U.S. Supreme Court Slaps Down Starr in Hubbell Indictment

by Edward Spannaus

On June 5, the U.S. Supreme Court threw out the tax conviction of Webster Hubbell, the former Justice Department official and friend of President and Mrs. Clinton, on the grounds that independent counsel Kenneth Starr had unconstitutionally indicted Hubbell on the basis of documents which Hubbell had handed over to Starr under a grant of immunity from prosecution.

News reports called the ruling a "stinging setback" and a "rebuke" to Starr. But it is also a rebuke to the U.S. Justice Department, which had supported Starr before the Supreme Court, with the Justice Department defending the right of a prosecutor to subpoena documents from a target, and then to use those documents to indict that same person.

Starr's Pressure To 'Cooperate'

The background is this: While Hubbell was already in prison as a result of Starr's first indictment, Starr opened another investigation, as retaliation for Hubbell's lack of "cooperation," trying to force Hubbell to turn against the Clintons. Starr issued a very broad subpoena to Hubbell, calling for the production of 11 categories of financial and tax information. Hubbell objected on Fifth Amendment grounds, and Starr obtained a court order, granting Hubbell immunity from prosecution for the act of production of the documents.

The pretext for this second investigation and the subpoena was the assertion that the White House had conspired with Hubbell and others to obstruct justice, by helping Hubbell obtain high-paying consulting jobs. But, unable to come up with evidence of obstruction, Starr instead turned around and indicted Hubbell, plus Hubbell's wife, his lawyer, and his accountant, on tax conspiracy charges. (Which led Hubbell to declare that Starr could indict his dog and his cat, and he would still not lie about the President and the First Lady.)

Federal District Judge James Robertson then threw out the indictment, on the grounds that the use of the documents violated Hubbell's Fifth Amendment right against self-incrimination. (In a hearing on the matter, when prosecutors said that they could indict Hubbell, using documents produced under a grant of immunity, Judge Robertson called that notion "really scary.")

Robertson was unceasingly vilified by the right-wing press for allegedly protecting President Clinton, who had appointed him to the bench. Subsequently, the U.S. Court of Appeals reinstated the indictment, and Hubbell then pled guilty to a lesser, misdemeanor charge, with one of the conditions being that the charges against his wife and others would be dropped.

With Hubbell still refusing to "cooperate" with Starr against the Clintons, the independent counsel then brought yet another indictment against Hubbell, charging him with 15 felony counts of fraud, perjury, and obstruction of the original investigation of the Whitewater allegations conducted by the Federal Deposit Insurance Corp. and the Resolution Trust Corp. To get rid of the prosecutions, Hubbell pled guilty to one felony count in that indictment—which still stands.

"It is not normal for a prosecutor to keep indicting the same person over and over again," his attorney John Nields said at that time. "It is wrong for a prosecutor to keep on indicting the same person over and over again in the hope that he may some day tell him something about his real quarry"—i.e., President Clinton. Hubbell himself declared: "I don't know of any wrongdoing on behalf of the First Lady or the President, and nothing the independent counsel can do to me is going to make me lie about that."

Hubbell was also subject to unrelenting attack from key media organs of the "Olson Salon" (see review p. 80). The *Wall Street Journal* began targetting Hubbell in March 1993 with a series of "Who Is Webster Hubbell?" editorials, followed by series of "Who Was Webster Hubbell?" editorials after he was forced out of his position in the Justice Department. The *American Spectator* also pummelled Hubbell mercilessly—often with the aid of leaks from Starr's office.

Unusual Supreme Court Ruling

In their June 5 ruling, eight justices (only Chief Justice William Rehnquist dissenting) held that because Starr's office was only vaguely aware of the existence of the documents Hubbell was forced to produce, that the act of production also involved "testimonial" aspects—i.e., he was admitting the existence of the documents, that he was in control of them, and that they were authentic. The court said that this "was tantamount to answering a series of interrogatories asking a witness to disclose the existence and location of particular documents fitting certain broad descriptions." And, they said: "It is abundantly clear that the testimonial aspect of respondent's act of producing subpoenaed documents was the first step in a chain of evidence that led to this prosecution."

Today's ruling may have far-reaching implications. Since 1976, the Supreme Court has held that the Fifth Amendment's stricture that no one can be compelled to be a witness against himself in a criminal case, applies only to testimony, *not* to the production of documents or things. In a concurring opinion, Associate Justice Clarence Thomas, joined by Antonin Scalia, suggested that this is at variance with what the Fifth Amendment meant at the time of its adoption, and Thomas said that he would be willing to reconsider whether the Fifth Amendment bars compelled production of any physical evidence.

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