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BRIEF CASES

And justice for all

BY HARVEY SILVERGLATE

One phrase comes to mind in assessing the performance of US District Judge Gerhard Gesell, who is presiding over the criminal prosecution of Oliver North and his three co-defendants in the Iran-contra case: "There he goes again."

Gesell recently engaged in an acute case of hand-wringing over the White House's foot-dragging in processing classified documents that must be turned over to the defendants' lawyers as part of their right to a fair trial. He even threatened to dismiss the prosecutions unless the White House became more cooperative — a warning certain to gladden the heart of a president who has called North "a national hero." In issuing a threat to dismiss, a move that was more incredible than credible, Gesell seriously over-reacted. Instead, he should have threatened to hold in contempt, and even to jail, recalcitrant executive-branch officials, regardless of their high or low station, if they persisted in disobeying his orders to produce the documents.

More recently, Gesell questioned whether the defendants would ever face trial in light of his having to assure three of the four defendants of a trial that would not be influenced in any way by the prosecution's use of the testimony the defendants gave to the congressional committees investigating the Iran-contra scandal last year. Since these defendants testified only after Congress agreed to confer so-called use immunity on their testimony, the burden is now on independent counsel Lawrence Walsh to prove that he has built a case against North, John Poindexter, and Albert Hakim (defendant Richard Secord did not insist on immunity before testifying) by accumulating evidence entirely independent of the defendants' congressional testimony.

This dilemma, Gesell opined in a highly publicized court hearing on May 26, may well be impossible to resolve. The result, he warned, might well be dismissal of the charges. He went on to blame Congress for the predicament: after all, had Congress not succumbed to the pressure to wring the story out of the defendants before the criminal-justice system was done with its work, none of these problems would have arisen. "Congress used immunized testimony in a public forum to force witnesses to make certain admissions or denials," Gesell said. "I'm curious whether that act is not an act by Congress that precludes prosecution."

Admittedly, the "immunity taint" problem is a tough one. Congress let the toothpaste out of the tube by compelling witnesses to give use-immunized testimony in a public forum, but the problem cannot be solved by threatening anybody with contempt or with any other penalty, including dismissal. If the prosecutors are unable to satisfy the judge that their evidence is entirely independent of the immunized testimony, however, the case must — and should be — dismissed.

Still, it is curious that Gesell pressed the panic button so early, before he even made the effort to examine the independence of the prosecutors' evidence. The fact is that a number of successful prosecutions have been conducted against defendants who had been forced to give use-immunized testimony. In some cases it was a prosecutor who extracted the testimony, and in others it was congressional committees. Indeed, just about all the defendants convicted in the Watergate scandal had earlier been compelled to testify before the late Senator Sam Ervin's Watergate Committee under a grant of use immunity. Although some commentators grumbled that Ervin's committee was jeopardizing prosecutions by insisting on eliciting testimony so early in the game, Ervin responded that there was a strong public interest in getting to the bottom of the story quickly, even if it meant making subsequent criminal prosecutions harder. Those prosecutions proved to be a bit more difficult, but hardly impossible.

The same can happen in the Iran-contra prosecutions, provided that Gesell treats the defendants the same way the judicial system would treat any ordinary defendants in similar circumstances, rather than as celebrities worthy of special consideration.

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The Fifth Amendment to the United States Constitution provides that "no person ... shall be compelled in any criminal case to be a witness against himself." Some judges who have been particularly protective of individual liberty — such as the late William O. Douglas — have taken the position that this means that under no circumstances may the government pry open a person's lips and force him to confess his crimes. Those with a slightly less absolute position would allow such interrogation, provided the government agrees to forgo the prosecution of such an individual for the crime or crimes about which he is forced to testify. This broad immunity from prosecution is called "transactional immunity."

Transactional immunity was the norm in this country until 1970, when Congress enacted a use-immunity statute that it hoped would pass constitutional muster. The federal use-immunity statute reached the Supreme Court in 1972 and was upheld, despite vigorous dissents from Douglas and Justice Thurgood Marshall, as well as warnings from civil-libertarians. The Court, in *Kastigar v. United States*, ruled that it was okay for the government to compel someone to give testimony and later to prosecute that individual, so long as prosecutors do not use the immunized testimony, nor any leads gathered by exploiting the testimony, to aid the prosecution. The burden is on the prosecutor, said the Court, to demonstrate that the evidence used in the criminal case is entirely independent of and untainted by the immunized testimony.

Justices Douglas and Marshall warned that use immunity was illusory, since as a practical matter it would be difficult, if not impossible, for a defendant to rebut a government claim that its evidence was gathered entirely independently. The dissenting justices pointed out — prophetically, it seems, in light of current events — that "it is futile to expect that a ban on use or derivative use of compelled testimony can be enforced." This is pretty much what Gesell has said, particularly in the context of "compelled" public testimony such as the Iran-contra congressional hearings produced.

The Supreme Court made a serious mistake in *Kastigar*. The justices should have listened to the civil-libertarians and not allowed the government to try to eat its cake and have it, too. But inasmuch as all three branches of government have now taken the view that prosecutions are permissible even in the face of prior use-immunized testimony, and since a number of prosecutions have been carried out under such circumstances, one would think that the Iran-contra case could be handled in such a way as to make it possible to conduct the trial without fatal immunity taint.

The most frequent and successful technique for surmounting the immunity hurdle is for a prosecutor to memorialize in writing and then place into sealed envelopes all the evidence in his or her possession at the point in time when the prospective defendant is immunized. At trial, the prosecutor is able to prove easily that his or her evidence is free of immunity taint, for if the evidence is found in one of the sealed envelopes, it must be considered independent. Independent counsel Walsh has already used this method in the Iran-contra case, and this should go a long way toward satisfying Gesell that the requirements set out by the Supreme Court in *Kastigar* have been met. If Walsh limits himself at trial to the sealed evidence, there will be no immunity-taint issue in the case.

Gesell points out the existence of yet another problem, however. The Iran-contra indictment charges the defendants with, among other crimes, *conspiracy* — or a criminal agreement among the defendants — to violate the law. Under the rules of evidence in conspiracy cases, the defendants are normally tried together, and each one's lawyer is entitled to cross-examine any of the others who choose to testify. In conducting such cross-examinations, the other defendants' lawyers may normally base their questions on anything they have learned about the defendant-witness, or on anything the defendant-witness has stated in the past. If these rules are followed in the Iran-contra case, a lawyer for, say, Hakim would be allowed to question North on the basis of things North disclosed during his immunized testimony. North might thereby be incriminated on the basis of his own earlier compelled testimony, in violation of his Fifth Amendment rights.

One solution to this problem would be to grant each defendant a separate trial. It would be time-consuming and costly, but it could be done. When faced with this suggestion (emanating from Walsh's office), Gesell simply stated that separate trials would be "ridiculous." Without further explanation, this response appears puzzling. Many successful prosecutions have been conducted in multiple trials with defendants severed from one another in order to avoid immunity or other legal difficulties. Why not in this case?

There is yet another avenue available to prosecutors that would hardly be ridiculous. They could try Secord first. Secord chose to testify before the congressional committee without a grant of immunity; thus there is no immunity problem in his case. If convicted and threatened with a heavy enough sentence, he might throw in the towel and testify against the other three in hopes of getting his sentence reduced. Such testimony might sufficiently strengthen the case against the three so that the government would not even have to use evidence that might be tainted by immunity. Secord might even

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testify of his own knowledge about matters that were the subject of immunized congressional testimony by others, thereby providing the demonstrably independent source needed by Walsh and his assistants to get over the Fifth Amendment problem.

This technique of pressuring one of several co-defendants to "turn" and become a government witness has serious civil-liberties implications. Such witnesses are, for example, all too often tempted to lie or exaggerate in their testimony in order to gain the prosecutor's favor and thereby win a sentence reduction. Nevertheless, the practice has become deeply engrained in the criminal-justice system in recent years, and there's no reason it should not be used against North and friends if it can be used against ordinary criminal defendants.

If the Iran-contra defendants are to be treated like any other criminal defendants, the immunity-taint issue, though thorny, can be surmounted. For the judge to threaten to take the extraordinary step of dismissing the prosecutions on such grounds is unusual and highly questionable from a legal point of view.

Gesell has said that he will probably rule by the end of June on whether any or all of the charges should be dismissed because of the immunity problem. Although it may be true that there is no practical likelihood of the prosecutors' producing entirely untainted evidence (as Justices Douglas and Marshall warned), one cannot know for sure that this will be so unless and until the case has been tried. Then, and only then, will the courts be able to judge whether the evidence sealed by Walsh prior to the congressional hear-

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ings was the sole basis for these prosecutions or whether the prosecutors were aided by the defendants' immunized testimony.

Any dismissal prior to trial, such as that suggested by Gesell, would undoubtedly raise many an eyebrow in the legal community, especially among the many criminal-defense lawyers — myself included — who have had clients convicted in cases raising equally serious immunity questions that the courts have managed to resolve in favor of the prosecutors.

One of the most intriguing and challenging sections of the Bill of Rights assures all Americans "equal protection of the laws." This means, essentially, that what's sauce for the goose is sauce for the gander. This is one of the legal principles that forces the powerful among us to follow the golden rule "Do unto others what you would have others do unto you." The way in which the majority of Supreme Court Justices in 1972 treated Charles Joseph Kastigar, and the way in which federal prosecutors have in the years since then treated countless ordinary criminal defendants, paves the way for the prosecution of North, Poindexter, and Hakim — even in the face of the immunized testimony compelled from their lips at the congressional hearings. To carve out a different rule for North and those who helped him would be a travesty of the principle of equal protection. □