

Manafort Plea Reminds Us Of Whitewater

By **Lawrence Laurenzi and Joe Whitley** (September 25, 2018, 6:04 PM EDT)

"Today's defendant is tomorrow's witness" is a time-tested strategy at U.S. attorney's offices around the country. This practice is being used by special counsel Robert Mueller in the prosecution of Paul Manafort, where after convicting him on eight counts in the U.S. District Court for the Eastern District of Virginia, the government continued to aggressively pursue Manafort on additional counts in Virginia, as well as in the U.S. District Court for the District of Columbia, until Manafort entered into a plea agreement this month. In applying legal pressure, the Special Counsel's Office hopes that Manafort will provide useful information that will lead to charges on others.

The government employed this precise tactic in the 1990s in the Whitewater investigation. Bill and Hillary Clinton and Jim and Susan McDougal were co-owners of the Whitewater Development Corp., which was formed to invest in real estate in north-central Arkansas. The Clintons and the McDougals borrowed substantial sums of money to purchase the property in 1978. This project was unsuccessful, and the Clintons eventually sold their interest back to the McDougals for a paltry \$1,000.

Kenneth Starr, in his recent book, "Contempt: A Memoir of the Clinton Investigation," characterized the post-trial status of the investigation as follows: "[O]ur team's continued success was largely dependent on the cooperation of one of the McDougals. Our goal remained: get to the bottom of the Whitewater deal, especially the issue of any potential culpability on the part of the Clintons, as quickly as possible and be done."

The Whitewater investigation centered around a loan for \$825,000 made by Madison Guaranty Savings and Loan — owned by the McDougals — to Dean Paul so that he could buy properties owned by David Hale at a grossly inflated price. Hale then used the profits from the sale to extract \$1.5 million from the Small Business Administration. From that \$1.5 million, Hale made four separate loans to entities identified by McDougal and Tucker, including a \$300,000 loan to Susan McDougal, supposedly to finance marketing efforts. Instead, these funds went to personal expenses and to repay certain loans, including \$25,000 toward a land purchase by Whitewater Development Corp. Hale claimed that the Clintons were involved in this fraudulent conduct.

As part of the Office of Independent Counsel's investigation into Whitewater, Starr prosecuted and struck deals with several individuals close to the Clintons. The first of these individuals was David Hale, who pled guilty for conspiring to defraud the Small Business Association, and as part of his plea agreement, agreed to cooperate with the Whitewater investigation.

The government also — unsuccessfully — sought the cooperation of Webb Hubbell. Hubbell was a former law partner of Hillary Clinton's from the Rose Law Firm who was named the White House liaison to the U.S. Department of Justice in 1993. Hubbell, however, had engaged in embezzlement and billing fraud during his time at the Rose Law Firm, totaling \$482,000 in theft. The Office of Independent Counsel and Starr negotiated a deal with Hubbell, wherein Hubbell would plead guilty to mail fraud and tax evasion and would cooperate with the Whitewater investigation. In return, if Hubbell cooperated, the government would recommend a downward departure from the sentencing guidelines. Hubbell did meet with Starr and his staff. However, as noted in his book, Starr, while hopeful of Hubbell's interview, was dissatisfied with the information provided.



Lawrence Laurenzi



Joe Whitley

The government also prosecuted the McDougals and Arkansas Gov. Jim Guy Tucker based on a 21-count indictment alleging financial fraud and conspiracy. Independent counsel Starr believed that the Clintons were intentionally evading his questions and providing misleading testimony, and sought to obtain the McDougals' and Tucker's cooperation by pursuing these charges. The trial against the McDougals and Tucker proved successful. Jim McDougal was convicted on 18 counts of fraud and conspiracy, Susan McDougal on four counts of fraud and conspiracy, and Tucker on one count of conspiracy and one count of mail fraud.

The OIG struggled to obtain the cooperation of Susan McDougal or Webb Hubbell. It did, however, achieve Jim McDougal's cooperation after he was convicted. Jim McDougal's testimony led the OIG to significant evidence, including an approximately \$25,000 check with the notation "Pay off Clinton," which the OIG eventually discovered. Jim McDougal faced a potential sentence of 84 years imprisonment, but the OIG recommended a downward departure, resulting in a sentence of three years imprisonment and one year of house arrest.

Despite this lengthy investigation, the OIG determined that it did not have sufficient evidence to seek an indictment of the Clintons in the Whitewater scandal. It instead turned toward obtaining the cooperation of Monica Lewinsky, in an effort to expose Bill Clinton's perjury and obstruction of justice. Though not initially receptive to the OIG's proposal to cooperate, Lewinsky eventually reached an immunity deal to testify and provide evidence against President Clinton. Lewinsky's cooperation was instrumental in the OIG's referral to the House of Representatives.

The investigation of President Donald Trump, led by special counsel Robert Mueller, in many ways mirrors Starr's Whitewater investigation. In Mueller's probe thus far, grand juries have indicted or information have been filed against Michael Flynn, Rick Gates, George Papadopoulos, Alex van der Zwaan, Richard Pinedo, 13 Russian nationals, three Russian companies and 12 Russian intelligence officers. Manafort is just the latest to have entered into a plea agreement with the government. The American targets of Mueller's investigation have largely been charged with financial crimes, making false statements to the FBI, and/or failing to register as a foreign agent. None of these individuals has entered pleas or been convicted of any offenses involving the central mandate laid down by Deputy Attorney General Rod Rosenstein: to investigate collusion between the Trump campaign and the Russian government.

The special counsel's desire for cooperation is spelled out in Manafort's plea agreement and further confirmed during Manafort's change of plea. Pursuant to his plea agreement, Manafort pled guilty to two counts in his D.C. criminal case, admitted guilt — but did not plead guilty to — the remaining 10 counts in his Virginia criminal matter, and agreed to cooperate with federal investigators. He also forfeited substantial real property and bank accounts. The plea agreement further provides that, with respect to the two charges to which Manafort pled guilty, the estimated sentencing guideline range would be 210 to 262 months of imprisonment, plus a potential \$40,000 to \$400,000 fine. Notably, Manafort's sentencing will be delayed until his cooperation is fulfilled. Assuming Manafort does cooperate, the prosecution will dismiss the remaining counts in the D.C. and Virginia cases. Additionally, the government has agreed that if, at the time of sentencing, it determines that Manafort has provided substantial assistance, the government would move for a downward departure, which could dramatically reduce Manafort's prison time.

Mueller's team is pursuing Manafort and others using the same prosecutorial strategy that Starr and his team used in Whitewater. Mueller's team, however, faces the same headwinds that Starr faced more than two decades ago. The effective use of a cooperator to obtain convictions against another is problematic. This is particularly true where the cooperator has been convicted of criminal acts that are unrelated to the matters under the special counsel's central mandate. In the case of Mueller, Manafort's convictions have little to do with the actual subject matter he was directed to investigate.

This difficulty in using cooperators as witnesses is widely recognized. The uniform jury instructions specifically admonish the jury that a cooperator's testimony needs to be reviewed with caution. Their motives are clearly influenced by a desire to reduce their exposure to jail time. Manafort's offenses of conviction carry substantial penalties and his exposure to incarceration is significant. Prosecutors know firsthand that "there are no swans in the sewer" and cooperator testimony must be corroborated if it is to be relied on by the government to support further actions. This is particularly

true in the context of special counsel investigations where the impact of any charges has national ramifications.

With the caveat that the Whitewater investigation can be viewed with hindsight and Mueller's investigation is incomplete and ongoing, there is an obvious parallel between the two. Each investigation was directed by a central mandate setting out a clear, albeit elusive, goal for the investigation. Mueller's central mandate — investigating collusion between Russia and the Trump campaign — presents the clear goal of proving a coordinated effort between individuals within the Trump campaign and the Russian government to influence the 2016 presidential election. The Whitewater central mandate — investigating crimes relating to the Clintons' relationship to the Whitewater project — presented the clear goal of proving that the Clintons committed crimes in connection with Whitewater.

However, both investigations have relied primarily on secondary mandates — i.e., the authority to investigate and prosecute crimes discovered or occurring during the investigation into the central mandate — to obtain convictions and guilty pleas of former associates of the respective presidents. Starr and his team failed to use their convicted cooperators to bring criminal charges against the Clintons. As the Whitewater investigations illustrate, flipping a defendant may produce a witness, but the type of witness, whether his or her testimony can be corroborated, and how helpful he or she may be to the government's central mandate is never certain. However, Mueller, like Starr, is not faced with the same budget constraints like other DOJ divisions and U.S. attorney's offices. Instead, the Special Counsel's Office is well-funded, allowing it to pursue multiple cases in search of cooperation. In the end, whether Mueller is more successful than Starr in developing cooperator testimony remains to be seen.

Lawrence J. Laurenzi is of counsel at Baker Donelson Bearman Caldwell & Berkowitz PC and a former U.S. attorney.

Joe D. Whitley is a shareholder at Baker Donelson and chairman of the firm's government enforcement and investigations group.

Nicole Berkowitz and Timothy J. Colletti, also with Baker Donelson, contributed to this article.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.