



Part X

Political Oversight and the Rule of Law

The Iran/contra prosecutions illustrate in an especially stark fashion the tension between political oversight and enforcement of existing law. Congress's decision to compel immunized testimony from a number of Iran/contra figures pursuant to 18 U.S.C. 6002 -- most notably Lt. Col. Oliver L. North and Vice Adm. John M. Poindexter -- was thought important both to address an immediate crisis of political confidence and to shed light on flaws in the functioning of the national security apparatus. Ultimately, however, that decision also was fatal to the prosecutions of North and Poindexter, and made a full and equitable accounting for criminal wrongdoing impossible. That outcome holds important lessons for the future.

Background

It was apparent from the outset of the Iran/contra investigation that congressional grants of use immunity to the principals in the affair would make prosecution of those persons problematic. The Office of Independent Counsel noted that concern in its first Interim Report, issued in April 1987, explaining that the award of immunity "will have a serious and possibly destructive impact upon a subsequent prosecution" and "might preclude future prosecution of those [immunized] individuals." The Office pointed out that, under *Kastigar v. United States*, 406 U.S. 441, 458 (1972), a grant of use immunity results in "a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom." The Office accordingly took extensive steps to avoid this danger. It expedited the elements of its investigation most likely to be the subject of congressional inquiry. It memorialized the statements of potential trial witnesses -- in the vernacular, "canning" them -- that were made prior to the time that immunized testimony became publicly available. It implemented prophylactic procedures designed to shield prosecutors and investigators from exposure to immunized disclosures. And it urged Congress to be conservative in granting immunity.

When Congress nevertheless chose to compel testimony from North and Poindexter, these prophylactic procedures continued before the Grand Jury and at the North and Poindexter trials. Grand Jury witnesses were instructed by the Government to "make sure that your answers to our questions are based solely on your own personal knowledge and recollection of the events in question. Do not relate to us anything which you learned for the first time as a result of listening to or reading or hearing about immunized testimony." The district judge gave a similar instruction to all witnesses at the North trial.

The district judge presiding in the Poindexter case took even more extensive precautions. Prior to trial he reviewed statements made by potential trial witnesses before Poindexter's immunized testimony became publicly available, finding that all of the proposed testimony of most of these witnesses had been memorialized by that date. As for those witnesses whose trial testimony would not be limited to that "canned" prior to Poindexter's congressional appearance, the district judge found that the proposed trial testimony of most of them concerned subjects that Poindexter did not address in his immunized statements.

This left the Government still to prove that five of its potential witnesses were free of taint. The district judge ordered these witnesses to appear at a pretrial hearing. Of the three of these witnesses who subsequently testified at trial, two credibly affirmed at the hearing that their anticipated trial testimony would not be affected in any way by Poindexter's immunized statements.

The third witness, North, took a different tack. He stated at the hearing that he was unable, with respect to any relevant subject, to distinguish between what he had personally done, observed or experienced and what he had heard about the events by way of Poindexter's immunized testimony. As for Poindexter's destruction of the December 1985 presidential Finding, North acknowledged that he had seen Poindexter destroy a piece of paper, but insisted that he did not know that the document was the Finding until Poindexter stated that fact before Congress.

The district court, however, rejected North's testimony at the hearing as incredible. Basing its ruling on North's demeanor, on inconsistencies in North's testimony, and on other objective indicia that North had an untainted memory of events, the court found that North "appears to have been embarked at that time upon the calculated course of attempting to assist his former colleague and co-defendant . . . by prevaricating on various issues, including most notably the issue whether he had to rely for his recollection of events on Poindexter's immunized testimony." North accordingly was permitted to testify.

The North and Poindexter Decisions

Both convictions were set aside by divided panels on appeal. In the North case, the appeals court concluded that receipt of testimony from witnesses whose memories had been refreshed by exposure to North's immunized disclosures constituted improper "evidentiary use" of North's statements. The majority accordingly directed the district court to determine on remand as to each witness whether it was possible to separate out "unspoiled memory" from that influenced by North's testimony and, if not, to exclude evidence presented by such witnesses.

The court of appeals also concluded that the trial judge's instructions to witnesses were inadequate to prevent them from testifying to matters that they had first learned from North's immunized disclosures, accepting North's argument that such witnesses could not filter their answers through the district court's "prior knowledge" test. The court therefore held that the trial judge was obligated, on remand, to hold a full hearing "that will inquire into the content as well as the sources of the Grand Jury and trial witnesses' testimony. That inquiry must proceed witness-by-witness; if necessary, it will proceed line-by-line and item-by-item." The court explained that the district judge was required to "make express findings that the government has carried [its] heavy burden as to the content of all of the testimony of each witness."

Then-Chief Judge Patricia M. Wald dissented, declining to find that the district judge's "prodigious and conscientious efforts to protect North's Fifth Amendment rights were in any way so ineffectual as to require reversal on the formalistic grounds the majority advances." She noted that virtually all of the Grand Jury evidence relating to the counts on which North was convicted had been presented prior to North's congressional appearance. And she found it "indeed striking that North's counsel cannot point to a single instance of alleged witness testimony tainted by exposure to North's immunized testimony." In all, she observed that the procedural regime imposed by the majority "makes a subsequent trial of any congressionally immunized witness virtually impossible." ¹

¹ The court reaffirmed its initial conclusions when it denied rehearing. It did, however, appear to modify its opinion in two respects. It retreated somewhat from the suggestion in its initial opinion that the Government could establish a lack of taint only by showing that a witness never had been exposed to the immunized testimony, or that all of his evidence had been "canned" prior to exposure. At the same time, however, the court added another element to the showing required on remand: whether Government witnesses were motivated to testify by the immunized disclosures. Chief Judge Wald again dissented. She concluded that the procedures used by the district court -- under which the Government effectively made a showing that no illegal use of the immunized testimony was made -- were adequate; she suggested that the majority's contrary conclusion "represents an unneeded and unprecedented incursion into the trial court's discretion in managing a fair trial." She also faulted the majority for failing to realize that any use of the tainted evidence may

have been too attenuated to raise constitutional concerns, noting that the question ``is a deep and unsettled one in current constitutional law."

On remand, the prosecution of North was dismissed when Independent Counsel concluded that satisfaction of the court of appeals' requirements would be both very difficult and enormously burdensome.

A different panel of the appeals court reversed Poindexter's convictions. The majority concluded that all of the convictions had to be set aside because, in its view, the trial court's measures failed to ensure that Poindexter's immunized testimony was not used against him at trial. In reaching this conclusion, the court of appeals restated the standard set out in North: ``that a prohibited `use' [of immunized testimony] occurs if a witness' recollection is refreshed by exposure to the defendant's immunized testimony, or if his testimony is in any way `shaped, altered, or affected,' by such exposure." Under this standard, the court explained, ``the Government must demonstrate affirmatively that the immunized testimony did not . . . [have] an influence on [the trial witnesses'] thinking, even one for which they cannot at this time consciously account.' "

Although the Poindexter case was tried prior to the decision in North, the court of appeals declined to remand for new findings under the North standard. Focusing on North's testimony at the Poindexter trial, the court held that the district judge's finding that North lied when he denied having an independent recollection could not be used to support the proposition that North did have an untainted memory. The court of appeals also went on to reason that the district judge's finding of differences between North's account and Poindexter's immunized testimony was irrelevant, opining that a ``substantially exposed witness" who has not ``canned" his testimony may give evidence at trial only when he ``persuasively claim[s] that he can segregate the effects of his exposure."

Chief Judge Abner J. Mikva dissented in part. Although he did not take issue with the North standard, he complained that in North ``the Court changed the standards the special prosecutor had to meet; today we refuse to let him try to meet them." The majority's failure to accord any weight to the district judge's credibility findings, Chief Judge Mikva added, ``tells future defendants that all they need to evade responsibility [to testify at trial] is a well timed case of amnesia." 2

2 There are grounds to doubt the correctness of the court of appeals' decisions in North and Poindexter. There is considerable authority for the proposition that a finding that a witness lied may be used to establish ``that the truth is the opposite of his story'" (NLRB v. Walton Mfg. Co., 369 U.S. 404, 408 (1962) (per curiam), quoting Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952) (L. Hand. J.)) -- which means that the finding that North lied when he denied having an untainted memory could have been used to establish that he did have an untainted memory. And the Supreme Court repeatedly has applied attenuation concepts in deciding whether evidence must be excluded under the Fourth or Fifth Amendments -- concepts that were rejected by the court of appeals in North and Poindexter. See, e.g., Nix v. Williams, 467 U.S. 431, 442 (1984); United States v. Crews, 445 U.S. 463, 471 (1980). The Supreme Court denied Independent Counsel's petitions for certiorari in both cases, however, and further analysis of the constitutional issues is beyond the scope of this report.

The Implications of North and Poindexter

The decisions in North and Poindexter have significant implications for the interplay between congressional oversight and law enforcement. While it may affect any case in which immunity is granted, the holding in North will have its most profound impact on prosecutions involving public immunized testimony -- in particular, testimony before Congress -- that is widely disseminated. In such cases, the court of appeals' ruling on refreshed recollection will require a complex psychological inquiry into the thought processes and memory of every witness. At the same time, the large number of witnesses potentially exposed to immunized testimony in cases involving newsworthy events means that the court of appeals' draconian procedural requirements will, as

Judge Wald observed, ``consume[] countless extra weeks or months of trial." In all, then, the North ruling may, again in Judge Wald's words, amount to ``an absolute deterrent of any prosecution after a grant of immunity in a high-profile case."

The decision in Poindexter took the North ruling a step further. The court purported to state its procedural holding in modest terms: focusing on North's testimony at the Poindexter trial, the court said ``only that where a substantially exposed witness does not persuasively claim that he can segregate the effects of his exposure, the prosecution does not meet its burden merely by pointing to other statements of the same witness that were not themselves shown to be untainted." But while it is difficult to quarrel with that statement in the abstract, the real effect of the court's holding is dramatically broader. In fact, the court held that the Government could not carry its burden by pointing either to persuasive evidence that a witness was lying when he denied having an untainted recollection of the relevant events or to other forms of circumstantial indicia that the witness had not been affected by the immunized testimony. It bears emphasis that the court of appeals decided more than that the district judge applied the wrong standard in assessing such evidence; by refusing to remand the case, the court concluded as a matter of law that such evidence never may be used to carry the Government's burden. It thus is manifest that, unless the court retreats from its rule, a witness whose testimony has not been ``canned" and who asserts that he has been affected by exposure to immunized disclosures will not be permitted to testify at trial, no matter how improbable or internally inconsistent his claim.

These rules will have obvious practical consequences. They will make almost impossible the prosecution of any case involving public immunized statements that requires testimony by persons sympathetic to the accused, such as co-conspirators or other associates. And the dangers of abuse and manipulation are magnified by the court of appeals' view, expressed in North, that a witness inclined to assist the defense may become disqualified from testifying at trial by the simple expedient of soaking himself in the defendant's immunized statements.³ As the outcome of the North and Poindexter prosecutions makes graphically clear, these consequences have particular importance because the cases most sharply affected by the court of appeals' new rules will, by definition, be prosecutions involving conduct that has far-flung implications for national policy -- those where Congress has determined that the national interest requires an immediate public examination of the activity at issue.

³ As the court of appeals put it, persons sympathetic to the defense ``could have held evening classes in `the Parsing and Deconstruction of Kastigar' for the very purpose of `derailing' the [Independent Counsel's] prosecution, and such a curriculum would have been simply irrelevant to the question of whether or not the prosecution's case made use of North's compelled testimony."

The Competing Roles of Congress and the Independent Counsel

With this as background, the competing roles of Congress and the Executive (here represented by Independent Counsel) must be borne in mind. As Independent Counsel recognized from the outset of his investigation, it is Congress (in the case of the Iran/contra affair, its Select Committees) that is primarily responsible for the accurate public disclosure of the facts concerning transactions such as the Iran/contra matter. Ultimately, it is Congress that is empowered to legislate in a manner that not only will preclude future similar transactions in a narrow sense, but that also will facilitate the effective management of foreign policy and that will discourage disregard for existing legal strictures.

Although the Independent Counsel also has a reporting function, his first responsibility, in contrast, is the prosecution of criminal conduct. Accordingly, it is not primarily his duty to develop for the public a knowledge of what occurred.

When a conflict between the oversight and prosecutorial roles develops -- as plainly occurred in the Iran/contra affair -- the law is clear that it is Congress that must prevail. This is no more than a

recognition of the high political importance of Congress's responsibility. It also is the appropriate place to strike the balance, as resolution of this conflict calls for the exercise of a seasoned political judgment that must take a broad view of the national interest.

In exercising this judgment, however, it is imperative that Congress be sensitive to the dangers posed by grants of immunity to the successful prosecution of criminal conduct -- and that it bear in mind, as well, the importance of the even-handed application of criminal justice. In recent years Congress has granted use immunity with some frequency, in cases including many of the most notable examples of misconduct involving public officials or matters of public policy: in addition to the Iran/contra affair, the list includes the Watergate, "Koreagate," and ABSCAM scandals; congressional ethics inquiries; impeachment proceedings against federal judges; inquiries into narcotics trafficking, assassinations, and organized crime; investigations of fraud, corruption, and mismanagement on Indian reservations; and most recently, allegations of misconduct at the Department of Housing and Urban Development and of improper favors for savings and loan officials. In all, Congress has conferred use immunity on more than 300 witnesses over the last two decades.

In the past, members of Congress may have been of the view that the experience of the Watergate cases suggests that grants of use immunity do not significantly impede successful prosecution. Even at the time, that would not have been the proper lesson to draw from Watergate. Although two immunized witnesses in the Watergate matter -- John Dean and Charles Colson -- subsequently pleaded guilty, no immunized Watergate witness who refused to plead guilty was successfully tried and convicted. Gordon Strachan, the only immunized witness who was charged in the Watergate cover-up indictment, never went to trial because the Watergate Special Prosecutor concluded that there was a significant possibility that Strachan eventually might prevail on his claim of taint.⁴ The same thing happened in the case of Felipe De Diego, who was granted immunity by state authorities in connection with the break-in at the office of Daniel Ellsberg's psychiatrist.⁵ But in any event, the decisions in North and Poindexter should lay to rest any lingering sense that a congressional grant of use immunity is not a serious bar to future prosecution.

⁴ See Strachan, Self-Incrimination, Immunity and Watergate, 56 Tex. L. Rev. 791, 814-820 (1978).

⁵ See United States v. De Diego, 511 F.2d 818, 822-825 (D.C. Cir. 1975).

Congressional action that precludes prosecution -- or, as in Iran/contra, that makes it impossible to sustain a successful prosecution -- imposes costs on society that far transcend the failure to convict a few lawbreakers. There is significant inequity when (again as in Iran/contra) the more peripheral players are convicted while the central figures in the criminal enterprise escape punishment. And perhaps more fundamentally, the failure to punish governmental lawbreakers feeds the perception that public officials are not wholly accountable for their actions. It also may lead the public to believe that no real wrongdoing took place. That is a danger in the Iran/contra affair, where Oliver North hailed the ultimate dismissal of the prosecution against him as a personal vindication. While it was, of course, nothing of the sort -- North was found guilty beyond a reasonable doubt of serious criminal offenses, and the court of appeals' decision setting aside his conviction cast no doubt on his factual guilt -- the risk of public confusion on the point is substantial.

This background strongly suggests that Congress should compel public testimony from a Government official suspected of criminal misconduct only in the most extraordinary circumstances. Before doing so, it should determine whether there is substantial evidence that the prospective witness was involved in a criminal transaction, whether he or she ordinarily would be a logical subject for prosecutive consideration, and whether the prospective witness had a leading or substantial role in the criminal enterprise. If so, Congress also should determine whether a less culpable person could supply the evidence sought, and what the likelihood is that the witness to be immunized will supply honest, useful and necessary information. Only if no less culpable person is

available -- and if the need for obtaining the information is compelling -- should the prospective witness be granted immunity.