes, the lawyers are being investigated for threatening a witness. They have denied wrongdoing, claiming only to have been

"zealous" in representing their client. Mr. Walsh, meanwhile, has recanted his taped statements about Judge Lopez, calling them self-aggrandizing puffery.

Rewarding witness cooperation and punishing the reverse has become so commonplace in federal law enforcement that it seems, to practitioners engaged in the system, ordinary and even necessary. Only when the public gets a whiff of how "cooperating witnesses" are developed, or when ex-prosecutors forget they are not now covered with a protective mantle, does uneasiness set in.

Civil libertarians argue for a single standard of conduct that would bar the practice altogether. Justice Louis Brandeis put it eloquently in *Olmstead v. U.S.*, 277 U.S. 438 (1928): "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." ☐

Pages A22-A23

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