PODIUM

Use of Informers Hurts Accuseds' Rights

By Harvey A. Silverglate SPECIAL TO THE NATIONAL LAW JOURNAL

THE STARTLING NEWS of former Deputy Attorney General (and presidential friend) Webster Hubbell's recent guilty plea to mail fraud and tax evasion charges has dragged to the fore yet again the Department of Justice's growing reliance on "turned" witnesses to make criminal cases. Indeed, a report from the Boston Globe's Washington, D.C., bureau went so far as to opine that because Mr. Hubbell and other Whitewater "players" have been "turned" in "classic prosecutorial fashion," Independent Counsel Kenneth W. Starr "should now be able to get to the bottom of the Whitewater matter."

There is heated debate on whether testimony from witnesses who cooperate in exchange for substantial reductions in their prison sentences really helps "get to the bottom" of a criminal investigation. (This is, of course, assuming that "the bottom" implies obtaining truth rather than just scalps.)

Indeed, in this very space less than two months ago ["Substantial Subversion," NLJ, 11-28-94], David L. Lewis suggested that the remarkably light sentence meted out to mobster-murderer Salvatore Gravano in exchange for his successful testimony against John Gotti placed a premium on "fabrication and criminality."

Mr. Lewis further argued that creation of an informant culture has had still other socially negative consequences, not the least of which is that dangerous vultures such as Mr. Gravano are set loose on the populace instead of paying for their crimes.

Yet the fact that the national debate on the growing—indeed, routine—use of rewarded informant witnesses has centered recently on its social desirability or lack thereof demonstrates that the effort by defendants to attack the fundamental fairness of this tactic appears to have been given up for dead.

This is unfortunate because the U.S. Supreme Court has never ruled squarely on the impact of the Fifth Amendment's due process clause on the more egregious examples of purchased testimony. Case law in the U.S. district and appellate courts yields a mixed rather than a clear picture. The due process limitations on turning witnesses may yet gain a toehold in federal criminal jurisprudence.

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Institutionalized System

Realists, of course, must concede that with the advent of the federal sentencing guidelines, the turning of convicted defendants into witnesses bearing Justice's seal of approval has been so deeply institutionalized that any constitutional attack on the system would be uphill. These days, unless a federal prosecutor supplies a defendant under the guidelines with a Sec. 5K1.1 letter that attests to the defendant's "substantial assistance" in prosecuting others, a judge is virtually unable to impose a sentence less than the minimum under the guidelines.

Yet the question of the due process implications of this admittedly deeply entrenched system has never been finally answered. In a remarkable 1984 case, *U.S. v. Waterman*, 732 F.2d 1527, a panel of the 8th U.S. Circuit Court of Appeals reversed a district judge's denial of relief to the defendant in a case in which the witness had testified pursuant to a deal. The arrangement was described by the court as a "bounty" or "contingency agreement." Under the witness's plea agreement, the government was to recommend a two-year reduction in sentence if, as the district judge found, the "truthful testimony led to further indictments."

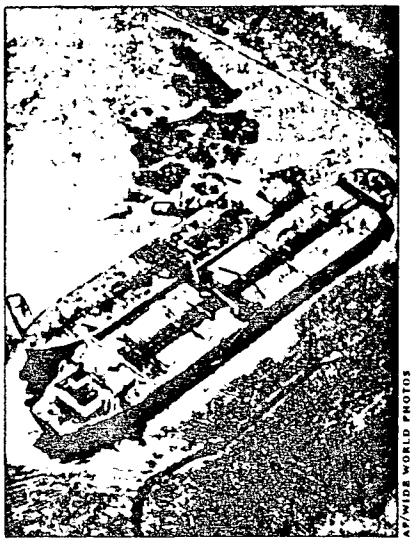
The district court had denied the defendant's claim that the arrangement was a violation of the federal bribery statute, encouraged perjury and undermined the integrity of the judicial system. The 8th Circuit panel disagreed, however, holding that placing "a premium on testimony adverse to a defendant" created "a risk of perjury so great that even the jury's full knowledge of the agreement is insufficient to protect the fundamental fairness inherent in the due process clause."

Remarkably, despite the six-page panel opinion supporting the defendant's contentions, the court reheard the case en banc and was evenly divided, thereby affirming the district court's ruling against the defendant. The half of the court that voted to affirm did not write a single word explaining its disagreement with the panel's opinion mandating reversal. One suspects that the silent judges felt too uncomfortable with their position to articulate reasons.

The issue arose again in a 1985 Boston case in which the district court suppressed, on due process grounds, the testimony of three drug dealers whose

[SEE 'INFORMERS' PAGE A23]

a National Court System



AP/WIDE WORLD PHOTOS

Joint Effort: *Federal and state judges coordinated the Exxon Valdez litigation.*

together. In the Exxon Valdez litigation, federal and state judges coordinated the schedules of both the pretrial and trial processes. State judges have formed the Mass Tort Litigation Committee, which coordinates litigation involving many states. With such inventions, the outlines of a "de facto" set of new courts come into view.

Get Congress Involved

Instead of this ad hoc, erratic integration, federal and state judges should jointly request that Congress create a new set of national courts that would have jurisdiction over those cases involving litigants from several states and arising under state law, and over ordinary diversity cases.

These courts could be established in several regions across the country. Technology (such as "filing by fax" and computer-based data accessing) could ease the difficulties distance poses. State judges would rotate in and out of these courts.

Judges should not be shy about calling for the development of new courts. During the past 50 years, Congress already has quietly created a new set of courts—called agencies. As this century closes, federal agencies collectively handle more "cases" than the federal courts. For example, the Social Security Administration annually hears about 250,000 disputes between individuals and the government.

The problems are not going to go away; the press of the criminal docket will continue to crowd the civil cases in both state and federal courts. Instead of trying to shift cases back and forth, national but state-based courts could relieve burdens on the federal courts (enabling those courts to maintain their focus on federal statutory and constitutional adjudication) as well as relieve burdens on state courts (enabling the individual state systems to concentrate resources on the problems particular to each state).

Judges should approach Congress, but they don't have to await congressional action. As state and federal judges come to realize with increasing clarity that more problems unite than divide them, the judiciaries themselves could develop a single organization whose aim would be to forward their joint agendas.

These judiciaries should be teaching us all that an interstate problem is not necessarily a problem for the federal courts to consider, nor one to be remitted to a single state's judiciary. In a world in need of more justice, judges should be considering how to expand the pie, rather than how to pass the crumbling slices around.

Defies Simple Solutions

Geography affects the size of awards. Significant differences in the size of awards partially reflect differences in tort doctrine. For example, all other things being equal, no-fault automobile accident states should (and do) have larger awards than other states do because minor accident injuries in no-fault states are compensated through third-party insurance, raising the average size of awards in the remaining cases. But within a given state, as well, under the same set of tort laws, juries in central cities tend to render larger verdicts than do juries in adjoining suburbs.

Deep-Pocket Attacks. There is some evidence to support a "deep pocket" hypothesis. When individuals sue institutional defendants such as governments, corporations or insurance companies, the awards are significantly larger than when individuals sue individuals. This

sult in multimillion-dollar awards, the overwhelming proportion of tort litigation is relatively routine. Most tort lawsuits settle, involve few pretrial motions and experience little or no formal discovery. We know very little about the dynamics of the settlement process. It follows that we are poorly positioned to predict the impact of any tort reform legislation on the vast bulk of litigation: the 97 percent of cases that do not go to trial.

Mythical Explosion. There is no evidence of a national explosion in the volume of tort litigation. Two-thirds of the states have experienced a fall in tort filings since 1990, and one-third have shown an increase. While the total volume of tort litigation is therefore declining, different forces are at work in the states.

Finding Solutions

Reliance on Informers Is Excessive

['INFORMER' FROM PAGE A21]

sentence reductions were contingent on the value or "benefit" (as assessed by the government) of their information. *U.S. v. Dailey*, 589 F. Supp. 561. The 1st Circuit reversed, noting that while the panel members "share the concern and uneasiness of the district court over the coercive potential...[T]he risk of perjury created by the agreements is not so great that Dailey's due process rights will be violated by the admission of the accomplices' testimony at trial" thanks to "the traditional safeguards," including full disclosure to the jury. *U.S. v. Dailey*, 759 F. 2d 192 (1985).

Harder Issues

In its discussion, however, the panel distinguished other forms of cooperation agreements that might pose a harder issue. A contingent cooperation agreement that required not only testimony but the witness's active cooperation in trapping (and perhaps entrapping) the target defendant would be a case in point. In any event, visibly holding their noses, the

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panel members reversed the district court and admitted the evidence.

Various states have experimented with procedural mechanisms for treating immunized witness testimony with special care and even skepticism, and have considered legislation dealing with witnesses given inducements short of complete immunity. No such suspicion has been apparent in federal jurisprudence, with the exception of the few courts that have expressed "discomfort."

The U.S. Supreme Court has not yet debated whether to draw a line between permissible inducements to a witness and tactics that offend due process. What about the "hostage ploy" sometimes resorted to by the Justice Department, whereby prosecutors agree not to proceed against a wife or a child in exchange for the husband-father's guilty plea and cooperation against others? What about a deal explicitly contingent on the conviction of the defendant, not just the ability to proceed with prosecution? What about a requirement that, to earn a sentence reduction, the defendant must repeat in court what he or she said to FBI agents during an earlier