Judge whitewashes U.S. misconduct in the Boston LaRouche trial

by Our Legal Correspondent

The federal judge presiding over the LaRouche case in Boston has found that there was "institutional and systematic prosecutorial misconduct" by the government, but he has nevertheless ruled that the case can go to trial again.

The rulings, issued on Aug. 11 by Judge Robert E. Keeton (see *Documentation,* next page), were immediately denounced by defense counsel as "ludicrous" and as "a wink and a nod" to the prosecution, telling them that their misconduct will be allowed by the court.

Defense lawyers announced in court that they will file an immediate appeal of one of the rulings, and it expected that this will delay the start of any second trial, now scheduled for Oct. 3.

Misconduct and double jeopardy

Keeton was ruling on two major defense motions, both seeking dismissal of the Boston indictments against presidential candidate Lyndon LaRouche, six other individuals, and five organizations. One motion sought dismissal on grounds of government misconduct, the other on grounds of the Constitution's prohibition against double jeopardy.

The defense moves were prompted by the mistrial which Judge Keeton declared on May 3 on the first trial, for which jury selection had begun in September 1987. The defense contends that the mistrial was caused by the prosecution's failure to disclose relevant evidence which led to lengthy hearings on government misconduct.

Keeton in fact found, in his factual findings, that the government had violated its clear legal obligation to make timely disclosures of exculpatory evidence. He also found that the prosecutors and investigatory agents had made numerous false and inaccurate statements in the course of the trial and evidentiary hearings.

But in order to get around having to dismiss the case, Keeton came up with a tortured interpretation of the law by ruling that the misconduct was "institutional," and not the result of intentional or deliberate misrepresentation by the two prosecutors trying the case for the government. Keeton blamed everybody but the two prosecutors: the U. S. Attorney's office, the Justice Department, investigative agents for the FBI and Secret Service, and even "zealous" defense counsel!

Legal observers were astounded by Keeton's novel idea that the government—which after all brought the case—should not be held responsible for "institutional" misconduct. This is the exact opposite of most theories of corporate liability, under which a corporation is held responsible for the actions of its employees.

The attorney for Lyndon LaRouche blasted Keeton's rulings, saying that the misconduct of the prosecutors in the case was not a mistake or "negligent," but deliberate.

"This case was run from the highest levels of the Justice Department," said attorney Odin P. Anderson of Boston. "Nothing was a mistake. It is ludicrous to say that the prosecutors did not have sufficient backup from the U. S. Attorney's office or the Department of Justice. It is also ludicrous to blame the investigative agencies, especially the Secret Service."

Anderson said that the government has accomplished what it intended with the mistrial, which is a drop-by-drop financial bleeding of the political movement associated with LaRouche. "Repeatedly, government sources have been quoted saying they are conducting a war of attrition against LaRouche and his movement," charged Anderson. "As we argued in our court papers, John Markham, the prosecutor in this case, intentionally provoked a mistrial. He got what he wanted. The only thing better, in Markham's view, would be to hang LaRouche at high noon on the Boston Commons."

Double jeopardy appeal

On Aug. 18, lawyers for the defense filed a notice of appeal and a motion to postpone the second trial while the appeal is heard. Although prosecutor John Markham had indicated earlier that he would probably oppose a stay of the trial, on grounds that the appeal is frivolous, Markham did not take this position in his own Aug. 18 filing. Instead, Markham said the government will ask the appeals court to expedite the appeal and rule on it summarily. The government is now taking the position that this should only delay the start of the second trial until late October or early November. However, many observers believe that because of the seriousness and complexity of the appeal issues, a ruling on the appeal is likely to take many months, delaying the start of the second trial until after the first of the year.

Judge rules: Government lawyers were over-worked

The following are excerpts from Judge Robert E. Keeton's Memorandum and Order, dated Aug. 19, 1988.

. . . I have found government failures to make timely disclosures of information that was in the possession of a government agent and, in some instances, government representations that were inaccurate. . . . I find that the government has been guilty of negligent misrepresentation in relation to these matters. In reaching this finding of failure to exercise reasonable care to assure the accuracy of representations made and the completeness of disclosures made . . . and in finding no intentional violation, I have taken account of the extraordinary burden upon government attorneys assigned to this case, by reason of the massive volume of documentary materials to be examined, the number of defense attorneys making discovery demands upon the government in the representation of their clients, the legal and factual complexities of the charges and of the defenses advanced by defense counsel, and the fact that only two government attorneys have been assigned responsibility for the prosecution of the case and during most periods with each of them having other assigned responsibilities as well as responsibilities to this case. . . . The government's choice to indict and prosecute, and then to commit only limited attorney resources to the case, cannot excuse failure of the government to comply fully with its obligations of due care to comply with disclosure obligations. I find that the government attorneys assigned to this case—AUSA Markham and DOJ Trial Attorney Mark Rasch—have at no time intentionally made any misrepresentation regarding any of the matters that have been the subject of this hearing. Viewing the government's conduct as a whole, however, I find that the government has failed to take due care to assure the accuracy and timeliness of representations and disclosures. . . .

The discretion of the district court to fashion a remedy/sanction to deter illegal conduct is not without limits. I conclude, for example, that a district court lacks power to order dismissal solely as a sanction to deter illegal conduct. . . . In choosing a sanction short of dismissal, I conclude that the district court must choose an available remedy that is "narrowly tailored to deter objectionable prosecutorial conduct." . . .

The most important factor to consider is whether the government's conduct was deliberate. . . . Other important factors are how pervasive the misconduct was and whether it was continuous. . . .

The conclusion is inescapable that the government's failure to comply with its disclosure obligations in this case is serious. Although the record does not establish *Brady* violations approaching the scope of those asserted by defendants, the disclosure obligations that were violated were clearly established in the law, not founded on close or debatable legal questions. . . .

At the same time, I conclude that the government's misconduct was neither pervasive nor deliberate. The discovery demands placed upon the government in this case were enormous. The defendants requested a wide variety of information that, potentially at least, might have been material to a number of defenses. The government was obligated by these many requests to conduct an extensive search of the evidence generated by a lengthy, multi-district investigation. On the whole, the government complied with its disclosure obligations. It caused government files throughout the country to be searched, and it disclosed huge quantities of *Brady* and Jencks material. . . . I find on the record before me that the government's failure to make timely disclosure of Emerson materials was overwhelmingly the exception rather than a pervasive or continuous practice.

Many aspects of the evidence before the court support the finding, which I make, that the government's disclosure violations were not deliberate. First, the prosecutors had very little to gain by deliberately *delaying* disclosure. . . .

Second, the court is convinced by the great weight of evidence that the individual prosecutors appearing before the court in the case take the government's disclosure obligations seriously. This is not a case where the defense made a few simple discovery requests to which the prosecutor failed to respond. To the contrary, defendants made thousands of discovery requests, hundreds of which required the government to conduct wide-ranging searches, and the overwhelming majority of which the government responded to with reasonable promptness.

Finally, I find that the government's late disclosures were not deliberate because the specific circumstances presented support a finding of negligence rather than deliberateness. . . .

I find that government agents other than the prosecutors appearing before the court in this case were in numerous instances more relaxed in their attitude to *Brady* and Jencks.

On more than one occasion aside from the Emerson matter, agencies in possession of necessary files have been slow to provide them, and individual agents have demonstrated that their own view of disclosure obligations is narrower than the view of the prosecutors (and of the law as determined by the court).

Ultimately, of course, the responsibility for fulfilling the government's disclosure obligations rests with the prosecutors. Agents of the federal government outside the Department of Justice are not as fully and professionally trained in the complexities of *Brady* and Jencks. . . . In this case, the prosecutors were limited in their ability to fulfill this responsibility by lack of adequate support and assistance both within and beyond the United States Attorney's office.

The failure of the prosecutors consistently to guarantee the responsiveness of other federal agents was institutional negligence rather than deliberate misconduct. There was no cover-up of evidence extremely damaging to the government's case or delay for tactical advantage; rather, the delayed disclosures are chargeable to a "bureaucratic failure to properly support massive litigation." . . . It is apparent that two prosecutors cannot comprehensively develop trial strategy, prepare and examine witnesses, respond to substantive defense motions from ten (10) zealous defense attorneys, assemble Jencks material for more than 150 witnesses, and personally oversee all aspects of the *Brady* search.

The appropriate remedy for this transgression . . . is to pare the trial down to a scope that the government can reasonably support given the resources it sees fit to assign to the case. . . . This is a remedy "narrowly tailored" to deter the kind of institutional and systemic prosecutorial misconduct that occurred during the first trial. . . .

NDPC seeks to quash Writ of Execution

The National Democratic Policy Committee (NDPC) filed a motion on Aug. 16 before Judge A. David Mazzone in Boston, Massachusetts to quash or stay a Writ of Execution for a $5.1 million fine, since the fine itself is now on appeal before the First Circuit Court of Appeals.

"The NDPC is the First Amendment-protected multicandidate political action committee of the LaRouche wing of the Democratic Party which ignited an international explosion over the mental incapacity of Michael Dukakis to be nominated as President at the Atlanta Convention. In retaliation, friends of Michael Dukakis and William Weld are trying to put it out of political business before the national elections," Warren J. Hamerman, the chairman of the NDPC, announced. He revealed that the NDPC challenge to the Writ includes the following points:

1) The Writ was illegally filed by the government ex parte as a trick to try and short-cut the NDPC's right to appeal;

2) The fact that the fine is set at an absurdly high amount of over $5 million, unmasks the fact that the only intention of the Writ is to try and put the NDPC out of political business;

3) Since the NDPC is a political action committee, the government can not come in and "take over" the PAC as if it were a normal business with an income stream and assets to liquidate;

4) It would not only be absurd and impractical for the government to try and run NDPC and "solicit contributions," it would also be illegal and unconstitutional! The NDPC is a Federal Election Commission-regulated political action committee and spends its contributions on political enterprises such as publishing and political campaigning. It is inhibited by statute, regulation, and function from acquiring assets. The law does not allow contributions to be diverted from political activities into other expenditures. Furthermore, since each contributor can only give a fixed amount of money per year, if his or her money were siphoned off by the government, then the constitutional rights of that contributor to give money for political purposes would be destroyed.

5) The NDPC does not have income remotely capable of supporting a bond for a $5 million judgment. It would take the NDPC, at its level of income generation, well over a decade to raise the money *just to post a bond,* while the appeal will probably be announced within a few months.

6) The government has nothing to lose in waiting for the appeal to be decided. The NDPC is no more able to pay $5.1 million now than it will be then. The only thing the government would gain is cutting off the NDPC's right to appeal. Only the NDPC's rights to exist and appeal hang in the balance.

7) The Writ was issued illegally and is not valid. It was a maneuver by the government to get around an order by a Richmond, Virginia federal magistrate that the government had to return discovery documents to the NDPC from a previous matter. The government attempted an end-run around the Virginia court by going *ex parte* to a Massachusetts court and getting it to issue the Writ, without telling the Massachusetts court what the Virginia magistrate ruled.

8) Once before, the government tried to collect the $5.1 million fine from the NDPC, and the First Circuit Court in Massachusetts ordered it to stop until the appeal is decided.

The NDPC is asking the court to stay the collection of the fine pending the outcome of the appeal, or, alternatively, to quash the Writ entirely.