FREEDOM WATCH

A civilized democracy should not allow the government to exert what would otherwise be criminal pressure against witnesses

Bench pressing

BY HARVEY A. SILVERGLATE

IT WAS ONE of those breathtaking acts of hypocrisy we've come to expect from public officials when the news media flub their job as government watchdog. Last Thursday, Suffolk County district attorney Daniel F. Conley announced that his office will undertake a new initiative to protect witnesses in criminal cases from intimidation. Appearing with Boston police commissioner Paul Evans and flanked by a host of community activists and ministers, Conley proclaimed that in 90 percent of cases involving the prosecution of gang members or others accused of serious violence, prosecutors have trouble with witnesses who refuse to cooperate due to fear of reprisals. To counteract this, Conley's office will form teams of prosecutors, police, clergy, and community groups who will visit prosecution witnesses to offer support. He also proposed legislative funding of a program patterned after the federal witness-protection program, where witnesses are given protection, money, new identities, a job, and, essentially, a new start in life in exchange for pro-prosecution trial testimony.

Sounds like a good idea, right? The initiative would be fine if only it were aimed at the *entire* problem of witness intimidation. Trouble is, it does nothing to protect witnesses from pressure by police and prosecutors. And the media have said virtually nothing critical about Conley's lopsided approach.

Conley noted that the issue came to the public's attention as a result of the Paul Pierce trial (in which three men were tried for attent testimony. Well-known techniques for pressuring and leading witnesses include threatening them with prosecution for their own ill deeds unless they "cooperate," and interview techniques that suggest to witnesses which suspects committed the crime, and how. Only law-enforcement officials and the prospective witness are present for these conversations, which are rarely revealed to defense lawyers, judges, and juries, even though the Supreme Court long ago ruled that all such inducements to obtain a witness's testimony must be disclosed to the defendant. Once on the witness stand and under skillful cross-examination by defense lawyers, these witnesses sometimes decide to tell the truth — risking the wrath of police and prosecutors. But all too frequently, such testimony produces convictions. This is one reason why new DNA-testing technology is suddenly proving the innocence of such a disturbingly high number of people on death rows all over the country.

A 1999 CASE offered a golden opportunity for serious national debate about the widespread use of these heavy-handed prosecution techniques. In *United States v. Sonya Singleton*, a Kansas woman convicted on federal money-laundering and drug-distribution charges claimed that an important witness against her had effectively been threatened and bribed by federal prosecutors into testifying against her. At first prosecutors must

to challenge the practice: she asked a court to exclude such a witness's testimony from trial, and the court agreed.

Stung, and fearful that it would be deprived of this major tool for lining up witnesses willing to sing or compose for the right price, the Department of Justice asked the full membership of the 10th Circuit Court of Appeals to review the panel's judgment. Nine members of the full court, over the protests of the three dissenting judges of the original panel, quickly reversed the decision. While it was true, the majority admitted, that at first glance the word "whoever" would appear to allow for no exceptions (meaning, of course, that it would apply to prosecutors when they offered leniency in exchange for testimony), the defendant's view was "absurd." And why was it so absurd to suggest that offering threats and inducements to witnesses, even when done by police and prosecutors, constitutes witness tampering? Here's the best the court could do: "This ingrained practice of granting lenience in exchange for testimony has created a vested sovereign prerogative in the government." The court then likened it to an ancient practice in England: "[I]t has acquired stature akin to the special privilege of kings."

Well, now, that's a helluva weak basis — isn't it? — for allowing the government to

and defense lawyers for Samuel Waksal, the former chief executive officer of ImClone Systems Inc., who is suspected of having communicated inside information to "decorating diva" Martha Stewart, just before she sold nearly 4000 of her ImClone shares a day before they began their plunge in value. It is well known that federal prosecutors want Waksal to testify against Stewart, and now, according to the *WSJ*, they may have figured out how to force his cooperation. It seems that Waksal's elderly father and his daughter, who sold about $10 million in stock in the days before the negative corporate news was announced to the investing public, are also under investigation for insider trading. Prosecutors have threatened to charge Waksal's father and daughter unless he cooperates. The *WSJ* reported Waksal's thinking in polite but nonetheless clear terms: "Dr. Waksal . . . concluded that cooperating gives him the best chance of winning less jail time for himself and shielding his father and daughter from being pursued in court."

In other words, prosecutors are now so emboldened — and the press so cynical or co-opted or both — that even when the government resorts to *hostage-taking* in a major breaking case, it's reported like an ordinary news story. The government has indicted Dr. Waksal, and it's holding over his head the possible indictment of his daughter and his father (why else, if there is evidence against all three, were they not indicted together?) while he considers how to gain favorable treatment for his kin as well as himself. There been no perceptible outcry over this tactic because we've grown accustomed to these thuggish maneuvers on the part of prosecutors; after all, it's happened before, even in high-profile cases — the Michael Milken case, for one, where the financier pleaded guilty in order to save his brother, against whom all charges were then promptly dropped. (Disclosure: I was one of Michael Milken's lawyers.) It does not seem to occur to many, most egregiously the news media, that if you threaten a man with indicting his father and child, he's likely to say anything. (On October 15, Dr. Waksal pleaded guilty to various counts not implicating his father and daugh-

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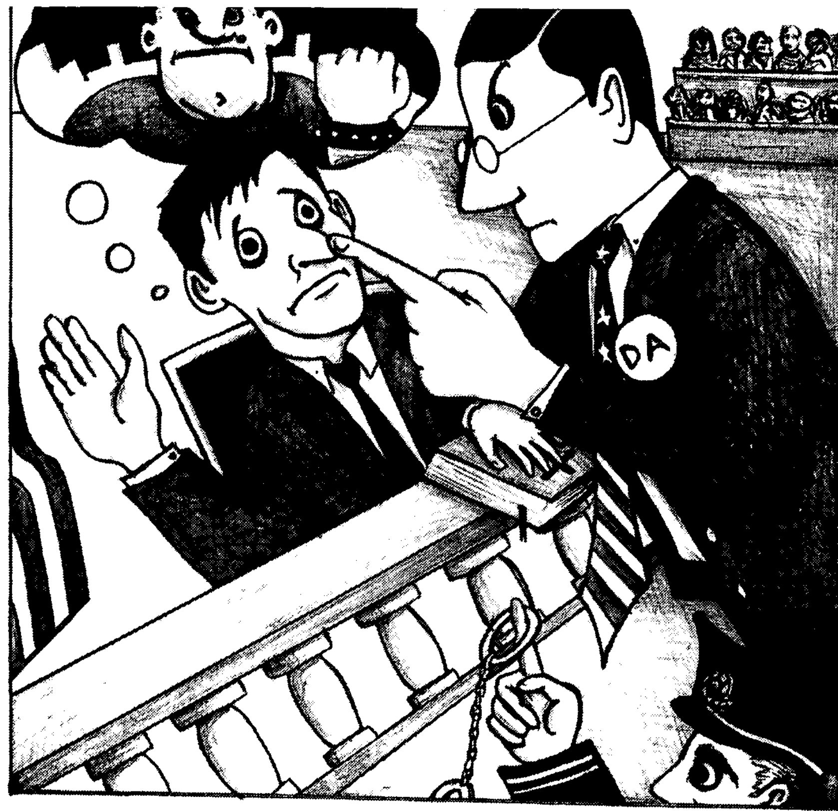
Conley noted that the issue came to the public's attention as a result of the Paul Pierce trial (in which three men were tried for attempting to murder the Celtics star, and the jury returned a mixed verdict, acquitting one defendant, Anthony Hurston, and convicting the other two on lesser charges). Suffolk County prosecutors had claimed that a host of witnesses suddenly changed earlier police statements and even grand-jury testimony at trial, where witnesses were no longer as certain that the defendants, particularly Hurston, were in fact Pierce's assailants. But as I argued in this column last week (see "Who's Zoomin' Who in the Paul Pierce Case?", News and Features, October 11), police and prosecutors may have leaned rather heavily on some witnesses in order to get them to finger all three men. One government witness in particular, Regina Henderson, told the trial jury that her earlier photo ID of Hurston had resulted from hints by Assistant District Attorney John Pappas that her lack of cooperation could result in the reopening of an old criminal charge against her.

In other words, cloaked in pious intent — protecting witnesses from the violence of former associates — the DA once again trotted out his office's now-familiar story that the only reason prosecutors did not get attempted-murder convictions against all three men in the Pierce case was that prosecution witnesses had been threatened by friends of the defendants. Yet there was no credible evidence that Hurston, in particular, participated in either the assault on Pierce or witness tampering. Neither the DA nor much of the news media treated Hurston as a man wrongly indicted; instead, he was widely viewed as a guilty guy who got away with attempted murder.

The problem with Conley's proposal, then, is its one-sidedness. It's true that defendants and their cohorts sometimes threaten witnesses to deter truthful testimony. But it's also true that police and prosecutors subject uncertain witnesses to enormous pressure to finger a suspect or testify against a defendant. Even worse, they may give such witnesses a script rather than asking them for independ- threatened and bribed by federal prosecutors into testifying against her. At first, prosecutors must have been startled to find themselves accused of bribing a star witness. But then everyone looked more closely at the federal-witness-bribery statute, which provides:

> *Whoever ... directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial ... before any court ... shall be fined ... or imprisoned for not more than two years, or both.*



Defendant Singleton's lawyer convinced a three-judge panel of the US 10th Circuit Court of Appeals that the government's offer of leniency in exchange for testimony did in fact constitute tampering with the witness, even though such deals had become common practice in state and federal cases. The appeals court ordered the tainted witness's testimony excluded from the trial. Howls of outrage — and panic — went up in state and federal prosecutors' offices across the land, because while it had long been understood that *defendants* and their lawyers were not allowed to make either promises to or threats against witnesses, it had long been assumed that *prosecutors* were exempt from such rules. Of course, the main reason a prosecutor had never been prosecuted for pressuring a witness to "sing" — and perhaps to "compose" — is because it takes a *prosecutor* to bring a prosecution! Suddenly, however, a defendant had found a way bribe and threaten witnesses into singing the right tune. The three dissenting judges thought so. The practice, they noted, runs afoul of "a straight-forward interpretation of [the statute], which encompasses a prohibition against the government buying witness testimony." In the end, concluded the dissenters, "[g]overnment leniency in exchange for testimony can create a powerful incentive to lie." But that's just too bad, because the issue was put to rest when the US Supreme Court declined to hear the case.

The federal government, buoyed by its victory in *Singleton*, returned to its "vested sovereign prerogative" with a vengeance. On September 30, the *Wall Street Journal* reported an even more radical abuse of prosecutors' power over witnesses. The story concerned ongoing plea negotiations between federal prosecutors guilty to various counts not implicating his father and daughter, reportedly not as part of a plea-bargain — yet. The pressure on him, using his loved ones as pawns, will, of course, continue.)

So, there's little doubt as to why Suffolk district attorney Conley would like the legislature to provide him with resources to emulate the feds' methods of handling witnesses. They've refined bare-knuckle techniques to an art form.

Sure, we should be concerned about strong-arm tactics used against witnesses by defendants. Sure, we should protect such witnesses from harm. But if we really want the criminal-justice system to convict the guilty, and *only* the guilty, we need to be concerned about the tactics used by the *government* as well. It should not be acceptable, in a civilized nation calling itself a constitutional democracy, to allow the government to engage in what would otherwise be criminal pressure brought against witnesses, on the theory that it's just another "special privilege of kings." If the issue of witness intimidation is going to be investigated in the Pierce case, then it's crucial that *all* pressure exerted on witnesses be explored. And since it has been alleged that police and prosecutors engaged in such tactics, the investigation should be conducted by some less-self-interested office than Conley's. Perhaps the news media, too, should play their historic role of protecting the public's interest in the uncorrupted administration of justice. ■

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