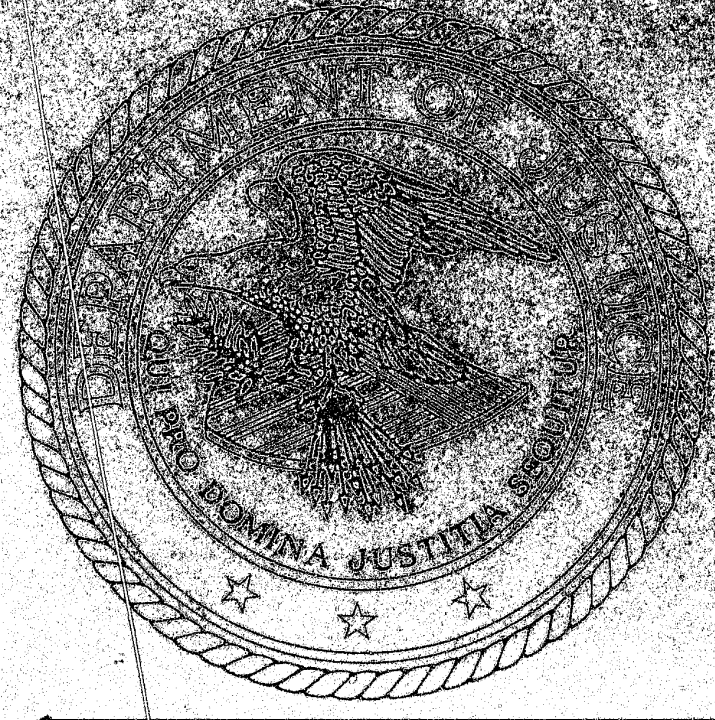

# INTRODUCTION

## WHY PUBLIC CORRUPTION IS NOT A VICTIMLESS CRIME

One of the most challenging problems we face in combating corruption today is the widely held public perception that corruption is a victimless crime. For years prosecutors have encountered this frustrating attitude in our dealings with witnesses, jurors and even judges who think we should be spending our time going after "real criminals" -- guys who say "dese, dem and dose" -- rather than the buttoned-down type puzzled to find himself in the dock of the court. Far too often even the people who have been victimized by corruption and who should be outraged and eager to cooperate shrug their shoulders, in effect saying, "Hey, what are you going to do?"

In many parts of the country, a certain laxity in the conduct of public business has developed over time that is unacceptable, and an attitude of resignation on the part of the public has, also over time, allowed the system to grow and flourish. One poll in Massachusetts indicated that ninety-two percent of the people believed that corruption in the state was widespread. While the attitude that "you can't fight city hall" is not as widely held as it once was in Chicago, Boston, Philadelphia, New York and other cities, there is still far too much of it. This should be disturbing to private citizens, not just to investigators and prosecutors.

The myth that corruption is a "consensual crime" that harms no one is one of the biggest lies in public life today. Public corruption is not a victimless crime. There are many victims and one has only to look at the headlines to know who they are.

In Boston, for example, where public buildings have had to be closed because of the fear that they may collapse from shoddy construction attributable in part to a corrupt system of selecting architectural and construction firms, public corruption is not a victimless crime.

In Atlanta, where some residents have had to live with the fear that their tenements may burn down or fall apart as

a result of substandard electrical wiring or the use of low grade building materials that have never been properly inspected because the inspectors were paid off to look the other way, public corruption is not a victimless crime.

In Chicago and Philadelphia, where judges and lawyers have been caught taking money in exchange for fixing criminal cases and the result is that drug dealers and other dangerous criminals have been turned back out on the streets, public corruption is not a victimless crime.

In New York, where contracts for all manner of public services have been given out not to the low bidder but to the company that best lines the pockets of those making the contracting decision, with the result that the city budget goes through the roof and public programs for transportation, insurance, schools, medical care and other necessities are underfunded, public corruption is not a victimless crime.

On Capitol Hill and in State Houses across the country, when lobbyists and special interest groups win the hearts of legislators by wining and dining, by lavish trips, fees and boondoggles and the result can be special interest legislation that counts its costs in jobs and taxpayers' money and helps no one but the promoters of the legislation, public corruption is not a victimless crime.

In Alabama and Louisiana, where voter fraud, ballot box stuffing and corruption in the electoral system have deprived the poor and the elderly and minorities of their right to vote in public elections and have ensured the election of corrupt state and local officials, public corruption is not a victimless crime.

In New Jersey, where environmental inspectors have been caught taking payoffs to allow toxic wastes to be dumped illegally on local lands and lakes and streams endangering the health and safety of the public, public corruption is not a victimless crime.

In Washington, D.C., and anywhere military contracts involving vital defense and weapons systems have been the subject of fraud, bribery, payoffs and kickbacks, with the resulting drain on our budget and potential harm to national security, public corruption is not a victimless crime.

In Miami, where police officers have been put on the payroll of narcotics enterprises to protect the flow of illegal drugs into this country and onto our streets and

when drug-related deaths and suicides and emergency room admissions continue to rise because of it, public corruption is certainly not a victimless crime.

Corruption has other less obvious victims as well. If left unchecked it poses a powerful threat to democratic society. It erodes public confidence in the institutions of government. It distorts the democratic process that is supposed to fairly resolve competing meritorious claims to limited resources on a rational basis -- almost always to the detriment of the most disadvantaged members of society. This undermines the legitimacy of government and short-circuits the hope of those who have not prevailed or benefited that there is someone in government who will faithfully serve, rather than sell out, their interest.

Corruption also deters honest and able citizens from seeking public office, and that is particularly troubling to me because, in the long run, it is the participation in public life of many civic-minded men and women that provides the best hope that our democratic processes will function freely and fairly.

Another consequence of corruption and political favoritism in many states has been the acceptance of work in the public sector that would not be tolerated in the private sector, and should not be tolerated in public projects. For example, in 1980 a Massachusetts blue ribbon commission found that corruption was one of the principal reasons why so many public buildings, including government offices, parking garages, courthouses, hospitals, libraries, and prisons, were in substandard shape and why many had to be closed.

It should not be surprising that those in the business community who pay tribute, whether through payoffs or required "campaign contributions," will make their money back many times over by inferior work, substituting a lesser grade of materials or lower quality products, or cutting corners on workmanship. Even the out-of-pocket cost of a bribe is never borne for long by a contractor: it is plowed back into the contract, or a change order to the contract, and passed directly on to the taxpayers, usually with interest.

A perception that the system is corrupt or rigged will, by a sort of political Gresham's Law, eventually drive the good players out of the game. That is precisely what we found to have occurred in Massachusetts. Over time, many reputable contractors refused to bid on government contracts.

From a law enforcement perspective, any public perception that corruption hurts no one makes it much harder for us to do our jobs. Witnesses who do not see bribery or extortion as serious crimes do not want to come forward, do not see the need to testify, and will not cooperate in investigations. Prosecutors who are reluctant to challenge the power structure, and judges who let corrupt officials stay on the street, have unwittingly aided and abetted this problem.

What can be done to change this? The most effective thing the Justice Department can do is to bring more corruption cases, cases designed to attack the corrupt power structure wherever it exists and cases which challenge the assumption of any of those on top who may believe they are above the law. It is important that we bring cases that are designed to change public attitudes, cases that make it apparent who has profited at the public's expense.

The best kind of cases for reshaping public attitudes in this area are the kind that make the average citizen and taxpayer angry. I recall in Boston we prosecuted a series of pension fraud cases against a number of politically well-connected officials in the City's budget office. All had claimed "slip-and-fall" accidents in their final year in office and after a falling-out with the Mayor had retired from City government on $30,000-per-year disability pensions with a total value of $1 million each over the rest of their lifetimes. These phoney pensions would have cost the taxpayers of Boston millions of dollars and I can remember seeing a secretary as she was typing the indictments, punching out the keys one at a time saying "I'VE--WORKED --SINCE--I--WAS--FIFTEEN--YEARS--OLD. I--PAY--MY--TAXES --AND--THIS--REALLY--MAKES--ME--MAD."

This type of case makes a good point -- not only to the citizens who read and hear about it but to the corrupt officials as well. And the results can sometimes be dramatic. In fact, in 1981, the year before our investigations started, the City of Boston awarded 260 disability pensions. In 1983 and 1984 respectively, after several officials were convicted, only forty-eight and forty-four such pensions were awarded.

What happens when cases like this change public perception is that people become less tolerant and more likely to express outrage. Tougher state laws against corruption are passed. More pressure is put on state and local law enforcement to do their job. Auditors and Inspectors General are appointed. Ethics rules are complied with and enforced. Government agencies which had served as

political dumping grounds start to be restructured and recharged. Integrity in government starts to become part of the political dialogue and part of candidates' platforms. Gradually public attitudes are reshaped and the public's interest in honest government is vindicated.

My suggestion is that we try to design, in each District, an anti-corruption program that is not simply reactive to the problems that appear on the surface (the walk-ins), but one that proactively attacks all corrupt elements or aspects of the power structure in the community. This means setting up a specialized corruption unit, developing an intelligence base that taps into the corrupt infrastructure, and then using all the tools at our disposal -- including the most intrusive investigative techniques -- to develop cases that will have an impact. This Manual is intended to outline the basic ingredients of such a program.

William F. Weld

William F. Weld *
Assistant Attorney General
Criminal Division
U.S. Department of Justice
February 1988

* Prior to being appointed Assistant Attorney General in charge of the Criminal Division, William F. Weld served as the United States Attorney in Boston, Massachusetts for five years. During his tenure, the prosecution of public corruption cases was the number one priority of his office.

110010

PROSECUTION OF PUBLIC CORRUPTION CASES

TABLE OF CONTENTS

* * * * * * * *

The preparation of this Manual was coordinated by the Public Integrity Section, Criminal Division, with the assistance of the Division's Office of Policy and Management Analysis. The Department wishes to acknowledge the valuable support and editorial contributions of the following people: Julie Samuels, Suzanne Gesin, Edith Levine and Debra Russell, of the Office of Policy and Management Analysis; Jo Ann Farrington and Diane Blakely of the Public Integrity Section; and Velia Valencia, Sherry Flower, Joyce Cason and Diane Roberts of the Office of the Assistant Attorney General.

Each chapter reflects the personal experiences and viewpoint of the author, and is not intended to represent Department of Justice policy. It is hoped that by presenting the varying views and perspectives of experienced corruption prosecutors nationwide, valuable insights and enthusiasm for pursuing these cases will be communicated.

This Manual is not intended to confer any rights, privileges or benefits on prospective or actual witnesses or defendants. It is also not intended to have the force of law or of a United States Department of Justice directive. See United States v. Caceres, 440 U.S. 741 (1979).

CHAPTER ONE

# JUDICIAL CORRUPTION

BY

ANTON R. VALUKAS*

United States Attorney
Northern District of Illinois

AND

IRA RAPHAELSON**

Chief, Special Prosecutions Division
Northern District of Illinois

* Anton R. Valukas has been United States Attorney in the Northern District of Illinois since 1985, and has supervised Operation Greylord since then. He also was the lead prosecutor in the trial of Judge Raymond Sodini, described herein.

** Ira Raphaelson, Chief of the Special Prosecutions Division in the U. S. Attorney's Office, participated in Operation Greylord and Operation Incubator, both judicial corruption investigations.

# JUDICIAL CORRUPTION

> "How can anyone tell how a judge would have ruled if he had not been bribed?" United States v. Holzer, 816 F.2d 304, 308 (7th Cir.), vacated and remanded for reconsideration in light of McNally v. United States, 108 S. Ct. 53 (1987).

Nothing is more loathsome to a prosecuting attorney than a member of the judiciary who sells his office in connection with the disposition of cases over which he presides. There have been many corruption probes of judges taking money around the country. Nowhere has there been as much judicial corruption exposed as in the ongoing Greylord [1/] investigation of the Circuit Court of Cook County, Illinois.

In order to effectively prosecute judicial corruption, a prosecutor should develop an understanding of the types of corruption, theories of prosecution and methods of investigation.

## Forms of Corruption

> "They tell a story about a judge who called the parties into his chambers and announced: 'I have received $1,500 from the plaintiff to decide the case in his favor and $1,000 from the defendant to decide the case for the defense. In fairness to the parties, I will return $500 to the plaintiff and decide this case on the merits.'"
>
> -- Chicago Courthouse folklore as related by Irv Kupcinet, columnist for the Chicago Sun-Times.

The Greylord experience identified at least three distinct forms of corruption: the outright fix, hustling and brokering.

### The Fix

The most obvious form of judicial corruption involves the direct promise by a judge, or someone acting on his behalf, that the judge will give a specific disposition or consideration to a case (quid) in exchange for (pro) money or other things of value (quo).

---

1/ To date, 65 persons have been convicted including ten former or sitting judges. This seven-year probe would not have succeeded without the efforts of the Greylord "core group," former AUSAs Daniel E. Reidy, Charles Sklarsky, Candace Fabri and Scott Lassar.

Greylord revealed substantial corruption within the traffic courts. In those courts a corrupt chief judge assigned other judges to the "big rooms", (courts where driving under the influence cases were heard) based on their willingness to accommodate the corrupt defense lawyers who practiced there. These defense lawyers were called "miracle workers" because they never lost a case. These same lawyers got their results by paying judges, often through middlemen, for favorable disposition of their clients' drunk driving cases. Often the arresting police officer was also paid to testify in a way that created a reasonable doubt. The weakened evidence gave the corrupt judge "something to hang his hat on" in finding the defendant not guilty. Greylord found the corruption in traffic court to be open and notorious. In one example cited by the Seventh Circuit, the corrupt judge openly complained that the corrupt defense lawyer had just let his client confess, giving the judge no basis to rule in his favor. Nonetheless, the judge acquitted the defendant. The fix was in so the evidence did not matter. See United States v. Murphy, 768 F.2d 1518 (7th Cir. 1985).

In contrast to the overt corruption evident in Murphy, a subtler form of corruption was practiced in Holzer, supra, the most intricate of the Greylord cases. Holzer, a chancery judge, was convicted of racketeering, Hobbs Act extortion, mail fraud and tax charges arising from his extortion of "loans" from the attorneys who practiced regularly before him. While the judge did not expressly threaten the lawyers with adverse rulings, the Seventh Circuit found that the implied threat there was sufficient for purposes of the Hobbs Act.

Hustling

Greylord also revealed that lawyers would pay off judges for permission to "hustle" clients in large volume criminal courtrooms. These same lawyers often paid other courtroom personnel such as clerks or sheriffs to steer clients to them. At one point, the hustlers were organized into a hustlers' bribery club where corrupt lawyers paid the chief judge of the district $500 a month for the privilege of cutting a deal with the judge assigned to the courtroom where they wanted to work. Illinois canons of ethics, of course, prohibited lawyers from soliciting clients and judges from allowing hustling.

Nonetheless, business was good and in some courtrooms, an attorney could make a six figure salary even after paying off courtroom personnel and judges for the privilege of hustling the courtroom. 2/

---

2/ See United States v. Reynolds, 821 F.2d 427 (7th Cir. 1987) and United States v. LeFevour, 798 F.2d 977 (7th Cir. 1986).

In the Criminal Courts of Cook County, defendants can bond out of jail by posting 10% of the bond imposed by a judge in cash. The bond is refundable to the defendant or his designee at the conclusion of his case in the form of a cash bond refund (CBR) which the Clerk of the Court mails to the defendant or his designee. Typically, the hustler kept one third of the CBR, gave one third to the judge and used one third to pay his taxes.

Brokering

Some judges branch out to fix cases not only in their own courtrooms but in the courtrooms of other judges as well. See LeFevour, supra. This practice is called "brokering" and may involve a chief judge leaning on another judge for a particular result because of politics or because of payoffs. It can also involve judicial colleagues exchanging "favors" or sharing in payoffs. It can involve judges simply introducing a lawyer to the judge who will hear the case so they can "work out their own deal." One judge even brokered extra-judicial corruption using his office as a judge to obtain liquor licenses and zoning changes for money. 3/

Theories of Prosecution

Mail Fraud, 18 U.S.C. § 1341

The Supreme Court in McNally v. United States, ___ U.S. ___, 107 S. Ct. 2875 (1987) gutted the intangible rights theory of mail fraud prosecution, though Carpenter v. United States, ___ U.S. ___, 108 S. Ct. 316 (1987) reopened some doors. In looking for alternative theories of prosecution, we should consider using 18 U.S.C. § 1952, the Travel Act, where the bribery scheme is furthered or facilitated through the use of the mails. An open issue is whether the statute reaches intrastate mailings. See also the chapter in the appendix of this Manual concerning possible strategies remaining available under the mail fraud statute.

Hobbs Act, 18 U.S.C. § 1951

> "A threat is not a state of mind in the threatener; it is an appearance to the victim." Holzer at 310.

The Hobbs Act prohibits effects on interstate commerce through extortion under threat or fear of economic harm or under color of official right. Because judges are clearly public officials who act "under color of official right," we will focus on how the money is obtained and whether that act affects commerce.

---

3/ United States v. Salerno, 87 CR 460 (N.D. Ill. (1987)).

1. Fear or Threat:

In the Seventh Circuit, extortion "under color of official right" means "the knowing receipt of bribes; they need not be solicited." 4/ It is enough "if the official knows that the bribe, gift or other favor is motivated by a hope that it will influence him in the exercise of his office and if, knowing this, he accepts the bribe." Holzer, at 311. Murphy at 1530.

The Seventh Circuit has distinguished between payments made out of fear of retribution by the official and those made in hopes of obtaining a benefit from the office holder. In the latter situation, extortion is committed by the officeholder "where bribes are offered and accepted even without having been solicited." Holzer, at 310.

2. Effect on Commerce:

As long as we can show the extortionate conduct affected commerce "in any degree" or would have done so (in attempt cases), the commerce element is satisfied. Two theories are generally advanced -- direct effect and indirect effect. In the latter type of case, the Government must show that the extortionate payment depleted the victim's assets, and that those assets were used in the purchase of goods in interstate commerce. In that regard, it should be noted that the courts have distinguished between business and personal assets. 5/ This distinction may cause difficulties where the "victim" is an individual paying to fix his case. However, in United States v. Freeman, 568 F.Supp. 450 (N.D. Ill. 1983), an effect on commerce was found in the depletion of the assets of a bribe-paying criminal whose activities affected commerce. Commerce may be found if the lawyer as "victim" has a business effect on commerce. See Murphy at 1530.

While the majority of Hobbs Act cases are prosecuted on an indirect effect theory, a direct effect theory may also be advanced in many judicial corruption cases. For instance, the fixing of a case involving the possible loss of a business license for a business involved in interstate commerce has been

---

4/ The Second Circuit in United States v. O'Grady, 742 F.2d 682 (2nd Cir. 1984) has required proof of solicitation in order to satisfy the Hobbs Act extortion element.

5/ Compare United States v. Boulahanis, 677 F.2d 586 (7th Cir.) cert. denied, 459 U.S. 1016 (1982) and United States v. Mattson, 671 F.2d 1020 (7th Cir. 1982).

held to have a potential direct effect on commerce. [6/] This approach applies even with FBI-supplied funds to cooperating "victims." See United States v. Tuchow, 768 F.2d 855 (7th Cir. 1985).

RICO, 18 U.S.C. § 1962 et seq.

The most powerful weapon in the Federal prosecutor's arsenal is well-suited for use in judicial corruption prosecutions.

A person who conducts, through a pattern of racketeering, directly or indirectly, the affairs of an enterprise with which he is associated and which affect interstate commerce, faces RICO conviction and possible forfeiture of his ill-gotten gains and interests.

The "enterprise" may be the court system, Murphy, a judgeship, United States v. Hunt, 749 F.2d 1078 (4th Cir. 1978), a local prosecutor's office, United States v. Yonan, 800 F.2d 164 (7th Cir. 1986), or a law firm Yonan. However, an individual lawyer may not under all circumstances be an enterprise. [7/]

RICO commerce is more easily satisfied than commerce under the Hobbs Act. Murphy at 1531. Only the enterprise need affect commerce. Id. at 1531. Even if it is the racketeering activity itself that affects commerce, the element is satisfied. United States v. Conn, 769 F.2d 420 (7th Cir. 1985).

A person "associates" with the enterprise even if he works against the goals of the enterprise, e.g., a person who bribes a prosecutor is still associated with the prosecutor's office. See Yonan.

The pattern of racketeering activity is most easily found in the pattern of bribery and extortion charged. RICO forfeiture can reach judgeships, salaries and bribes.

RICO Conspiracy

A group of people, associated in fact, who agree to conduct the affairs of the court/enterprise through bribery of the judge and courtroom personnel can be prosecuted as a RICO conspiracy. In United States v. Sodini (85 CR 813, N.D. Ill.) the judge, the hustlers, the bagmen, sheriffs and clerks, nineteen defendants in

---

6/ Compare United States v. Irali, 503 F.2d 1295 (7th Cir. 1974); and United States v. Staszcyk, 517 F.2d 53 (7th Cir. cert. denied 413 U.S. 837 (1975)).

7/ Compare Yonan and United States v. McCollum, 815 F.2d 1087 (7th Cir. 1987).

all, were charged together. Eleven cooperated and pled and another seven went to trial.

The advantages of this type of prosecution are many. The eleven cooperators all pled to the indictment charging the defendants on trial and faced sentencing before the judge in whose courtroom they testified against the defendants. When the jury heard the full picture of a corrupt judge presiding over a courtroom where bribery of clerks and sheriffs ran wild, it was obvious that the judge took money too.

Tax Laws

A lengthy discussion of this common prosecutive tool is impossible here. Greylord revealed that no corrupt judge discloses his bribe income. This gives rise to charges under 26 U.S.C. § 7206 (filing a false return) and 7201 (tax evasion). Few lawyers can afford to declare their true income and pay taxes on the bribes they pay. They are equally accessible targets. Surprisingly, we found many Greylord targets did not even bother to file returns, apparently calculating that the risk of prosecution under 26 U.S.C. § 7203 (failure to file), a misdemeanor, was more acceptable than filing a false return and exposure to a tax felony or revelation of his bribery and risking his license to practice law. Net worth and expenditures prosecutions are effective means of exposing corruption. See Reynolds and LeFevour.

Investigative Strategies

Undercover Operations

> "It may be necessary to offer bait to trap a criminal. Corrupt judges will take the bait, and honest judges will refuse . . . Operation Greylord harmed only the corrupt."--Hon. Frank Easterbrook on behalf of the Seventh Circuit upholding the propriety of the use of phantom cases in the undercover investigation of judicial corruption in Cook County, Illinois. United States v. Murphy, 768 F.2d 1518, 1529 (1985).

Nothing stirs greater controversy than the question of undercover operations to "find" corruption. Critics will complain of entrapment and outrageous Government conduct. Ethical issues abound. For instance, what steps need be taken before a Federal prosecutor authorizes the fixing of a state court case? If the case being fixed is criminal, do we violate the defendant's Sixth Amendment rights by purchasing his acquittal from a corrupt judge? In doing so, have we defrauded the public or the state courts? Should we utilize contrived cases to avoid fixing real ones? In contriving cases, do we suborn state court perjury and defraud the state court system? In an undercover investigation of judicial corruption, do

individual AUSAs risk disbarment or discipline by the state courts?

In analyzing the propriety of particular undercover approaches, Sixth Amendment and ethical concerns must also be evaluated. In a Memorandum for William H. Webster (U.S. Department of Justice, June 16, 1981) the Office of Legal Counsel (OLC) concluded for the then-head of the FBI that the use of undercover agents as lawyers for real defendants in judicial corruption probes was prohibited by the Sixth Amendment even if the defendants were acquitted. The OLC memo concluded:

> Particular procedures are guaranteed absolutely, not merely as a means to an end: and they are required for constitutional compliance not merely because the defendant has a right not to be convicted in violation of these rights. The specific rights are guaranteed as an end in themselves: a system of justice characterized by fair process and regularized procedures . . . The defendant is deprived of his rights under the Sixth Amendment if he is not provided with this certain treatment in the course of the process. Intentional conduct that would deprive the defendant of these certain procedures is inconsistent with the duty of Federal officers to uphold the Constitution; and without regard to what might be the remedy for a deprivation of Sixth Amendment rights, the existence of the rights defines the limits of the officers' conduct.

Memo at 9-10. These conclusions are under further study by OLC in light of recent Supreme Court decisions in the area of ineffective assistance of counsel which requires a showing of prejudice, so consultation with OLC is recommended if a similar investigation is under consideration. See United States v. Cronic, 466 U.S. 658 (1984) and Strickland v. Washington, 466 U.S. 668 (1984).

A related troublesome issue is the use of a real private lawyer in an undercover capacity. If he represents defendants in contrived cases as well as regular clients, might the regular clients later claim ineffective assistance of counsel? Compare United States v. DeFalco, 644 F.2d 132 (3rd Cir. 1980) and Roach v. Martin, 757 F.2d 1463 (4th Cir.) cert. denied, 106 S.Ct. 185 (1985). The resolution seems to be that use of target attorneys in undercover capacities poses a greater risk of a conflict of interest rising to the level of ineffective assistance than the use of volunteer attorneys. The use of a Federal target in a state investigation as in the analogous case of Roach also seems safer because of the dual sovereigns than the use of a Federal target lawyer against another Federal target defendant-client where disclosure of attorney-client communication is a constant risk. While the ethical questions must be closely and continuously monitored, the Sixth Amendment issues where the defendant is acquitted seem resolved by the fact that the defendant suffered no harm.

In Greylord, the Seventh Circuit noted that the staged cases that were "fixed" to gather evidence were part of a "nasty but necessary business" to expose corruption. Murphy at 1529. The impact on third parties was reduced by fixing "staged" rather than "real" cases. Moreover, notice was given to the State's Attorney, Attorney General, Governor and Presiding Judge of the State Court before staged cases were put into the state court system. The Supremacy Clause might protect a Federal prosecution that did not include such notices, [8/] but notice protects the integrity of the project and may be required by the realities of local bar requirements. The best advice to the Federal prosecutor in this regard is to consult with both the Office of Legal Counsel and the Criminal Division of the Department of Justice. It would also be prudent to explore local disciplinary rules to avoid risking individual AUSA's licenses for authorizing such an operation.

Title III

The nonconsensual recording of corrupt activity is an effective method of evidence-gathering once there is sufficient proof that payoffs are occurring at a given location. In Greylord, through consensual monitoring by an undercover agent, evidence was gathered that a narcotics court judge would receive payoffs in chambers. Ultimately a "bug" was placed in the judge's chambers and substantial evidence was gathered against the judge and the corrupt lawyers who paid him. [9/]

Immunity, Doe Immunity, and Cross Immunity

The creative and tactical use of immunity is an effective tool in prosecuting judicial corruption. After a group of lawyers is convicted for underreporting their income, they should be immunized and forced to testify against those whom they bribed.

In Holzer, the Government subpoenaed the defendant's personal financial records which he tendered after testifying (his Fifth Amendment privilege had been waived). Included in the records were a list of "loans" from friends. The friends were the extortion victims alleged in the indictment (and others). Having testified to sloppy recordkeeping on direct, the defendant was devastated by his own detailed list of creditors.

---

8/ See Baucom v. Martin, 677 F.2d 1346 (11th Cir. 1982).

9/ See United States v. Costello, 610 F. Supp. 1450 (N.D. Ill. 1985), aff'd sub nom., United States v. Olson, 830 F.2d 195 (No. 86-1496, 7th Cir., Sept. 11, 1987).

Doe ("act of production") immunity can also be used to obtain a corrupt judge's personal financial records. In United States v. McCollum, 815 F.2d 1087 (7th Cir. 1987) the production order led to the destruction of records by the judge and his wife. Detection of that act of obstruction led to the judge's mid-trial guilty plea. The McCollum case contains an excellent discussion of this procedure.

Cross-immunity involves the creation of Chinese Walls between separate prosecutive teams and cross-immunization of targets. The tactic is to immunize the lawyer to testify against the bagman and the bagman against the lawyer. There are risks aplenty to this procedure but when "you've got nothing, you (might) have nothing to lose." It is best to have a proffer (or tape) to force the truth in these situations because if both witness-defendants tell the same lie (nothing happened) you might be stuck.

Court Record Analysis

A traditional, historical (labor intensive) method used to find lawyers who got favorable treatment by particular judges simply involves statistical comparisons of dispositions of cases where a public defender is involved to cases where the suspect lawyer is involved. The Greylord investigation of Chicago's traffic court, for instance, found that 90% of defendants represented by public defenders were convicted of drunk driving while the miracle workers won almost all their cases. See Murphy and Conn.

Court Personnel Interviews

Again, a labor intensive approach, this method often results in corroborative testimony and anecdotes from local prosecutors, defense lawyers, courtroom personnel and observers. Sometimes these personnel are also corrupt but may be "flipped" for the right deal.

More Leads

Try subpoenas to bar groups, judicial candidate evaluation committees, judicial inquiry boards, campaign disclosure officers and anyone who gets judicial ethics statements. Look for places the judge spends money and do a financial analysis.

Financial Analysis: Wine, Women and the IRS

An old-fashioned Internal Revenue Service case is sometimes the best way to catch a crooked judge. Find a starting point. Find his bank loan applications that are filled out under penalty of 18 U.S.C. § 1014. Find his vices. One Greylord judge spent thousands in cash at a bar. Another spent thousands on a boat. Two others spent tens of thousands of dollars in cash on girlfriends they kept secret from their wives and families.

Ex-girlfriends and ex-wives (particularly those who become "ex" after learning of each other's existence for the first time during the investigation) make great sources for admissions, cash hordes and safe deposit boxes stuffed with cash.

Find the grocer, mailman, laundry and everywhere else the target spends cash. Analyze his bank deposits and find insufficient cash generation. With a couple of bribe-paying witnesses supplying the "likely source of income," you have a great expenditures tax evasion prosecution.

The Internal Revenue Service in our District did a computer match of Clerk's Office CBRs to lawyers and their reported income. Naturally the hustlers underreported to avoid paying tax on the one third they paid to the judge as bribes. We made tax cases on the lawyers and then flipped them on the judges.

Financial analysis has also shown some judges who saved their salaries (checks into bank accounts) and paid their most routine bills in cash (bribe money). See LeFevour and Reynolds. Judge Reynolds paid his daughter's college tuition in cash. At trial, he said he got his cash from his sock drawer. He was convicted.

## Trial Suggestions

1. Start strong -- end strong, both in argument and evidence. Begin with a bribe-paying witness, and end with one. Start with a clean judge to testify that he threw the hustlers out of the corrupt judge's courtroom when he sat there. End with an IRS expert testifying to excess cash expenditures.

2. Corroborate the bagman before he testifies. That way by the time he is cross-examined about his inconsistencies, faulty memory and general unsavoriness, he is already believable because the jury has heard six bribe-paying lawyers confirm his testimony.

3. Use your strongest flipper/witness first. That way, the jury will have heard (and believed) that the judge is corrupt before your weaker flippers are impeached till the cows come home.

4. Take the sting out. Put the cooperator's deal in front of the jury in opening statement and your direct examination.

5. Charts -- make them understandable and use them. Compare public defender dispositions to the miracle workers'. Chart the number and amount of cases going to hustlers in the bribery club. Show how the hustlers underreport their own taxes in relation to their illicit income. Chart the judge's cash generation and cash expenditures.

6. Use pictures and tapes. An audiotaped bribe is worth a thousand flippers. A videotaped bribe is a conviction. Pictures of a condo in Florida (if the defendant is a frost-belt judge), a boat and the girlfriend's fur coat are all good for jury appeal.

7. Explain the cooperating victim's failure to report the attempted extortion by a judge, e.g., "The judicial inquiry board would not have believed me." "I'm ashamed but it would have ruined my career in the atmosphere that existed before this probe exposed the corruption."

8. Protect your sources. The "mole" who worked undercover is not a ratfink flipper, he is a hero. Tell the jury.

9. Try to keep out instances of "good acts." There is legal authority for excluding cases where the defendant-judge ruled the same way as he did in a fixed case, for a good reason. See LeFevour, supra.

10. Remember to use specific instances of misconduct in cross examining a defense character witness. Don't be afraid to show bias. In LeFevour, a newspaper reporter testifying as a character witness got a free rental car from the same company that LeFevour did. LeFevour also routinely dismissed the rental car company's parking tickets.

11. Have anti-character witnesses available, e.g., the state prosecutor who felt the case was fixed or heard the judge was a crook but never saw cash pass hands.

12. How much deference on cross-examination of a judge? It depends on your style, the presiding judge and the jury. In Holzer, the lead prosecutor called Holzer "judge" throughout the trial including a sometimes heated cross-examination. In rebuttal, his method was made clear when he described to the jury the special "status" society confers on judges, even when they themselves are on trial for using that status to unlawfully and unfairly enrich themselves. The argument was devastating and Holzer was sentenced to eighteen years in jail, the longest Greylord jail term.

CHAPTER TWO

# CORRUPTION IN GOVERNMENT CONTRACTS: BRIBERY, KICKBACKS, BID-RIGGING AND THE REST

BY

JOHN R. HAILMAN*

Senior Litigation Counsel and
Chief, Criminal Division
Northern District of Mississippi

* John Hailman has been a Federal prosecutor for fourteen years, and Chief of the Criminal Division in the U. S. Attorney's Office for the past eight years.

## CORRUPTION IN GOVERNMENT CONTRACTS: BRIBERY, KICKBACKS, BID-RIGGING AND THE REST

Corruption in government contracts is, unfortunately, rather common in this country. There are certain cities, counties and even entire states, where fraud in government contracts is endemic. Recent reports by nationally syndicated columnists speculate that the problem is so widespread that it is inhibiting efforts to rebuild our national infrastructure of highways and bridges because bribes and kickbacks add so tremendously to the costs of construction.

### State and Local v. Federal Corruption

Corruption in state and local government contracts is, generally speaking, the responsibility of local prosecutors. It becomes of Federal concern, however, when it either corrupts local law enforcement or becomes so pervasive that local prosecution can no longer handle it on an individual-case basis. We have seen stark recent examples of such statewide corruption in Oklahoma, New York and Mississippi, among others. The positive side is that Federal intervention in those states seems to have been welcomed by local citizens and, for the most part, has been successful.

Such corruption is of course not unique to state and local contracts. Nor is it a new problem. Although few prosecutors are familiar with it, there is a Federal Anti-Kickback statute, 40 U.S.C. § 276c, which has been on the books unchanged since 1934. In addition to the broadly applicable Federal bribery statute, 18 U.S.C. § 201, there are also several specific Federal statutes outlawing bribery and the giving of kickbacks and gratuities in particular areas of Federal government contracts and related areas such as public works (18 U.S.C. § 874), union pension plans (18 U.S.C. § 1954), bankruptcy proceedings (18 U.S.C. § 152), bank examinations (18 U.S.C. § 213), Social Security (42 U.S.C. § 1396(b)(1)), and even sporting events in interstate commerce (18 U.S.C. § 224). Bribery is not tax deductible. 26 U.S.C. § 162(c).

Each of these areas has developed its own case law, some of it conflicting, but most of it useful in analyzing corruption in Federal or state government contracts generally, regardless of the particular agency or unit defrauded. This case law, readily available in the United States Code Annotated, is especially helpful in defining terms used and in drafting indictments charging the infinite variety of corruption schemes we face.

Most corruption in Federal contracts will be investigated either by the FBI, Postal Inspectors or an agency Inspector General with experience in the area and some knowledge of the

usual customs and practices of that type of Government contracting. State and local contract corruption, however, often comes to Federal prosecutors from state sources, be they investigators, prosecutors or victims, and in contexts much less well-known to the Federal prosecutor. For that reason this chapter will address itself primarily to attacking corruption in state and local contracts rather than Federal ones, because the former is both more common and less familiar, and because the techniques used are basically identical in both.

## Operation PRETENSE

One usually speaks most practically from personal experience, so this discussion will focus on one particular series of investigations and prosecutions: the FBI undercover operation known as PRETENSE in my home state of Mississippi. For several years, private citizens had made sporadic complaints to us about county government corruption, and we had prosecuted several individual cases of bribery, usually under the mail fraud statute, and occasionally under RICO (18 U.S.C. § 1962) and the Hobbs Act (18 U.S.C. § 1951). As the reports persisted, we began getting requests for help from local District Attorneys as well. They claimed that at the county level in our state corruption had become so widespread and accepted by public officials (and even voters) that only all-out Federal intervention could attack it successfully.

At first we wanted to believe that the corruption was limited to certain counties or certain industries, and that we could concentrate on those. We soon learned, however, that the problem was both wider and deeper than we thought. Our county supervisors, the all-powerful officers of county government also known elsewhere as trustees or commissioners, were conducting most of their business on a regular basis of bribery, kickbacks, extortion, bid-rigging and nearly every other kind of official fraud known to humankind. It became apparent that only an intensive statewide FBI undercover investigation, in both the Northern and Southern Districts, could hope to attack the problem.

It was reassuring to learn, upon seeking advice from the Public Integrity Section on how to attack this endemic corruption, that Oklahoma had suffered from a similar statewide pattern of corruption and had successfully attacked and destroyed it by colossal efforts of U.S. Attorneys and the FBI, and with lots of Federal money, over a period of three to four years.

We learned that the first thing to do when you discover widespread corruption in local government contracts is to consult AUSAs and agents who have prior personal experience in combatting it. In our case we sought the advice of AUSAs in Oklahoma who had convicted over 100 county officials in Oklahoma during the early 1980s. The SAC of our own Jackson, Mississippi, FBI

Division also procured the help of the FBI case agent on the statewide Oklahoma case. The agent came in person to Mississippi, met with us and discussed for several days the origins of their investigation, how they pursued it, the mistakes they made, what they did right and what they would do if they had to do it over again. The agent brought with him copies of their indictments, plea agreements, search warrant affidavits, press releases, sentencing memoranda -- in short, the fruit of all their thinking and experience over a period of several intense years.

Based on Oklahoma's advice, we opened an undercover FBI front company called Mid-State Pipe, which specialized in sales to county governments of metal and concrete culvert pipes, road-grader blades and other items on which bribes and kickbacks were habitually paid. Our letterhead said "Servicing All Your County Needs." An early version even spelled our product "covert pipes," but this was wisely deemed too risky a "gotcha."

A legitimate local businessman, who was familiar with corrupt county practices because they had effectively forced him and other honest vendors out of business, agreed to be the apparent owner and operator of the business. He introduced three undercover FBI agents from Arkansas, Alabama and Louisiana who had the appropriate accents and "good ole boy" demeanors to be accepted as crooked local salesmen. They wore caps saying Mid-State Pipe and chewed liberal amounts of tobacco. In many ways, this undercover operation against political corruption operated surprisingly like a large undercover drug operation with its moments of excited euphoria before and during meetings with targets, followed by many boring hours transcribing Nagra tape recordings, followed by indictments, press conferences and lots of plea negotiations.

One of the most valuable assets in such an operation is having someone on the inside. In PRETENSE it turned out to be a sole proprietor chemical vendor who had operated in about half the counties in the state for many years. After tape recording him several times admitting his payoff practices, the undercover FBI agents confronted him and persuaded him to cooperate. He first gave the agents their required predication to approach corrupt county officials by listing everyone he had been paying off. He then introduced the agents to corrupt supervisors he had paid off, enabling the agents to pay off those supervisors and others on the tape. Later we began confronting supervisors and turning them against new vendors, who in turn implicated still other vendors, and so on. As in Oklahoma, the project was soon into its third year, and although dozens of indictments had been returned and trials were in progress, other supervisors were still asking for and taking payoffs. Corrupt officials and vendors became more cautious, but not much. Several continued their corrupt practices even after indictment, and at the time of this writing, Operation PRETENSE is still far from over.

## Typical Patterns of Corruption: Extortion v. Bribery

A number of distinct forms of corruption are commonly found in local government purchasing contracts. In Operation PRETENSE, we seem to have found nearly all of them, even extortion, which we had formerly thought was a kind of corruption encountered more in urban areas than rural states like ours. In our typical extortionate transaction, the vendor unwillingly gave a gratuity or other type of undeserved reward or benefit to the government purchasing agent in his personal capacity, usually in cash or kind, whether property, fuel, equipment, free labor, free trips, tickets to sporting events, or other desirable things of value. The extortion was successful mainly because the victim-company feared economic loss by being shut out of a lucrative but relatively closed market where everybody was paying off. Extortion, however, by having a readily identifiable victim, was still much more isolated and rare in local government contracting than its near relation, bribery.

A bribe, like any other gift, might be said by the cynical to be twice-blessed: it benefits both the bribe-taker, who likes it because he gets the cash, but also the briber, because he gets the profit of the government business, usually at the expense of more honest (or less wily) competitors, and ultimately the public. The bribe-giver and bribe-taker are thus in a very real sense partners in crime, and neither has a motive to tell on the other. Moreover, in bribery as in sex, either partner may initiate the transaction, and if it is not consummated, there is little chance that one will tell on the other. With "mere" attempts the rule of thumb seems to be "no harm in asking," or in sporting terms, "no harm no foul." Most importantly, jurors often seem to observe this unwritten rule.

A key thing to remember when investigating government contract corruption is that it would not exist without either substantial ignorance or, worse yet, outright acquiescence by the people of your district. To prosecute these offenses successfully before juries, you must have a good idea of what your community considers real lawbreaking. By analogy, in many areas it is both illegal and very common to bet on football games, and seldom thought of as really criminal or even questionable conduct. Similarly, the acceptance of occasional gifts, lodging and travel expenses by public officials is often not thought of as truly criminal unless of substantial value; it is too close to what goes on in the private sector. To convict these officials you must usually show cash going into their hands, or else that the gifts or trips were lavish enough to shock the conscience, or to influence their actions substantially. The level of public morality in your area will determine whether prosecution will succeed or not. As Robert Kennedy once said, in a minor borrowing from the Greeks: "Justice, in a republic, must first reside in the hearts and minds of its citizens."

Rather than simply cursing the hearts and minds of your own citizens, the more productive course is to decide first which conduct they will tolerate and which they won't. You will soon learn which conduct public officials and vendors consider dubious but not criminal, and which conduct they consider totally beyond the pale, something for which they will go to jail for if caught. Most of them will have committed both kinds, but you must concentrate on the latter. It is critical to make these decisions of relative culpability before giving immunity to lesser fish and in choosing which acts of the bigger fish to allege as crimes.

One classic example of this dilemma is the distinction between a small kickback and a totally fictitious invoice. When a government agency gets everything it paid for and the agent only gets a 5% kickback, the vendor will usually call it, when caught, a "premium" or a "finder's fee" or a "commission," analogizing it to similar but legal practices in the private sector. Vendors, perhaps to justify it themselves, usually claim that the gratuity they gave, especially if not too large, was a mere discount which came out of their profit and not the taxpayer's pocket and that its cost was not added to the government's cost by being added to the invoice, but was absorbed by the vendor as a cost of doing business. This is, of course, nearly always false, but nearly universally claimed by both vendors and government agents when caught. Even after they have pled guilty and are testifying against each other, they tend to backslide on the witness stand to their old ways of thinking.

Fictitious invoices, on the other hand, are by every definition bogus, shameful and a fraud. When caught on tape admitting to "busting" or fabricating invoices that were paid for by the taxpayers, but for which nothing was delivered to the government agency, most defendants in PRETENSE caved in and asked for permission to cooperate.

## Kickbacks

Probably the most common form of corruption after bribery is the "kickback." Traditionally, a kickback involved an employee receiving a salary, part of which he returned or "kicked back" in cash to his employer. Even U.S. Congressmen and Senators have been convicted of such kickback schemes, U.S. v. Brewster, 408 U.S. 501 (1972), which go back to early English common law, under which violators were "Committed to the Tower." Powell v. McCormack, 395 U.S. 486, 525 (1969). Currently, however, kickbacks most often involve purchase contracts rather than employment contracts, and a kickback could now be defined as an extra charge which a vendor adds to the price of an item sold to a government agency, that the vendor later gives or "kicks" back to the government purchasing agent or other official in his personal capacity, either in cash or in kind.

The various Circuits have defined kickbacks basically as described above, but with some important variations that should be noted. 1/ The two most troublesome cases presenting pitfalls in attempting to limit the definition of kickback are both from the Fifth Circuit: U.S. v. Washington, 688 F.2d 953 (5th Cir. 1982); and U.S. v. Porter, 591 F.2d 1048 (5th Cir. 1979). There is also an interesting treatment of kickbacks in related civil cases under the False Claims Act (31 U.S.C. § 3729) in U.S. v. Killough, 625 F. Supp. 1399 (M.D. Ala. 1986).

The typical corrupt system, as we found it, operates in flexible and varied ways depending on the ingenuity of the people involved. In some cases the kickback is a fixed percentage of a given series of contracts, such as 10% on culvert pipe, 12% on gravel or 15% on equipment repairs. In other cases the "thing of value" given each week or month is not cash but property, such as trips, free hotel suites, use of expensive condos and, in one reported case, large shipments of free liquor. U.S. v. Perlstein, 632 F.2d 661 (6th Cir. 1980). The provision of sexual favors is also not an uncommon form of a "thing of value," which one imaginative U.S. Attorney successfully prosecuted under RICO as predicate acts of "carnal bribery." U.S. v. Brown, 555 F.2d 407 (5th Cir. 1977). This type of kickback or payoff would probably still constitute a type of "tangible property interest" sufficient to pass muster even under McNally.

## From Kickbacks to Phantom Invoices

In most cases, competing vendors offer ever-higher kickbacks to obtain government contracts until their prices become so high as to arouse public and media inquiries. At that point, the greedier, bolder vendors approach the corrupt government purchase agent and suggest the next natural step on the ladder of corruption: the fictitious or "busted" invoice for materials or services not delivered, also known as "invisible" supplies and "phantom" employees. In Operation PRETENSE, corrupt county supervisors referred to culverts listed on phony invoices but not to be delivered as "invisible pipe." In such cases either the vendor or the corrupt government purchasing agent will suggest that if the items on the invoices are only partially delivered, or not delivered at all, the vendor can split his unmerited profit on the deal, usually 50-50, with the corrupt government agent.

---

1/ U.S. v. Addonizio, 451 F.2d 49, 55 (3rd Cir. 1971), cert. denied, 405 U.S. 1048; U.S. v. Godwin, 566 F.2d 975 (5th Cir. 1978); U.S. v. Thompson, 366 F.2d 167 (6th Cir. 1966); U.S. v. Hancock, 604 F.2d 999 (7th Cir. 1979); U.S. v. Engle, 458 F.2d 1017, 1020 (8th Cir. 1972); Maheu v. (Howard) Hughes Tool Co., 569 F.2d 459, 474 (9th Cir. 1977).

Where nothing is delivered, the vendor has no costs so he can make the price much lower, successfully undercutting his competitors and also avoiding the suspicion aroused by unduly high prices. Lax or nonexistent inventory controls in many areas make such "phantom" invoice schemes possible. In Mississippi this practice became so common that one chemical company established what it called the "drum-of-the-month club," under which county supervisors were automatically mailed a phony invoice every month for a drum of a petroleum product. After the county paid for the nonexistent and never-delivered drum, the vendor mailed the corrupt supervisor half the price in cash with a note in the envelope thanking him for the short-term "loan," just in case someone opened the envelope.

## Bid-rigging

A system of corruption related to bribery is bid-rigging, which is more akin to an antitrust violation, but often found operating in conjunction with bribery. In bid-rigging schemes, vendors get together in collusive deals to divide government business, usually geographically or for defined periods of time, to avoid competition and inflate prices. In a typical example from PRETENSE, all the suppliers of gravel or asphalt met privately and agreed on how much each would bid to particular local governments to furnish materials for road building. Each agreed never to underbid another, and each in return was guaranteed that it would "win" noncompetitively one or more bids, usually at exorbitant prices. Entire states or even regions have fallen victim to rigged-bid schemes, especially where markets are dominated by a few large companies, as in the highway construction and heavy equipment industries. Because of the large sums involved, local politicians can be bought for long periods of time and a truly closed system, utterly without competitive bidding, can thrive.

These schemes usually succeed only briefly unless corrupt government purchasing agents are involved, as they were in PRETENSE, because an honest purchasing agent or auditor will soon notice that local prices are much higher than those in other cities or counties nearby. With the cooperation of one corrupt bidder, undercover agents can be introduced to tape the bid-rigging activities, as done in Operation PRETENSE.

Another classic example of bid-rigging found in PRETENSE was in the auto and truck repair business, where allegedly competing body shops kept copies of each other's letterheads, and a single company would submit three or four "separate" bids in separate envelopes to the local government agency on the others' letterheads on a job, underbidding the others. Their alleged competitors would then do the same on the next job, resulting in grossly inflated prices to taxpayers for repairs of agency equipment and equally inflated profits for the crooked companies involved in the phony bid schemes.

More cautious companies never let anyone else have their letterheads or blank invoices, but customarily accommodate each other by submitting "complimentary" or high bids to local government agencies to ensure that their competitors win that job. Their competitors will then ask for the same courtesy on the next job they want, and so around the horn. The extent of "complimentary" bids in the truck and auto and other repair industries is staggering, and the annual national cost hard to overestimate.

A major legal defense to bid-rigging, beyond the usual bald denials, is that there was no real financial loss to the government, only a theoretical one, especially since the McNally decision. This theory can usually be rebutted with proof of the lower prices the government agency could actually have been paying. A leading case indicating how McNally defenses can be defeated is U.S. v. Fagan, 821 F.2d 1002 (5th Cir. 1987) which, although it involved kickbacks, is post-McNally and contains excellent examples of how to describe "property" loss flowing from corrupt schemes to defraud.

## Investigative Techniques

The most effective (but also most expensive) investigative technique used to attack government contract corruption is the covert or undercover investigation. This approach can employ either a confidential informant or "source," which is usually short-term approach and involves only the making of a few critical tapes to corroborate substantial existing oral testimony; or it can involve introducing regular, trained undercover Federal agents posing as either corrupt vendors or other credible crooks. One highly successful technique of this type is the bogus bagman, an agent posing as a payoff collector for a supposedly corrupt government employee, who is actually cooperating with us.

In our PRETENSE investigation, the technique involved an actual company run entirely by three FBI agents, two posing and functioning as crooked salesmen, and the third agent acting as office manager, putting him in position to have extensive taped telephone conversations with the subjects. The third agent was extremely important because he could also handle the mass of paperwork that builds ups and backlogs in investigations of government contract fraud.

Another advantage of the covert technique in this context is in saving investigative time and manpower because the criminals themselves provide you many of the records, make the mailings for you and give you extensive confessions on tape filled with insights into their intent, methods of operation, how they generated their kickbacks in other cases, the extent of their profits and other highly probative evidence.

Another useful technique is infiltrating conventions attended by corrupt public officials by having undercover agents open a bugged hospitality suite and invite the subjects on whom you have predication. In PRETENSE, known subjects repeatedly introduced corrupt colleagues to us and thereby unwittingly furnished further predication on numerous new subjects, many of whom were convicted thereafter.

In cases where covert activities will not work, or have been completed, the usual white collar investigative techniques apply. Search warrants, where available, are preferred over subpoenas to preserve records. The best sources of information are often disgruntled former employees and spouses. In these cases it is especially helpful to look where the political and financial power reside; that is generally where you will find the corruption worth pursuing. As in other cases, your plea bargaining posture should be planned as far in advance as possible to work up the ladder from the small fish to the big fish because they invariably grow into bigger fish in this arena if you don't convict them.

One last tip on handling the massive paperwork and analysis these cases often generate: if you have state or local auditors, accountants or similarly trained paper specialists, they can often be used to great advantage when FBI or other Federal manpower is slim. With the Postal Service, we have found that much of the documentation not only can, but must, be put on computers in order to manage it and not be overwhelmed by it.

## Statutes of Choice for Prosecuting Government Contract Corruption

Obviously these schemes, like most kickback schemes, are most easily prosecuted under the mail fraud statute, 18 U.S.C. § 1341, since the invoice, the county's check and in some cases the cash kickbacks themselves, are mailed in execution of the scheme. Of course, even if the mailings are actually done by innocent clerks or secretaries in the offices, it is always the defendants who cause the mailings, and their prosecution is obviously appropriate under 18 U.S.C. § 2.

One problem that often arises in using the mail fraud statute is the claim by a cooperating witness that sometimes invoices and checks were mailed, but sometimes they were not. The only solution to this problem is to charge a conspiracy to commit mail fraud, alleging that the mails were used in some of the transactions as overt acts. This way of charging the acts means explaining to jurors the difficult concept of a conspiracy to scheme, but they usually seem to accept the legal theory if the evidence is there.

Nearly as effective as mail fraud is 18 U.S.C. § 666, that can be used even for small kickbacks where there was a series of transactions. It is especially important to note that under

subsection (a)(1)(B) it is not the bribe that needs to be $5,000 or more, but the entire series of transactions or invoices in connection with which the bribe is paid. The penalty under section 666 is ten years as opposed to five for mail fraud, which gives it more impact, especially in plea bargaining. Of course, maximum impact may be gained by a charge under the Hobbs Act, 18 U.S.C. § 1951 for extortion "under color of official right," which carries a twenty-year penalty, but must be approved by the Public Integrity Section before it is charged. At least some minimal impact on interstate commerce must be shown under Hobbs, but some rather imaginative examples of interstate nexus have been approved by the courts, and if the bribe amounts are themselves substantial, approval can usually be obtained.

The same cannot be said of approval by the Organized Crime and Racketeering Section under the other major, twenty-year statute, RICO (18 U.S.C. § 1962). Under RICO, larger amounts, very significant violators and two or more predicate acts other than a series of mail frauds must be shown to obtain approval because this statute is under constant scrutiny in Congress and to preserve it intact, RICO must be used only when it truly and obviously applies. To date we have not even attempted to get RICO-Bribery approval for any PRETENSE cases because section 666, the Hobbs Act and mail fraud charges have thus far sufficed. Our applications in similar prior local contract corruption cases were approved under RICO mainly because there was violence present in the form of witness intimidation by defendant public officials. Because the officials in those cases pled guilty, none are reported.

Case Law

Set forth below are a baker's dozen of illustrative cases which show the interplay of the relevant Federal statutes from mail fraud to Hobbs and RICO typically used to combat government contract corruption cases involving all of the problems discussed above. A thorough reading of these cases, supplemented by the case law in other parts of this manual, should give the new prosecutor a good foundation in the statutes most effective in combatting corruption in government contracts.

U.S. v. Spitler, 800 F.2d 1267 (8th Cir. 1986)

U.S. v. Schmidt, 760 F.2d 828 (7th Cir. 1985), cert. denied, 106 S. Ct. 86

U.S. v. Bibby, 752 F.2d 1116 (6th Cir. 1985)

U.S. v. Conner, 752 F.2d 566 (11th Cir. 1985), cert. denied, 106 S. Ct. 72 (similarity to private kickback schemes)

U.S. v. O'Grady, 742 F.2d 682 (2nd Cir. 1984)

U.S. v. Dozier, 672 F.2d 531 (5th Cir. 1982), cert. denied, 459 U.S. 943

U.S. v. Barber, 668 F.2d 778 (4th Cir. 1982), cert. denied, 103 S. Ct. 66

U.S. v. Grande, 620 F.2d 1026 (4th Cir. 1980), cert. denied, 449 U.S. 830

U.S. v. Butler, 618 F.2d 411 (6th Cir. 1980), cert. denied, 447 U.S. 927

U.S. v. Hall, 536 F.2d 313 (10th Cir. 1976)

U.S. v. Hathaway, 534 F.2d 386 (1st Cir. 1976), cert. denied, 429 U.S. 819

U.S. v. Mazzei, 521 F.2d 639 (3rd Cir. 1975), cert. denied, 423 U.S. 1014

U.S. v. Addonizio, 451 F.2d 49 (3rd Cir. 1971), cert. denied, 405 U.S. 936

110012

CHAPTER THREE

# REGULATORY AGENCY CORRUPTION

BY

RUDOLPH W. GIULIANI*

United States Attorney
Southern District of New York

AND

RHEA KEMBLE BRECHER**

Executive Assistant United States Attorney
Southern District of New York

* Rudolph Giuliani has been United States Attorney in the Southern District of New York for the past five years, during which his office has handled two major regulatory agency corruption investigations.

** Rhea Brecher has been Executive Assistant United States Attorney for the last year, and is supervising the Wedtech investigation.

## REGULATORY AGENCY CORRUPTION

Though the diverse regulatory agencies at the Federal, state and local levels often are vast bureaucracies with many layers of employees, the number of officials with direct knowledge of a particular subject of regulation may be quite small. A single agency employee may be charged with overseeing the operations of an entire manufacturing plant. A lone inspector travels out to view a building or an elevator. The reports of these officials may require approval at a number of organizational levels, but it will often be quite difficult to question the judgment of workers in the field. This fact -- together with the economic value of avoiding regulation to the corrupt subjects of regulation -- is perhaps the chief challenge to the integrity of the regulatory process. And it poses special problems in the prosecution of corruption in regulatory agencies.

In contrast to other types of public corruption cases, regulatory agency corruption cases thus may often involve lower-level officials, acting without the knowledge of their superiors. The corrupt building inspector, for example, can easily write a report betraying no hint that his judgment was clouded by the receipt of landlord payoffs. The only way for his superiors to check his judgment is to send yet another inspector -- a method of oversight that is prohibitively difficult if used on any more than an occasional basis. And the example of the building inspector can be extended to illustrate a paradox inherent in prosecuting regulatory agency corruption. Such corruption can be insidious either because there are no consequences or because the consequences are catastrophic. A building inspector who accepts bribes from landlords to ignore code violations in their buildings will improperly give official approval to buildings that are in fact quite sturdy and to buildings that are dangerously close to collapse. In the first case, the only evidence of a bribe would be testimony from either the inspector or the landlord, who may well have paid because either he merely wanted to avoid an official intrusion or he feared the inspector would otherwise report non-existent violations. In this case, there may be no real evidence of the crime. In the second case, the collapsed building will provide powerful real -- though circumstantial -- evidence of official misfeasance, but the harm to the public will be irreversible.

Obviously, many cases involving regulatory agency corruption will fall somewhere between these two extremes. Evidence of regulatory blindness that may have been illegally purchased may be available and may not be as blatant as a collapsed building. But given the range of discretion often allowed to inspectors, and the possibility that even major oversights may be attributable to incompetence rather than bribery, the assistance of cooperating witnesses will usually be critical in this area. Prosecution may often be wholly impossible without a witness who

can credibly testify that he actually paid a bribe, accepted a bribe, or saw a bribe being paid.

The discussions that follow will describe the various investigative techniques that can be used to detect regulatory agency corruption and will analyze the statutes under which prosecutions may successfully be brought in these cases.

## The Investigation: Investigating Regulatory Agency Corruption

### How They are Initiated

There are essentially three ways in which an investigation by the criminal enforcement branch of a regulatory agency can commence: 1) the criminal enforcement branch of the regulatory agency receives a complaint about a public official; 2) the criminal enforcement branch receives information from a public official; or 3) the criminal enforcement branch discovers corruption in the course of conducting its own investigations.

1. Receiving Information About a Public Official:

The criminal enforcement branch may receive a complaint about a public official's abuse of authority. For example, a bribe-payer might complain that an official has blatantly demanded payoffs or threatened improper consequences. However, such complaints are not common both because payoffs are often considered a part of business "realities" and because victims fear retaliation. Indeed, if corruption is endemic or tolerated by non-corrupt employees, even if the subject of the complaint is successfully prosecuted, his former colleagues may retaliate against the complainant by overly strict regulation.

The willingness of payers to treat bribes -- even bribes obtained through blatant extortion -- as mere "gratuities" is a potent obstacle to law enforcement. The businessman who pays his employees or his suppliers "a little extra" to induce or expedite performance might consider money paid to an inspector as just another "cost of doing business." He surely would prefer not to pay the money, but he can become quite accustomed to paying it. His lack of outrage will make him an unlikely source of information for law enforcement, though he can give credible testimony at trial.

The man who will neither trigger an investigation nor be a willing witness at trial is the businessman who has paid bribes out of sheer fear and ignorance -- fear that if he does not pay, he will be deprived of his livelihood and ignorance of the legal means to oppose an inspector's extortionate tactics. A restaurant owner may fear that failure to pay a health inspector will lead to the closing of his restaurant. And his fear that "everybody" in the regulatory agency has either participated in the corrupt practice or acquiesced in it, may make the owner

believe that reporting the "shake down" will only get him into more trouble.

Another reason why bribe payers are not likely to initiate investigations is that they frequently suffer no injury. With creative bookkeeping, the cost of paying off an inspector can easily be passed on to an innocent party, e.g., a general contractor, or consumers.

2. Receiving Information from Public Officials:

The criminal enforcement branch may receive information from an employee of that agency regarding the possible existence of unlawful activity and abuse of authority. One inspector might, for example, learn through office conversations of another inspector's malfeasance. Agencies that are sensitive to the severe peer pressure of an inspector to "mind his own business" have established channels through which an honest employee can communicate with internal security units without fearing reprisal. Nevertheless, it might take considerable cajoling before trial to convince an honest inspector to testify if he fears social or even physical retaliation from his co-workers.

When an honest inspector may be particularly useful is in alerting investigators to the various rumors of payoffs that may develop in agencies where corruption is commonplace. Where a number of inspectors routinely demand bribes, they can be expected to keep one another apprised of such data as the "going rate" and the willingness of particular businessmen to pay. These conversations -- however vague -- can often suggest avenues for further investigation, even where the quality of the information may bar its use in formal legal proceedings.

3. Internal Investigations:

The criminal enforcement branch of each regulatory agency may conduct internal investigations aimed at promoting efficiency and preventing and detecting fraud and abuse. These branches may routinely test the integrity of inspectors by posing as the subjects of regulation, e.g., restaurant owners, electrical contractors. However, this approach is usually not very efficient since a business is usually not inspected very frequently. Without more specific information that would permit the targeting of particular inspectors or regulatory subjects, internal investigators must often rely on routine audits that might disclose questionable patterns of enforcement or non-enforcement on the part of one or more inspectors.

## Investigative Techniques

Once an inquiry is underway, there are three basic investigative techniques employed by a criminal enforcement branch of a regulatory agency: 1) "flipping" insiders; 2) using undercover agents; and 3) using surveillance equipment.

For the reasons that have already been described, both payers and recipients of bribes are unlikely to come forward with information that can initiate a corruption inquiry. However, once such an inquiry has commenced and clear evidence can be amassed on one or more inspector-payers, they frequently can be "flipped" to cooperate with the government in exchange for reduced indictment counts or a promise to inform their sentencing judges of their cooperation. Where it appears that an industry or agency is rife with corruption, the first few inspectors or businessmen contacted might be made to recognize that if they do not cooperate immediately, they will eventually be prosecuted to the fullest extent of the law, on the basis of testimony from other targets who have cooperated.

The same pressures that made the cooperators unwilling to come forward will make them reluctant to testify at trial or to play leading roles in undercover schemes. However, if an investigation is to progress far beyond the first "circle" of targets, testimony or participation in taped operations must frequently be made an explicit condition of a written cooperation agreement. 1/ With any luck, this investigative technique will allow the rapid development of strong cases that will usually inspire quick pleas. If a large group of corrupt individuals is to be rooted out, this momentum is critical. As soon as an inspector flips, he should be used against corrupt businessmen; the businessmen should in turn be used against other inspectors.

In addition to using cooperators, investigators may themselves assume undercover roles, posing as either bribe-takers or recipients. Where the barriers to entry into an industry are prohibitive, the cooperation of an existing firm might be sought. Thus, an apartment house owner may permit an agent to pose as a

---

1/ To avoid horrible problems on cross-examination, the agreement should never specify the name of any person who is a "target" of the inquiry. Thus, the agreement should provide that the cooperating witness agrees to work in an undercover capacity, including wearing a recording and/or transmitting device when circumstances permit, as directed by the Federal Bureau of Investigation or other investigating agency. It should not provide that the cooperating witness agrees to go undercover against John Doe.

It may also be useful for the cooperation agreement to provide that the cooperating witness agrees to have a recording device placed in his office or home premises, on a controlled basis, to record conspiratorial meetings attended by him. Similarly, the agreement should provide that the cooperating witness is obliged to turn over any books and records requested by the investigating agency and/or United States Attorney's Office.

superintendent. However, where entry is easy, investigators may establish their own business, e.g., a small restaurant.

Whether undercover agents, payers or receivers of bribes are working undercover, surveillance equipment should be used whenever possible. Photographs, taped conversations, and videotaped exchanges of cash will, at trial, give powerful corroboration to the testimony of even the most impeachable cooperators. During these controlled situations, double coverage is always preferable: 1) a body wire -- a mini-cassette device that is worn on the person; and 2) a microphone and transmitter which transmits to a surveillance van located near the scene of the payoff. Because governmental electronic equipment is rarely top-of-the-line and may not be well maintained, it should always be tested before the undercover use.

Although a transmitter is always a good back-up device in case the commonly-used Nagra recording device is defective, it is especially important if the cooperator's integrity is open to question. The transmitter will answer any claims that a cooperator eager to make a case has fabricated events or doctored the Nagra tapes.

In addition, a cooperator's testimony as to bribes paid or received can be corroborated if he is searched both before and after the payoff, so as to ensure an accurate report of amounts passed.

Videotapes should also be used whenever possible. Videotapes (or photographs, as second-best) are instrumental because it is difficult to get someone to say on tape that he is receiving or paying cash. 2/ Capturing the passing of an envelope on videotape, coupled with an audiotape of the transaction, allows the prosecutor to convince a jury of the illegal payoffs.

## The Prosecution: Prosecuting Regulatory Agency Corruption Cases

While the criminal enforcement branch of a regulatory agency is almost entirely responsible for the investigation of regulatory agency corruption, the United States Attorney's Office's role in combatting regulatory agency corruption is primarily a prosecutorial one.

---

2/ Indeed, in meetings leading up to the payoff, often a bribe payer or receiver will not even verbally mention the amount of money demanded or offered. Rather, the amount may be written on a piece of paper or indicated by hand signals. A videotape can capture this.

## Statutes Used to Prosecute These Cases

Most of the statutes discussed in the appendix to this Manual are used to combat regulatory agency corruption, including 18 U.S.C. § 201 (bribery and gratuities to Federal officials); 18 U.S.C. § 371 (conspiracy); 18 U.S.C. § 666 (corruption in Federally-funded programs); and 18 U.S.C. § 1952 (the Travel Act, which includes use of mails and wire fraud in furtherance of a bribery scheme). Even after McNally, mail fraud, 18 U.S.C. § 1341, surely remains useful against public officials where the Government can show that, as a result of a bribery scheme, the public was deprived of the full value of its expenditures. This will certainly be the case where, for example, an inspector regulator is bribed to approve shoddy work done on a public project.

The Hobbs Act, 18 U.S.C. § 1951, allows the prosecution to charge corrupt public officials with committing extortion by obtaining money under color of official right. At least in the Second Circuit, in order to get a conviction under the Hobbs Act a prosecutor should show that: 1) the defendant repeatedly accepted substantial benefits over a period of time; 2) the defendant offered a quid pro quo in exchange for these benefits; and 3) the defendant requested, solicited or demanded payments. See United States v. O'Grady, 742 F.2d 682 (2d Cir. 1984) (en banc). A drawback of the Hobbs Act is that it can be used only against the receiver, not the payer, of a bribe.

In addition or as an alternative to charging extortion under color of official right, an indictment can charge extortion through economic coercion. However, where this prong of the Hobbs Act is charged, at least some courts require that a victim have been threatened with a clear economic disadvantage, not the mere loss of an opportunity to gain a special benefit. See United States v. Capo, 817 F.2d 947 (2d Cir. 1987) (en banc).

Additionally, it should not be forgotten that each regulatory agency typically has its own statutes under which corrupt public officials often can be prosecuted.

## Problems with Prosecuting These Cases

### Lack of Jury Appeal

The prosecutor should bear in mind that low-level corruption cases are often unappealing to a jury. An effective way of overcoming this lack of jury appeal is to show a jury a corroboration tape of the transaction. In addition, it is often effective to focus on the betrayal of the public trust. Where possible, it is also effective to show that a corrupt regulator actually approved substandard work; if particular instances of shoddy work actually pose a danger to the public, this point may be quite powerful. However, proving that work actually was

substandard may be quite difficult, and may needlessly complicate a straightforward corruption trial that can be won simply by denouncing an official's avarice.

The Appearance of Payers as Victims

In general, it is harder to get a jury to convict a payer of a bribe than it is to get a jury to convict the receiver of the bribe. This can be attributed to the fact that a jury may look upon the payer of a bribe as a victim -- a person who is just trying to make a living. The problem is clearest when a public official who has already been convicted of extortion under 18 U.S.C. § 1951 is used as a witness against the bribe-payer.

In these situations, it is helpful to seek guidance in the cases that uphold the legal consistency of prosecuting the payer of a bribe for bribery, and the recipient for extortion. See e.g., United States v. Kahn, 472 F.2d 272 (2d Cir. 1973). The point to stress is that a businessman should go to the proper authorities rather than yield to the demands of a corrupt official. In addition the jury should, where possible, be reminded that other businessmen compete for the same benefits cleanly, and are disadvantaged if some give bribes.

Because of the perception of the payer as a victim, it will be the rare case indeed in which the public official should be offered total immunity or anything less than a plea to extortion (carrying a possible prison sentence of up to 20 years) in return for testimony against bribe-payers. On the other hand, it may sometimes be desirable to offer a bribe-payer a relatively lenient guilty plea, or even immunity, for testimony against a public official. Immunity may be particularly appropriate if the businessman has voluntarily come forward in an offer of proof situation.

Another way to help bolster the testimony of the bribe receiver against the bribe giver is to require, as part of the public official's cooperation agreement, that he agree to: 1) permit all information (including that covered by Fed. R. Cr. P. Rule 6(e)) in the possession of the United States Attorney's Office to be made available to the IRS for its civil purposes; and 2) file amended tax returns and pay any additional tax, interest and/or penalties, by a certain date, preferably a date in advance of any likely trial testimony.

# CHAPTER FOUR

## NARCOTICS-RELATED CORRUPTION

BY

LEON B. KELLNER*

United States Attorney
Southern District of Florida

* Leon B. Kellner has been United States Attorney in the Southern District of Florida since 1985. Prior to that, he was Executive Assistant United States Attorney.

This chapter was co-authored by Assistant United States Attorneys Charles V. Senatore, Mark P. Schnapp, William Richard Scruggs, and Michael Patrick Sullivan of the Southern District of Florida.

## NARCOTICS-RELATED CORRUPTION

The massive profits generated by narcotics trafficking have had a tremendous corrupting influence over almost all aspects of law enforcement and the criminal justice process. Narcotics-related corruption concerns a source rather than a type of corruption. Accordingly, most techniques associated with investigations of corrupt public officials and the law governing such prosecutions have application here; however, several problems unique to narcotics corruption investigations must be understood to conclude an investigation successfully. To approach any corruption case associated with drug trafficking, the prosecutor and investigators first must assess the nature and manifestation of the problem.

### The Scope And Indications Of The Problem

The drug trafficker has an incentive to corrupt law enforcement during all stages of the narcotics trafficking process. During importation, receipt and sale of narcotics, the trafficker who is assisted by corrupt law enforcement is at a distinct advantage. For example, during the importation phase of any narcotics operation, several needs of the drug trafficker open the door for corruption of officials in Customs, the Coast Guard, the Border Patrol and the Immigration and Naturalization Service. Obviously, the trafficker's initial concern is the successful importation of illegal drugs into the country. In South Florida, for example, United States Coast Guard and Customs officials have accepted unlawful payments for disclosure of information pertaining to vessels and aircraft on lookout lists, as well as law enforcement search patterns, radio frequencies and operational plans for combined interagency interdiction efforts. Also, at points of entry into the United States, there have been several prosecutions of Customs Inspectors and Agents for facilitating the importation of narcotics into the country and the exportation of illegal profits out of the country.

Several opportunities for corruption occur after drugs have been imported into the United States. Narcotics traffickers, like other criminal enterprises, have a need for information and domestic protection for their illegal business. In many cases, the corruption may involve a single officer or agent operating on his own providing protection or "shaking down" drug trafficking. Often, however, the problem concerns a law enforcement officer or group of officers protecting a particular drug organization. To the extent that is true, an investigation of the narcotics enterprise will provide informants who can assist in either a proactive or historical investigation of both the narcotics organization and the corrupt officers on the organization's payroll.

There have been several cases where a group of officers or agents have operated independently as a corrupt enterprise selling protection to multiple organizations. When officers are not associated exclusively with a particular group of traffickers, there is an opportunity for undercover agents to purchase the services offered by the corrupt officials by posing as drug traffickers seeking their services.

A more disturbing trend is corruption that crosses agency lines. Recently, evidence has been developed of ex-law enforcement officers who have maintained corrupt contacts in several Federal and local police agencies. Frequently, the ex-officers are private detectives or associated with security service firms. These detective or security agencies operate to protect various narcotics traffickers by utilizing their law enforcement contacts to determine the identity of informants and agents, and to detect undercover operations. These individuals, known colloquially as "snitch busters", are particularly difficult to investigate because the very service they offer is the ability to detect undercover or informant operations conducted by any Federal or local agency.

Another dimension of the narcotics corruption problem is the cross-over between corruption in police agencies and corruption in the judicial system. In the cases that have focused on the networks of corrupt law enforcement officers that offer the "snitch buster" service, evidence has been developed concerning links to the judicial system. Several of these groups foster contacts in the court clerk's office or with the judges to gain access to sealed pleadings, such as wiretap pleadings and cooperation agreements. Drug traffickers also have an interest in protecting members of their organizations who have been arrested, partially out of a concern about the possible cooperation of a defendant facing a substantial sentence. Often corrupt police officers are associated with corrupt defense attorneys and judges. Police officers or agents refer an arrested defendant to the "right" defense attorney who can pay off the judge to reduce a bond, dismiss charges, suppress evidence or impose a light sentence. The corruption may involve a prosecutor willing to "throw" a case or falsely acknowledge "substantial assistance" by a defendant to the Government that could result in a substantial reduction of a sentence.

There also have been several cases involving thefts of seized evidence involving Federal officials, including the prosecution of a Federal prosecutor for theft of seized evidence and prosecution of Federal agents and Coast Guard officers, among others, for theft and sale of seized marijuana and cocaine. In cases of this nature, in which the drugs are defined as contraband under Title 21, the stolen drug evidence may be prosecuted as a theft of Government property.

Finally, the most disturbing and violent trend is the evolution of the traditional model of police selling protection or sensitive law enforcement information into police becoming principal actors in narcotics trafficking. Cases have occurred in Miami where policemen-turned-narcotics-traffickers have assumed two new roles: (1) the policeman as protector or courier, and (2) the policeman as a drug dealer or "rip-off artist".

Police officers acting as protectors or couriers are often employed by narcotics traffickers and essentially use their law enforcement positions to shield distribution operations by actually moving merchandise. Situations have been uncovered where police, often while uniformed, on duty, and driving their marked vehicles, have transported large amounts of cocaine for their drug trafficker employers. Officers who engage in this conduct are rarely doing so as independent contractors; customarily, such conduct results from actual employment in a narcotics organization.

Policemen who are drug dealers simply deal narcotics for their own account, and those who do "rip-offs" steal narcotics from traffickers, with the object of ultimate resale for tremendous profit. This "rip-off" scenario presents the highest likelihood of violence and the highest probability of huge profit for the participants. In Miami, cases have arisen where local police have "busted" cocaine organizations while on duty only to keep the narcotics for themselves, with the collateral result that the putative "suspects" are harassed, injured or killed. Also, in some instances, policemen have engaged in this conduct on behalf of existing narcotics organizations, to plunder merchandise from rivals. The possibility of tremendous profit is a particularly corrupting incentive in this scenario: policemen who obtain drugs for nothing can resell the narcotics at prevailing wholesale or retail prices, and realize the entire sale price as pure profit.

Several indications are common to the law enforcement officer corrupted by narcotics. First, a common indication of corrupt activity is the observations that an otherwise modestly-paid police officer is living beyond his expected means. Acquisition of homes, cars, boats, expensive clothing or jewelry are indicative of this behavior. Financial investigation techniques, to be discussed later, can cement this suspicion. Second, fellow officers, informants or internal affairs investigators often can reveal associations inappropriate to correct police behavior. Surveillance that places a police officer or agent socializing or fraternizing with suspects should warrant a closer look. Third, corrupt officers might find themselves in situations where their professional conduct is being questioned. Look closely at allegations of undue force, false arrest, or harassment. Such activity might provide clues to narcotics-related activity. Also, if an officer is absent

without explanation, or is repeatedly in locations inconsistent with his assignment, or routinely fails to report various types of criminal conduct, such behavior could alert you to corrupt conduct.

In sum, the magnitude of potential narcotics corruption is enormous. Each of the examples mentioned in this section have been documented in several cases throughout the country. In structuring an investigation and prosecution, the prosecutor and agents should focus not only on individual targets but should determine whether the individuals are participants in a corrupt system.

## Investigative Considerations As Applied To Narcotics-Related Law Enforcement Corruption

The task of uncovering and prosecuting corrupt law enforcement officials involves several considerations that are not present in other cases. Obstacles that are unique to these cases include the difficulty of piercing the corrupt circle, the difficulty in undercutting the "code of silence" among corrupt policemen, and the large quantum of evidence needed to convince a jury beyond a reasonable doubt that a custodian of the public trust has abrogated that trust. Most challenging is the likelihood that the Government's star witness or "rip-off" victim will be a drug dealer. Especially in situations where a jury perceives the drug dealer is receiving a substantial break to advance his allegations against the police officers, the credibility problems are enormous. The discussion below will focus upon considerations in investigating narcotics corruption.

### The Historical vs. the Proactive Case

Other portions of this Manual discuss the two types of general investigative techniques available: historical cases (i.e., cases built upon past events), and proactive cases (i.e., cases built upon current events controlled through undercover participants). While historical cases can be made in the narcotics corruption context, they are extremly difficult because of enormous corroboration necessary to defuse the witness credibility problem. A proactive undercover scenario which captures the corrupt cops actually committing crimes is more effective in this context. Evidence of this nature, especially when audio or videotaped, is powerfully incriminating and is invaluable to overcome the presumption of trust most jurors place with a law enforcement defendant.

1. The Proactive Case:

The proactive opportunity arises when an informant surfaces who has the opportunity to establish or re-establish current contact with targets. It should be maximized by using the

informant to introduce an undercover agent into the scenario. Using an undercover agent is far superior to using an informant, because (1) the credibility problems at trial with an informant are absent if an agent is testifying; (2) an agent is easier to control than an informant; and (3) an agent will more readily understand and appreciate the legal consequences of his undercover conduct (i.e., adjusting his conduct properly to avoid entrapment issues and making sure certain critical types of incriminating conversations are elicited).

Three basic models will surface in your investigations. Police may be: (1) part of a narcotics organization; (2) individually or collectively providing services to other narcotics traffickers; or (3) involved in "snitch buster" operations transmitting sensitive law enforcment information to traffickers. In the first scenario, an undercover agent might work into the organization, but might not come into direct contact with corrupt police. If that occurs, two basic alternatives exist to reach them. First, if you learn that police happen to congregate in one place or speak on the telephone with particular traffickers, you could try to gather probable cause for a wiretap or a room bug. The second alternative is to make sure police participants are heavily surveilled during the operation. Even if the undercover operative cannot make direct contact with the corrupt police, the cooperation incentives built into the narcotics laws are available to "flip" the trafficker against the police, with the possibility of using his testimony as corroborated by the surveillance.

The second scenario, where corrupt police are acting independently, presents a far easier possibility for penetration, since an undercover agent can be guaranteed direct contact with the cops. In South Florida, for example, there have been several prosecutions of members of a particular police department that collectively sold "protection" to traffickers. In cases where the police are either trafficking themselves or selling protection, the scenario can be manipulated to foster direct contact.

The "snitch buster" scenario is the most difficult to penetrate, since the object of "snitch busting" is to determine whether law enforcement is focusing its attention on particular targets. Accordingly, we must assume that "snitch buster" targets have access to means to discover whether particular agents are secretly trying to snare them. In this situation, a very carefully controlled cooperating witness or an agent unknown to local law enforcement presents the best investigative possibilities, due to the ability of the "snitch buster" to ascertain the bona fides of the individuals seeking his services.

Planning is crucial to developing facts in the most persuasive light. For example, undercover operations should be sensitive to possible entrapment defenses. A possible anti-

entrapment safeguard to build into the scenario is to present the corrupt officer with an "out", i.e., say to the subject "if you want out, say so". Structure the facts also to preclude the "I was conducting my own investigation" defense by capturing evidence inconsistent with that claim. For example, a photograph or video of a uniformed armed policeman moving narcotics or accepting payments together with checking auto tags improperly or conducting operations off duty can overcome this assertion ab initio. Make certain that the undercover operatives allow the subjects to speak freely and resist the temptation to allow operatives to monopolize the conversations. Oddly enough, from our experience, police targets often state what they can accomplish. Have the targets establish the amounts of drugs on tape that they are going to "protect" or "rip-off" in a sting operation. For example, a group of officers selling their services to undercover agents posing as drug dealers may indicate that their organization can protect amounts of drugs that could result in the imposition of substantial sentences in a conspiracy case under the Sentencing Guidelines (Section 2B of the Guidelines provides a schedule of punishment that increases with the amount of drugs involved).

A final but crucial consideration in proactive cases is danger. Undercover operatives will find themselves encountering police officers providing armed protection to narcotics traffickers, or planning violent "rip-offs". The threat of violence in these scenarios is real, and must be very carefully controlled.

2. The Historical Case:

Historical cases can be made, but should be considered a last resort in the narcotics corruption area. As noted earlier, one's star witnesses are usually a rogues' gallery of drug dealers who might be perceived as retaliating against "honest" policemen. Moreover, to the extent a drug dealer claims he was "ripped off", he is not a sympathetic victim in a civil rights, extortion or narcotics case. Extensive corroboration is critical, since ultimately a jury will be asked to believe the claims of felons who were brought to justice by police, over the protestations of innocence of those same police whom the jury is conditioned to believe and trust.

To minimize impeachment of these admittedly distasteful witnesses: (1) try to locate disinterested witnesses who can corroborate the events described by the informant; (2) consider a financial investigation to document sudden lifestyle changes that corroborate criminal conduct; (3) avoid giving a cooperating witness a "sweetheart" deal in exchange for his testimony, since juries will resent a drug dealer who is perceived to have too good a deal because he "gave up" police officers; and (4) try to locate informants involved in unrelated scenarios.

service of a court order (which can customarily be obtained ex parte) prior to that agency releasing credit information. See generally 15 U.S.C. § 1681. Pen registers can provide leads to identifying merchants from whom the target may have purchased big-ticket items with cash.

After leads are compiled, grand jury subpoenas for records from banks and institutions disclosed by the investigation could also reveal whether the target has made substantial cash withdrawals or deposits. Similarly, subpoenas to merchants with whom the target dealt could reveal more information regarding purchases by the target. Should secrecy be an issue, the Right to Financial Privacy Act and the All Writs Act provide authority for an ex parte non-disclosure order to be sought from the court in conjunction with a subpoena for bank records. See 12 U.S.C. § 3409; 28 U.S.C. § 1651.

Once all this financial information is accumulated on the target, the investigator is likely to find the same patterns of financial activity and transactions developing that were observed in several South Florida police corruption cases. These patterns are based upon the "drunken sailor" syndrome, i.e., once the officer with only modest income strikes it rich with a major "score", he begins suddenly to spend like a drunken sailor. If the officer previously used to cash his salary check, he will instead begin to deposit it and not write checks for cash or to pay bills. If he had been depositing his salary check, and then writing such checks, that activity will cease, and he will pay bills with money orders, cashier's checks and cash. He will promptly pay off car loans, finance company loans and credit card balances, even though in the past he may have had difficulty making minimum monthly payments. All of this activity including the changing patterns can be clearly illustrated on graphs and charts for display to trial juries. The date of the major "score" should be prominently highlighted, since it will be the obvious turning point of the financial patterns.

## Coordination of Anti-Corruption Efforts

### 1. Designation of a Special Corruption Squad or Task Force:

Coordination among all agencies involved in narcotics investigations as to police corruption is important. Frequently, DEA may obtain some evidence of police corruption in an investigation that may supplement information developed by the FBI or Customs. In the Southern District of Florida, the FBI has created a special squad exclusively devoted to law enforcement corruption. This squad collects data from several different agencies and has developed close working relationships with local police agencies. Several local police officers have been specially detailed to the FBI to assist in law enforcement corruption investigations.

## The Use of Financial Investigations

Fortunately, police officers corrupted by narcotics obtain money in lavish quantities that is difficult to hide; this area is the most promising form of corroboration in both a historical and proactive case. The goal in this situation is simply to gather evidence of wealth that is incompatible with your targets' expected lifestyles.

Several means exist to determine whether a potential target is living a lifestyle incompatible with that of an honest policeman. An important initial step is applying to the court for an ex parte order permitting disclosure of a target's income tax returns pursuant to 26 U.S.C. § 6103(i). Included in the returns would be extremely useful W-2 information, together with representations as to all other sources of income. This avenue is a particularly useful alternative if the investigator wishes to avoid alerting the target through grand jury subpoena of employment records. Moreover, this information provides valuable leads to other possible sources of income.

Another avenue involves searches of the public records to reveal ownership interests in real property. Examination of deeds and mortgages reveal who the parties in interest were in a transaction, including the seller, the buyer and lienholder. One can calculate the purchase price of real property by extrapolating from applicable taxes paid in the transaction (in Florida, these are reflected on documentary stamps located on the deed).

Similiar techniques exist for determining ownership and lienholder interests in chattels (i.e., cars, boats, etc.). Title information is customarily located in state public records; lienholders can also be identified by consulting title documents or Uniform Commercial Code statements that may be on file in the public records of a state.

Once these public record avenues are exhausted, the prosecutor will find he has several leads as to banks, financial institutions and merchants with whom the target has transacted business. An often overlooked technique for obtaining leads of this nature is the use of mail covers and garbage pickups. Examination of mail in a mail cover, and examination of discarded envelopes, statements, or other correspondence in garbage pick-ups often provide leads that are unavailable from other sources.

Other investigative tools available to the financial investigator are consumer credit reports and pen registers. The credit reports will provide information on credit cards used, bank accounts utilized, mortgage loans outstanding and small loans from finance companies. If you are seeking more than identifying information and prior employment records from a credit reporting agency, the Fair Credit Reporting Act requires

In creating a special squad or a task force, the major concerns are security and providing a common information base. Be certain that the circle you create is such that information developed remains secret and is not disseminated.

2. Development of a Central Intelligence Base for Corruption Allegations:

In the narcotics corruption area, it is critical that allegations and evidence of corrupt conduct be located in a central intelligence base. The simplest way is to coordinate investigations through the corruption section of the United States Attorney's Office, or, as in the Southern District of Florida, with the Police Corruption Squad of the FBI. In this way, information is not lost.

3. Use Local Internal Affairs Resources:

Often, a prosecutor may find himself in a situation where he feels he may take the local police internal affairs division into his confidence. If so, these policemen are useful allies in providing leads and information concerning the activities and relationships of the targets. Each internal affairs division maintains files on complaints or allegations raised against officers, and has immediate access to officers' daily time and attendance worksheets. Should a target have had complaints in his file, the file will contain references to the evidence gathered and the witnesses involved as to allegations of misconduct. The prosecutor may uncover misconduct that matches with allegations surfacing through informants, or that provides leads for further investigation of conduct consistent with the allegations.

Moreover, internal affairs can help the prosecutor assess the subject's conduct as a police officer. Files will contain leads as to unusual work patterns, failure to file certain reports or other types of misfeasance.

Cases Involving the Sale of Information

Traditional law enforcement corruption has involved the protection of criminals and criminal activities by law enforcment officers. One way in which this protection can be given is by providing the criminals with confidential law enforcement information. Armed with this information, the criminals are better able to carry out their illegal activities and to avoid arrest. Due to the increase in narcotics-related offenses within the last decade, the problem of "leakage" of confidential law enforcement information has become particularly acute in some Districts. Traffickers have learned that even the most carefully planned investigation can be frustrated simply by having a corrupt law enforcement officer provide information.

Numerous types of law enforcement information are of interest and value to narcotics traffickers. These include: (1) written reports of investigations and interviews; (2) vessel, aircraft and automobile look-out lists; (3) U.S. Coast Guard and Customs operational plans; (4) wiretap and pen register information; (5) automobile license plate information; (6) informant identities; (7) undercover agent identities; and (8) computer-maintained information such as that contained in the Narcotics and Dangerous Drug Information System ("NADDIS") and the Treasury Enforcement Computer System ("TECS").

The main considerations in developing an investigative plan are: (1) what type of law enforcement information is being provided; and (2) from whom, or what agency, is the information being provided. Typically, your confidential informant will know what types of information can be provided and for what price; however, he will not know which law enforcement officer is the source. The best he can do is to identify a middleman who has the ability to obtain the information from an unidentified source. Experience has shown that the middleman is often an attorney, private investigator, or other person with routine law enforcement contacts. Building a case on the middleman is relatively simple through the use of tape recorded face-to-face meetings, while identifying and making a case on the unidentified law enforcement officer is much more difficult. Yet with careful investigative planning, identification and successful prosecution of this individual is highly probable.

There are several techniques that can be used to identify the source of information. These techniques generally depend on whether the law enforcement information being provided is contained in "hard copy" files or in computer files. Examples of the former are reports such as FD-302s and DEA-6s, while examples of the latter are NADDIS and TECS. Once it is determined where and how the information is stored and maintained, a plan can be developed so that the middleman can be requested to have his source provide a particular document or a specific type of information. For example, slight differences can be made on each copy of the document such as the placement of commas or the use of conjunctions. When the document is purchased through the middleman, analysis will reveal from which agency and from which area the document was obtained. Even if the undercover agent or confidential informant cannot keep a copy of the document, he can be instructed to look for the unique features in each of the versions of the document. At this point, access to that particular document can be checked in order to identify the target or potential target.

If too many persons had access to the document, so that the target cannot be identified, a second purchase of information will be necessary. For this purchase a document should be placed in the specific agency or area with either video or visual

surveillance established. Using this technique, whoever takes or photocopies the document will be immediately identified.

A second technique is to put a "clean" copy of the document in the relevant area so that whoever touches the documents after its placement can be identified through fingerprints.

Different techniques apply when the information is contained within computers. As with hard copy documents, real law enforcement information should be used as the basis for prosecution, since there are no clear legal precedents for the use of false information. Actual information already in the computer can be used, or new, yet accurate, information can be placed in the computer for purposes of the investigation. All law enforcement computers should, at the time of this writing, maintain a record of who accesses information on what date. These logs may be manually kept by operators of the computer, or by the computer itself. Either way, the person accessing the information can be identified.

DEA's NADDIS system has the most sophisticated security systems. If the investigation is focusing on NADDIS "leaks", the system should be alarmed so that when the relevant information is sought, DEA Headquarters in Washington, D.C. is immediately notified through NADDIS that the system has been accessed. The notification includes the specific location of the computer terminal accessed, and the computer access code of the person gaining access. Utilizing this technique, the person obtaining the information will be immediately identified. With other computer systems lacking the capability of NADDIS, it is just a matter of checking computer security tapes or logs maintained by the computer operators to determine who obtained the relevant information from the system.

In historical cases concerning documents, there is virtually no way to determine the law enforcement source, except through testimony. Since often the narcotics trafficker was not allowed to keep a copy of the document, there is no way to determine where it was obtained. If the law enforcement information was provided orally without reference to any document, the investigative task is even more difficult.

However, in historical cases concerning computers, the aforementioned records of access remain in existence and can be checked to either determine, or verify who had access to the system on what date. Most logs also contain a record of what information was obtained from the computer. The NADDIS system maintains a continual security tape that can identify who accessed the system on what date and exactly what information was obtained. This can be extremely important evidence to either identify the law enforcement officer who provided the information, or to corroborate the testimony of a witness.

## Statutes Available In Narcotics Corruption Cases

### Statutes to Be Considered in Charging Decisions

Narcotics-related corruption cases invite the prosecutor to consider statutes that transcend "customary" corruption statutes (i.e., bribery, 18 U.S.C. § 201 and Hobbs Act extortion, 18 U.S.C. § 1951), and that provide greater flexibility in prosecution. Since the corruption in cases of this nature is more than merely receiving bribe or extortion payments and spills into narcotics-related acts, the entire arsenal of statutes applicable to that activity becomes relevant. Accordingly, an entire host of violations exists that do not require proof of a payment or bribe.

Title 21 offenses often describe the actual offense behavior of the corrupt policeman. Policemen dealing narcotics or assisting importation efforts can be prosecuted as principals or aiders and abetters in violation of 21 U.S.C. § 841(a)(1) (narcotics distribution) or 21 U.S.C. § 952 (importation). Such conduct could also support narcotics conspiracy liability, 21 U.S.C. § 846, and if the enterprise and supervision can be shown, a continuing criminal enterprise, 21 U.S.C. § 848.

Several additional Title 18 offenses also surface. Receipt of payments for sensitive information, or cases involving conversion of evidence can result in application of 18 U.S.C. § 641 (theft of Government property) since the Government has a proprietary interest in its information and the evidence, and both can be valued in the "thieves market" at over $100. See 18 U.S.C. § 641. Efforts to thwart an investigation can result in obstruction of justice charges, 18 U.S.C. § 1503, and officers joining in an agreement to frustrate enforcement operations through fraud can give rise to a conspiracy to defraud the United States under 18 U.S.C. § 371. When corrupt police involve themselves in rip-offs while armed, the prohibition against use of firearms in conjunction with narcotics felonies gives rise to a violation of 18 U.S.C. § 924(c)(1), as well as a civil rights violation as to victims. 18 U.S.C. §§ 241 and 242. In situations where officials assist in the international movement of narcotics traffickers through passport or visa fraud, Chapter 75 of Title 18 prohibits such conduct. See 18 U.S.C. § 1541 et. seq. Finally, involvement as a principal or aider and abetter in money laundering is prosecutable under 18 U.S.C. § 1956, and participating in racketeering activity through the commission of predicate crimes (including Title 21 offenses) can subject the corrupt officer to RICO liability under 18 U.S.C. § 1962.

Other statutes that conceivably could be used against corrupt police are located in Title 26, i.e., tax evasion (26 U.S.C. § 7201), failure to file tax returns (26 U.S.C. § 7203), and the making of false statement on tax returns, (26 U.S.C.

§ 7206(1)). Also, Title 31 governs the illegal failure to report the inbound and outbound movement of currency, and can be used to prosecute officials assisting in those schemes. See 31 U.S.C. § 5316.

Use of the Narcotics Statutes to Induce Cooperation of Informants

Often after a conviction, a narcotics trafficker might have information on his direct dealings with police. Narcotics traffickers threatened with five year perjury exposure will rarely flinch. However, the narcotics laws as recently amended provide a powerfully unique incentive for such individuals to cooperate. Amendments to Title 21, effective October 27, 1986, provide for strict mandatory non-parolable minimum terms of imprisonment. However, 18 U.S.C. § 3553 provides an escape from these mandatory terms for the convicted trafficker, if he offers the Government substantial assistance. Further, Rule 35, Fed. R. Crim. P., permits the Government to move for reduction of sentence for up to one year after its imposition if a convicted defendant provides substantial assistance to the Government. See also Commentary to § 5K1.1, Sentencing Guidelines; See generally Prosecutors Handbook on Sentencing Guidelines (November 1, 1987).

110014

# CHAPTER FIVE

## LEGISLATIVE CORRUPTION

BY

REID H. WEINGARTEN*

Steptoe & Johnson, Washington, D.C.

* Before joining the law firm of Steptoe & Johnson, Reid H. Weingarten spent ten years as a trial attorney with the Public Integrity Section. He was lead attorney in the conviction of Congressman George Hansen, and was co-counsel in the trial of Congressman John Jenrette, one of the ABSCAM prosecutions.

# LEGISLATIVE CORRUPTION

A prosecutor with a case involving Congress soon learns that there are special rules that apply to Capitol Hill. If the target is a Member of Congress, the path will be strewn with constitutional, substantive, and procedural hurdles. As one frustrated FBI agent once aptly observed, "It's a different world up there." The prosecutor is well advised to learn how to overcome or avoid these hurdles early in the investigation, so as to avoid later disaster or embarrassment.

## Speech or Debate Clause

At the center of any investigation of a Member of Congress is the Speech or Debate Clause, Article I, § 6 of the Constitution, which provides that "for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other place." The Speech or Debate Clause has its roots in the English Bill of Rights of 1689, and its purpose is to ensure the independence of the legislative branch by protecting Members "not only from the consequences of litigation's results but also from the burden of defending themselves." Dombrowski v. Eastland, 387 U.S. 82, 85 (1967). As the Supreme Court explained in Powell v. McCormack, 395 U.S. 486, 505 (1969):

> The purpose of the protection afforded legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions.

The Supreme Court has read the Clause broadly to effectuate this purpose. Among the actions the Court has deemed protected under the Clause are voting by Members of Congress, the preparation of committee reports, and conduct at legislative committee hearings. Gravel v. United States, 408 U.S. 606 (1972). In addition, the Court has unequivocally declared that the Clause protects legislative aides as well as the legislators themselves. In Gravel, the Court stated that "for the purpose of construing the privilege a Member and his aide are to be treated as one." 408 U.S. at 616.

In 1969 the Supreme Court first interpreted the Clause in the context of a criminal charge against a Member of Congress. In United States v. Johnson, 383 U.S. 169 (1966), Congressman Johnson was charged with assisting Savings and Loan officials in return for a bribe. Part of his help came in the form of a speech made by Johnson on the House floor, a speech that became

the subject of extensive cross-examination of Johnson at trial. The Government questioned Johnson about the "manner of preparation and the precise ingredients of the speech" as well as Johnson's motives for giving the speech. 383 U.S. at 176, 176. The Court held that this examination contravened the Clause, even if Johnson's speech was motivated by the receipt of a bribe.

The Clause thus sometimes leaves the Government in the frustrating position of not being able to prove in court the quo of a bribe when the quo was an action that took place in Congress, in public, and was reported in the press. The Clause does not prohibit outright, however, the prosecution of Members of Congress. That is, the Clause does not go so far as to make legislators "super citizens, immune from criminal responsibility." United States v. Brewster, 408 U.S. 501, 516 (1972). The Supreme Court has expressly held that "...a Member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely on legislative acts or the motivation for legislative acts." United States v. Brewster, supra at 512.

Much of the litigation dealing with the Clause concerns the definition of "legislative acts." The Court has made it clear that the definition does not include improper attempts by a Member of Congress "to influence the Department of Justice, that is in no way related to the due functioning of the legislative process." United States v. Johnson, supra at 172 (emphasis added). Nor does the definition include acts of bribe-taking by legislators:

> Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as part of or even incidental to the role of a legislator. It is not an "act resulting from the nature, and in the execution, of the office." Nor is it a "thing said or done by him, as a representative, in the exercise of the functions of that office,". Nor is inquiry into a legislative act necessary to a prosecution under this statute or this indictment. When a bribe is taken, it does not matter whether the promise for which the bribe was given was for the performance of a legislative act as here or, as in Johnson, for use of a Congressman's influence with the Executive Branch. And an inquiry into the purpose of a bribe "does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them."

United States v. Brewster, supra at 526 (citations omitted). In sum, in a bribery case with a congressional defendant, the Government may prove: (1) the fact that the thing of value was given to the defendant; (2) the promise by the defendant to perform an official act; and (3) the official act, so long as the act is not covered by the Clause.

In addition to the typical opponents a prosecutor faces in developing a corruption case, in a case involving a Member of Congress a new and formidable adversary may well enter the scene. The prosecutor should anticipate that the Congress as an institution will take every opportunity to expand the reach of the Speech or Debate Clause. Both Houses have legal staffs who view as an integral part of their work the development of the Clause. For example, in the recent successful prosecution of Congressman George Hansen for filing false financial disclosure forms to Congress, the Government sought ministerial evidence from the Clerk of the House so as to establish how the disclosure forms were processed on the Hill and thus prove the materiality of the forms. Counsel for the House resisted this effort, claiming that use of the forms on the Hill was an "internal matter," relating to the potential discipline of members and was thus protected by the Clause. The trial court agreed, requiring the Government to prove materiality with other evidence.

Congressional rules guarantee that Congress as an institution will have every opportunity to inject the Clause into a criminal investigation. For example, by House Rule 50, all subpoenas to any Member or employee of the House must be submitted to the Speaker and the Speaker determines "whether the subpoena . . . is a proper exercise of the court's jurisdiction, is material and relevant and is consistent with the privilege and rights of the House[.]" If the Speaker determines these issues in the affirmative, the subpoena is to be complied with "unless the House adopts a resolution to the contrary" or unless the recipient has a basis to quash the subpoena unrelated to Congress. If the Speaker determines there is something wrong with the subpoena, lawyers representing the House of Representatives will be sent to court with a motion to quash on behalf of the institution. It is our experience that the courts give much weight to such motions.

By a long-standing, informal agreement, the Department of Justice has agreed that lawyers for the House of Representatives may attend FBI interviews of Members of Congress or staff that pertain to official business. The FBI often balks at this requirement, arguing that the presence of a Hill lawyer will inhibit the witness. This point, while often valid, is usually mooted by the interviewee's awareness of the informal agreement and insistence that the House lawyer attend the interview.

It is our experience that in most instances our interests are best served by not seeking out a legal fight with Congress. In most prosecutions of legislators, the defendants are vigorously represented by able counsel. There seems little reason to seek to have Congress as an institution on the other side as well. This is particularly true as the courts seem to give special deference to constitutional arguments authored by Congress. Of course, often we are obliged to take on the Hill if

crucial evidence or even a prosecution is at stake. The recent successful prosecutions of Congressmen in ABSCAM and the Hansen case illustrate that Hill opposition can be overcome in the right cases.

Publication Clause

Other constitutional issues may be interposed by Congress in the face of a prosecutor's effort to receive Hill evidence. The publication clause of the Constitution provides that "[e]ach House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy[.]" U.S. Const. art. I, § 5, cl. 3. This language has been cited as constitutional support for congressional claims of a privilege to resist requests for a certain type of documentary evidence -- transcripts of testimony given to executive sessions of congressional investigating committees. The courts have examined the relationship of the publication clause to refusals to give up such transcripts in two well publicized cases. The first case was one of the Watergate trials -- a criminal prosecution for a warrantless search of a psychiatrist's office instigated by White House officials. In this case, defendant G. Gordon Liddy issued subpoenas for transcripts of testimony by Government witnesses who had appeared before the House Armed Services Special Subcommittee on Intelligence. When it seemed that the House would not honor the subpoenas, the district court ruled that the transcripts were privileged under the publication clause and that Liddy had no right to require their production. See United States v. Liddy, 452 F.2d 76 (D.C. Cir. 1976).

The second case arose out of the court-martial of Lt. William Calley, Jr., for the mass murder of Vietnamese civilians at My Lai in 1968. The military judge requested that the House release evidence and testimony given in an executive session of the Armed Services Subcommittee. The House did not accede to this request, and the court-martial held that the House's failure to release the papers was within the scope of the privilege delineated by the publication clause. See United States v. Calley, 8 Crim. L. Rep. (BNA) 2054-55 (Army GCM, 5th Jud. Cir. 1970)(court order no. 19), reprinted in 116 Cong. Rec. 37652-53 (1970). In granting habeas corpus relief in Calley v. Callaway, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911 (1976), the district court apparently agreed with this interpretation of the clause, but thought that, on balance, "the legislative branch was not entitled to invoke the privilege of confidentiality at the expense of the individual accused's right to evidence at his criminal trial."

Strong arguments can be made against interpreting the publication clause as empowering Congress to refuse to produce subpoenaed transcripts of closed congressional hearings, not the

least of which is the literal reading of the clause itself. On its face, the publication clause gives Congress only the power to determine that certain records of its proceedings should be omitted from the public record. Nothing in the clause gives Congress the power to block other modes of disclosure of its proceedings. A prosecutor confronted with this problem, however, will have to deal with the lower court opinions in Calley and Ehrlichman.

## Immunity from Arrest Clause

Arguments have been made that the immunity from arrest clause, which provides that "they [Senators and Representatives] shall, in all cases except treason, felony, Breach of the Peace, be privileged from arrest during their attendance at the Session of their respective Houses, and in going from and returning to the same," U.S. Const. art. 1, § 6, cl. 1, immunizes Members of Congress from appearing as witnesses in criminal cases. In a celebrated case, Congressman Fiorella La Guardia successfully avoided testifying in a grand jury by claiming that the subpoena directed to him invaded territory made privileged by the arrest clause. See 6 C. Cannon, Precedents of the House of Representatives §586 at 825 (1936). Hopefully, the Supreme Court put such efforts to avoid testimony to rest in Gravel v. United States, 408 U.S. 606 (1972). Senator Gravel's assistant sought to avoid testifying in the grand jury about allegations that Gravel arranged for the Pentagon Papers to be published. For analytical purposes, the Court treated the assistant as a member of the Senate. The Court stated that "[h]istory reveals, and prior cases so hold, that [the immunity from arrest clause] exempts Members from arrest in civil cases only." Since the grand jury subpoena did not constitute an "arrest" in a "civil case," the Senator and, a fortiori, his aide, had no protection by virtue of the immunity from arrest clause. In general, the Court declared, the clause does not "confer immunity on a Member from service of process as...a witness in a criminal case."

## Bribery Statute

Difficulties with congressional cases do not end with constitutional issues. The statute most frequently used in connection with such cases, the bribery statute -- 18 U.S.C. § 201 -- has some difficulties. Generally speaking, Section 201 is implicated when gifts, money or other things of value are received by Members of Congress that are somehow connected to his official duties and acts. There are two applicable clauses within the bribery statute that specifically prohibit Federal officials (including legislative branch officials) from: (1) "corruptly" receiving or asking for "anything of value for himself or for any other person or entity, in return for being influenced in his performance of any official act," (bribery, a

15-year felony at section 201(b)); and (2) from receiving "otherwise as provided by law" anything of value "for or because of any official act performed or to be performed by him," (illegal gratuity, a 2-year felony at section 201(c)). So then, what is difference between a bribe and an illegal gratuity? The D.C. Court of Appeals explained it this way in United States v. Brewster, 506 F.2d 62, 72 (D.C. Cir. 1974):

> The bribery section makes necessary an explicit quid pro quo which need not exist if only an illegal gratuity is involved; the briber is the mover or producer of the official act, but the official act for which the gratuity is given might have been done without the gratuity, although the gratuity was produced because of the official act.

The shorthand interpretation of this language is that bribes are forward-looking (the briber buys official action) and gratuities are backward-looking (the gratuitor gives thanks for official action already done). But what about the lobbyist who gives $50,000 to a Congressman, not for a specific vote, but to guarantee that the Congressman is kindly disposed to the lobbyist's official needs in the future? Is this a gratuity? Certainly, in the Fifth Circuit, where "it is not necessary that the official actually engage in identifiable conduct or misconduct or that any specific quid pro quo be contemplated by the parties nor even that the official actually be capable of providing some official act as quid pro quo at the time." United States v. Evans, 572 F.2d 455, 479 (5th Cir. 1978). Rather, "all that need be proven is that the official accepted, because of his position, a thing of value, otherwise than as provided by law for the proper discharge of official duty." 572 F.2d at 480 (emphasis added). The Fifth Circuit observed that the purpose of the gratuities in this case was simply to "keep Evans happy," 572 F.2d at 581.

The D.C. Circuit, on the other hand, takes a different view and has required some proof relating to official acts. In United States v. Muntain, 610 F.2d 964 (D.C. Cir. 1979), a gratuity conviction was reversed because the solicitation of benefits relating to an insurance venture by an HUD official had nothing to do with his job duties at HUD:

> In the instant case there was no evidence that Muntain's meetings with labor officials to discuss and promote group automobile insurance involved a subject which could be brought before Muntain -- or, for that matter, anyone else at HUD -- in an official capacity. There was, therefore, no apparent danger that the receipt of gratuities from Flemming or Cordial in connection with the group automobile insurance scheme would induce Muntain to act improperly in deciding a HUD-related matter. Accordingly, 18 U.S.C. §201(g) [the former gratuity section] simply does not apply.

610 F.2d at 968. In a later case, United States v. Campbell, 684 F.2d 141 (D.C. Cir. 1982), the D.C. Circuit rejected a defendant's claim that to be convicted there had to be proof that he had "specific knowledge" of a "definite official action for which compensation was intended"; but still the court required proof that the official accepted gifts "with knowledge that the donor was paying him as compensation for an 'official act.'" 684 F.2d at 150.

Other Circuits have placed themselves closer to Evans' "keep him happy" standard than the District of Columbia's "show me the official act" standard. See, e.g., United States v. Niederberger, 580 F.2d 63, 68-69 (3rd Cir. 1979)(holding it unnecessary to allege in a gratuity indictment that a gratuity received by a public official was, in any way, "generated by some specific identifiable act performed or to be performed by the official"); United States v. Alessio, 528 F.2d 1079, 1083 (9th Cir. 1976) (holding that a gratuity violation may occur "whether or not there was an agreement . . .regarding particular acts"). Cf. United States v. Standefer, 452 F. Supp. 1178, 1183 (W.D. Pa. 1978) (finding a gratuity violation when gifts were given "for the creation of a better working atmosphere"), aff'd, 610 F.2d 1076 (3rd Cir. 1979)(finding a violation where gifts were given "because of Niederberger's official position, and not solely for reasons of friendship or social purposes"); and United States v. Barash, 412 F.2d 26, 29 (2nd Cir. 1969) (recognizing that a gratuity violation occurs when payments are made to an official out of "a desire to create a better working atmosphere"). Prosecutors contemplating a gratuity indictment obviously should take a careful look at the appropriate law of their Circuit.

A gratuity can be a lesser-included offense in a bribery case, see United States v. Brewster, supra. To be noted are two peculiar aspects of section 201: (1) a former public official can receive a gratuity but not a bribe; and (2) a bribe can be paid to someone other than the public official, while the gratuity must go directly to the public official. Compare section 201(b)(2) with section 201(c)(1)(B).

Finally, it should be noted that campaign contributions can be the stuff of both bribes and gratuities. When, however, the contributions are consistent with the Federal Election Campaign Act of 1971 and the subsequent amendments to the Act, it is a steep, uphill climb to a successful prosecution, usually requiring a taped conversation of the illicit agreement between the donor and the Member of Congress.

# CHAPTER SIX

## INVESTIGATION AND PROSECUTION OF POLICE CORRUPTION CASES

BY

EDWARD S. G. DENNIS, JR.*

United States Attorney
Eastern District of Pennsylvania

AND

DENNIS O. WILSON**

Acting Chief, Corruption and Labor Section
Eastern District of Pennsylvania

* Edward Dennis has been United States Attorney in the Eastern District of Pennsylvania for five years, a period that has seen several major multi-defendant police corruption prosecutions in the District.

** Dennis Wilson has been a prosecutor in the Eastern District of Pennsylvania for five years.

## INVESTIGATION AND PROSECUTION OF POLICE CORRUPTION CASES

"Honor," "Service," and "Integrity" are the watchwords describing the duty and responsibility entrusted to police officers. Police officers are the protectors of the public, the enforcers of the laws. When the law enforcers become lawbreakers, the public's trust in government is diminished. Accordingly, the responsibility of the Federal prosecutor in safeguarding a local police department against corruption is one of the most important in Federal law enforcement.

Since 1981, the Philadelphia Field Office of the Federal Bureau of Investigation and the U.S. Attorney's Office for the Eastern District of Pennsylvania have successfully investigated and prosecuted nearly three dozen present and former Philadelphia police officers who, by their corrupt activities, violated the laws that they had sworn to uphold. Traditionally, the investigation and prosecution of police corruption was left to state and local government. Unfortunately, pervasive corruption within a local police department may make the investigation and prosecution of corruption by local authorities politically sensitive if not impossible. Therefore, Federal authorities should consider assuming the responsibility for investigating and prosecuting local police corruption.

Typically, police corruption cases are initially difficult to develop and prove. The reason is the so-called "conspiracy of silence" among the police officers, and to some extent, among the individuals who provide illegal payments to officers in order to permit their illegal activities to continue or to "fix" cases against them. The first step in the investigation is to focus on the most available source of information, the persons making the illegal payments. Once you have identified these persons, you will be able to choose among various investigative techniques, including wiretap and other electronic surveillance, undercover operations, grants of formal and informal "use" immunity and investigative grand juries including documents and records subpoenas. After evidence of corruption has been developed, the principal statutory tools available to you are the criminal provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), the extortion provisions of the Federal Hobbs Act, the Federal obstruction of justice statutes, and Federal and state bribery statutes.

In most cases, the initial prosecutions will be of lower echelon officers, the ones most directly and actively involved in the corrupt activities. Following conviction, these officers can be induced to cooperate with Federal authorities through the judicious employment of use-immunity, permitting the Government to effectively extend its investigation and prosecution into the

upper echelons of the police department and break the "conspiracy of silence."

It is hoped that this primer will serve as a useful tool for Federal officials around the country investigating and prosecuting police corruption within their Districts.

## What is Police Corruption?

### Extortion of "Protection" Payments from Operators of Illegal Vice Activities, Including Gambling and Prostitution

You may find evidence of police officers extorting or accepting payments from operators of illegal vice activities, offering in return to protect these activities by not enforcing the laws that prohibit them. Typical illegal gambling activities include the use of video and other poker machines as gambling devices and illegal lottery or numbers writing. Police officers also may ignore prostitution in exchange for periodic payments of money and property.

### Extortion of Payments from Owners and Managers of Bars and Nightclubs

Police officers may extort payoffs from owners and managers of bars and clubs so that these bars and clubs can serve liquor after lawful hours. Police also extort payoffs from homosexual bars and clubs by threatening to harass the clientele. The threatened harassment typically takes the form of increased police presence in the area of the bars and clubs, thereby discouraging patrons.

### Evidence Abuses

Police officers, executing lawful arrest and search warrants, may fail to account for and thus unlawfully retain money, property and contraband seized in the execution of these warrants. Contraband includes stolen property and narcotics.

### Case Fixing

Police officers may extort illegal payments from persons who have been arrested or were subject to arrest for illegal activities in exchange for "fixing" or influencing the local prosecutor or judicial system to either dismiss or reduce the charges.

## Investigative Techniques

The following investigative techniques may be employed in investigating police corruption.

Strategy

In many cases of police corruption, some act of wrongdoing is committed not only by the police officers but also by the individuals who make illegal payments. Therefore, an initial decision has to be made regarding the focus of the investigation. In the case of police corruption, the recommendation is that you focus the investigation on the police officers. In most instances, experience has shown that it will be impossible to develop competent evidence of police corruption without the testimony of the payers. The reason for favoring the payers over the police officers is that the police are the public officials paid to enforce the law; they, therefore, have violated the public trust and are the more serious offenders.

Another decision is whether to structure your case as a single conspiracy within the entire police department or as multiple conspiracies involving discrete units within the department. Experience has shown that when corrupt activities involve upper level officers whose responsibilities cross organizational lines within the department, the corrupt activities are usually coordinated throughout the entire department, thus suggesting a single conspiracy. It is not unusual for officers assigned to one area in a city to accept payoffs only from payers who operate in that area and not cross over into other areas. The seeming respect that the officers have for one another's territories is also indicative of a single, coordinated plan.

Finally, decisions have to be made about which payers to approach and what investigative techniques to employ to gather evidence.

Legwork

At this stage, good old-fashioned legwork is the most effective tool in making some of these strategy decisions. With indications of corrupt activities by members of the local police department, there also will be various leads and sources of information that will indicate the source of illegal payments. As a first step, the investigators should identify the payers and the type of illegal activity being protected. Once the universe of individuals making illegal payments has been identified, some thought must be given as to whether to seek the cooperation of a few, some or all of them.

Approaching a great many payers initially may have the negative effect of "tipping" your investigation and causing the illegal activity to cease. A good strategy is to identify a few of the payers for initial contact -- those who have the greatest involvement in making the illegal payments or those against whom you can develop a case to use as a lever for cooperation.

On the other hand, it may well be the case that the universe of payers is so small or the activity of a particular payer so

clouded that many or all of them must be contacted. In that situation, the contacts should be coordinated and discreet.

Getting the Payer to Cooperate

The task at this point is to induce the payer to cooperate with you and provide information and evidence that will result in the successful prosecution of the police officers. Obviously, most of these persons will not offer their assistance for altruistic reasons, but will only cooperate when they have no choice. Accordingly, it is necessary to employ some type of process in order to make these individuals cooperate.

In rare cases, advising the individual that he is not the subject of the investigation will be sufficient, and a letter to that effect will serve the purpose. In most cases, however, the individual will require some form of use-immunity, either formal immunity or informal "letter" immunity. Informal immunity is provided to individuals who have indicated that they will cooperate in exchange for an assurance that their words and actions will not be used against them. For the most part, however, these individuals will be compelled to testify and in that instance, formal use-immunity pursuant to 18 U.S.C. § 6001 et seq. must be applied for and approved by the Justice Department. Formal immunity is granted as part of the grand jury process, and a still uncooperative subject may be held in criminal contempt and imprisoned for the length of the grand jury.

Once the individual is cooperative, whether through a non-subject letter or informal or formal use-immunity, then you may use several additional investigative techniques to further develop your case.

Wire and Other Electronic Surveillance

Assuming that the corrupt activities are ongoing, the cooperating individual may have the opportunity to record the illegal payoffs as they occur. Individuals can be wired and instructed on how to engage in conversation with the officers. Meetings may be arranged at a site selected by the cooperating individual where the illegal transaction can be taperecorded or videotaped.

Undercover

In some instances, Federal agents, acting in an undercover capacity, may be introduced to the corrupt police officers by the cooperating individual. In this way, the undercover agents, acting as the surrogate of the cooperating individual, may make the illegal payoffs directly to the police officers.

## Investigative Grand Jury

Of vital importance are the tools afforded by an investigative grand jury, including subpoena power and contempt of the grand jury proceedings. The subpoena power should be employed in the early stages of the investigation, as soon as you have identified the payers targeted for cooperation. The power permits the Government to obtain business and other records, if any, for the businesses protected by the police. In some cases, those records may actually reflect the illegal payments. The subpoena power may also be used to obtain the personnel files of any corrupt police officer who has been identified by the cooperating payers. These files are important because they will contain, among other things, the officer's duty assignments, partners and records of any disciplinary actions.

Of course, the grand jury is also used to "lock in" the testimony of the payers, forcing them either to admit and describe their illegal payments to the police or to deny their payments. This is usually an important consideration to prevent the payers from attempting to change their testimony later in the investigation or at trial. It is also important in the situation where a payer denies making payoffs and later a convicted officer admits accepting payments from that payer. The payer can then be prosecuted for perjury or making a false statement to the grand jury or Federal agents. This prosecution has the psychological effect of letting your witnesses know the serious consequences of delivering less than complete, truthful testimony.

The grand jurors themselves may prove a valuable tool in the course of your investigation. As a prosecutor, you may discuss investigative strategies with the grand jurors. Very often, the grand jurors will come up with good ideas for investigating the case that you may not have considered.

## Search Warrants

Of far less importance is the use of search warrants as an investigative tool. In most cases, you will be unable to gather sufficient probable cause to support a warrant, and the materials likely to be seized with a warrant, such as business records and police personnel files, may be obtained just as effectively through a grand jury subpoena. However, a search warrant may be used when investigating forms of corruption involving evidence abuses. The warrant may enable the Government to seize the property and contraband retained illegally by the police officers. The likely source of probable cause for the warrant will be the individuals from whom the property and contraband were originally seized.

## How to Charge the Corrupt Activities

### The Criminal Provisions of RICO

The principal tool employed in prosecuting police corruption is the RICO statute, 18 U.S.C. §§ 1961-1968. The RICO statute is designed to combat the infiltration of corruption in legitimate enterprises and, in part, makes it unlawful for any person associated with an enterprise that affects interstate commerce to further that enterprise's affairs through a "pattern of racketeering activity for the collection of unlawful debt." Thus, in order to convict corrupt police officers, Federal prosecutors must establish that the local police department constitutes an enterprise for purposes of the statute, and that the officers' conduct in the conspiracy amounted to racketeering. Caselaw from numerous jurisdictions holds that a police department is an "enterprise" for purposes of RICO.

A pattern of racketeering activity is established under RICO by proof that the officer committed two or more predicate offenses that are enumerated in the statute (see 18 U.S.C. § 1961(1)). In order to establish the statutory requirements for a RICO conviction, prosecutors may charge the corrupt police officers with bribery (18 U.S.C. § 201 or the appropriate state bribery statute), obstruction of criminal investigation (18 U.S.C. § 1510), obstruction of justice (18 U.S.C. § 1501 et seq.) and, particularly, extortion in violation of the Hobbs Act (18 U.S.C. § 1951).

### Hobbs Act Extortion

The Hobbs Act serves as a particularly useful tool in reaching police corruption. It may serve as a predicate offense under a RICO prosecution or it may be charged as a separate offense. The Hobbs Act creates Federal sanctions for extortion and conspiracy or for attempts to commit extortion that interfere with commerce. Under the Act, the term "extortion" is defined as obtaining property from another, with his consent, induced under color of official right. Simply stated, a payment to a police officer simply because he is a police officer is sufficient to prove an extortion under the Hobbs Act.

### Bribery

Either the Federal bribery statute or the appropriate state bribery statute may be employed, principally as a predicate offense under a RICO prosecution. A police officer is by definition a "public official" and his action of accepting an illegal payment in order to influence his official conduct amounts to accepting a bribe.

Obstruction Offenses

The Federal obstruction offenses, i.e., obstruction of justice and obstruction of a criminal investigation, are also used primarily as predicate offenses under a RICO prosecution. The obstruction charges usually stem from the so-called "conspiracy of silence" maintained among the police officers that insulates higher ranking officers from investigation and prosecution.

Federal Tax Offenses

Of less utility but nonetheless important, are certain Federal tax statutes, including income tax evasion (26 U.S.C. § 7201) and filing a false tax return (26 U.S.C. § 7206). These charges may be useful in cases where you are able to develop proof that a police officer has received illegal payoffs and has failed to report these payments on his tax returns. They also may be the most appropriate charges against an officer whose corrupt activities include evidence abuses, since the retention of the seized money, property and contraband may well not violate Federal law. In these cases, you begin by examining the officer's tax returns and comparing the income figures stated therein to the amount and value of the retained seized property as revealed by your investigation.

Post-Indictment, Trial and Post-Trial Strategies

At the time an indictment charging police corruption is returned, the prosecutors and agents should hold a press conference in order to fully brief the public on the allegations and charges. Obviously, there is a limit beyond which a prosecutor should never tread in addressing the press prior to trial. However, an aggressive explanation of the nature of the charges and the facts underlying them is important to educating the public about police corruption and overcoming their initial skepticism and resistance.

With regard to the officers against whom you have developed the strongest cases, you may want to offer to negotiate a pre-trial plea for a lighter sentence. In all likelihood the offer will prove fruitless. However, it is worth the effort because a cooperating officer will vastly strengthen your other case and, more importantly, will be the first crack in the "wall" of silence. 1/

---

1/ The so-called "wall" is created by the considerable social pressures faced by an officer who cooperates with the Government. He is labeled a traitor and is ostracized by his fellow officers. Moreover, to accuse a superior officer of wrongdoing is to confront an established pattern of authority and discipline.

In most instances at trial, the accused officers will testify and deny the allegations of wrongdoing, and the trials of these cases become battles of credibility between the immunized payers and the officers. As ammunition on cross-examination, and later on rebuttal, the prosecutor should attempt to present evidence that the officers seem to be living beyond their means, either through the acquisition of real and personal property or through stock and securities investments. Review of the officers' income tax returns may be instructive, either to determine whether they have reported the illegitimate monies as income or, if you can establish lavish or expensive purchases or investments, to demonstrate the lack of reported income to account for these purchases or investments.

Another fertile area for cross-examination of the accused officers will be whether the officers have ever been offered bribes or whether they have knowledge of other officers having been offered or accepting bribes. When several officers are on trial in the same case and each is testifying, they may give divergent responses to those questions, leading to an interesting conflict among the officers' testimony, a conflict which you may argue is indicative of untruthfulness. Moreover, an officer who admits to having been offered a bribe or who has knowledge of bribes being offered to or accepted by other officers, may then be asked whether he reported this information to his superiors. Most likely he has not, which you can confirm through his personnel file. Obviously, an officer, as an enforcer of the law, has a duty to report such information and his failure to do so is suggestive of other possible breaches of duty.

Following trial, assuming your investigation is continuing, you should judiciously approach and seek the cooperation of selected convicted officers. You should approach those officers who are likely to advance your investigation into the upper echelons of the police department. If necessary, these officers should be compelled to cooperate by employing formal use-immunity. This gives you an important "hammer" over the officers because they may be held in contempt and imprisoned for the length of your grand jury. This imprisonment, of course, is in addition to whatever sentence is imposed by the court and must run its course prior to the court's sentence.

## Preclearance

All indictments, complaints and grand jury investigations must be authorized by the Department of Justice's Criminal Division if these investigations will involve prosecution under either RICO or the Hobbs Act. Preliminary investigations may be conducted in these matters without consultation with the Criminal Division. However, full field investigations require prior Departmental clearance. See 9 U.S.A.M. 2.133(j) and 2.133(s).

Authorization of grand jury and full field investigations may be obtained by telephone in many, but not all, instances. In especially complex or sensitive cases, or in instances of United States Attorney recusals, the Public Integrity Section has attorney manpower that may be available to assist in the preparation and/or litigation of these cases. Requests for such operational assistance should be directed to the Chief of the Public Integrity Section at FTS 786-5056. Finally, while informal or letter immunity requires only the signature of the U.S. Attorney, requests for formal immunity must be authorized by the U.S. Attorney and then be approved by the Assistant Attorney General of the Criminal Division of the Department.

# CHAPTER SEVEN

# ELECTION CRIMES

BY

CRAIG C. DONSANTO*

Director, Election Crimes Branch
Public Integrity Section
Criminal Division

* Craig C. Donsanto has been the Director of the Election Crimes Branch since its inception in 1980, and has been involved in the Federal prosecution of election crimes since 1971.

# ELECTION CRIMES

The right to vote, and the power that the franchise confers upon citizens to elect and control their government, is the cornerstone of the American democratic process. Elections not only determine winners, but more importantly they confer legitimacy on the power of public officials and hold them accountable to the people they serve. Where the franchise is corrupted by fraud, bribery or intimidation, corrupt government, public cynicism and even political instability can result. Accordingly, the responsibility that the Federal prosecutor bears for protecting the integrity of the franchise is among the most important in Federal law enforcement.

Ballot fraud cases are normally easy to present factually in court, and the prosecution of this type of offense has been shown to be a fast, efficient and effective way of bringing Federal law enforcement remedies to bear on government corruption problems. If they are properly managed and presented, voter fraud cases are also generally well received by the public and the media.

## What is Ballot Fraud?

Ballot fraud is any course of conduct aimed at corrupting the process by which votes are cast or tabulated. On the other hand, ballot fraud is not aggressive campaigning, dirty tricks, irregularities in obtaining nominating petition signatures, irregularities in the process through which candidates are induced to enter or withdraw from elective contests, or inaccuracies in the rhetoric of candidates campaigning for elective office.

Most forms of ballot fraud are easily recognized. It is, for example, illegal:

- To bribe voters;
- To cause ballots to be cast in the names of individuals who did not personally subscribe the ballot attributed to them;
- To falsely report or fraudulently alter vote tallies;
- To steal ballots;
- To stuff ballot boxes with fraudulent or illegal votes;
- To tamper with voting equipment, or vote-tabulating software;

- To fraudulently change a voter's ballot;

- To intentionally prevent a qualified voter from casting a ballot;

- To intimidate voters in connection with the exercise of the franchise; or

- To physically assault voters for having exercised their franchise.

Other forms of ballot fraud are more subtle. For example, it can be a Federal criminal offense for political participants to intentionally seek out the illiterate, the elderly or the socially disadvantaged for the purpose of intimidating them in casting their ballots. Similarly, it can be illegal to cause ballots to be cast in the names of voters who are not given the opportunity to personally examine and execute the ballot attributed to them. 1/

## Getting Started

Ballot fraud investigations usually require a few simple things to be successful. These include the following:

### Let the Public Know of Your Intent to Prosecute Election Fraud

Most complaints that lead to prosecutable ballot fraud cases come from participants in the political process -- voters, candidates, campaign workers, poll officials, etc. However, in places where ballot fraud has been an entrenched problem, there is usually a history of tolerance of voting abuses by local law enforcement authorities. This in turn frequently leads to public cynicism, which must be overcome if productive complaints are to be generated and received. The following steps can help in this regard.

- Hold press conferences before important elections, and announce to the public that prosecution of ballot fraud is an important Federal law enforcement priority on which the Federal Government is prepared to act.

- Make Assistant United States Attorneys and Federal Bureau

---

1/ Ballot frauds should be distinguished from civil rights matters involving the voting process. In civil rights matters, a motive of racial animus is present. Such matters are handled by the Civil Rights Division pursuant to the Voting Rights Act and other statutes specifically implementing the Fifteenth Amendment.

of Investigation (FBI) agents accessible to the public during, and immediately after, important elections by publicizing the telephone numbers at which these people can be reached by the public.

- Contact representatives of major political factions shortly before elections to express Federal interest in ballot integrity, and to enlist the support of political party officers in bringing complaints of possible criminal irregularities in the balloting process to the attention of Federal law enforcement personnel.

- Contact election administrators (e.g., registrars, county and town clerks, Boards of Election) within your District, and enlist their help in funneling information about voting violations to your attention. These people are plugged into the voting system, and in most cases they are dedicated public servants who genuinely wish to help root out criminal abuses of the process they administer. They are also the custodians of documentary records generated during the voting process, which are extremely important in identifying fraudulent voting transactions.

- Try to investigate and prosecute at least one factually simple ballot fraud case soon after an important election, and be certain that this case receives wide publicity. This will demonstrate the sincerity of your resolve to prosecute voter fraud, which in turn will spark public confidence in your office's ability to act quickly and effectively in this area.

Act Promptly to Protect the Integrity of Voting Documentation

The voting process produces voluminous records ranging from registration cards and absentee ballot applications, to tally sheets, poll lists and ballots themselves. These materials are particularly important to successful vote fraud investigations, since they contain information that helps in identifying fraudulent voting transactions and putative defendants. For example:

- Persons registering to vote are normally required to provide detailed personal information about themselves to election registrars, and to furnish a specimen of their handwriting on the registration form. This data can be used to determine the authenticity of voting transactions attributed to specific voters.

- Voters appearing to vote on election day are required in most states to execute poll lists and other documents prior to casting their ballot. The bona fides of a particular voting transaction can frequently be

determined by comparing these poll list signatures to the voter's exemplar on his or her registration card. The identity of putative defendants responsible for casting fraudulent votes can also frequently be determined by comparing the poll list signatures of known fraudulent voting transactions to exemplars taken from suspects.

- Absentee voters are generally required to apply for the absentee ballots in writing, and the absentee ballots themselves customarily require voters to manually subscribe an oath (generally on the ballot envelope) that attests to the authenticity of their ballot. These signatures can be used to identify fraudulent voting transactions, and can also help in identifying putative defendants.

- In most states, the signatures of voters on absentee ballot documentation must be notarized or witnessed by third parties. Also, the election official responsible for overseeing the absentee voting process is required in most states to maintain a log of applications received, applications approved, ballots issued, ballots returned, and ballots challenged. Once one or two fraudulent voting transactions have been identified, this information can be used to identify the subjects with whom the voters involved dealt, and to locate other voters who also dealt with the same individuals in casting their ballots.

- Tally sheets prepared at the polls normally contain the handwritten certification of the poll officials who prepared them, and in many states these officers are required to execute an oath attesting to the authenticity and accuracy of the returns. This can be a source of reliable handwriting exemplars of persons having official access to voting materials in polls where ballot-box stuffing is suspected.

- Many states require voters needing assistance in voting at the polls to execute affidavits identifying the person they wish to accompany them into the voting booth. This information can often be useful in identifying patterns of voter intimidation and voter bribery.

- Federal law, specifically 42 U.S.C. § 1974, requires that all voting documentation be maintained intact, and in secure condition, for at least twenty-two months following elections where Federal candidates are voted upon. This is a significantly longer time period than that which normally applies under state laws for the retention of documentation in non-Federal elections. It is therefore important to contact all of the election administrators in your District before you begin a ballot fraud investigation to be certain that they are aware of

this Federal retention requirement, and that they comply with it.

Ask for Assistance from Local Law Enforcement Authorities

The United States Constitution leaves to the states the principal responsibility for administering the clerical aspects of the elective process. However, state law enforcement machinery is usually not well equipped to act vigorously and effectively against ballot fraud. Local prosecutors and police agencies should therefore be informed of the Federal interest in prosecuting election fraud cases, and of the following attributes of the Federal law enforcement process that can make prosecution of this type of case in Federal court particularly attractive:

- Resources -- The investigation of ballot fraud matters usually requires a fairly large manpower commitment, which the Federal government is better able to marshal than local prosecutors and investigative agencies.

- Grand jury -- The development of ballot fraud cases demands an effective grand jury process through which reliable testimony can be secured from the vacillating witnesses who are frequently encountered in this type of case, and through which necessary documentation can be secured.

- Broadly drawn venires -- Trials of ballot fraud cases are usually best heard by juries that are not drawn from the location in which the alleged fraud occurred. Federal venires are usually drawn from much wider geographic areas than are state venires, and are therefore better suited to trying this type of case.

- Political detachment -- State prosecutors are usually more closely tied to local politics than are their Federal counterparts. Federal prosecution of this type of case, therefore, is more apt to be accepted as politically detached by the media and the public.

Know the Political Landscape

Ballot fraud is most apt to occur in jurisdictions where there is lively political conflict between factions, where voters are fairly equally divided numerically between factions, where local elective officers wield substantial power, and where there is a high incidence of poverty or illiteracy. Political jurisdictions meeting these criteria should be identified, and complaints coming from them given special attention in allocating Federal resources to ballot fraud matters.

Develop a Strategy For Your Investigation Early

Very few people corrupt the franchise for the simple thrill of winning elections. Usually, there is a deeper motive behind

this type of crime, such as protection of illegal activity, control over patronage, political corruption, etc.

Moreover, the typical ballot fraud scheme usually involves many types of participants performing a variety of tasks on behalf of identifiable political forces. For example, vote-buying schemes usually have "haulers" who take voters to the polls and pay them, "bankers" who obtain and distribute the money to the "haulers" and make territorial assignments, and "checkers" who accompany the voter into the voting booth to assure that they vote correctly.

It is important to identify the motive for electoral corruption at an early stage, to identify as many of the "players" in the scheme as possible, and to assess the relative culpability of these individuals. In this way, an investigative strategy can be developed which initially targets low-level participants for the purpose of making witnesses out of them against higher-placed participants, and ultimately to obtain an investigative inroad into the illegal activity that motivated the voter fraud.

## Structuring a Ballot Fraud Investigation

Ballot fraud investigations are generally divided into three stages: preliminary investigations, full field investigations, and indictments/trials. Preliminary investigations are usually conducted at the initiative of the United States Attorney or FBI office that received the complaint. Full field investigations, and indictments of individual subjects, require approval from the Criminal Division and from Bureau Headquarters, and are normally monitored closely by the Public Integrity Section. Trials of voter fraud cases are generally conducted by Assistant United States Attorneys.

Preliminary investigations involve the taking of a complaint, and sufficient investigation:

- To identify the type of ballot fraud present;
- To determine whether that fraud is criminally actionable under one or more of the prosecutive theories applicable to this type of activity; 2/

---

2/ The Federal statutes used to prosecute ballot frauds are summarized in the Appendix.

- o To evaluate the need for Federal intervention in the matter as a function of:
  - the extent to which the fraud affected Federal contests for the United States Senate, the United States House of Representatives or the Presidency,
  - the capacity and desire of local law enforcement to handle the case, and
  - the scope and duration of the fraud;
- o To ascertain the identity of individual suspects who participated in the scheme; and
- o To ascertain, if possible, the identity of a few specific fraudulent voting transactions.

When the preliminary investigation has been completed, its results should be forwarded to the Public Integrity Section and to Bureau Headquarters, along with the recommendation of the United States Attorney in the District of venue as to whether further investigation is warranted. In most situations, the matter will be discussed at this point between Washington and the District, and where appropriate a full field investigation will be approved.

Full field investigations take their direction from the type of fraud involved. Their purpose is to develop sufficient evidence against specific subjects to support criminal indictments. They are apt to be very labor intensive, and heavily dependent on the procurement and examination of documents produced during the course of the electoral process. Obviously, each full field investigation is unique, being driven by the facts peculiar to each violation. However, election investigations normally do have common features. Examples of full field investigative strategies for two of the most frequently encountered varieties of ballot frauds follow.

Absentee Ballot Frauds

These schemes involve the corruption of absentee ballot voting transactions through such methods as bribery, forgery, intimidation, and/or voter impersonation. The investigation of this type of scheme involves the identification of specific fraudulent voting transactions, interviewing those voters, using the testimony of voters who were corrupted or defrauded to make cases against those who corrupted or defrauded them, and flipping those defendants to make cases against subjects higher up in the scheme. The normal investigative methodology for this type of case entails the following steps --

(1) Subpoenas should be issued to obtain relevant absentee ballot documentation for the target elective jurisdiction. This usually includes applications for absentee ballots; the absentee ballots themselves; the envelopes in which each ballot was enclosed when returned for tabulation (usually called a "privacy" or an "oath" envelope); the outer envelopes in which the completed ballot was returned for tabulation (usually called a "mailer"); and the log which the absentee election manager is usually required to keep of applications issued, applications received, ballots issued, ballots returned, and ballots challenged. 3/ The voter registration cards for the voters involved should also be secured at this time.

(2) The election-related documents should be analyzed. Ballot applications and the oath envelopes contain three things of particular interest to investigators: the purported signatures of voters, the signatures of witnesses or notaries, and the address where the ballot package was sent to the voter. This data should be analyzed to locate specific questionable voting transactions. Examples should include situations where a common notary or witness appears on a large number of absentee ballot documents, situations where the signatures of voters on absentee ballot applications do not match their signatures on the corresponding ballot envelopes or registration cards, and situations where absentee ballot applications purport to direct that ballot packages be mailed to addresses other than that of the voter. If one or more specific questionable voting transactions have been identified in the preliminary investigation, this document analysis should be directed at identifying voting transactions having similar characteristics (e.g., same handwriting, same witnesses, same address where ballot packages were sent).

(3) A sample of the voters involved in the questioned voting transactions thus identified should be interviewed to assertain whether their ballot was fraudulent (that they were paid, that they were intimidated, that they did not vote, that they did not personally mark their ballot, etc.). These voters should also be questioned regarding the identity of the individual(s) with whom they dealt,

---

3/ This document must be maintained intact for twenty-two months when it pertains to balloting in elections where Federal candidates are voted upon. 42 U.S.C. § 1974.

and the circumstances under which they "voted." 4/

(4) Handwriting exemplars should be taken from individuals suspected of forging absentee ballot documents, and these specimens should be compared to the handwriting on those documents.

(5) You should now be at a point where you are ready to prepare criminal cases against the individuals with whom the voters dealt. Experience in this regard is that a case having at least four voter-witnesses against a common defendant has a good chance of resulting in a conviction. This is because voters who are involved in fraudulent voting transactions are often poorly educated, easily intimidated by courtroom appearances, and generally do not make strong witnesses. (These factors, on the other hand, paint a realistic picture of voter manipulation that is quite effective in front of juries.) Remember that proposed indictments must be cleared in advance by the Public Integrity Section of the Criminal Division prior to presentment to the grand jury.

(6) The defendants indicted in the first round of cases should, upon conviction or plea, be immunized and put before the grand jury to provide testimony inculpating other participants in the scheme. Those subjects should then be prosecuted.

(7) If testimony can be obtained from "insiders" within the scheme at an early stage, this should be done through offers of prosecutive leniency. This tactic can substantially shorten this type of investigation, and facilitate the identification of both target voting transactions and high level participants.

(8) Finally, an effort should be made to ascertain the motive that fueled the scheme (e.g., protection of illegal activity, patronage, government corruption), and to use the leverage secured over defendants prosecuted for voter fraud to obtain evidence on those who may have committed other Federal crimes.

---

4/ Departmental policy is to offer informal immunity to voters who may have been involved in the crime (e.g., by accepting money for their ballot), and to use their testimony to prosecute those persons who corrupted them.

Ballot-Box Stuffing Cases

Stuffing cases involve the insertion into ballot boxes of invalid, fraudulent, or illegal ballots. A common feature of all stuffing cases is the involvement in the scheme of poll officers, since access to voting equipment is essential to the commission of this type of fraud, and since such access is controlled by state and local laws. The objective of ballot-box stuffing investigations is to identify the voting transactions that are fraudulent, and to tie specific poll officers to them. The investigative methodology for this type of case includes the following:

(1) The poll lists that voters sign when entering the polling place should be secured into Federal custody through subpoena, as should the permanent registration cards for voters residing in the target precinct, any paper or punch card ballots, and any tally sheets which were prepared by the poll officials reporting on the electoral results.

(2) The poll lists should be examined for similar handwriting, with special attention given to names entered at times when voting activity was slow (e.g., during the mid-morning and early afternoon), and those entered shortly before the poll closed.

(3) A comparison should be done between signatures on the poll list of the target precinct and the corresponding permanent registration cards to identify voters who may not have cast the ballot attributed to them.

(4) The voters identified through the foregoing process should be individually interviewed to determine if they voted personally at the poll.

(5) Handwriting exemplars should be taken from each poll officer having access to the ballot box.

(6) An attempt should be made to "flip" at least one poll official. This is usually done by offering immunity or plea to a misdemeanor to the first poll officer who agrees to cooperate in the investigation.

(7) Prosecutions against the remaining poll officials implicated in the scheme should be brought.

(8) Convicted poll officers should be "flipped" to testify against politicians and candidates who benefited from their activities or against those who instructed them to cast fraudulent votes.

(9) An effort should be made to identify the ultimate motive that drove the fraudulent ballot scheme, and to prosecute Federal crimes that may have resulted from it.

## A Few Cautions

Ballot fraud investigations sometimes present unique issues that are not normally encountered in the course of other criminal investigations. Federal prosecutors need to keep the following points in mind when doing this type of case.

### Respect the Integrity of the Polls

All states have defined by statute who is entitled to be physically present inside of the polls while an election is being held. With the exception of Illinois, these poll access laws do not permit Federal personnel to have access to open polling places. Requesting Federal investigative personnel to enter open polls risks violating the unique sovereignty that the states have over such places, and unpleasant confrontations may ensue between poll managers, local police and Federal investigative agents. Accordingly, no Federal investigation should be conducted inside an open polling place.

### Be Careful Not to Interfere with the Voting Process

Many types of voting documentation are needed by the states and localities to conduct elections (e.g., registration cards, voter lists, poll books, voting machines), or to tabulate and certify the results (e.g., ballots, tally sheets, absentee voting materials). Special care must be exercised to assure that subpoenas for such documentation are timed so as not to deprive election officials of documentation which they need in order to complete their statutorily-imposed duties to tabulate votes and certify returns.

### Non-Prosecution of Voters

Most ballot fraud schemes involve subjects who manipulate voters in some illegal way so as to corrupt their ballot choices. Where voters are involved in ballot fraud schemes, it is the Justice Department's policy not to prosecute them, but rather to treat them as victims and to use their testimony against those who corrupted them.

### Search Warrants to Open Ballots

Sometimes ballots -- particularly absentee ballots -- come into the possession of Federal investigators while still sealed in the enclosure envelopes bearing the voter's name. Also, a few states provide by statute or regulation for some types of ballots -- usually paper ones -- to be numbered in a way that

corresponds with the order of signatures on a poll list. In either situation, ballots can be attributed to individual voters. This is a particularly useful circumstance in cases involving suspected fraud in the marking or alteration of the ballot document itself. However, since ballots are documents in which individual voters have a very real expectation of privacy, it is the Justice Department's policy that ballot secrecy should not be violated without satisfaction of the Fourth Amendment's "probable cause" standard. Accordingly, where ballot privacy is breached by Federal personnel incident to a ballot fraud investigation, a search warrant should be obtained prior to attributing individual ballots to the voters who allegedly cast them.

Prior Clearance

All indictments, complaints and grand jury investigations must be authorized by the Criminal Division's Public Integrity Section. Preliminary investigations may be conducted in these matters without consultation with the Department. However, full field investigations require prior Departmental clearance. See 9 U.S.A.M. 2.133(h) and 2.133(o).

Authorizations for grand jury and full field investigations may be obtained by telephone in many, but not necessarily all, instances. The telephone number of the Election Crimes Branch is FTS 786-5060.

110017

# CHAPTER EIGHT

# CONFLICTS OF INTEREST CRIMES

BY

G. ALLEN CARVER, JR.*

Director, Conflicts of Interest Crimes Branch
Public Integrity Section
Criminal Division

* G. Allen Carver, Jr., has been the Director of the Conflicts of Interest Crimes Branch since it was established in 1981. Notable conflicts cases he has tried in recent years include the convictions of the EPA Assistant Administrator, the HHS Chief of Staff and the Senior Assistant Postmaster General. He also handled the preliminary investigation, under the Ethics in Government Act, of former White House Chief of Staff Michael Deaver on conflicts allegations; Deaver has since been convicted by an Independent Counsel.

# CONFLICTS OF INTEREST CRIMES

## Introduction

The effectiveness of the Federal Government's operations largely depend on the public's confidence in the integrity and objectivity of both Federal officials and the decision-making process of the Government. The Federal conflicts of interest statutes are designed to foster such confidence, as well as to further a number of other important policy objectives; namely, assuring that decisions of public importance will not be unduly influenced by private considerations, fairness and equal treatment for those who deal with the Government, efficiency and economy in carrying on the business of the Government, and preventing the unfair use of public office and inside information for private gain. 1/

It is also vitally important to the effectiveness of democratic government that highly qualified individuals serve in the Government. 2/ The Federal conflicts of interest statutes, therefore, strike a balance seeking to ensure that the law is adequate to deal with serious conflicts of interest but is not so strict that it deprives the Government of the services of its best qualified citizens.

The Federal conflicts of interest crimes most likely to be brought to the attention of a Federal prosecutor are specifically defined by the following statutes contained in Chapter 11 of Title 18 of the United States Code: 18 U.S.C. § 201(c)(1); 18 U.S.C. § 203; 18 U.S.C. § 205; 18 U.S.C. § 207; 18 U.S.C. § 208; and 18 U.S.C. § 209. The appendix to the Manual includes a discussion about each of these statutes. The remainder of this chapter will provide general guidance regarding the handling of a conflict of interest matter. 3/

---

1/ See, e.g., S. Rep. No. 170, 95th Cong., 1st Sess. 31-32 (1977) reprinted in 1978 Code Cong. & Ad. News 4247-48; H.R. Rep. No. 748, 87th Cong., 1st Sess. 5-6 (1961); Perkins, The New Federal Conflict of Interest Law, 76 Harv. L. Rev. 1113, 1118 (hereafter "Perkins"); Association of the Bar of the City of New York's Special Committee on the Federal Conflict of Interest Laws, Conflict of Interest and Federal Service, 6-7 (1960).

2/ See, e.g., H.R. Rep. No. 748, supra.

3/ Of course, conduct violating one conflict of interest statute may involve other violations as well. For example, a section 208(a) offense may also involve violations of 18 U.S.C. § 201

(Footnote Continued)

The Public Integrity Section of the Criminal Division has attorneys who have substantial experience investigating and prosecuting conflicts of interest cases. The Section furthermore has a significant collection of materials interpreting a number of Federal conflicts of interest statutes. Requests for assistance from the Section may be made by calling the Director of its Conflicts of Interest Crimes Branch (FTS 786-5077 or (202) 786-5077) or by letter addressed to the Section (Post Office Box 27231, Central Station, Washington, D.C. 20038).

Office of Government Ethics

Conflicts of interest matters are subject not only to the scrutiny of Federal prosecutors but also to regulation by the Office of Government Ethics (OGE). Title IV of the Ethics in Government Act of 1978 (Pub. L. 95-521, October 26, 1978) established the Office of Government Ethics within the Office of Personnel Management. The Director of the OGE was vested with the responsibility of providing overall direction of Executive Branch policies related to preventing conflicts of interest on the part of officers and employees of executive agencies. Pub. L. 95-521, Title IV, § 402(a). Such responsibility includes the development, recommendation and interpretation of regulations governing conflicts of interest and ethical problems, as well as the authority to render formal advisory opinions on matters of general applicability and on important matters of first impression that involve the interpretation of application of 18 U.S.C. §§ 202-209. The Office of Personnel Management, upon recommendation of the Director of the OGE, has promulgated comprehensive regulations that explain and amplify the provisions of the post-employment restrictions of 18 U.S.C. § 207. 5 C.F.R. § 737.1 et seq.

Various terms like "particular matter," "particular matter involving a specific party or parties" and "substantially" are used in section 207 and in several other conflicts of interest statutes contained in Chapter 11. The OGE's definitions of such terms, and the examples set forth in the regulations, should, therefore, be given consideration by a prosecutor reviewing a conflict of interest referral. 4/

---

(Footnote Continued)
(bribery or illegal gratuity), 18 U.S.C. § 203 (illegally receiving unauthorized compensation), and 18 U.S.C. § 209 (illegally receiving a salary supplementation). In addition, tax code violations and false statement offenses may occur in conjunction with a conflict of interest violation.

4/ 5 C.F.R. § 737 comprises the post-Federal employment regulations of the Office of Government Ethics. The regulations
(Footnote Continued)

In addition, OGE entered into an agreement with the Deparment of Justice, effective May 19, 1980, relating to the responsibility for rendering formal advisory opinions. Under the terms of that agreement, the OGE will consult with the Criminal Division before rendering any advisory opinion on an actual or apparent violation of any conflict of interest law. If a decision to undertake a criminal investigation is made, the OGE will refrain from issuing any opinion until a prosecutive decision has been made. Similarly, when an advisory opinion is sought in a matter not involving an actual or apparent violation of the law, the OGE has agreed to consult the Department of Justice's Office of Legal Counsel before issuing any opinion. The importance of the agreement to Federal prosecutors is that once an advisory opinion has been issued, a person who is involved in the transaction or activity in question, or in a materially identical transaction or activity, and who relies upon the advisory opinion in good faith, shall not be subject to prosecution under the conflicts of interest statutes. Another important function of the OGE is to consult, when requested, with agency ethics counselors and other responsible officials regarding the resolution of conflicts of interest problems in individual cases. Pursuant to the regulations of the Office of Personnel Management, each agency must establish a counseling service to provide authoritative advice and guidance to employees who seek advice and guidance on questions of conflicts of interest and ethical standards of conduct. 5 C.F.R. § 735.105. Any counselor in an agency counseling service may request assistance from the OGE in resolving conflicts of interest questions.

The OGE has issued numerous informal opinions. Copies of such opinions are available on request directly from the OGE.

Finally, 5 C.F.R. § 737.1(c)(6), requires the heads of Federal departments and agencies to report substantiated allegations of violations of 18 U.S.C. § 207 to the OGE as well as to the Department of Justice. Criminal enforcement of the

---

(Footnote Continued)
have been approved by the Attorney General and are applicable to all agencies of the Executive Branch. The interpretation given by an agency to a statute it administers is entitled to considerable deference. See, e.g., Ford Motor Credit Co. v. Cenance, 452 U.S. 155, 158 (1981); Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978); Udall v. Tallman, 380 U.S. 1, 16 (1965). In addition, "[t]he connotation of a term in one portion of an Act may often be clarified by reference to its use in others," United States v. Cooper Corp., 312 U.S. 600, 606-607 (1941); hence, the meaning of terms in other Chapter 11 statutes may be determined, in part, by reference to definitions which have been applied to the same terms in section 207.

provisions of 18 U.S.C. § 207 remains the exclusive responsibility of the Attorney General. 5 C.F.R. § 737.1(a).

## Referrals

Referrals of conflicts of interest matters come mainly from Inspectors General of Federal agencies, Offices of General Counsel (including designated agency ethics officials), and criminal investigative agencies like the Federal Bureau of Investigation. Other typical sources of referrals include the Office of Government Ethics, private individuals and organizations, and press reports.

Time spent immediately after receiving a referral carefully evaluating the credibility of a particular source and the specificity of an allegation should save time and resources by leading to prompt identification of allegations not warranting investigation or prosecution, and facilitating the development of a sound investigative plan where an investigation is warranted. In addition, ordinarily early contact with the source of a referral, either personally or in writing, should be made. Such contact not only helps to foster a good relationship with the source, but also may lead to the discovery of additional information which should be considered during the preliminary review of the referral.

## Investigations

### Overview

A conflict of interest investigation is conducted much like any other criminal investigation. The main objective is to collect information sufficient to resolve the allegation; that is, to demonstrate that an offense has been committed, no offense has been committed, or there is insufficient evidence to prove or disprove the allegation and no reasonable likelihood that further investigation would be worthwhile.

How best to conduct an investigation ordinarily is determined on an ad hoc basis, taking into account a number of factors. Such factors include, for example:

(1) The known facts;

(2) Additional information that must be known in order to evaluate the allegation;

(3) The investigative techniques available to use in collecting information (e.g., consensual monitoring, pen registers, surveillance, and use of informants);

(4) The availability of investigative resources (Will the FBI or other concerned investigative agency commit the effort necessary to conduct an effective investigation? Is grand jury time readily available?);

(5) Whether the allegation pertains to ongoing activity or past events;

(6) Whether using more than one investigative agency is desirable (e.g., FBI, IRS and an Office of Inspector General, each conducting part of the investigation, with the prosecutor coordinating the overall effort).

In determining what information needs to be collected, the prosecutor must, of course, thoroughly understand the statutes implicated by the allegation. Ready sources of information about the conflicts of interest statutes include attorneys from the Public Integrity Section of the Criminal Division and attorneys from the OGE. Inquiries to the Public Integrity Section may be addressed to the Director of the Section's Conflicts of Interest Crimes Branch (FTS 786-5077; (202)786-5077). The OGE may be contacted by calling (202)632-0569.

Most conflicts of interest allegations are made after the questionable conduct has occurred; thus, the typical investigation focuses on past events. In such matters, it is not likely that the employment of consensual monitoring or similar techniques will prove warranted. But always present during an investigation is the potential for endeavors to obstruct it. Such endeavors may very well warrant using sophisticated investigative techniques.

Usually the investigation will be conducted by means of investigative agent interviews of witnesses; the collection and analysis of documentary material by investigators; office interviews of witnesses by the prosecutor (preferably with an investigator present if the witness' testimony is important), laboratory examination of handwriting, fingerprints, real evidence and so forth; and grand jury work. Ideally, investigators known for their attention to detail, patience, ability to handle complex matters, and perseverance will be assigned to the investigation. Agency files often contain important, but easily overlooked, documentary material. Desk calendar entries made by a secretary, for example, may indicate that an official substantially participated in a matter in which a prospective employer of the official had a financial interest (possibly a violation of 18 U.S.C. § 208(a)). Cursory searches for documents, which might be inconsequential in the investigation of some kinds of crimes, can be harmful if occurring during a conflict of interest investigation. Likewise, hastily planned and carelessly conducted interviews can prove to be damaging. Such conduct can result in disclosure to a potential defendant of sensitive investigative information without gaining anything of value in return, the loss or

destruction of valuable evidence, and the necessity for additional investigative work to accomplish what should have been done previously.

Conflicts of interest cases often involve the use of a substantial number of documentary exhibits at trial. Investigators should be used as custodians of such material when it is held by the prosecution. In addition, investigators should be advised to identify and interview potential authenticating witnesses where important documents are involved and to have providers of documents initial and date them when there is the possibility that the provider's identification of the documents may be needed later in the investigation or at trial. The investigator, also, should initial and date such documents to assist the investigator to identify them.

Examining Potential Defenses

Potential factual and legal defenses should be identified as soon as possible. The investigation should be designed to thoroughly examine such defenses and to discover any existing rebuttal evidence. Occasionally, a potential defendant may claim that the questionable conduct occurred with the approval of a supervisor or following advice from an agency's designated agency ethics official or that official's designee. Even if no such claim is made, there is the potential in a conflicts of interest matter that such an event occurred. Even though reliance on such approval or advice may not be a defense, since proof of a consciousness of wrongdoing or bad purpose to disobey or disregard the law is not required, it may in some cases be unfair or unwise to proceed with a prosecution of an offense occurring in such a context. Whether such an event occurred should be resolved as soon as possible in the investigation. That task usually can be accomplished through interviews of supervisors and agency ethics officials.

Early Interview of Potential Defendant

Although ordinarily an early interview of a potential defendant should be attempted only after the investigation has progressed to a point where a substantial amount of material information has been collected, thereby enhancing the ability of the interviewer to prepare for and effectively conduct the interview, an early interview may be warranted in some cases. It may appear, for example, that a potential defendant who is willing to be interviewed immediately is likely to decline to be interviewed later in the investigation. In addition, there may be little risk in a particular investigation that conducting the interview would prematurely reveal sensitive investigative information. Under such circumstances an early interview might be worthwhile; it might surface significant investigative leads to pursue, supply admissions useful at trial, or result in false exculpatory statements, later damaging to the declarant. In addition, it might lead to a speedy resolution of the allegation

through quick discovery of information warranting a declination of prosecution.

### Opening an Investigation Before a Grand Jury

The timing of the opening of a matter before a grand jury is another important factor. Premature involvement of a grand jury may generate unwanted, distracting pressure for a resolution of the investigation before the matter is ready for a prosecutive determination. Important witnesses may be called to testify before there is sufficient background information to enable the prosecutor to most effectively question the witnesses. In addition, sensitive investigative information might be revealed to a potential defendant or hostile witness, thereby facilitating efforts to impede the investigation. On the other hand, there may be a compelling basis for immediately subpoenaing witnesses or documents requiring grand jury involvement at an early stage of the investigation.

### Exploring the Possibility of False Statements

Several successful conflicts of interest prosecutions have involved the discovery of a false statement made by a potential defendant on a form (SF 278) filed with a Federal agency and purporting to disclose certain financial interests of the potential defendant. False statements made to conceal a conflict of interest are prosecutable under 18 U.S.C. § 1001. Investigators and prosecutors should, therefore, examine such forms for evidence of omissions and false entries. Agency ethics officials should be able to supply, or lead investigators to, forms filed by officials required to file them. In addition, the Office of Government Ethics maintains filings made by certain high ranking officials.

### Continuing the Investigation After Charges Have Been Filed

Investigation usually should continue even after an indictment has been returned or an information has been filed. A grand jury may not be used for pretrial investigative work but investigative agents should be available to pursue investigative leads quickly and thoroughly. Through such investigation, previously unknown defenses may be discovered, rebuttal evidence may be found, and additional documentary and testimonial evidence strengthening the Government's case may surface.

## Charging Decision

Occasionally, potential defendants, individually or through counsel, request an opportunity to make a written (or oral) presentation to the Government in opposition to prosecution. Ordinarily, such a request should be granted unless to do so would, without justification, delay a prosecutive decision or a grand jury's consideration of an indictment. But in agreeing to

receive such a presentation a prosecutor should retain absolute discretion regarding how much time the defense will have to prepare the presentation, what weight to give it, whether its content is adequate for the prosecutor, and what use to make of it.

The "Principles of Federal Prosecution," published in the United States Attorneys' Manual (U.S.A.M. 9-27.000 et seq. (6/84)) contains guidelines for the Federal prosecutor describing various factors that should be considered when making a prosecutive decision. See also U.S.A.M. 9-85.203 at 5 (3/84). In a number of investigations where evidence of a conflict of interest offense had been developed, but prosecution was declined, the following reasons for the decisions against prosecution frequently appeared:

- o No evidence of venal conduct;
- o No evidence of tangible harm to the Government;
- o No evidence of gain to the violator or to the party represented by the violator;
- o Strong legal defenses;
- o Strong factual defenses;
- o The authorized punishment would be disproportionate to the offense or the offender;
- o Substantial likelihood of an acquittal if prosecution were undertaken; and
- o The existence of administrative actions as an adequate alternative to criminal prosecution under the circumstances of the particular matter at issue.

CHAPTER NINE

# THE USE OF THE UNDERCOVER TECHNIQUE IN CORRUPTION INVESTIGATIONS

BY

GERALD E. McDOWELL*

Chief, Public Integrity Section
Criminal Division

* Gerald McDowell has been Chief of the Public Integrity Section since 1980, and a Criminal Division representative sitting on the FBI Undercover Operations Review Committee since 1979.

## THE USE OF THE UNDERCOVER TECHNIQUE IN CORRUPTION INVESTIGATIONS

Convincing a jury beyond a reasonable doubt that a public official has committed a Federal crime is a formidable task. Unlike other big-time criminals, the corrupt public official will not display to a jury an aura of criminality as a gangster or a dope smuggler would. Instead, the defendant in a corruption case will bring to court the credibility built into the office he holds. Indeed, with elected defendants, many members of the venire may have voted for him.

The Federal prosecutor should not be satisfied with merely developing witnesses to public corruption. These witnesses must be corroborated in every way possible, to overcome the very real presumption of innocence a jury will likely afford to a defendant/public official. If you are still at a stage of your investigation where a covert probe is possible, an undercover investigation is often the best way to provide corroborated evidence of public corruption.

An undercover investigation conducted by trained FBI agents allows you and later the judge and jury to literally see and hear the crime as it occurs. The undercover agent's testimony coupled with video and audiotape surveillance is so powerful that often there is no real defense possible to the charges you bring.

The very power of this investigative technique causes the Department of Justice and the FBI to zealously safeguard it. The Attorney General has promulgated guidelines to the FBI governing the conduct of undercover operations. All major undercover investigations, including all corruption undercover operations, are examined by the FBI's Undercover Operations Review Committee in Washington. No such undercover operation will be authorized without the favorable recommendation of the Committee. Another safeguard to ensure that the undercover technique will be used wisely is the expectation and requirement that the United States Attorney or Strike Force Chief will personally review and approve each important undercover operation even before it is even sent to the Committee in Washington. Nowhere is that requirement more important than in a public corruption investigation.

### Preparing To Use The Undercover Technique

#### Predicate

The undercover technique is a powerful tool of Federal law enforcement. It should only be used when you can demonstrate a reasonable belief that a particular person or group is committing Federal crimes or that a Federal crime is being committed by persons unknown, and that an undercover investigation is likely to acquire evidence of the crime and the criminal. This is

especially important in the sensitive area of investigating public corruption. Having articulable predication on the subjects of your investigation prior to using the undercover technique insulates you from charges that you were merely fishing with a dragnet.

## Investigative Strategy

Undercover operations aren't conducted in a vacuum for their own sake. The Federal prosecutor should join with the agents in formulating an investigative strategy. What are the elements of the crime you are investigating? What evidence of these elements do you already have or could easily develop? Of the evidence you need to obtain, what can be acquired through mounting an undercover operation? Only by analyzing the evidentiary benefits you might get from going undercover, can you balance the benefits against the risks of the operation.

## Realistic Plan of Action

When you plan to send an agent undercover to obtain evidence, the cover should resemble something in the real world. Your office will have to prosecute based on the fruits of the plan of action. The agent's role should mirror what real people in your district have to do when dealing with crooked politicians. The plan should sound sensible to your judge and jury.

The investigative plan should be within the capabilities of the FBI to carry out. You may plan to have the agent use the cover of subway tunnel contractor because the regional mass transit authority takes kickbacks from contractors. Better plan to get agents who can dig a good hole or pay the kickback before any work has to be done. Federal agents and prosecutors are fairly familiar with the mechanical details of blue collar crime and can come up with a good plan to pose as a loan shark or a dope dealer. White collar operations often take us into terra incognita, however. Complex, sophisticated undercover plans requiring poses as an undercover bond broker, road contractor or the like may be so difficult to carry out that more time is spent perfecting the pose than in gathering evidence of corruption.

## Knowledge of the Attorney General's Guidelines

All Federal prosecutors who rely on the undercover technique for evidence should be familiar with the Attorney General's Guidelines on FBI Undercover Operations. These guidelines govern the conduct of the FBI, and your expectations as to what the Bureau will do undercover should be shaped by what the guidelines permit. The guidelines are in the public domain and courts and defense counsel may well be familiar with them.

The guidelines identify certain risk factors that may be present in a proposed undercover operation. (Guidelines at F.(3)) Analyze your proposed plan in detail to see if any of these risks might apply. Then balance these risks against the contemplated evidentiary benefits and decide if you really want to go forward with the undercover activity. These risks are:

(a) the risk of harm to private individuals or undercover employees;

(b) the risk of financial loss to private individuals and businesses, and the risk of damage liability or other loss to the Government;

(c) the risk of harm to reputation;

(d) the risk of harm to privileged or confidential relationships;

(e) the risk of invasion of privacy;

(f) the risk that the proposed undercover conduct will result in entrapment; and

(g) the suitability of undercover employees or cooperating private individuals participating in activity of the sort contemplated during the undercover operation.

Your risk analysis should not stop at the interaction between the undercover agent and the subject of the investigation. Often the undercover pose has consequences for third parties or the public in general. For instance, paying bribes to rezone land in a neighborhood from residential to commercial may be an excellent way to make a case on corrupt county commissioners. But the economic effect on the innocent citizens of the neighborhood may be so severe as to make your plan unwise. Once a risk has been identified by your analysis, it is usually possible to tinker with the plan so that the risk would be minimized. In the above example, the land targeted for rezoning could be changed to a rural location, or plans could be made to ensure that the rezoning process could be halted once the bribes are paid.

Your analysis of the risks inherent in the proposed undercover operation should be conducted prior to signing the letter to the FBI recommending that the operation go forward. The Undercover Operations Review Committee will repeat this analysis when it reviews your proposed operation in Washington. Once the operation is underway, you should frequently review its progress. Determine if things are going as planned and whether your original risk analysis remains valid or needs updating to fit the facts as they are.

## Using The Undercover Techniques

### Involvement of the Prosecutor

The Federal prosecutor is an active participant in a successful undercover operation. The prosecutor should be working with the agents from the conception of the idea to go undercover. The FBI ought to have the benefit of the prosecutor's analysis of whether the proposed undercover operation is legal, ethical, likely to produce needed evidence of the crime under investigation and a good idea in light of any risks that are foreseeable during the investigation.

Occasionally, an FBI agent will politely suggest to a prosecutor that "the Bureau does the investigating and the prosecutors do the prosecuting." There have been occasions when an agent may be reluctant to share the written undercover proposal with the federal prosecutor. Such notions are relics of a bygone era, and are clearly against Department of Justice and FBI policy. The Attorney General's Guidelines for FBI undercover operations require that any application by an FBI field office to headquarters for permission to do or renew a Group I Undercover operation must be accompanied by a letter signed by the United States Attorney or Strike Force Chief agreeing with the proposal. FBI headquarters strictly enforces this requirement.

The active involvement of the prosecutor must, however, be with the understanding that the undercover operation belongs to the FBI, not the prosecutor. No matter how forceful the prosecutor or great his expertise, the FBI Special Agent-in-Charge is held responsible for the successful conduct of the undercover operation. FBI agents are specifically trained to carry out the operation, and this training is extensive compared to any the prosecutor is likely to have had. Thus, the active participation by the prosecutor must be accompanied by deference, tact and diplomacy.

It is important that the United States Attorney or Strike Force Chief assign a capable Assistant who has the time to devote to work on the undercover investigation. Then the chief prosecutor must insist that the Assistant actually spend that time on the case. Since much of the day-to-day work of an undercover operation may be perceived by the Assistant as "investigative" rather than "prosecutive," the line attorney may become disengaged from the operation. When that happens, the case agent will fill in the Assistant in a casual, summary fashion once a week or less, on the conduct of the investigation. The briefing will, no doubt, be an upbeat, "no problems" type of briefing. This is flirting with disaster.

The prosecutor should not obtain all information about the operation secondhand from the case agent. The Assistant should review the tapes, transcripts and FD-302s produced by the

investigation within a few days of their creation. The prosecutor should sit in on the planning of strategy and tactics, and for important meetings the head of the office or chief deputy should attend. This can seem unbelievably time-consuming, but it is nothing compared to the pressure your office will face trying to review six months or more worth of conversations if you start after the indictment has been returned. If the FBI does not make available to your office the needed tapes or prepare transcripts and FD-320s on a timely basis, this could be a sign of a serious administrative breakdown in the investigation. You should personally discuss this with the SAC to resolve the problem.

Consensual Taping

Because of spectacularly successful FBI undercover operations of the last decade, Americans have come to expect that every federal corruption prosecution will be replete with audio and videotapes of the crime in progress. While that isn't always realistic or possible, the expectation is there and the investigation must strive to meet it. This evidence most often comes by the consensual taping of the conversations and activities of the undercover agent or informant. The prosecutor must be familiar with how the tape-recorded evidence is obtained and maintained, and have a detailed and timely knowledge of its cortent.

A good general rule to follow is that all conversations with non-governmental parties during the conduct of the operation should be recorded. Even though this uses several extra dollars worth of tapes and clearly produces some evidence not likely to be needed at trial, such a policy prevents the defense from charging that the Government "selectively taped" only favorable evidence and ignored evidence showing the defendant's innocence. The policy also benefits the prosecution in preserving little gold nuggets of evidence which may have gone unnoticed by the participants at the time of the conversation. This policy is especially important in initial contacts with individuals who are not yet predicated as subjects. The initial conversation often offers an unrepeatable instance of establishing the subjects' predisposition to commit the crime under investigation. If the FBI does not record these initial meetings (or any other encounters between the undercover agent and third parties) the burden should be on the FBI to articulate a reason for not taping and to memorialize the reason as well as the substance of the conversation in a contemporaneously prepared FD-302 or other document.

The prosecutor should review early on the FBI's procedures for maintaining custody and control of evidentiary tapes. Tapes made by an informant should not remain long in his possession. If FBI agents from another division make tapes in your case, the original tapes should go to the FBI office running the undercover operation, not the home office of the transient agents.

Unfortunately, autos and briefcases get lost or stolen and if they contain original tapes, these will be missed far more than their container. Occasionally, original tapes will be destroyed or reused. If there is a sound and rigorously enforced policy on custody and control of tapes already in place, the likelihood of these disasters ever occurring will diminish. The FBI should routinely debrief its undercover agents and informants each day as to significant conversations and reduce this information to FD-302s. If the interview notes are not stored in the same auto or briefcase as the tapes, the FD-302s will provide some backup corroboration of the conversation.

The tapes in an undercover case must be reviewed by both the agents and prosecutor. The prosecutor does not have to listen or watch each and every one if the FBI is diligent in making transcripts. These should be done within a reasonable time after the tape is created -- not months afterward. Whether or not transcripts are available, the important tapes should be reviewed by the prosecutors immediately since these will be played to the jury. If there are lacunae in the evidence on these tapes, a timely review will spot these flaws and allow the undercover agents a chance to quickly fill in the gaps at the next meeting.

Informant Control

In the normal division of labor of the Department of Justice, the FBI, not the prosecutor, is responsible for controlling informants and cooperating private individuals. This makes sense when the informant only provides intelligence information and never intends to publicly reveal his cooperation with the FBI. When such characters actively participate by covertly gathering evidence in an undercover operation, they will likely surface as witnesses in any resulting prosecution. In litigation any flaws in the informant's behavior or motivation will be exposed -- most often to the detriment of the prosecution. Thus, the Federal prosecutor has a duty to monitor the activities of informants involved in undercover activities and to share with the investigators the difficult task of controlling informant behavior.

The best way to control informants in undercover operations is not to use them at all. Informants are indispensable in providing detailed intelligence information about the crimes under investigation. Often they can make necessary introductions between the undercover agent and the subjects of the case. Any further use of informants as a sort of co-undercover agent will likely bring you sharply diminished returns.

Informants, unlike FBI agents, are not trained to detect crimes in accord with our Constitution and laws. They rarely are motivated to fight crime and do right as are FBI agents. Their characters are often impeachable and they lack the discipline of FBI agents. Don't wait until motions to suppress or dismiss to ask, "why did we use him?". Before there is any covert investi-

gation at all, you should rigorously examine your plan to see why a trained FBI undercover agent couldn't obtain substantially the same evidence as the informant is likely to gather. Often you will hear that no agent can penetrate the criminal milieu as effectively as the informant who is already part of that world. In conducting an undercover operation, however, the object is to gather evidence, not to successfully make a lifelong commitment to the underworld. FBI agents have gathered evidence while undercover in state houses, courthouses, mafia families and outlaw motorcycle gangs. With prior planning, and the right introductions, any good FBI agent should be able to supplant the role of the informant.

If you or your agents find it necessary to use an informant to assist in the conduct of an undercover operation, there are certain things you can do to maintain control of your informant. First, never assume that your case is the only case the informant is working on. Find out what other investigations may compete with you for your informant's time. If you can live with the reality that your informant may be exposed in another case, right in the middle of your investigation, then make appropriate advance arrangements with the other case's agents and prosecutors to minimize your risks and maximize your information about what your informant is doing in the other case.

If you can't live with sharing your informant, don't share. Before proceeding with your undercover operation, reach an agreement with the FBI and any other prosecutors so that you have the exclusive services of the informant. Don't rest on these laurels, however. You should be alert throughout the life of the undercover operation to the possibility that your informant might be snatched away to pursue another investigative opportunity.

Second, you can control your informant by training him. Make detailed plans as to what the informant is allowed to do and say in the course of gathering evidence. Don't assume that anyone will communicate your ideas to the informant. The Federal prosecutor should personally ensure that a Government official (usually an FBI agent) trains the informant to do what is expected and not to do what is prohibited. This should be done throughout the course of the operation as new situations develop. The essence of your instructions should be in writing and read and signed by the informant.

Third, you can control your informant by minimizing the occasions when the informant is the sole witness to important evidence. One of the advantages of using the undercover technique is the ability of the government to structure and to some extent control investigative encounters that produce evidence. Maximize this advantage by making sure that an FBI agent as well as the informant is a witness to important conversations with subjects. If this is not practical, make sure that

video or audiotape records the conversation of the informant and the subject. Crucial, uncorroborated evidence given by the informant rarely is persuasive to a jury.

Since you will not always be in control of when your informant will be contacted by a subject of the investigation, you must make sure that your investigative agency has equipped the informant with the means to corroborate unplanned contacts. A good example of "penny wise, pound foolish" is giving an informant only one or two cassette tapes to record home phone conversations. Those tapes can fill up quickly and unless replaced, the informant will either stop recording or tape over previous conversations. Similarly, the FBI should systematically debrief the informant as soon as practicable after he has talked with a subject. This should be reduced to an FD-302. This will go a long way toward making up for a failure to tape, a failure of the tape, or the later loss or accidental destruction of the tape.

The prosecutor should make clear to the FBI and the informant that all telephone calls and all conversations with potential subjects should be completely recorded. If the informant is given control over the taping mechanism, it is common that the tape device is only turned on once the informant gets through to the subject, past a secretary, or spouse, and the conversation becomes subjectively important. A jury may see this as "selective taping" allowing doubt as to what conversation may have occurred when the tape device was not on.

The initial encounter between informant or undercover agent and a subject is often critical on the issue of predication and rebutting claims of entrapment. Yet, such encounters are often not taped because the government operatives did not expect it and either lacked taping equipment or forgot to turn it on. You should emphasize the importance of being prepared to capture these moments on tape. If that proves impossible, insist on a systematic debriefing and detailed FD-302s as soon as practicable after the events.

All of these precautions discipline the investigative team into emphasizing corroboration of their expected testimony.

Fourth, you can control your informant by keeping track of what he is doing when there is no agent with him. Normally, being paranoid and suspicious about members of your investigative team would be a symptom of trouble. But unlike government agents and prosecuting attorneys, the informant's skill at treachery is precisely what makes him valuable to you. You should be professionally suspicious of your informant even if (or especially if) you grow fond of him personally.

Prior to going operational, you should plan how you will keep track of your informant's activities when he doesn't believe you are watching. You should plan on subpoenaing his telephone toll records and using a pen register to track his outgoing

telephone calls. Occasional spot surveillances may be appropriate to see with whom he meets. Measures like these should alert you to the informant's double dealing with the subjects of the case; using the operation's cover to work scams or commit other crimes; or worst of all, dealing with subjects of the case in a way that borders on entrapment. It is counterproductive for government personnel to tell the informant he is being watched in this manner.

Continuing Reassessment of the Undercover Operation

No matter how detailed your investigative plan was prior to the start of covert investigation, circumstances will force you to reassess your course of action during the operation. The trick is for the agents and prosecutors to stay on top of events and make the reassessment when there is time for it to do some good.

The prosecutor should not be a mere cheerleader for the agents involved in a difficult undercover task. Rather the prosecutor should critically analyze each undercover foray to make sure it is producing the best evidence possible. To be really effective, this sort of analysis should be made available to the undercover agent before as well as after an event. The prosecutor should participate in the planning of investigative encounters. The agents should be aware of what evidence the prosecutor expects and what the quality of that evidence should be. For instance, when a group of potential subjects is to be met for the first time, the agent should be told to be sure to identify each participant in the meeting. After the meeting the FBI's actual performance in identifying the participants can then be critically assessed and used as a guide to future action.

Prosecutors should remind the undercover agent that the agent has substantial control over the direction and content of conversations in which he participates. If you feel that conversations with subjects have been too ambiguous, then tell the agent to make clear the illegal nature of the opportunity offered to the subject.

In corruption undercover operations, a recurring problem involves "bagmen" or "middlemen." These intermediaries serve as a buffer between the bribe-giver and bribe-taker. They not only broker corrupt deals, but effectively prevent law enforcement from direct dealings with the public official on the take. These middlemen deal unwittingly with the undercover agents. Their behavior is beyond the control of the FBI and the prosecutor. Great care must be taken to ensure that any corrupt deal entered into with a middleman actually involves the public officials under investigation. Middlemen have been known to lie about their relationship with public officials or have associates pose as public officials so that they can keep the entire bribe. The prosecutor as well as the FBI must be alert to the possibility that the middleman is making up his relationship with a public

official on the bribe in question in order to scam the agent. Some strategem must be used to demonstrate that the public official will get the money. In ABSCAM, the undercover agent told the middleman that his boss, the "Arabian Shiek," insisted on the agent meeting with the public official before the "Shiek" would authorize the bribe payment. Even with this precaution, middlemen sometimes brought innocent politicians to the agents, hoping to talk the agents into believing they were paying a bribe, and the politicians into believing they were to be receiving a campaign contribution.

The prosecutor should remind the investigative team that when a middleman throws out a public official's name as being corrupt - it ain't necessarily so. Predication beyond this bare bones should be obtained before paying a bribe.

Going Undercover in the Courts and Legislature

The undercover technique allows Federal investigators to go virtually anywhere and meet with almost anyone to covertly gather evidence of a crime. When that crime is found in the courts and legislatures, however, Federal prosecutors must tailor the investigative plan to ensure that due deference is paid to important institutions of our government. Behavior that may be appropriate in investigations of a gang of drug smugglers would not be acceptable in an undercover penetration of suspected criminals in your local Federal district court or the Appropriations Committee of the State House of Representatives.

The courts at every level are protected by a web of criminal and civil laws and ethical rules that are designed to make the courts run smoothly, free from corrupt or coercive interference. Without a doubt, these laws and rules were drafted with no thought given to their effect on the Justice Department's ability to investigate undercover. Yet by their terms, these laws and rules prohibit much of the behavior that would be necessary to successfully run an undercover operation in a court. For instance, if you were to have an undercover FBI agent go through a sham arrest, indictment and trial in Federal court in order to determine if someone in the probation office were taking bribes for favorable pre-sentence reports, then once the undercover operation surfaced, you would likely find the local Federal district judge raising pointed questions about perjury, subornation of perjury, obstruction of justice, contempt and related ethical rules.

A good rule of thumb is never to go undercover in a court -- Federal, state or local -- unless the judge and court personnel in that very court are the subjects of your investigations. Once you determine that it is necessary to mount an undercover investigation against a corrupt judge or judges, devise a plan that keeps the intrusion into the court system to the minimum necessary to obtain evidence against your subjects. You should strive to avoid false testimony, empaneling of juries, trials and

any other substantial use of the resources of the judiciary. In other words, don't "make a Federal case out of it," just pay the bribe and get out quickly.

Prior to the operation's commencement, you should identify some high level figure in the government whose court you plan to investigate. This person should either directly or in some sense "supervise" the court under investigation. Such a person, like the Chief Justice of the State Supreme Court, or the Chief Judge of the U.S. Court of Appeals, should be told of the proposed investigation. While strictly speaking you would not seek the formal "approval" of this person, you certainly would want his approval in a colloquial sense. If the official has any useful, pertinent suggestions, try to incorporate them in your plan.

The United States Attorney would ordinarily handle this contact. Since it is the FBI's investigation and the FBI undercover agent is most at risk if there is a breach of confidence, no contact with third parties should be made without the FBI's prior knowledge and approval.

Legislatures -- from city councils to the United States Congress -- make the laws which govern us all. When you suspect that some of these laws are bought and paid for by bribery, an undercover operation is often the best way to gain evidence of the corruption. Care must be taken to make sure that in the course of our investigations, the Justice Department does not buy and pay for legislation that will affect the lives of the citizenry. It is simply not acceptable to cause a dry county to go wet, or a state to legalize gambling no matter how many crooked legislators are caught in the process.

The prosecutor should ensure that the investigative plan represents the minimum intrusion into the legislative process consonant with effective results. Often bribes can be paid to line up support for legislation that is never introduced. If a bill must be introduced, it should be narrow, special interest, type of legislation that affects no one in the jurisdiction except the entity providing cover for the FBI agent.

Once an "undercover" bill is introduced, the FBI should make every effort to derail it prior to passage. This is easier said than done. In some cases the FBI could bribe a legislator into getting a bill introduced, but no amount of money or suasion could stop it from being favorably voted on. If it is feasible, the governor of the state should be informed so that the legislation can be vetoed.

A situation related to investigating courts and legislators occurs when executive officials under investigation are running for election. Timely cash infusions into a corrupt candidate's coffers prior to an election may give a crook all the resources he needs to win the election. It would be ironic if an undercover investigation of a corrupt politician served as a cash cow

that helped keep the bad guys in power. The prosecutor should analyze any bribe payments scheduled to be made prior to an election to see if they would have the effect of being a campaign contribution that would skew the results of an election. If there is a chance of this, don't make the payment.

Termination of the Covert Phase

The undercover operation should not take on a life of its own. It should continue only as long as it produces evidence needed for your investigation, and does not cause some unacceptable harm in its course.

If the undercover operation is not producing evidence against some of your subjects, then switching to a different technique -- search warrants or electronic surveillance -- would be a wise move. If the operation is a great success, but the FBI agents and your assistant are exhausted from months of nerve-wracking work, consider shutting down before someone makes a mistake from fatigue.

Make sure your investigative team and all their supervisors know clearly how much time you will need to prepare between the end of the covert phase and when you can go overt. In most cases it makes little sense for an undercover operation to keep churning out taped conversations up until the date of indictment, if no prosecutor will have time to review them. The prosecutor should insist that transcripts and FD-302s are complete before the indictment. The time after indictment should not be spent wondering what your evidence will be.

To the extent it can justifiably be prevented, undercover corruption investigations should not surface between September and early November. This is election season, and some malcontent will always charge the government with attempting to manipulate the outcome of the election if a Federal corruption case surfaces during these months. If luck and good foresight are with you all your corruption undercover operations will end between January and March.

Since the decision to terminate an undercover corruption probe is an important event, the United States Attorney or Strike Force Chief should insist that the Assistant assigned prepare a detailed legal and factual memorandum explaining and justifying the termination. This analysis will assist you in not overlooking serious gaps in the evidence you have obtained at a time there may be something you can do about it.

Finally, there should be no leaks -- no leaks -- no leaks!

110819

CHAPTER TEN

# THE SUCCESSFUL USE OF INFORMANTS AND CRIMINALS AS WITNESSES FOR THE PROSECUTION IN A CRIMINAL CASE*

BY

STEPHEN S. TROTT

Associate Attorney General
United States Department of Justice

* This excerpt is condensed from a considerably longer unpublished article prepared by Associate Attorney General Trott. Copies of the complete article are available upon request from the Public Integrity Section.

# THE SUCCESSFUL USE OF INFORMANTS AND CRIMINALS AS WITNESSES FOR THE PROSECUTION IN A CRIMINAL CASE

In the early stages of a prosecutor's career, most prosecution witnesses are normal citizens who, by virtue of some misfortune or otherwise, have been either the victim of, or a witness to, a criminal act. Mr. Jones, for example, is called to the stand, and testifies that he was swindled out of his life's savings; Mr. Wilson tells the jury about his stolen car; Mrs. Johnson identifies the body of her son who was killed in a robbery; or agent Bond recounts his discovery of cocaine in the defendant's luggage at the airport.

Sooner or later, however, another type of not-so-reliable witness starts to make an occasional appearance on the subpoena list, and the prosecutor begins to venture out onto a totally different sea where he or she is frequently ill-prepared to navigate -- the watery and treacherous domain of the accomplice, the co-conspirator, the snitch, and the informant. After Mr. Jones testifies about the swindle, the swindler himself is called to the stand in an attempt to convict the mastermind who cooked up the scheme and who hid all the money in foreign bank accounts. After Mr. Wilson laments the disappearance of his Mercedes, the car thief is called in pursuit of the kingpin who runs hot German cars in Arizona for profit. After the mother of the murdered clerk identifies her dead son, the defendant's cellmate is called to recount a jailhouse confession; and after agent Bond identifies the cocaine, the mule in turn points the finger of guilt at the brains of the organization.

The usual defense to this kind of criminally-involved witness is never just a polite assertion that he is mistaken. Not surprisingly, the rejoinder ordinarily mounted amidst loud, indignant, and sometimes even enraged accusations is that the witness is lying through his teeth for reasons that should be patently obvious and clear to every decent person in the courtroom. In this vein, the prosecutor on occasion will surprisingly discover that his or her own personal integrity is on the line. Such an unexpected turn of events is not a laughing matter. It is neither helpful to a prosecutor's case nor very comforting personally to have the defense persuasively arguing to the court and jury, for example, that you, as a colossal idiot, have given immunity to the real killer in order to prosecute an innocent man. How these witnesses are managed and how these issues are approached and handled may determine the success or failure of the case.

The first of the two reasons why criminally-involved witnesses come under such heavy fire relates to the general nature of a person/witness predisposed to criminality. Read it and commit the message to memory:

> Criminals are likely to say and do almost anything to get what they want, especially when

> what they want is to get out of trouble with the law. This willingness to do anything includes not only truthfully spilling the beans on friends and relatives, but also lying, committing perjury, manufacturing evidence, soliciting others to corroborate their lies with more lies, and doublecrossing anyone with whom they come into contact, including -- and especially -- the prosecutor. A drug addict can sell out his mother to get a deal; and burglars, robbers, murderers and thieves are not far behind. They are remarkably manipulative and skillfully devious. Many are outright conscienceless sociopaths to whom "truth" is a wholly meaningless concept. To some, "conning" people is a way of life. Others are just basically unstable people. A "reliable informant" one day may turn into a consummate prevaricator the next.

The second of the two reasons pertains to the general disposition toward criminals of people who become jurors. To a prosecutor, it is of equal importance as the first. Commit it also to memory:

> Ordinary decent people are predisposed to dislike, distrust, and frequently despise criminals who "sell out" and become prosecution witnesses. Jurors suspect their motives from the moment they hear about them in a case, and they frequently disregard their testimony altogether as highly untrustworthy, and unreliable, openly expressing disgust with the prosecution for making deals with such "scum."

A clear example of this hostile attitude is found in a newspaper report of a Federal prosecution of eleven Hell's Angels. The failure of the case was accurately reported in the newspaper as follows:

> After two mistrials and a cost in the millions, the government gave up Wednesday trying to convict the notorious Hell's Angels motorcycle gang on conspiracy and racketeering charges[.]
>
> Federal prosecutors had attempted to prove that the maverick and frequently violent motorcycle gang had become engaged in fulltime criminal activity sometime in the 1960s and was deeply involved in an extensive drug and narcotics operation in Northern California and elsewhere, using illegal firearms, murder, threats and assaults to further its enterprise.

> But a second trial, which began last October, ended with the jury of nine men and three women advising [the trial judge] it was hopelessly deadlocked. An earlier trial which began in 1979 and concluded in 1980 also ended in a hung jury for most of the defendants. [The rest were acquitted.]
>
> A juror in the latest trial told reporters that the vote was 9-3 for acquittal and described the government's key witnesses, including a former Hell's Angel who admitted being paid $30,000 in exchange for his testimony, 'despicable and beneath contempt.'

With the foregoing in mind, let me put a different spin on this and confront you with some observations that color the answer to the threshold question of whether or not to use accomplices or snitches as witnesses in the trial of any particular case. The observations are as follows:

> (1) Calling to the stand an actual eyewitness to the crime who knows the criminals and can easily identify them -- normally a devastating witness -- can backfire and have the unintended effect of making your case worse rather than better if the eyewitness is a crook who has bartered for some sort of consideration as a deal in return for his testimony.
>
> (2) Evidence amounting to a complete confession -- normally the end of a defendant's chances with a jury -- can actually have the unanticipated effect of making your case weaker rather than stronger if the witness upon whom the jury has to rely for the truth of the testimony is a person they will not trust.

Why? Because in the hands of a skillful defense tactician, all the liabilities and the unseverable baggage that such a witness brings to your case, along with the "confession" or the "identification," become the elements of reasonable doubt the defense is looking for and the brush with which the rest of your case is then tarred. Like the effect of the proverbial red herring, the issue of the defendant's guilt can leak away as the prosecutor attempts to defend against the forceful assertions of deceit and misconduct on the part of the Government's witnesses; and once a prosecutor loses control and begins in desperation to defend rather then prosecute, disaster is right around the corner!

Notwithstanding all the problems with criminals as witnesses suggested by these observations, the fact of the matter is that police and prosecutors cannot do without them -- period. Usually they do tell the truth, and on occasion they must be used in court. If a policy were adopted never to deal with criminals as

prosecution witnesses, many important prosecutions could never make it to court. United States v. Dennis, 183 F.2d 201 (2d Cir. 1950).

For every setback such as the one mentioned above, there are scores of sensational triumphs in cases where the worst scum of the earth have been called to the stand by the Government. The prosecutions of Charles Manson, the Watergate conspirators, the infamous Hillside Strangler, and the Grandma Mafia are only a few of the thousands of examples of cases where such witnesses were used effectively with stunning success.

The material in this chapter is not designed to scare you off or make you gun-shy but instead to recognize the validity of the maxim that "to be forewarned is to be forearmed." My objective is to help you to become more effective when you have to enter this arena.

The appropriate questions, therefore, are not really whether criminals should ever be used as Government witnesses, but when and if so, how? The following material is designed to do nothing more than to accomplish the two main goals of a prosecutor:

(1) To discover the truth, the whole truth, and nothing but the truth; and

(2) To sell that truth to the jury and persuade them to rely on it in arriving at their verdict of guilty.

Perspective

Tread with care. In this regard, there are few important rules of thumb that should normally be observed.

Never say anything to a witness -- or for that matter to anybody including people on your own team -- that you would not repeat yourself in open court or want to see on the front page of the New York Times. Assume at all times -- especially when you are on the telephone -- that you are being taped.

Make agreements only with "little fish" to get "big fish." A jury will understand this approach, but they will reject out of hand anything that smacks of giving a deal to a "big fish" to get a "little fish." It will offend their notion of basic fairness and play into the hands of the defense. In a well known East Coast legal disaster, a police chief was let off the hook relatively easily in order to prosecute subordinates. Angered at this inverted set of priorities, juries acquitted all of the subordinates.

Do not give up more than you have to. If you have to give up anything at all, a plea to a lesser number of counts, a reduction in the degree of a crime, or a limitation on the number of years

that an accomplice will serve is frequently sufficient to induce an accomplice to testify; and it sounds better to jurors when they discover that both fish are still in the net. Total immunity from prosecution should be used only as a last resort. Section 9-27.610 of the United States Attorneys' Manual makes it clear as a matter of policy that if possible, an offender should be required "to incur . . . some liability for his/her criminal conduct."

It is a good idea in a non-threatening way to remind the defendant's attorney that a sentencing court may properly consider the defendant's refusal to cooperate in the investigation of a related criminal conspiracy after his Fifth Amendment rights are gone. Roberts v. United States, 445 U.S. 552, 556 (1980). He can stand before the judge as a person who helped or a person who did not help. The option is his. You will be surprised how often this will be all you need. It is also possible to place a defendant on probation and make cooperation with the Government a mandatory condition under 18 U.S.C. § 3651.

Do not use such witnesses unless in the most careful exercise of your judgment such a move will significantly advance your ability to win your case. When you do, be prepared for war. Remember that the injection of a dirty witness into your own case gives tremendous ammunition to the defense, ammunition that frequently is more powerful than the benefit you expect. Juries expect prosecutors to be men and women of integrity. If you don't show the proper distance between yourself and the witness in court and if you have not handled your witness correctly beforehand, you might as well throw in the towel.

Never forget in certain circumstances that the defense may try to prove that your witness actually did what the witness claims was done by the defendant, and that is why he knows so much about the crime.

## Working Towards an Agreement with an Accomplice or an Informant

### The Initial Contact

Your first hurdle involves ethical considerations. Is the prospective witness represented by an attorney? Has he been indicted? If so, are you required to work through that attorney, even if you suspect his or her integrity? The American Bar Association's Disciplinary Rule 7-104(A)(1), for example, prohibits contacting a person represented by a lawyer on the subject of the representation without going through the lawyer. Many states also have such ethical standards for lawyers. Also, Standard 4.1(b) of the ABA Minimum Standards for Criminal Justice provides, in part, as follows:

> It is unprofessional conduct for a prosecutor to engage in plea discussions directly with an accused who is represented by counsel, except with counsel's approval[.]

If the prospective witness is under indictment and he calls and says that he wants to cooperate but that he does not want his lawyer to know about it, be very careful. You will be confronted not only with Fifth Amendment waivers, but also Sixth Amendment waivers that carry a greater burden. The best answer is to take the witness in secret before a court to confirm his wishes, securing for him a new confidential lawyer if necessary.

A second complication with which you may be confronted in this context is the situation in which the witness at some point during debriefing begins to tell you about ongoing or new crimes in the offing in addition to those that already happened. This particular hurdle can become unusually touchy when the witness with whom you are dealing is an attorney who himself is under suspicion of criminal conduct and he suddenly offers up his own clients with respect to new or ongoing offenses in return for leniency or immunity. This rare but real situation should immediately set off loud alarm bells in your analytical mind, raising questions of privilege, Fifth Amendment rights, Sixth Amendment rights, conflict of interest, and disciplinary rules, especially if the suggestion is made that the attorney wear a wire and work his clients with respect to crimes in progress. If you are not extremely cautious, you may succeed in convicting the attorney's clients, but you may do so at the expense of your own license to practice law, a kamikaze mission that is not recommended. See United States v. Ofshe, 817 F.2d 1508 (11th Cir.), cert. denied, 108 S. Ct. 451 (1987).

Take great care in the debriefing of any recruited co-defendant who you plan to use against his cohorts to avoid "invading the common defense camp." If the witness without warning begins to tell you the particulars of a defense strategy meeting he attended with his co-defendants and their attorneys, you are in trouble. This pitfall is easily avoidable up front by advising the witness not to tell you about any such meetings.

Who Goes First, You or the Witness?

The first problem that usually arises is the "Catch-22" situation where you want to know exactly what the witness has to offer before committing yourself to a "deal." But the witness -- even though he wants to cooperate -- is afraid to talk for fear of incriminating himself unless he is promised something first.

The answer to this seeming dilemma is very simple. Promise the witness in writing that you will not use what he tells you at this stage of the proceedings against him, but make it equally

clear that your decision whether or not to make a deal will not be made until after you have had the opportunity to assess both the value and the credibility of the information. I tell them "It's an opportunity to help yourself; take it or leave it."

Make sure that the full extent of the preliminary understanding is in writing and signed by all the parties. Try to anticipate all problems that you might be confronted with down the road.

Documents

Remember, the documents you prepare at this stage may come back to haunt you if they are badly drafted. Make it honestly self-serving as well as accurate. Remember that your side of the agreement -- immunity or whatever -- will be used in court by the defense as the "reason the witness is lying." The defense will characterize it as a "payoff," a "bribe," etc. Do not cause unnecessary problems for yourself by giving away too much. See United States v. Stirling, 571 F.2d 708 (2d Cir. 1978).

Do not Negotiate on Tape

It sounds bad even though it's not, and transcribing the transcripts may drive you to distraction.

Probe for "Side-Deals" with the Police

If they exist, get them out in the open. The defense is entitled to know everything that the witness or his relatives or friends for that matter have been promised. If the jury finds out for the first time on cross-examination that the chief investigator on the case has been paying the witness $100 a week pending the trial or fixing his parking tickets, you will be in deep trouble.

## Extracting Information from the Witness

Once the preliminary understanding is negotiated and the witness is now prepared to tell you what he or she knows about the case, the suspect, etc., precautions must still be taken to get the witness to tell the whole truth, not just parts of it.

Your first line of defense here is the witness's attorney. Impress the requirements of absolute honesty and full disclosure on the witness's attorney and ask the attorney to have a private discussion with the witness to try to emphatically convey this point. Don't start the interview until the attorney assures you that he believes that his client is ready to come clean.

When you start the interview, repeat the "honesty" and "full disclosure" admonitions to the witness. Discuss perjury and the witness's liability for false evidence, etc. The objective is to "get at the truth" -- not "get the suspect." One frequent problem confronted here is that the witness will falsely minimize his own role in the scheme. Warn him not to do this and be on the lookout for evidence that this is what he is doing. It will stand out like a sore thumb, if you are looking for it.

A prosecutor must never conduct such an interview without an investigator present. And remember, never say anything to a crook that you do not want repeated in open court. He may be taping you!

Do not feed the witness key information. First, let the witness tell the complete story on his or her own; then ask any questions needed to fill in the gaps, etc. One of your best jury arguments is that "the witness must have been there (or talked in confidence to the defendant) because he knows details that only somebody who was there would know!" Don't give this away by arguably being the source of the inside information. Make sure everybody on your team understands this and doesn't let the cat out of the bag. The investigators should watch for this kind of evidence during the interview and make good discoverable notes!

Do not be afraid to subject the story and the witness to intense scrutiny and cross-examination. Do not fear that the witness will crack. If he does, it's better that it happen in your office than in court. Prosecutors without much experience tend to treat such witnesses far too softly for fear that they will not hold up. This is wrong. Bear down!

## Test the Witness's Story

Mistrust everything; look for corroboration on everything you can; follow up all indications he may be fudging.

Secure information on the witness' background, mental problems, probation reports, prior police reports, and prior prosecutors who have either prosecuted the witness or used him in court. What do they think about his credibility? How did the jurors react to him?

Assess the motivation of the witness. Why did he decide to cross over? You must understand why he has turned in order to keep him on your side once he has crossed over. On occasion you will get a witness who is really and truly sorry for what he did. Play this for all it's worth with the jury -- but first make absolutely sure the sentiment is real.

The key to whether or not a jury will accept the testimony of a criminal is the extent to which the testimony is corroborated. Devitt and Blackmar § 17.06, which allows the conviction of a defendant based on the uncorroborated testimony of an accomplice, may protect you from Rule 29, but it will cut very little ice with the jurors.

Never overlook the appropriate opportunity to have your witness contact the defendant and try to extract from him some incriminating statements -- on tape, of course. This is dynamite if you can get it. Your investigator will help you and the witness come up with a plausible scenario for such a contact. But don't stumble over Massiah or Henry.

Consider the polygraph, but don't use it just because it's there. The machine is fallible. It is a tool, not a guarantee.

Be wary of drug addicts. Get a medical examination and find out from a doctor the effect of the drug your witness abuses on his capacity as a witness. Does Valium ruin your memory? You might want to call the doctor during your case-in-chief.

Cast yourself in the role of the defense attorneys for your suspect. How would you attack this witness and his testimony? Can the weaknesses be explained? Plan to shore up the weaknesses before the defense gets to them. Spend a lot of time at this exercise. Every minute will be well worth it.

If You're Convinced, Negotiate a Final Agreement; but Don't Give Up Too Much, and Don't Give It Away Too Soon!

Put the total agreement in writing, but before you do, read United States v. Dailey, 759 F.2d 192 (1st Cir. 1985) and United States v. Cervantes-Pacheco, 826 F.2d 310 (5th Cir. 1987). Consider adding a paragraph to the effect that if the witness backs out, everything he has said during the negotiations can be used against him.

Don't lock the witness in so strongly to a particular evidentiary script that the ground rules violate the defendant's rights to confrontation. All you can require is that the witness tell the truth. See People v. Medina, 41 CA 3d 438 (1974).

Tell the witness all the ground rules:

- What he will have to do in terms of testifying; i.e., grand jury, two trials, or whatever.
- How long it will take. Do not underestimate!

- He does not have carte blanche to go around committing other crimes while you are using him as a witness. Tell him not to call you if he gets a ticket. Do not leave this to the imagination.

- Security precautions may be in order. Decide what is necessary; what is available. If the witness is going into a witness security program, make sure that you and the witness understand exactly what this entails. Get a copy of the witness's memorandum of understanding with the Marshals' Service and read it yourself.

Hold something back. The witness must perform first. If you give him everything to which he is "entitled" before he testifies, you may be unpleasantly surprised when he disintegrates on the witness stand. I prefer if possible to have such a witness plead guilty before testifying and sentenced afterwards.

However, the government cannot, consistent with due process, offer favorable treatment to a prosecution witness based on the indictment or successful prosecution of individuals. This type of an offer is viewed by the courts as an invitation to perjury.

Rewards and payments must also be discussed. Money for a witness can be trouble if not handled openly and with clear hands. There exists no outright legal prohibition against rewards, and indeed they have been sanctioned on the grounds of public policy interests in bringing witnesses to crimes forward with their information. United States v. Murphy, 41 U.S. (16 Pet) 203 (1842); United States v. Walker, 720 F.2d 1527 (11th Cir. 1983); United States v. Valle-Fekker, 739 F.2d 545 (11th Cir. 1984). Payments to an informant on a contingency basis, however, may be viewed as an inducement to entrapment. United States v. Civella, 666 F.2d 1122 (8th Cir. 1981); Williamson v. United States, 311 F.2d 441 (5th Cir. 1962). If a witness asks for some sort of a "cut" or "percentage" or "reward," such a request may be discoverable even if it is turned down.

Although a reward or monetary inducement does not automatically disqualify the recipient as a competent witness, it is clear that the jury must be advised of the arrangement. The issue is not one of competency, it is one of credibility; and that is an issue for the jury. In my opinion, juries look askance at any arrangement whereby a prosecution witness will benefit financially from his testimony.

Have the defendant execute a signed and witnessed statement regarding what he knows that can be used in case he goes sour, either during the trial or later. This will be available as an admissible prior inconsistent statement should he "go south" on the

stand and as protection for you and the case after a conviction if he decides to change his tune when confronted as a "snitch" in prison by other inmates. Be familiar with the law of impeaching your own witness, prior inconsistent statements, prior consistent statements, etc. A case on this subject that ought to be read by all prosecutors intending to use a turncoat as a witness is United States v. DiCaro, 772 F.2d 1314 (7th Cir. 1985).

## Managing the Witness's Environment

Be mindful of where the witness is going after you take his statement and secure his cooperation. If he is going back to jail, serious problems may occur unless you take precautions to keep him away from other potential troublemakers. If he goes back into the "general population," chances are some other inmate will find out he is a snitch and confront him as an enemy. When this happens, it is not unusual for the witness to lie to his accuser and deny everything or worse, to say that he was coerced into lying by you and the police. When this happens, you have a scared witness who may recant all and you have a defense witness who will come in and tell the jury that your witness said he made it all up "just to get a deal," etc. These people also have a disquieting way of showing up unexpectedly as the predicate for a writ of error coram nobis or a motion for a new trial.

You must keep the witness out of harm's way, warn him against saying anything to anybody and especially to other prisoners, and have your investigator contact him frequently to keep the fires of cooperation burning. If you neglect the baby-sitting aspects of this business, you will get burned. If the Witness Security Program is available, know what it can do for you, how it does it, and what it can't do. Then use it!

## Discovery

The defense has a right to nearly everything that reflects on the credibility of the witness -- perhaps even your "work product" notes as a "statement of a Government witness." If you put something on paper, expect that it will have to be turned over. If it does, you won't be embarrassed. If it doesn't, so be it. Don't forget United States v. Harris, 543 F.2d 1247 (9th Cir. 1976), requiring the FBI to preserve rough notes of witness interviews. If you have any doubt about a piece of evidence, the very fact of that doubt should cause you to seek a pre-trial Brady ruling from the court, ex parte in camera if possible.

## Trial Tactics

### Motions in Limine

Although discovery is virtually limitless when it comes to factors weighing on the credibility of a cooperating criminal, careful consideration should be given to making a motion in limine to preclude the defense from going into inflammatory areas on cross-examination that are really a general attack on character rather than credibility. Rule 403, Fed. R. Evid.

This, however, is an area in which a prosecutor should tread with care. The right to confront and cross-examine a witness is a guarantee of constitutional dimensions, and a successful motion in limine in this area may backfire on appeal unless it is carefully crafted so as not to deprive the defendant of too much. United States v. Mayer, 556 F.2d (5th Cir. 1977) ought to be read and digested when you are contemplating erecting a protective barrier around a testifying criminal.

### Voir dire

Let the jury know without making a "big thing" about it that you are going to call a witness who is getting something in return for his testimony. Ask if the jurors will reject such a witness out of hand or if they will listen fairly to what the witness has to say. Adopt early an attitude that you aren't really pleased with having to do this, but crimes aren't all committed in heaven so all our witnesses aren't all angels, etc. Preempt the defense. If a judge is reluctant to ask these questions, point out that they are no different than asking a prospective juror whether he or she will give undue credibility to a police officer just because he is a police officer, etc.

### Opening Statement

Front matter-of-factly and briefly all the "bad stuff" including the deal, but don't dwell on it. Follow up the bad stuff with references to matters that corroborate what he says. This is sometimes called the "doctrine of innoculation." But don't put all your eggs in the accomplice's basket. The case stands on its own two feet. The objective here is to control the manner in which the jury first hears of the dirt. If you do not do this and turn over the opportunity instead to the defense to "uncover the Government's misdeeds," you will be in deep tactical trouble.

### Jury Instructions

You must be familiar with the instructions that cover accomplices, corroboration, perjurers, drug addicts, immunity, prior convictions, the witness security program, etc. Always review them with care before jury selection. This will cause you

to look for effective ways to cope with the cautionary admonitions that always crop up when an accomplice or an informant enters into a case.

A witness who is compelled to testify under 18 U.S.C. §§ 6001-6003 is not thereby provided with an inducement to testify. Nevertheless, it is not uncommon to encounter defense requests for jury instructions depicting such a witness as the recipient of a benefit, whose testimony may be colored by that benefit, and therefore must be weighed with special circumspection. Instructions suggesting that the compulsion of testimony under a use immunity order is a "benefit" to the witness should be resisted. Rather, the court should be urged to give a more balanced instruction, which describes the legal status of the witness whose testimony has been compelled under a use immunity order, and which explains in neutral terms that the testimony of a witness who is testifying in exchange for some benefit should be viewed with special care. See United States v. Lea, 618 F.2d 426, 432 n.7 (7th Cir.), cert. denied, 449 U.S. 832 (1980). An instruction drawn from Lea does not unduly emphasize the benefits of immunity, but it provides the defendant with a basis for arguing that the immunized witness is different from an ordinary witness. At the same time, it gives us a very valuable benefit: the explanation that if a perjury prosecution is not barred by the immunity order if the witness fails to tell the truth.

Direct Examination

Make it pointed and at times make it sound to the jury like cross-examination. You are not the champion of the witness. You are a person charged with getting at the truth; and you aren't at all embarrassed by having to call a crook to do it.

Bring out all the problems such as every benefit being extended to the witness in consideration of his testimony, previous inconsistent statements, participation in the witness protection program, etc., and confront the witness with them. Don't wait for the defense. You must control the manner in which the jury first hears of the dirt. Go on the offensive. Section 607 of the Federal Rules of Evidence allows you to do this. The jury must rely on you to get at the truth!

Your goal in this regard is to steal every bit of legitimate thunder that the defense might be able to muster on cross. If the jury has already heard it, it loses a lot of its sting. Under your skillful questioning, you can couch these matters in a sterile setting, minimize their dramatic impact and cushion them with an appropriate explanation. Examples of such material are prior convictions, grants of immunity or leniency, deals, promises, rewards, perjury, mistakes, inconsistencies, etc. As discussed earlier, play the part of the defense attorney and figure out how

you would cross-examine your own witness. Make a list of the areas you would attack, and then seek ways to prevent the attack by neutralizing the area before the defense attorney gets a chance.

If you like to write out verbatim the questions that you intend to ask a witness with the answers that he has told you he will respond with, be careful that you are not accused of perjuriously scripting the witness's testimony. Whatever you do, do not give a copy of such a document to the crook. If you do, it may come back to haunt you if the crook decides to cross back to the underworld with the "script" in his possession.

Corroboration

When evaluating your evidence and planning your case, always start from the proven rule of thumb that the jury will not accept the word of a criminal unless it is corroborated by other reliable evidence. Jurors will also pick and choose, accepting that part of a crook's testimony that is corroborated and rejecting that part that is not. I cannot stress this point too strongly. If you are going to have to rely on the uncorroborated or even weakly corroborated word of an accomplice or an informant, get back out in the field and go back to work.

Physical evidence is the best. Corroborate everything you can. Prove the guilt of the witness as well as the guilt of the defendant. Corroboration is what the jurors want and what they look for. Make it visual. Prepare charts, blow up pictures, etc.

In choosing the order of witnesses, consider corroborating the witness before you put him on the stand where it makes chronological sense; i.e., have the storekeeper identify him first as the bystander-robber, then he can take the stand and identify his killer-accomplice. You are allowed to prove the substantive guilt of your witness to establish the truth of his claim to firsthand knowledge of the crime in question. The fact of his guilty plea is also admissible, but a limiting instruction is required. If he is going to testify about his arrest, put the arresting officer on first to tell the jury what happened. If the jurors have already heard it from someone else, it is easily accepted by them when the same thing comes from him.

Preparation of the Witness for Cross-examination

Prepare the witness for cross-examination, but be careful not to create a rehearsed witness who can be unmasked as such by the defense. Your witness must be able to survive a vigorous cross-examination to have any substantial value in the eyes of the jurors.

The main thought to emphasize to the witness is that he must not play games with the defense attorney or allow himself to get upset. The only specific instructions I ever give a witness is to remember at all times that testifying is not designed to "get anyone" or to protect himself, it is a time to tell the truth about everything no matter who asks the questions -- the defense attorney, the judge, or me. If a foolish defense attorney ever asks such a witness what I told him to say or do on the stand, he will be told, "Mr. Trott told me to answer all the questions truthfully no matter who asks them, Mr. Trott, you (referring to the defense attorney), or the judge." Also, the witness should not play to the jury by looking at them on cross. Jurors do not like this.

Final argument

Accentuate the corroboration. Brush off the defense. Tell the jury:

> We know that. I told you all about that during my opening statement and again during the direct examination! The issue in this case isn't whether Terry Miller is a crook with a prior felony conviction who lied to the police after he was arrested, the issue for you to decide is whether he has told the truth under oath here in court about his crime partner [point out the defendant] Alfred Mason, the defendant. And with that in mind, let's talk about the evidence that corroborates his testimony and proves independently and conclusively that Alfred Mason murdered David Kernan.

One of my favorite tactics is to suggest to the jurors that they set aside at the outset of their deliberation the testimony of the accomplice for the purpose of testing the case on the basis of the rest of the evidence. The jury will do this anyway, and it enables you to argue that the case is "there" without his testimony.

"Let's suppose that Terry Miller, himself, was killed during the shooting and never made it into this courtroom," I tell them, "and let's see what the rest of the evidence shows." Then I take a Sherlock Holmes approach to "solving the case," and the jurors usually love it. They want to be the detectives, not just the jurors. Invite them to solve it with you. Dwell on the strength of the circumstantial evidence. Then after I have described an airtight case against the defendant, I then tell the jurors to add the accomplice's testimony to the mix and the defendant's guilt is established not only beyond a reasonable doubt but to an absolute certainty. "Terry Miller's testimony is just frosting on the cake; he is not the Government's 'key witness,' as the defense would have you believe."

In making this argument, you can fashion out of the corroboration and circumstancial evidence a web that points toward and snares the defendant. If you work towards this argument from the beginning of your case preparation, it will frequently fall easily into place. Its purpose among other things is to give the jury a device to shift the focus from your witness back to the defendant and to the incriminating and corroborating evidence. Do not buy into what the defense attorney says the case is all about.

One aspect of the witness that you can emphasize is his motive to tell the truth. Point out that his only motive is to tell the truth because that is what will get him what he wants. Lies will only destroy the deal and cause him to be prosecuted for perjury. "He wants to stay out of jail. All he has to do to stay out is tell the truth, not lie. Lies will put him right where he doesn't want to be, in prison. His motive based on the evidence and the record can only be to tell the truth!" To this you can add that "by stepping forward and telling you what he knows, he has made himself publicly into an informant, a snitch. Do you think that a person does that lightly? Of course not. That is not something that a person would willingly do if it were just make believe!"

During your rebuttal argument, be prepared if necessary to justify and defend any deal that you have made. Point out that crooks don't usually commit their crimes on videotape and leave copies lying around for everyone to review. Point out also that we can't go to central casting and get our witnesses, we have to go to people who know something about the crime and that unfortunately some of those people are going to be the crooks themselves. You didn't choose these witnesses, the defendant did by recruiting them into his scheme. They aren't the Government's friends, they're his!

You're not at all happy about having to have made this deal, but you are not apologizing for it either. "The integrity of the Government demands it. It is simply unacceptable to convict only the bagman and let the crooked politician get off. If we never made deals with the little fish, the smart big fish would always get away. Is that what you want to happen?" Once again, get the spotlight off your witness and onto the real crook.

This is also a good time to dust off the tried and true argument to the effect that when a defense attorney has the law on his side, he talks about the law; when he has the facts, he talks about the facts; but when he has neither, he attacks the prosecutor and the Government.

Be very careful how you use the plea agreement. You may not "vouch" for the witness. A number of cases in different circuits have criticized prosecutors severely for misuse of the terms of a plea agreement, referring to the polygraph, etc.

Finally, never at any time lose control of the witness. He will try to push you around if he can, thinking that you need him, not vice versa. Be prepared to say "no" to outlandish requests and let him know at all times that you are in charge. This can be done very politely, and believe it or not, he will usually respect you for it. He must trust you to a certain degree, but it doesn't hurt to have an element of fear built into the trust and respect. You do not want to let him think he can cross you and get away with it.

Postscript

As informative reading on this subject, I would strongly recommend Prince of the City by Robert Daly, the riveting, accurate story of the perils of prosecuting corruption with a corrupt person as the Government's "star witness." I would also suggest that you borrow and read chapters from Alan Dershowitz's controversial and flagrantly biased book, The Best Defense. Professor Dershowitz engages in wholesale, specious and unwarranted attacks on prosecutors, police, and judges in his writings, but the two chapters in question are useful nevertheless as "workshop material" to test your acumen in this area. It is also important to understand our opponents, and this book will give you useful insight into the workings of one defense attorney's mind. The specific chapters are entitled "The Boro Park Connection" and "It Takes One to Catch One," a chapter that pertains to the "Prince of the City" prosecutions.

One lesson that I'm sure you will learn -- if you don't know it already -- is that it is a monumental mistake to say anything to a witness -- and I mean any witness -- that you wouldn't repeat yourself in open court to a judge. Did you ever consider the possibility that the witness might be taping every word you say?

In addition, if you are involved to any extent whatsoever with the management of an undercover sting operation -- especially one using civilians -- you ought carefully to read the "Final Report of the Senate Committee to Study Undercover Activities of Components of the Department of Justice," better known as the ABSCAM Report.

Finally, be aggressive, but also be guided by the timeless words of Justice Louis Brandeis, who said:

> Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites everyman to become a law unto himself.

CHAPTER ELEVEN

# ADDITIONAL COVERT TECHNIQUES IN CORRUPTION INVESTIGATIONS

BY

WILLIAM A. KEEFER*

Deputy Chief, Public Integrity Section
Criminal Division

* William Keefer has been Deputy Chief of the Public Integrity Section since October 1987. Before then, he spent eight years as the Senior Attorney in the New Haven Field Office, Boston Strike Force, Organized Crime and Racketeering Section.

## ADDITIONAL COVERT TECHNIQUES IN CORRUPTION INVESTIGATIONS

The following is a summary of some of the covert investigative techniques, in addition to use of undercover operations and informants discussed in another chapter of this manual, that have served as useful components in public corruption investigations.

### Telephone Data

#### Toll Records

Telephone toll records can be valuable corroborative evidence in any corruption investigation and prosecution, but the limitations of these records as an investigative tool are obvious. It should be noted, however, that the increased use of computers by telephone companies has greatly expanded the utility of such records. For example, the microfiche records of many telephone companies now enable a prosecutor to obtain, by subpoena, the originating telephone number of a long distance telephone call in one area simply by notifying the telephone company in that area of the terminating telephone number of the call in another area. Thus, a prosecutor in New York City who believes that the target received a particular telephone call from Las Vegas can obtain the originating Las Vegas number -- even if the call was made from a coin-operated public telephone -- by providing the terminating New York number to the Las Vegas telephone company. This capability varies widely among telephone companies, and requires a timely request, but this and similar capabilities exist and should be exploited.

Toll records are now covered by 18 U.S.C. § 2703(c), which governs the means by which the Government may obtain access to such transactional records. The statute merely codifies existing practice; the records are still obtainable by grand jury subpoena, section 2703(c)(1)(B)(i), and no notice to the subscriber is required, section 2703(c)(2).

#### Pen Registers

The use of non-consensual pen registers and trap and trace devices is now controlled by statute, 18 U.S.C. § 3121 et seq., which codifies and streamlines past Departmental practice. Since such applications can now be presented to a magistrate (section 2136(2)(A)), require no supporting affidavit (section 3122(b)(2)), and may be granted for 60 days (section 3123(c)), the usefulness of this investigative technique has clearly been enhanced by Congress. In practice, however, the use of such devices in a particular investigation can be tempered by the relative scarcity of machines and the limited value of the information provided by them. Moreover, because trap and trace devices require considerable telephone company assistance, the Department has agreed that all trap and

trace technical assistance applications will contain specific language limiting the assistance to certain types of facilities and specific locations and hours of operation. For the precise language, see U.S.A.M. 0-7.927 and 7.928.

## Mail Covers

Since the Fourth Amendment does not protect the outside of a letter, United States v. DePoli, 628 F.2d 779 (2d Cir. 1980), the United States Postal Service is authorized under 39 C.F.R. 233.3 to undertake "mail covers", recording the contents of the outside covers of first class mail. Authorization is obtained by a "written request" from a law enforcement agency which contains "reasonable grounds" to show that a mail cover is "necessary to ... obtain information regarding the commission or attempted commission of a crime." 39 C.F.R. 233.3(d)(2)(ii). This investigative technique has proved invaluable in providing leads and following the flow of money in many types of fraud investigations. A problem with mail covers, however, is that the information on the letters is often recorded at the post office by the regular mail handler on duty, whose dedication to maintaining the covert nature of the investigation may be less than overwhelming. In practice, therefore, mail covers entail a real but unquantifiable risk to the secrecy of the investigation.

## Electronic Surveillance

### Mobile Tracking Devices

When physical surveillance of a target is made difficult by countersurveillance techniques or other factors, the installation of an electronic tracking device ("beeper") can be invaluable. In United States v. Knotts, 460 U.S. 276 (1983) and United States v. Karo, 468 U.S. 705 (1984), the Supreme Court resolved a split in the circuits, holding that the monitoring of beepers secreted in contraband in public areas does not tread upon the Fourth Amendment, but that such monitoring within a defendant's residence requires a warrant. Beepers are not covered under the wiretap laws (see 18 U.S.C. § 2510(12)(D)), and a new statute, 18 U.S.C. § 3117, permits multijurisdictional use of the devices when installed pursuant to warrant. While the case law regarding the need for a search warrant to install beepers in vehicles is muddled, see e.g., United States v. Webster, 750 F.2d 307 (5th Cir. 1984), prosecutors should use a warrant whenever possible in light of Karo, supra, and 18 U.S.C. § 3117.

### Closed-Circuit Television ("CCTV")

As ABSCAM and other cases amply have demonstrated, videotaped evidence of a crime has enormous impact at trial, particularly in

public corruption cases where the defendant's criminal intent is often the principal issue. Although CCTV is partially excepted from the new wiretap statute, (see H.Rep. No. 99-647, 99th Cong., 2d Sess., p.36 (1986)) recent appellate decisions have required that the Government's use of CCTV conform to the requirements of Title III. 1/ In United States v. Torres, 751 F. 2d 875 (7th Cir. 1984) and United States v. Biasucci, 786 F.2d 506 (2d Cir. 1986), the Seventh and Second Circuits held that applications and orders for CCTV must specify a limited period of use of up to thirty days, set forth a particular description of the visual communications to be intercepted and the offenses to which they relate, contain minimization provisions and a finding that other investigative techniques are not feasible. Such considerations do not apply, of course, to the consensual use of the device, or in areas of surveillance where the target has no reasonable expectation of privacy.

In most cases, however, the decision whether and how to use CCTV is dictated by its technical feasibility rather than its evidentiary value. In all cases, a prosecutor should work closely with the technical agents to insure that the court order covers the exigencies of the investigation; for example, many businesses today have alarm systems that utilize "live" microphones to detect noise levels within the premises. Because these microphones often employ leased telephone lines, a court order authorizing covert entry and installation of a CCTV (or other electronic surveillance device) should contain language directing the telephone company to interrupt the alarm service to facilitate entry by the agents.

Consensual Audio Recordings

Consensual tape recordings can appear to be a prosecutor's dream; easy to employ, they often provide irrefutable evidence of the crime. In public corruption cases, however, where the targets of the investigation are often highly intelligent and sophisticated, ill-advised or ill-timed consensual recordings can easily unravel months of fruitful investigation. Unless worn by an undercover agent, the efficacy of a consensual wire often depends upon the performance of a "cooperating" witness, about whom the investigating agents may know very little. Such witnesses are often either terrified neophytes or career criminals, neither of whom can be relied upon to follow instructions or convince the target of their sincerity.

---

1/ Current DOJ policy is to require Departmental authorization for CCTV use when this technique is used in connection with a wiretap. In these cases, CCTV justification piggybacks the wiretap affidavit.

Thus, a prosecutor should carefully consider a number of factors before seeking agency approval for a consensual recording. First, when the use of the Nagra body recorder is necessary, the situation may require that the operator turn the device on and off. Virtually every seasoned prosecutor can recite a litany of anecdotes about frightened or confused operators who forgot to turn on the recorder, turned it off too soon, etc., thereby missing or calling into question an otherwise "smoking gun" conversation. In addition, timing is critical. Recording a conversation too soon in the investigation, when the target is still suspicious of your cooperating witness, or too late, when the target has discovered or deduced the investigation, can result in an exculpatory monologue that will cripple the case. If an arrest is planned to follow on the heels of a successful recording, the simultaneous use of a transmitter should be considered, so that a prosecutor can be on the scene to hear the conversation and to make an immediate and informed decision about the timing of the arrest. In any event, consensual recordings should be approached with caution, careful planning and realistic expectations.

Interceptions Pursuant to 18 U.S.C. § 2510, et seq.

Court-authorized electronic surveillance ("wiretap") is the quintessential covert investigative technique. When properly utilized, a defendant is literally convicted out of his own mouth. A tape recording has no felony convictions or memory losses, and cannot be murdered, bribed or intimidated. Although "a criminal trial is not a tea party," United States v. Marrapese, 826 F.2d 145 (1st Cir. 1987), the right wiretap evidence can make it seem like one.

However, wiretaps are a "last step" investigative technique, and their legal and policy prerequisites are zealously guarded by the Department's Office of Enforcement Operations ("OEO") and the Federal Bureau of Investigation. Furthermore, the procedural steps in obtaining wiretap authorization are considerable. In an FBI case, proposed wiretap applications, affidavits and orders are forwarded simultaneously to FBI headquarters and the OEO, where they are simultaneously reviewed by both entities. The review is neither cosmetic nor accomplished overnight. If the Director of the FBI approves the paperwork and OEO concurs, an authorization letter is presented to the Assistant Attorney General for signature. A prosecutor armed with a copy of this letter must then present the paperwork to a Federal judge, who is free to require "additional testimony or documentary evidence in support of the application," 18 U.S.C. § 2518(2). Extension requests must generally repeat the same procedure.

Prosecutors considering the use of this extraordinary technique should also realize that they must devote months, even years, to working closely with the investigative agency at all stages of the investigation: helping draft the wiretap affidavits;

lobbying the paperwork through Washington; briefing all participating agents on the specifics of the wiretap order and the minimization requirements of the statute; closely and directly supervising the actual monitoring of conversations; making periodic reports to the issuing judge; drafting any extension requests and/or search warrants; insuring that the tape recordings are properly sealed; supervising inventory procedures; and even reminding the issuing judge to file a report with Washington. (See 18 U.S.C. § 2519). In short, prosecutors should be prepared to work exclusively on a wiretap before, during and after its operation.

Although the subject of wiretaps is too broad to be dealt with in any depth in this chapter, the following are some current issues of which any prosecutor handling a wiretap should be aware.

Other Investigative Procedures

18 U.S.C. § 2518(3)(c) requires that the issuing judge find, before authorizing any wiretap, that "normal investigative procedures have been tried and failed or reasonably appear unlikely to succeed if tried or to be too dangerous." Thus, the covert techniques described above must be utilized, attempted, or at least considered before applying for a wiretap. If these techniques have succeeded in making a submissible case, no wiretap is needed; conversely, if other covert techniques are not first attempted, courts will not hesitate to suppress the wiretap evidence. United States v. Lilla, 699 F.2d 99 (2d Cir. 1983). "Boilerplate" recitations of why techniques do not work, based upon an agent's experience in similar cases, will not suffice. See e.g., United States v. Katustian, 529 F.2d 585 (9th Cir. 1975). The case law makes it clear that wiretaps should be used only to uncover significant ongoing criminal activity that has frustrated serious attempts to penetrate it, and a poorly drafted affidavit in this regard will condemn the fruits of the wiretap even before the first interception has occurred.

Sealing

Section 2518(8)(a) of Title 18 requires that "immediately upon the expiration of the period of the order," the original tape recordings "shall be made available to the judge issuing such order and sealed under his directions." If there is no "immediate" sealing, suppression is required absent a "satisfactory explanation." Although generally concluding that the statute should not be read over-literally, the Courts of Appeal are deeply divided over the appropriate remedy for the Government's failure to comply. At one end of the spectrum is the Second Circuit, which in United States v. Massino, 784 F.2d 153 (2d Cir. 1986) adopted a "bright line" suppression test: tape recordings sealed more than two days after termination of the wiretap presumptively violate the

statute and suppression may be warranted. At the other end is the Fifth Circuit, which in United States v. Diadone, 558 F.2d 775 (5th Cir. 1977), held that tape recordings whose integrity went unchallenged were admissible in spite of the lack of any justification for the sealing delay. A recent First Circuit decision, United States v. Mora, 821 F.2d 860 (1st Cir. 1987), rejected both extremes and charted a middle course. The wise course for any prosecutor is to insist on prompt sealing to insure admissibility.

The Interception of "Other" Offenses

Section 2517(5) of Title 18 provides that when "communications relating to offenses other than those specified in the [wiretap] order" are intercepted, they are not admissible in any grand jury or trial proceeding unless first "authorized or approved by a judge of competent jurisdiction." Early decisions dismissed indictments for failure to comply with the literal language of the statute, see United States v. Brodson, 528 F.2d 214 (7th Cir. 1975) and United States v. Marion, 535 F.2d 697 (2d Cir. 1976), but subsequent cases have permitted "implicit" section 2517(5) findings by judges in periodic wiretap reports or extension affidavits, see e.g., United States v. Masciarelli, 588 F.2d 1064 (2d Cir. 1977), and have dispensed with the requirement for "substantially identical offenses," United States v. Young, 822 F.2d 1234, 1238 (2d Cir. 1987). Nonetheless, prosecutors should be alert to this statutory plain-view provision, that also requires that the Government's application be made "as soon as practicable." An unexcused failure by a prosecutor to seek such an ex parte order, only after indictment by an indignant defense counsel, may result both in dismissal of the indictment and enduring judicial hostility to the Government's case.

Recent Changes in the Wiretap Statute

The Electronic Communications Privacy Act of 1986 effected a number of significant amendments and additions to the wiretap statute. Among the new provisions are Deputy Assistant Attorney General approval, the designation of additional crimes for which a wiretap can be sought (including mail fraud), the multi-jurisdictional use of oral interception devices, a ten-day grace period to permit covert installation before the thirty-day period of interception begins, limited after-the-fact minimization provisions when codes and foreign languages are used, the use of Government employees as monitors, and authority to intercept wire and oral communications in certain cases even though a precise location is undetermined.

A new provision of enormous potential significance in corruption investigations permits the interception of "electronic communications," which are defined as "any transfer of signs, signals, writing, images, sounds, data or intelligence of any kind"

transmitted electronically and affecting interstate commerce. See 18 U.S.C. § 2510(12). The statute permits a prosecutor to make application for an electronic communications interception order in connection with any Federal felony, and without approval from Washington. (Such approval has been administratively required, however, for the first three years of the statute's operation.) As the use of electronic mail and other electronic communications increase, prosecutors may find this provision one of the most useful in their arsenal of covert techniques.

# CHAPTER TWELVE

## OVERT INVESTIGATIONS

BY

DANIEL SMALL*

Deputy Chief, Public Corruption Unit
District of Massachusetts

* As a Federal prosecutor, Daniel Small has specialized in corruption cases. He convicted the Commissioner of the Department of Public Works in Brockton, Massachusetts on charges of racketeering and obstructing a grand jury investigation, and also convicted the Chairman and Subcommittee Chairman of the Northeast Regional Vocational School in Massachusetts.

# OVERT INVESTIGATIONS

## "Going Overt"

"Going overt" means doing anything that may lead to disclosure of the existence of an investigation. In some cases, that means indictment or an arrest. Often, though, it happens much earlier: subpoenas to banks that have a policy of notifying customers (remember that Rule 6(e) secrecy does not apply to the witness); subpoenas to government agencies whose employees can't wait to call their favorite news reporters (or the subjects of the investigation who may be their friends); agent interviews; and many more possibilities.

Regardless of how it happens, though, the two most important things about going overt are that, wherever possible, it should not happen by accident, and it should not be rushed. Going overt should be an opportunity to further the investigation, not an obstacle. If not handled properly, there is an increased risk that an investigation will be in disarray or out of control, often leading to lost opportunities or mistakes. Asking a few short questions may help prevent this.

## "Are We Ready to Go Overt?"

You as a prosecutor retain the most control over the pace of an investigation in the covert stage: once it goes overt, there are far more pressures and demands on your time and that of the agents. Whenever possible, take the time (and insist that agents and associates do as well) to complete as many investigative, logistical and organizational tasks as possible: transcripts (if it is a tape case); laboratory tests and other work with exhibits; researching evidentiary and other legal issues that will clearly arise; and other tasks. Only then can you really finalize a plan for going overt.

## "Do We Have Everything We Can Get Before Going Overt?"

Walk through your case thus far, asking where it is likely to lead and what the possible defenses are. Then think creatively about all the possible testimony, tapes, documents, or other evidence that might be useful, and which of them you can obtain without revealing the investigation. Sometimes questions or subpoenas can be worded broadly -- for example, covering more individuals, entities and contracts than absolutely necessary -- to avoid compromising the investigation. Documents that are not obtained before a corruption investigation goes overt have a tendency to disappear or be altered.

"How Do We Want the Subject to Learn About the Investigation?"

Each focused records subpoena you issue and each associate of the subject you question may give the subject more information about the case. It is important to understand this and to exercise some control and discretion over the process. In some cases, you may want a subject's first knowledge of the investigation to be a full scale interview/confrontation, with tape excerpts, surveillance photos or other high impact evidence. "Requiring a defendant to face up to the real world in order to obtain his cooperation or to obtain admission of guilt or a plea of guilty is permissible under our system." United States v. Ryan, 548 F.2d 782, 790 (9th Cir.), cert. denied, 430 U.S. 965 (1977). In other cases, you may not want the subject to know what is going on right away. Indeed, sometimes you may want to give a subject looking for ways to obstruct your investigation the wrong idea about what you are looking at -- through subpoenas, interviews, questions to witnesses or other means. However it happens, it should happen in a way carefully calculated to further the investigation.

"Are We Prepared for the Time When the Subjects Learn About the Investigation?"

By working to control the timing, you can also control the circumstances and be more prepared for the likely results. Some of this is discussed elsewhere, but it is worth noting a few examples here.

Securing Exhibits

This may be your last chance to secure exhibits before their importance (and your interest in them) becomes apparent to the subject and he or she has a chance to react. Thought should be given to the best ways to obtain records immediately that you could not seek before for fear of compromising the investigation, such as subpoenas, forthwith subpoenas and search warrants (see below).

Meetings with Cooperating Individuals

In cases involving a cooperating individual (CI), events relating to the case going overt may naturally generate conversations (preferably tape-recorded) with the subject that may be incriminating. Questions by the CI about how to respond to grand jury subpoenas or interviews, or how to deal with certain facts, may give rise to discussions of past activities or planned obstruction of the investigation. In many corruption cases, the defendant's efforts to cover up their previous crimes become more serious, and more readily provable, than the original corrupt acts.

## Surveillance

When there may be others involved, subjects are likely to contact them when they first learn of the investigation. Pen registers, surveillance and other techniques should be considered in anticipation of such disclosures.

## Investigative Grand Juries

No investigative mechanism is more important to public corruption cases generally than the grand jury. Even clean "walk-in" and tape cases can be improved, and often widened, by good grand jury work. Prosecutors and agents who are accustomed to cases where the grand jury is used primarily as a screening device for probable cause are often surprised at how very different a major grand jury investigation can be. It can involve a large commitment of time and resources both in long hours and days of examinations, and in the overall length of the investigation. It also requires your best preparation and organization skills: grand jury investigations will inevitably evolve in ways that cannot be foreseen, but whatever can be anticipated should be carefully planned. Properly conducted, investigative grand juries can lead to the development of some of the most significant and sophisticated public corruption cases. There are various texts available on grand jury procedures, so this section will address only briefly some general principles and issues most applicable to corruption cases.

### General Principles

1. Follow the Leads:

Creativity and persistence are critical to successful corruption investigations. View each witness not only as a source of testimony, but also as a source of further individuals, entities and records to subpoena and explore. A grand jury attuned to this exploration process can often help by its own questions (although it is recommended that they be discussed first, then asked by the prosecutor). Review records and grand jury transcripts for further leads, and then follow them. Corruption cases are often the proverbial seamless web: your job is to unravel it.

2. Follow the Money:

Do not limit your investigation to the actual bribe transaction. Money can leave a trail coming and going, and should be followed in both directions. Checks may go through several banks, each of which may reveal more evidence. Cash purchases can be traced and confirmed. In these ways, for example, the generation or laundering of money can result in tax-related cases, the justifications for or dispersal of payoffs can result in fraud cases, etc. Indeed, whereas the actual

payoff may be a difficult one-on-one case, the resulting financial cases may be stronger, or easier, to prove.

3. Do Not Believe in Coincidence:

At sentencing, convicted corrupt officials often try to claim that it just happens that the incident in which they were caught was a single aberration -- don't believe it then, and certainly don't believe it at the grand jury stage. Assume for purposes of investigation that the incident about which you have information is not a coincidence, and then look for patterns and follow them up: other individuals or entities doing business in the same way; other similar public projects, contracts, or permits; other unexplained things of value obtained by the subject; other public officials who are close associates or involved in similar activities; and so on.

4. Deal with Perjury:

As investigative grand juries become more common, and more of a threat to public corruption, perjury also has tended to increase. Corrupt public officials often have been "living a lie" for so long that lying comes easily. Their associates may have come to believe in the ethic of the "stand-up guy," that if they "stand-up" for and protect the corrupt official, long after the prosecutors have gone away the public official can and will take care of them. 1/ Perjury cases can be difficult and time-consuming, but few ongoing corruption investigations can succeed without them, and setting the precedent is critically important.

To deal with perjury effectively, you first must be prepared for it. Prepare your questioning thoroughly; begin the grand jury session with an advice of rights, where appropriate, and obtain the witness's agreement that he will be sure he understands the question and let you know if he does not; try to ask more short, clear questions, rather than fewer, longer ones; listen carefully to the answers and make sure they are responsive; at the end of the session, where appropriate, give the witness a chance to change his answers to "make sure" they are correct, and finally, read over the transcript as soon as possible to make sure it is clear and consider bringing the witness back if it is not.

See also the Appendix chapter on perjury at the end of this Manual.

---

1/ Moreover, they may share the belief, clearly stated by a corrupt Deputy Sheriff in a taped conversation, "They ain't going to try no damn body for perjury. How many times you ever heard of that? They do that to scare the hell out of you."

Selected Issues

1. Fifth Amendment:

Along with the trend towards perjury has come an increase in the use (and abuse) of the Fifth Amendment privilege. Some defense counsel now apparently respond to subpoenas by saying their client will take the Fifth, regardless of the facts. The following steps may help limit abuse: insist on an appearance, unless you are absolutely certain that the witness (not just the lawyer) will take the Fifth (it is not unusual for a lawyer to say his client will take the Fifth, yet the client, once facing the grand jury, decides not to). Where appropriate, you may want to advise the witness that he or she is not a target, and give clear legal instructions on the limits of the privilege (e.g., not to protect third persons). When you suspect a witness may take the Fifth, you may want to begin with general, generic questions, and only then move to more specific ones if necessary -- don't let the Fifth Amendment become a discovery device. Finally, if you can build a record of abuse of the privilege, challenge that abuse, see Marcus v. United States, 310 F.2d 143 (3d Cir.), cert. denied, 372 U.S. 944 (1963); Roberts v. United States, 445 U.S. 552, 560 (1980).

2. Subpoenas Duces Tecum:

The complete and timely production of records often is crucial to an ongoing corruption investigation. For completeness, work out extensive "schedule" attachments for different types of subpoenas (banks, stockbrokers, etc.; some model schedules are available in other texts), and then review each subpoena for additions. Once in the grand jury, develop a standard set of questions to determine not only what is being produced, but who conducted the search and what has not been produced. As to timeliness, review of one set of records often leads to others, so be reasonable but firm on timing. In general, noncompliance sets a terrible precedent for everyone, so insist on proper compliance, and don't be overly reticent about threatening to use, and using, the remedies available, including contempt (18 U.S.C. § 1826 and Rule 17(g), Fed. R. Crim. P.).

3. Multiple Representation:

Multiple representation, whether of public officials or employees, corporate employees or co-conspirators, constitutes a serious threat to public corruption investigations. Whenever possible, it should be challenged from the beginning, with motions to disqualify and other appropriate steps. Even an unsuccessful motion at the early stages establishes a record for subsequent litigation as the situation evolves. In addition, wherever you suspect multiple representation or "benefactor" payments, be sure to ask in the grand jury about any payments from others (including for legal fees), arrangements for future

payments, and how payments are being made. See In Re Shargel, 742 F.2d 61 (2d Cir. 1984) (fee arrangements not privileged).

4. Advice of Rights:

The Department of Justice has a general policy that "targets" who come before the grand jury receive both a general advice of rights (in writing with the subpoena and on the record) and an additional warning that their conduct is being investigated for possible violations of Federal criminal law ("subjects" get only the advice of rights). U.S.A.M. § 9-11.260 (April 4, 1985). However, there is no further obligation, such as to say whether the witness is a "target" or to explain his or her status generally. "Target" here is a technical term, narrowly defined by the Department.

> A "target" is a person as to whom the prosecutor or the grand jury has substantial evidence linking him/her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant.

U.S.A.M. § 9-11.260. Generally, a balance needs to be struck between providing free advice to a witness and not "scaring off" someone who would otherwise testify -- truthfully or untruthfully. Always remember that advice of rights or special warnings are not required by law, see United States v. Washington, 431 U.S. 181 (1977), and even violation of such a Department policy is not a basis for judicial relief, see United States v. Irvine, 699 F.2d 43 (1st Cir. 1983); United States v. Lopez, 621 F. Supp. 1106 (N.D. Ill. 1985).

5. Tape Cases:

In any case involving secret tape recording, consideraton should be given to bringing the subjects into the grand jury before the taping becomes known. In such a situation, if the subject chooses not to tell the truth, his false story can be "locked-in" before he can adapt it to the tapes. Questioning in such cases should include not only any tape-recorded activity ("have you ever taken cash...?"), but also the discussions themselves ("have you ever told anyone that ...?"). False statements regarding either the acts or the conversations can be perjury, see United States v. Berardi, 629 F.2d 723 (2d Cir.), cert. denied, 449 U.S. 995 (1980). This kind of approach -- bringing a subject before the grand jury without informing him of the evidence against him -- has been attacked by defense counsel as an unfair "perjury trap," but has been consistently upheld by the courts.

> There is no duty on the prosecution to tell a Grand Jury witness what evidence it has against him or to give him repetitive warnings that it is his duty to tell the truth when he has sworn his oath to tell the truth. It is not an

> unfair dilemma to put upon a prospective defendant to require him to claim privilege or to tell the truth.

United States v. DelToro, 513 F.2d 656, 664 (2d Cir. 1975). See also United States v. D'Auria, 672 F.2d 1085, 1093 (2d Cir. 1982):

> Nor is there any merit in [defendant's] argument that the Government had an obligation to reveal to him documents in its possession in order to refresh his recollection. There is no requirement that the Government reveal to a perjurer that it has evidence of the untruthfulness of his statements, much less that it reveal evidence to a witness whom it believes to have committed perjury.

6. Recantation:

In some cases, a witness who has lied to the grand jury, and then realizes he or she might not get away with it, will try to come in and recant under the provisions of 18 U.S.C. § 1623(d). There are several ways to help guard against abuse of this section. In the grand jury itself: advise the witness of the risk of perjury; have the witness agree not to answer questions he doesn't clearly understand, and keep your questions short and clear; where appropriate, give the witness an opportunity to change or add to his testimony at the end; and, after that, in some cases you may want to advise the witness on the record that you have evidence that his answers are false, and give him one more chance. After the grand jury, make a written record of any communications with defense counsel relating to the witness's status or the evidence against him such as target letters. Finally, if there is a second appearance that you do not consider a recantation, make a statement to that effect at the outset and track the statutory language to explain why. As one court stated:

> The purpose of barring the prosecution of witnesses who recant is to promote the investigations of the grand jury or of the court. There is little benefit to these investigations in permitting a witness to escape prosecution by recanting after it is clear to him that his perjury will be exposed. Such a rule would encourage a witness to testify falsely knowing he could always recant if evidence of his perjury came to light. Congress did not intend to create so broad a shield when it passed § 1623(d).

United States v. Denison, 663 F.2d 611, 616 (5th Cir. 1981); see also United States v. Scivola, 766 F.2d 37 (1st Cir. 1985).

## Other Overt Investigation Tools

Too often, prosecutors and agents categorize cases in their minds and associate certain types of cases only with certain

types of investigative approaches. To successfully put together a public corruption case, you need to put aside those preconceptions and aggressively pursue every appropriate investigative option. Just as Title III's and other covert methods discussed above can be utilized, various overt investigative tools can also provide significant evidence. In addition to those discussed elsewhere, several others are worth specific mention.

Search Warrants

Search warrants executed before the subjects have had time to react to learning about the investigation can be used successfully in public corruption cases for various purposes. These include the following:

- Where the "thing of value" obtained by the public official is something other than cash, search warrants have been used to obtain photos and expert appraisals of work done on defendants' homes, appliances and other objects (and their serial numbers), cars (and their VIN numbers), and the like.

- Where surveillance or other evidence has traced money or other material to a certain location.

- Where there is reason to believe that records or other evidence relevant to the investigation may be (or is being) destroyed or altered.

Simultaneous Interviews/Subpoenas

Some corruption cases involve several, or many, similarly-situated individuals, whether witnesses, victims or subjects. If given time, they may band together, voluntarily or under coercion, to give similar coordinated false stories. To deal with such a "strength in numbers" conspiracy, it may be appropriate to organize large-scale simultaneous interviews, sometimes accompanied by grand jury subpoenas. The potential benefits of such an approach are many. The individuals, if caught unaware, may tell the truth, or some portion of it. If they choose to lie, it may be in a way inconsistent with others or the evidence. Resulting rumors (and their often inevitable exaggeration) about what is going on may further shake up some of the interviewees and help bring out the truth. Finally, the interviews and subpoenas may encourage the involvement of lawyers and lead to discussions regarding possible truthful cooperation, with the numbers of people involved stimulating a "bandwagon" effect.

Like everything else in these cases, however, large-scale interviews should be carefully planned. Possible questions should be discussed and written down, at least in outline form;

if agents other than the case agent are involved, they should be provided with both written and oral briefings on the facts and questioning strategy. Thought should be given to what evidence, if any, agents should bring with them. If all the interviews cannot be done at once, the sequence should be worked out on a strategic basis, not left to chance; and, if cooperation by any of the interviewees could lead to other immediate action (consensual monitoring, etc.), there should be appropriate planning and preparation.

CHAPTER THIRTEEN

# HOW TO OBTAIN COOPERATION IN A PUBLIC CORRUPTION INVESTIGATION

BY

MARK E. ROBINSON*

Special Counsel to the
Assistant Attorney General
Criminal Division

* Before joining the Criminal Division, Mark Robinson served for four years as an Assistant United States Attorney in Boston, Massachusetts, where he was a member of the Special Investigations Unit investigating and prosecuting public corruption cases. In Boston, Mr. Robinson was involved in the successful corruption prosecutions of the Chairman of the Ways and Means Committee of the Massachusetts Senate, the Zoning Administrator of the City of Boston, the Chief Structural Engineer of Boston's Department of Inspectional Services, a detective with the Boston Police Department and a member of the Revere, Massachusetts Board of Assessors.

## HOW TO OBTAIN COOPERATION IN A PUBLIC CORRUPTION INVESTIGATION

Very few witnesses volunteer to cooperate in corruption investigations. While investigators and prosecutors may occasionally encounter an outraged victim of a shakedown who wants to get even or expose the corruption, more often than not, even the victims of extortion do not want to get involved, either because they fear the retaliatory power of the corrupt public official or because they want to avoid the publicity associated with a corruption scandal. At the same time, few corruption cases would be successful without the cooperation and testimony of at least some of those involved in the crime.

There is no magic formula for obtaining cooperation in corruption investigations. In some cases, verbal persuasion (such as appealing to the witness's sense of civic duty) will work; in other cases, simply serving a subpoena may do the trick; and in still other cases, when the witness would rather go silently to his or her grave than cooperate with the Feds, it may be necessary to consider using some of the other, less friendly techniques at the Federal prosecutor's disposal.

The most effective approach in a particular case depends largely upon the witness's state of mind and the leverage available to the Government. It also depends on what the prosecutor wants the witness to do; persuading a witness to confess or testify may be easier than getting him or her to wear a wire.

Consequently, before deciding which technique to use, it makes sense for the prosecutor to analyze why it is that the witness in question has not stepped forward voluntarily to expose the corruption. The reason is probably not that the witness has been too busy to come forward or that the witness called the prosecutor's office but did not leave a message. More likely, the witness is unwilling to cooperate for one or more of the following reasons.

### Understanding Why The Witness Does Not Want To Cooperate

#### Fear of Retaliation

The witness may be afraid that if he or she cooperates and if that cooperation becomes known, the witness (or members of his or her family) will be killed, injured, threatened, harassed or driven out of business. These are understandable reasons not to come forward. They appear most frequently in police and narcotics-related corruption cases and to a lesser extent in bribery, kickback and payoff schemes where the personal stakes to the players may be lower.

The Scandal Factor

The witness may be afraid of having his or her name appear in the newspaper as a cooperating witness. Nobody likes to be branded a rat, and having one's name associated with a high-visibility corruption case (in any role other than as prosecutor or judge) is unlikely to enhance one's reputation in legitimate business or government circles. This fear is obviously greatest when the targets of the investigation are high-level public officials and the case is likely to receive intense attention from the press.

Witnesses in corruption cases are also not unaware of the fact that visibility in the press can lead to all sorts of other unwanted scrutiny -- by the IRS, state and local licensing boards, inspectors, regulators, police, auditors and even former spouses and business partners. In one prominent Hobbs Act case in Boston, the prosecutors needed an expert witness to testify about the "legislative process". The senior public official who was approached about serving in this role, far from being honored by his selection, sent a message from his staff to the U. S. Attorney's Office that he did not want to be called or even mentioned in the case under any circumstances and that if the U. S. Attorney insisted on using him as a witness he would interpret it as a "hostile act, motivated by considerations [political] other than the needs of the case." This particular public official, as far as anyone knew, was honest and had nothing to hide.

It is this fear of scandal and other collateral consequences associated with being a witness in a Federal corruption trial that generates so much of the rampant perjury that prosecutors encounter in corruption investigations today. The phenomenon has been described in prosecutorial circles as the "businessman's dilemma" and it can be a significant obstacle blocking the path toward truthful cooperation. A businessperson who has been involved in corrupt activity and who receives a subpoena to testify before a corruption grand jury, has only four options. Two of those options lead to the witness stand; the other two options may lead to jail.

- If the witness tells the truth -- "Yes I paid a bribe to get the contract" or "Yes, I was extorted" -- he or she is probably going to have to repeat the same story before a trial jury later on;

- If the witness takes the Fifth -- he or she runs the risk of being immunized and compelled to tell the truth at a public trial;

- If the witness refuses to testify -- there is a substantial risk of being jailed for contempt; and

- o If the witness lies (and the Government can prove it) -- the witness faces a perjury prosecution.

No matter which of these four options is chosen, the witness runs a significant risk of landing on the front page of the newspaper, mired in scandal. As a result, lying is, all too frequently, the option of choice for corruption witnesses. Perjury, even with its risks, is viewed as preferable to the potential consequences of truthful cooperation, including humiliation, ridicule, scandal, intimidation and financial ruin.

Double Exposure

The witness may have some personal involvement in corrupt (or other illegal) activities and may be afraid to come forward for fear that if he turns on others, they will, in turn, expose him. For example, a witness who has significant information about bribery by high-level city officials may be afraid to testify for fear that the resulting criminal investigation may reveal his own prior involvement in kickbacks, tax evasion, or embezzlement. This sort of information can surface in several ways during a criminal investigation: the prosecutor can pressure the witness to tell all he or she knows; enemies of the witness can provide evidence to the authorities; and defense counsel for the target can expose the witness's prior bad acts on cross-examination.

More often than not in corruption cases, it is the witness's own skeleton-filled closet that has kept him or her from knocking on the prosecutor's door. In many cases, however, the prosecutor will not know for sure what the skeletons are until some of them start rattling. In one case in Boston, the owner of an architectural firm that had been paying off certain state legislators to send business to his firm, adamantly refused to cooperate, even in the face of compelling evidence of the bribes -- until he found out that the FBI was aware that he and his firm had been providing hookers to the elected officials. The witness was more afraid of his wife finding out that fact than he was of going to jail for contempt.

The Stand-up Guy

Another phenomenon in corruption cases involves the so-called "ethic of the stand-up guy," which is the white collar criminal's version of "honor among thieves." This anti-government attitude is based on the premise that your friends will be around a lot longer than the Feds will and that if "nobody talks, everybody walks." There is an unspoken assumption here that if you do the time quietly, you will be rewarded for your loyalty and taken care of by your friends. Frequently, these witnesses do not want to cooperate simply because they hate the FBI, they hate do-gooders like Federal prosecutors and they hate anybody else in the system who does not

recognize their God-given right to use their public office for private personal gain. The caselaw of contempt is riddled with the names of people like this who stubbornly stood their ground and did their time. One such witness, the former administrator of a major government agency in Boston, did a full eighteen months dead time for contempt on top of a four year extortion sentence at age fifty-five rather than testify about certain other influential public officials. Convincing such anti-Government witnesses to cooperate can be the most difficult and frustrating challenge in the business, but it can also be the most rewarding; especially if you consider that the more dead time the witness is willing to do, the bigger the secret he or she must be hiding.

Advice of Counsel

It is no secret that there are members of the criminal defense bar (including a number of former Federal and state prosecutors) who are disinclined to advise their clients to cooperate in certain kinds of investigations or with certain kinds of prosecutors or agents. Perhaps too often they have seen what cooperation involves for a witness: countless hours spent with the FBI; constant pressure from prosecutors to tell all; insistent demands for polygraphs; repeated court and grand jury appearances; and, in some cases, the indignity of having a voice recorder strapped to one's body or a wire taped to one's chest. 1/ This is not to mention the excruciating pain to the witness of having to bare his or her soul under oath in front of a jury and press box, or even worse, having to face a defense attorney on cross-examination who is being fed very effective questions by the witness's former partner in crime who is now the defendant.

Frequently in corruption cases, the Government may encounter a circle of defense lawyers who always seem to appear in court or grand jury representing the same kinds of witnesses, subjects or targets and who never seem to want their client and the prosecutor to make eye contact, much less talk about a deal in exchange for cooperation. In many cases this attitude will appear to be consistent with some sort of informal agreement to protect the interests of third parties (higher level officials) who are perceived to be the real focus of the investigation.

---

1/ It is no surprise that this bothers some people. One remarkable witness who wore a wire for the FBI for over two years in Boston used to meet the agents at a motel room every working day, discuss the upcoming events of the day, who he was going to meet, what he would say (different scenarios) and at the end of the discussion the case agent would, as a matter of ritual, say "O.K., quit the grinnin' and drop the linen" so that the body recorder could be taped on. Every night the same procedure would be repeated in reverse.

This phenomenon is especially prevalent in municipal corruption (political machine) cases where investigations tend to work their way up from bottom to top with successively higher levels of officials being pressured to flip and cooperate against those in control. In some cases of this type, the lawyers involved may have, in fact, been provided to the witness by the third party who has an interest in limiting cooperation.

## General Approaches

There are several important steps that can be taken in your district to help create an atmosphere that encourages cooperation.

### Establish an Anti-Corruption Unit that Looks Like It Is Going to be Around for Awhile

This suggestion is discussed in detail elsewhere in this Manual but it bears repeating here. If you expect to change the way business is done in a particular institution or government office, the people in it must know that there is a strong and watchful Federal enforcement presence in the district. Too often corruption cases are viewed (correctly) by the targets as "fad" prosecutions. As soon as the heat dies down on a particular case, the institutional green light goes back on and the system returns to business as usual. This perception must be consistently and repeatedly undermined. Towards this end, the best thing a prosecutor can do to make people aware of his or her presence (apart from bringing good cases), is to set up an anti-corruption unit and keep an active anti-corruption grand jury in place.

### Develop a Reputation For Toughness, Persistence and Confidentiality

1. Toughness:

It is important for the prosecutor to demonstrate tough-minded leadership in promoting high standards for Government officials. The sooner people begin to see the prosecutor taking corruption seriously, the sooner public officials will begin to get the message. It may be necessary to educate the public (and even some of the judges in your district if they are not already aware) that corruption is not a victimless crime. 2/ Show the

---

2/ The Introduction to this Manual by Assistant Attorney General (Footnote Continued)

public through the kinds of cases you bring that you are not afraid to attack the power structure or to challenge the self-serving assumptions of those on top that they run the show for their own benefit. You may want to consider, in appropriate cases, returning indictments that describe in detail the scope of the corruption problem so that the public can see who has been victimized and who has profited at the public's expense. This same objective can also be achieved via sentencing memoranda filed with the court.

It is also important to treat corruption like the serious crime that it is and to use some of the more aggressive techniques that show people you are not kidding, such as search warrants, arrest and even detention where appropriate. 3/ The prosecutor's apparent strength in this regard may be a magnet towards which cooperating witnesses are drawn and a shield behind which they feel safe. It also sends a strong message to future witnesses who may not be inclined to cooperate, that the consequences may be severe.

2. Persistence:

The only way to break the code of silence among the stand-up guy crowd is to keep dogging the bad guys. Let them know that you are not going to go away, and do not take "no" for an answer.

a. Grand Jury Pressure. If you issue a subpoena to a witness and the witness later advises you that he or she intends to take the Fifth, insist that the witness comply with the

---

(Footnote Continued)
Weld lays out in some detail the reasons why public corruption is not a victimless crime.

3/ A number of people have argued that these heavy-handed techniques are inappropriate in corruption or other white collar investigations; many others disagree. The spectacle of a city building inspector being arrested for extortion at his desk at City Hall in the presence of his peers and colleagues can leave a worthwhile and lasting impression on other inspectors who are themselves going through the corrupt calculus of whether or not to take bribes. This can have a deterrent impact far greater than that which could be achieved by a string of successful, but perhaps more genteel, prosecutions. Moreover, apart from the fact that the Government is entitled to an arrest warrant following a felony indictment, the circumstances of the arrest can yield surprising results. One witness in Boston, who was indicted for perjury after denying that he had solicited any illegal campaign contributions for an elected official, was caught with a fistful of corporate checks to the candidate in question in his jacket pocket when he was arrested.

subpoena and appear in person. Avoid allowing an informal practice to develop in your District where witnesses are never actually produced before the grand jury unless the Government is prepared to grant immunity. There is substantial caselaw that supports a policy of insisting that witnesses appear in person as required by the subpoena. The grand jury is entitled to have the witness's appearance and the law says that the Fifth Amendment can be properly asserted only in answer to specific questions.

In addition, the practice forces witnesses to meet the prosecutor face to face, to see the grand jury and to see other witnesses going in and coming out of the grand jury room. The experience of these events can be useful in obtaining cooperation. If every witness in the investigation is required to come in and go behind the grand jury room door, then nobody can know for sure who is talking and who is not. This uncertainty about who is cooperating can be used to the prosecutor's advantage and at the same time can provide useful cover to those who are cooperating. Occasionally, you may even find a witness who, once in front of the grand jury, decides for whatever reason (ego, patriotism, lack of nerve) to go ahead and testify.

b. Employment Pressure. It is essential that the prosecutor make full use of outside leverage in order to sustain the pressure to cooperate. By establishing the right contacts with certain trusted managers of a particular Government agency or organization, it may be possible to create an employment atmosphere that fosters cooperation. If an employer lets his employees know that management expects cooperation upon penalty of job sanctions, the results can be impressive. In a recent police corruption investigation, the Police Commissioner issued an order that any police officer who was interviewed by the FBI or received a subpoena had to report the contact to headquarters. After appearing in the grand jury, the officer was required to file a report explaining the nature of the questions and the answers given. If the reports did not indicate total cooperation or if the reports were found to be false, the officer could be disciplined or fired. This internal policy went a long way towards encouraging officers to cooperate but you should be aware that an argument may be raised regarding the voluntariness of any Fifth Amendment waivers.

c. Collateral Consequences. Prosecutors should also be aware of the collateral consequences of convictions on different charges and use those consequences to their advantage. For example, in many states, public officials who are convicted of crimes of dishonesty while in office forfeit their pension to the state. Corruption convictions can have a similar impact on builders' licenses, licenses to practice law, and accounting and architecture licenses. Consideration of these collateral consequences in prosecutorial charging decisions can provide extremely powerful leverage in inducing guilty pleas and obtaining cooperation.

d. Post-Conviction Pressure. It is essential that corruption prosecutors establish a firm policy of making everyone involved in corrupt activity tell all they know. This means instituting a policy of putting convicted officials back in the grand jury after conviction (and compelling their testimony, if necessary) regardless of whether the case was disposed of by trial or plea. This policy should be non-negotiable and should have no exceptions.

Why make post-conviction testimony a matter of routine practice? The principal reason to do this is to educate the defense bar that cooperation is not an option, it is a requirement. Let them know that their client (the defendant) is going to have to tell all he or she knows about corruption sooner or later; that simply pleading guilty is not going to make the Feds go away. The result is that if people know they are going to be compelled to testify after they are convicted, pretty soon they will start to see the advantage of cooperating fully before they are convicted or sentenced when they can get some credit for it. Stated another way, if the reason a defendant does not want to cooperate is that he does not want to be a witness, let him know that he is going to be a witness anyway -- unless he is eager to do eighteen months of dead jail time for contempt of court -- and so he might as well do it early.

Another advantage of putting corruption defendants in the grand jury after conviction is that under the new Bail Reform Act, crimes committed while on parole result in a mandatory two years of on-and-after jail time. The threat of a perjury prosecution while on parole is therefore a very powerful tool in persuading witnesses to cooperate and testify truthfully. It may also be useful to keep an eye on convicted defendants via parole boards and to let them know that you will persist in opposing parole as long as they continue to be uncooperative.

3. Confidentiality:

In order for people to be willing to cooperate with the Government they have to trust the Government. It is very difficult for them to do that if they do not believe that their privacy and other interests will be appropriately protected. As a prosecutor seeking to persuade people to do the right thing and cooperate, you have got to demonstrate that you know how to keep a secret. In practice, this means not making promises of non-disclosure that you cannot keep. It means controlling leaks from your office. It also requires that you prove to people, on occasion, that you are willing and able to alter the course of an investigation in order to accommodate their concerns. Sometimes, this can mean simply keeping the witness's name out of an indictment or press release; in other cases it may require going before the judge to restrict unnecessary disclosure of certain facts or witnesses.

## Specific Approaches

If you are confronted with a particular witness who refuses to cooperate, what can you do to change his or her mind?

### Offer Protection

Obviously, if the witness fears retaliation, there are forms of protection you can offer including witness security and even relocation services.

### Argue the Benefits of Cooperation

If the threat is more financial than physical or psychological, there is less that you can do. You cannot promise to protect a person's business or reputation from ruin by vengeful competitors or public officials. The most you can do in this situation is to argue that by cooperating they may, in a sense, be affording themselves the best protection available. By getting out front in the public eye they may be setting themselves up for attack, but at the same time, when they are attacked, the motive and identity of those responsible will be more difficult to conceal. This may create a disincentive for the witnesses' enemies to launch so obvious a retaliatory attack. This argument is based on the same principle that the FBI and other Federal investigative agencies sometimes employ in dealing with alleged death threats to witnesses. They interview the person who allegedly made the threat or was supposed to do the hit and let them know that the Government knows that they have a motive and intent to harm the witness and that if anything happens to the witness they will be the primary suspect.

### Challenge the Witness

In some investigations it may be possible to persuade the witness that somebody has to stand up to the corruption -- that if they shrink from the task because of fear or intimidation the evil will continue to flourish and plague them and their children and their childrens' children. Surprisingly, this argument has been used successfully in some organized crime cases to persuade loan shark victims to testify against LCN members.

### Offer Confidentiality

In some investigations it may be possible to provide the witness with assurances that his or her cooperation will be kept confidential -- that is, the Government will not disclose the cooperation to anyone unless ordered to do so by a court. This promise may be difficult to keep where the witness is to deal directly with the target or where the information provided by the witness leads to probable cause for search warrants or electronic surveillance. Witnesses, and especially defense attorneys, are rightfully skeptical about such promises.

On the other hand, it may be possible to fashion a level of cooperation that may limit the risk to the witness of being exposed. For example, there may be ways to hide the source of the information given to the Government, such as delaying the timing of interviews so as not to reveal a particular person's cooperation. It may also be possible to shield the cooperating witness's identity by creating the impression, in your dealings with other witnesses, that there are alternative sources for the same information. Along the same line, prosecutors will occasionally attempt to disguise the voluntariness of a particular witness's cooperation by having the witness formally served with a subpoena. For example, if a prosecutor receives information from a source at City Hall that certain inspectors have been shaking down contractors and the prosecutor wants to protect the City Hall source, a general grand jury investigation can be commenced with the cooperating witness providing the Government with the information it needs to ask the right questions or to verify the answers received. This approach allows the grand jury to obtain necessary corroboration without exposing the witness. The questioning must, of course, be broad enough to conceal the source of the information.

Pursue the Witness

Sometimes, the witness must be made to fear the power of the Government as well as the danger from the bad guys. For example, in a recent police corruption case involving a detective who was offering protection to local drug dealers in exchange for money, no one wanted to cooperate against the police -- for obvious reasons. The witnesses from the local community, many of whom had criminal records themselves, were terrified at the prospect of having to testify against a police officer who lived and worked in their neighborhood. A person with a record of narcotics violations who is on parole or probation or is subject to imprisonment as a multiple offender is extremely vulnerable to intimidation by a corrupt police officer who has the power to make arrests, press charges, write up probation violations and recommend high bail. Such witnesses may fear drugs being planted on them, charges being falsified, and cases being fixed; not to mention the possibility of physical violence or the sinister prospect of having the line go dead when they dial 911. What can the prosecutor do to obtain the cooperation of a witness such as this who is deathly afraid to be seen anywhere near the Federal courthouse?

First, it is not obvious to many people that there is anyone in Government who can help them with a dirty cop. As a result, it may be necessary to convince the witness that there are people in Government whose job it is to prosecute anybody who violates the law, regardless of whether or not they carry a badge.

Such witnesses also have to know that the Government will pursue them relentlessly if they do not cooperate. Sometimes this means having the case agents track the witness down and escort him or her to court, or even arrest the witness for failure to appear where so ordered by a court. If the witness continues to be late or to not show up for grand jury or trial, you may have to ask the case agent to interview the witness's friends and neighbors concerning their whereabouts. This creates a strong incentive for the witness to show up next time so that everybody in town will not learn that he or she had an appointment with you. This is a very coercive tactic, but in certain kind of cases, it may be the only effective way to compel the appearance of recalcitrant witnesses.

Persuade the Witness

One technique that has been used successfully to obtain the cooperation of a reluctant witness (especially when the fear is publicity or retaliation) is to explain to the witness that on the present state of the evidence against the target it looks like there is going to have to be a trial -- a trial at which the witness will have to testify -- publicly. Furthermore, the only possible way that there will not be a trial would be if the target pleads guilty to the crime -- a situation which is unlikely to occur given the uncorroborated nature of the witness's testimony. On the other hand, the argument goes, if the witness could be persuaded to provide the Government with irrefutable evidence of the target's guilt -- perhaps by recording a phone call or two to the target -- then perhaps the necessity of a trial could be avoided. The point is that if you can make the witness understand that the only way to avoid having to testify is to help the Government gather sufficient evidence to induce a guilty plea, the witness's enthusiasm for wearing a wire or recording a phone call may increase dramatically.

Help the Witness

Every prosecutor has at his or her disposal a wide range of benefits that can be offered to sweeten the pot for a witness -- everything from an agreement to report the witness's cooperation to the court at the time of sentencing all the way to an agreement not to indict the witness at all. This package of benefits also includes everything in between such as an agreement to allow a witness to recant perjured testimony, an agreement not to press certain charges or an agreement not to pursue certain targets. All of these promises, rewards and inducements will, of course, have to be disclosed to the defendant and to the court at the appropriate time.

Other carrots that the prosecutor can offer the witness include agreements to recommend no jail, to stand silent at sentencing, to seek a reduction of a sentence under Rule 35 or to write a letter to the Parole Commission. There are endless

possibilities depending on the facts of a particular case and the considerations involved.

One particular incentive worth mentioning that can be offered to certain witnesses who have other professional interests at stake is to agree to go to bat for the witness in those other forums such as the Board of Bar Overseers, professional licensing boards and the like. Frequently, such assistance can be accomplished simply and diplomatically. For example, one company that assisted the Government in a recent Government contracting investigation suddenly found itself embroiled in proceedings aimed at revoking the cooperating company's license to do business in the state as a result of publicity surrounding the investigation. The licensing board's efforts to revoke the license ended abruptly upon receipt of a letter from the Federal prosecutor stating that the company in question had been cooperating in a Federal probe and that the prosecutor assumed that any action taken by the board was not intended to interfere with such cooperation or to intimidate or deter others from coming forward.

Confront the Witness

Another technique that has proven successful in inducing cooperation involves a carefully orchestrated confrontation with a subject of the investigation during which the subject is shown some of the Government's evidence against him and is then given an opportunity to cooperate. This technique has been most effectively used toward the end of a long-term undercover operation during which a cooperating witness has recorded incriminating conversations with numerous subjects who have subsequently been subpoenaed to testify in the grand jury and who have denied any knowledge of or involvement in corrupt activity. When the Government wants some of these subjects to be witnesses as well as defendants, the prosecutor may want to consider calling up one or more of the subjects (or their attorneys if represented by counsel), and asking them to come to the prosecutor's office for a meeting. The subject should be told that the grand jury has been conducting an investigation into corruption, that the investigation has turned up some serious evidence that relates to the subject and that you would like to show some of that evidence to the subject at the meeting. If you are dealing with the subject's lawyer, tell the lawyer that you insist on the client's presence and that neither the client nor the lawyer will have to say a word -- they can simply listen.

During the confrontation meeting, the prosecutor and the case agent should make a presentation of the evidence. In the scenario described above, the presentation would include: (1) the tape recording (cassette) of the subject's admission to the cooperating witness of having received bribes; (2) a transcript of the incriminating conversation highlighted to those portions where the most devastating admissions are made (in

some cases, you may even want to increase the dramatic effect by playing selected portions of the tape in the presence of the witness and his lawyer while they follow along with the transcript); and (3) a copy of the witness's grand jury transcript with those key portions where the witness denies any involvement in corrupt activity underlined.

At this point in the confrontation, assuming the witness and his or her lawyer have not walked off in a huff and bluster, the Government has the witness in a very vulnerable position. You have shown them enough of your hand to convince a reasonable person that a felony has been committed. It may be possible, at that point, to get the witness to agree to cooperate and to plead to some charge (perjury, bribery, mail fraud, conspiracy, etc.) in exchange for having a bit more say about the Government's anticipated recommendation at the time of sentencing. If you want the witness to wear a wire or perform some other extraordinary service to the Government, you may have to go a bit further and it may be appropriate to consider not indicting the witness at all.

Whatever the prosecutor decides to do at this point, the basic pitch is, as one veteran AUSA in Boston used to put it, "The train is leaving the station and I don't much care whether your client is on it or under it." The choice for the client is a tough one but, where the prosecutor has sufficient leverage, the decision is more often than not a clear one. 4/

Polygraph the Witness

Although there is a long-standing debate over whether or not polygraphs should be admissible in court or whether or not they should be routinely used in criminal investigations, there is no question but that in certain cases, polygraphs can be a useful investigative tool. 5/ Regardless of whether or not use of the polygraph is, in fact, an accurate means of ascertaining whether or not someone is telling the truth, many people believe that it

---

4/ You should be aware that some commentators have challenged the above-described tactic as an unfair "perjury trap" but the overwhelming caselaw says it is legal and proper. A Federal prosecutor has no obligation to tell a witness testifying under oath in grand jury everything that the Government knows, especially, as here, where to do so would disclose the identity of the cooperating witness who wore the wire. See, United States v. DelToro, 513 F.2d 656, 664 (2d Cir. 1975).

5/ The advice given in this section is a subject of some dispute. For another viewpoint, see the chapter on Use of Polygraphs by Lee J. Radek.

is. As a result, the psychological pressure created by the prospect of having to take a polygraph can be useful in inducing cooperation. This is especially true where the witness, as a result of a plea agreement with the Government, is required upon request of the prosecutor to submit to a polygraph examination regarding the truthfulness of any aspect of his or her cooperation. Such a clause in a cooperation agreement can go a long way towards keeping certain witnesses honest in their dealings with the Government.

Similarly, demands that a witness submit to a polygraph examination can also be useful as a means of putting pressure on lying or otherwise uncooperative witnesses to change their mind. In some cases, this pressure has been applied directly in the grand jury. For example, if a prosecutor has evidence that a particular witness has knowledge of corrupt activity, but the witness persists in denying any such knowledge, one option might be to ask him or her under oath in front of the grand jury if he or she would be willing to submit voluntarily to a polygraph examination regarding the truthfulness of the testimony given. If the witness says "yes," and the polygraph examiner is standing by ready to perform the examination, the prosecutor can simply suspend the witness's testimony while the test is performed. That way, there is no wiggle room for the witness to cancel the test, avoid showing up on the day scheduled or employ any of the other excuses that witnesses who initially say they are willing to take a polygraph later use to avoid being put on the box. On the other hand, if the witness takes and passes the polygraph examination, that information should be important to the prosecutor as well.

Immunize the Witness

The immunity power is perhaps the most powerful tool available to Federal prosecutors seeking to obtain the cooperation of corruption witnesses. The judicious use of formal and informal immunity in the course of an investigation, coupled with a well-publicized practice of prosecuting perjury cases, can be the dynamite that blasts a corruption investigation wide open.

An important rule to keep in mind when dealing with an immunized witness (or any other accomplice witness for that matter) is not to tell the witness everything the Government knows. Rather, such witnesses should be told only enough to keep them honest; some information should be held back in order to insure that the witness tells the whole story. For example, if you know about five bribes received by the witness, you may want to ask about the first three, and then ask what else the witness has done. That way if the witness does not tell you about the other two bribes, you can use that information to assist you in getting the whole truth.

One final technique concerning immunity is worth mentioning. In investigations involving a potential corporate defendant as well as a high ranking officer of the corporation, one tactic that has proven helpful as a means of persuading the individual witness to go the extra mile -- record a call or wear a wire -- has been to advise the individual witness that if he or she fails to cooperate, the immunized testimony of the individual can and will be used to indict and convict the corporation. Use of the immunized testimony of the President or other senior officer or employee of a corporation against the corporation is not inconsistent with the standard Federal Compulsion and Immunity Order. In some cases, where scandal can be every bit as devastating for the corporation as it is for the individual, you may be able to persuade the individual to go the extra mile in order to protect the interests of the corporation. Obviously, this sort of leverage is going to be most effective when applied to smaller, closely held corporations where the interests of the individual and the corporation are virtually the same.

* * *

This paper has outlined a broad range of tactics that are available to prosecutors seeking to obtain the cooperation of witnesses in corruption cases, some of which are controversial. The purpose of including these tactics in this Manual is not to advocate their use in all cases, or even in many cases, but rather to make certain that prosecutors are aware of their existence so that they can be effectively used when appropriate. In every case, the prosecutor must balance the needs of the investigation and the importance of the witness's testimony against a legitimate concern for the rights of the individuals whose lives and fortunes are affected.

# CHAPTER FOURTEEN

## TRACKING DOWN CASH GENERATION SCHEMES

BY

JAMES SCHWEITZER*

Deputy Chief, Special Prosecutions Division
Northern District of Illinois

* James Schweitzer has put most of the techniques described herein to the test as a prosecutor of corruption cases in the United States Attorney's Office in Chicago, Illinois.

Mr. Schweitzer wishes to thank Special Agent Dennis Czurylo of the Internal Revenue Service for his insight and suggestions in this area. Agent Czurylo's efforts in conducting financial investigations of corrupt public officials in the Northern District of Illinois have resulted in the convictions of numerous public officials, including Richard LeFevour, the former Chief Judge of the First Municipal District, Circuit Court of Cook County, Illinois.

# TRACKING DOWN CASH GENERATION SCHEMES

## Introduction

Some of the most incriminating and persuasive evidence in a public corruption case is evidence that a public official benefited financially from his allegedly corrupt activity. For example, evidence that a public official or employee deposited large sums of cash into his bank account, purchased expensive items with cash, or spent significantly more money than can be attributable to his legitimate sources of income is strong corroboration for the testimony of cooperating co-conspirators regarding their involvement in a bribery or payoff scheme with the defendant. Depending upon the thoroughness of the Government's financial investigation, this type of evidence will be unimpeachable and unexplainable by the defendant. Moreover, this type of evidence will have strong jury appeal because the typical juror will not have conducted his or her financial affairs in a manner similar to that of the corrupt public official (depositing large sums of cash, spending one hundred dollar bills, placing assets in the hands of nominees, etc.). Thus, a jury will be more inclined to believe the testimony of cooperating co-conspirator witnesses when the Government presents financial evidence that demonstrates the defendant's ability to spend cash or engage in certain types of financial transactions, an ability that can be explained only by the defendant public official's corrupt activity.

The purpose of this paper is threefold: first, to present an overview of the types of financial evidence that are available in detecting and prosecuting bribery, payoff, or other types of cash generation schemes involving corrupt public officials; second, to outline an investigative plan for attacking the typical corruption case in which a public official is allegedly accepting bribes or otherwise benefiting financially by corrupting a public office; and finally, to discuss the most effective manner in which to present financial evidence at the trial of a public official.

## Overview of Financial Evidence

There are different types of financial evidence that, depending on the nature of the allegations, should be developed and presented in a public corruption case. Where an investigation focuses on a public official's receipt of bribes or otherwise unlawful financial enrichment, a prosecutor should secure the involvement of the Internal Revenue Service in the investigation as soon as possible. The financial evidence developed by IRS will serve not only as the basis for tax charges (evasion or false statement on return by virtue of the defendant's failure to report his bribe income), but will provide

powerful corroboration for the Title 18 charges (racketeering, extortion, mail fraud). Additionally, a thorough financial investigation of the defendant will provide for a more complete cross-examination of the defendant (as well as certain defense witnesses, including defendant's business associates, if they are called to testify) should the defendant choose to present a defense.

Methods of Proof

In situations where the IRS becomes involved in the financial aspect of the grand jury investigation, the Assistant United States Attorney should familiarize himself with the available methods of proof to support tax charges relating to a public official's receipt of unlawful income. Indeed, there may be cases in which the only viable charges against a corrupt public official will be tax charges, particularly if the Government is unable to secure the cooperation of individuals who were allegedly involved in the corrupt scheme with the defendant. These methods of proof include the following:

1. Specific Items:

This is direct proof that the defendant failed to disclose an item of income during the charged period. In United States v. Scott, 660 F.2d 1145 (7th Cir. 1981), cert. denied, 455 U.S. 907 (1982), evidence was introduced showing that the defendant, the former Attorney General of the State of Illinois, was instrumental in having his girlfriend placed on the payroll of Arthur Wirtz, a Chicago businessman. As the Attorney General, the defendant had enforcement power over many of Wirtz' businesses. The defendant's girlfriend received several thousands of dollars in "salary" even though she never appeared at work (and hence, had not earned the money). Because the evidence showed that it was the defendant who had actually "earned" the money (the "salary" was paid to curry favor with Scott who had arranged for the "ghost" payroll situation), defendant Scott was obligated to declare this specific item of income and, in fact, willfully omitted it from his return.

Whenever the Government has a witness who will testify that he carried bribes to a public official on behalf of a third party (bagman) or paid the bribes directly to the official on behalf of himself (bribe-paying attorney, bribe-paying businessman), this evidence is "specific items" proof that will support a tax charge. Often, the evidence is used in conjunction with an indirect method of proof (net worth, total expenditures, bank deposits) that utilizes circumstantial evidence to support a tax charge and provides corroboration for the Title 18 charges.

2. Net Worth:

In a net worth tax case, the Government proves that the defendant underreported his income for a given year as evidenced

by an increase in defendant's net worth in excess of defendant's reported income. First, the Government establishes a defendant's opening net worth or total net assets at the beginning of the prosecution period (calculated by subtracting the amount of defendant's liabilities from his assets, including any accumulated cash). Then evidence of the increase in defendant's net worth over the tax year is presented. The Government must show that the increase in net worth is due to a likely taxable source, such as receipt of bribes, or that there were no nontaxable sources of funds that account for the increase in net worth, such as loans, gifts, or inheritances. Finally, the Government must negate all reasonable nontaxable sources suggested by the defendant to explain the increase in net worth. The difference between the defendant's reported income and the increase in net worth for that year, after accounting for all nontaxable sources, is the unreported income that forms the basis for the particular tax charge (and, according to the Government's theory, represents the bribe or otherwise unlawfully-derived income underlying the Title 18 charges). In Scott, supra, the net worth method was used in conjunction with the specific items method to show that Scott diverted campaign contributions to his personal use and willfully omitted this and other income from his tax return.

3. Expenditures Method:

a. Total expenditures: This method, and a derivative method -- the cash expenditures method -- are the most useful methods of financial proof in a public corruption case. 1/ While

---

1/ While the cases often refer to the total expenditures method as the "cash expenditures" method, see United States v. Citron, 783 F.2d 307, 310 (2nd Cir. 1986); United States v. Bianco, 534 F.2d 501, 503 (2nd Cir. 1976); United States v. Fisher, 518 F.2d 836, 838 (2nd Cir. 1975); Taglianetti v. United States, 398 F.2d 558, 562 (1st Cir. 1968), the expenditures method actually employed in these cases was a total expenditures method involving a review of all types of expenditures, including those by cash, check, or other instrument. A strict cash expenditures method, however, involves an analysis based solely on a review of the defendant's use of cash (cash expenditures versus cash sources yielding excess cash expenditures). The cash expenditures method (which a jury is more likely to understand) should be used with the well-established total expenditures method of proof in order to avoid any questions of the validity of its conclusions. However, assuming all of the financial records are available, the excess expenditures calculated pursuant to both methods should be the same since the non-cash uses of funds both on the expenditures side and the source side of the total expenditures method are deemed irrelevant in the cash expenditures method and therefore cancel themselves out.

the net worth method is most often used in situations where an individual invests his ill-gotten gains in durable property (real estate, stocks, business ventures), the expenditures method is primarily employed in the typical corruption case where a corrupt official spends his bribes or unlawfully-derived cash on consumable items. Thus, a corrupt official might spend his cash bribes or unlawfully-derived financial gains on food, entertainment (restaurants, bars), clothing, travel, girlfriends or boyfriends, or other less traceable items (cashier's checks, money orders, traveler's checks, etc.).

In the total expenditures method of proof, the Government calculates a "starting point" reflecting how much cash a defendant has at the beginning of the tax year (through defendant's financial statements, loan applications, financing arrangements, economic disclosure statements, admissions made to IRS, or a review of his financial condition prior to the indictment period). Then, all of the defendant's expenditures for the given year are totalled (increase in cash deposited into defendant's accounts, personal expenditures, checks written, cash purchases, third-party checks issued to the defendant but negotiated to another party, etc.). The Government next ascertains all of the defendant's nontaxable sources of funds, including loans, inheritances, gifts, checks, tax refunds, insurance settlements, nontaxable portion of assets disposed of during the tax year, and any prior accumulated cash. Where the defendant's total expenditures for a given year exceed his reported income, nontaxable sources of income, and available cash at the beginning of the year, the excess represents the amount of unreported income (bribes or otherwise unlawfully-derived financial gains) that forms the basis of the criminal conduct charged in the indictment.

This may sound complex, but can be a remarkably successful means of prosecution. An example of the total expenditures method employed in a public corruption context was the prosecution of Richard LeFevour, the former Chief Judge of the First Municipal District in Chicago, Illinois. In United States v. LeFevour, 798 F.2d 977, 980 (7th Cir. 1986), the Court referred to this evidence, saying "[A]part from testimony by the bagmen and other witnesses to the alleged bribes, the prosecution relied heavily on a reconstruction of Judge LeFevour's finances, showing that he spent much more money than he received from all known legitimate sources." Similarly, in United States v. King, 563 F.2d 559, 561 (2nd Cir. 1977), the Government established that the defendant, a police officer, made expenditures "well in excess" of his reported income in convicting the defendant of tax violations.

b. Cash expenditures: The most commonly used method of financial proof to support charges in public corruption in the Northern District of Illinois is the cash expenditures method. This method is the most understandable and probative method of

proof where the charges involve a bribery, payoff, or other type of unlawful cash generation scheme engaged in by a corrupt public official. This type of financial analysis deals solely with the defendant's use of cash. There are only so many lawful ways in which one can obtain cash: for example, writing checks to cash, withdrawing cash from a bank account, cashing salary or third-party checks, receiving cash gifts, or loans. By totalling all of the defendant's cash expenditures (depositing cash into an account, purchasing items or services with cash, paying bills with cash, etc.), and subtracting all of his legitimate cash sources (checks to cash, withdrawing cash, cashing third-party checks or one's payroll checks, prior accumulated cash, etc.), the Government can then determine the amount of cash expenditures that the defendant has made in excess of his legitimate sources of cash for a given period. The amount of this excess cash represents the cash bribes, payoffs, or otherwise illegally-derived funds resulting from the defendant's criminal conduct. The greater the excess of the defendant's cash expenditures, the more persuasive is the proof and the more difficult it will be for the defendant to devise some plausible explanation for the excess cash expenditures. Given the nature of the charged criminal conduct, a cash bribe, payoff or other type of unlawful cash generation scheme, this method -- which focuses simply on the defendant's use of cash and excess cash expenditures -- is the simplest and most persuasive type of financial analysis that can be presented to a jury. This method of proof has been used in various judicial corruption cases where the judges spent significantly more cash than was available to them. See United States v. LeFevour, 798 F.2d 977, 980 (7th Cir. 1986), and United States v. Sodini, 85 CR 813 (N.D. Ill. 1986).

4. Bank Deposits Method:

This method of proof is normally used when a defendant makes regular deposits to a bank account while employed in or conducting an income-producing business. Often, this method results in an expenditures-type analysis as the investigation focuses on defendant's cash deposits and other expenditures made during the indictment period. In United States v. Smalley, 754 F.2d 944, 946 (11th Cir. 1985), the defendant (Sheriff of Marshall County, Alabama) received cash payoffs from individuals who were involved in the illegal sale of alcoholic beverages and was convicted of tax violations based on a bank deposits/cash expenditures method of proof.

Other Types of Financial Evidence

Whether or not there are tax charges accompanying the substantive bribery, payoff or other type of cash generation criminal conduct charged against the public official, there are various types of financial evidence that should be developed and presented. It is well established that in cases where the charged crime involves a motive of financial enrichment, "[a]

sudden increase in cash expenditures or other unusual circumstances in the defendant's handling of money" may be probative and admissible. United States v. Crisp, 435 F.2d 354, 360 (7th Cir. 1970). [2/] Evidence that, during the indictment period, the defendant public official expended large sums of cash or engaged in certain types of cash transactions (evidence of the defendant's changed spending habits or lifestyle) will corroborate the Government's Title 18 proof regarding the defendant's participation in the charged scheme. Examples of persuasive financial evidence in this context include the following:

1. No Checks to Cash:

A review of the manner in which the defendant generates cash during the indictment period may demonstrate that the defendant had an unlawful cash source. The defendant's banking and checkwriting activity may reveal that during the charged period, the defendant wrote only a few checks to cash and made few cash withdrawals while depositing almost all of his salary checks. Yet, both prior to the time the defendant began accepting cash bribes and subsequent to the bribe period (usually after the Federal investigation began or once the defendant became aware of the investigation through the Government's issuance of subpoenas), the defendant wrote substantially more checks to cash and/or made more cash withdrawals or cashed more of his paychecks. Charting this out is persuasive evidence that during the indictment period, the defendant did not have to write checks to cash or generate his own cash because he was receiving cash bribes or payoffs and thus deviated from his normal spending or checkwriting habits. Also, one should review the defendant's checkwriting activity to determine if the defendant wrote fewer non-sufficient funds (NSF) checks during the charged period because his bank account was better funded (with cash deposits) during the period in which he is alleged to have received the cash bribes/payoffs.

2. No Loans:

In many instances, corrupt public officials who receive bribes on a systematic or regular basis do not finance the purchase of items during the bribe period. Yet, if they frequently financed or secured loans outside the indictment period when they did not have an unlawful cash source, this pattern in their lifestyle is another factor probative of the claim that they benefited financially through the alleged criminal conduct.

---

2/ See also, United States v. Towers, 775 F.2d 184, 187 (7th Cir. 1985); United States v. Vannerson, 786 F.2d 221, 223-224 (6th Cir. 1986); United States v. Kwitek, 467 F.2d 1222, 1225 (7th Cir. 1972).

3. Using Cash Instead of Checks:

Evidence that during the indictment period, the defendant used cash to pay bills despite his having maintained a checking account is probative of the defendant's attempt to hide his illegally-obtained cash. Thus, if it can be shown that the defendant purchased cashier's checks or money orders with cash and used these to pay bills (clothing store, utilities, country club, mortgage) instead of depositing the cash into his checking account and writing a check, it can be argued that the defendant did not want to "surface" his cash bribes and therefore refrained from depositing the cash into his bank account. Rather, the defendant chose to use a method of payment in which tracing the source of funds is more difficult. Securing information from a bank or financial institution showing that the defendant frequently purchased cashier's checks, money orders or traveler's checks with cash is strong corroboration for the Government's claim that the public official was involved in an unlawful cash generation scheme.

4. Unusual Use of Cash:

Evidence of various types of cash expenditures made during the charged period may suggest that defendant had an alternate cash source which, the Government argues, involved the bribery/payoff/unlawful cash generation scheme alleged in the indictment. Thus, evidence of frequent cash deposits, the use of large bills ($100s, $50s), unusually large cash expenditures made to purchase clothing, stereos, jewelry, cars, etc., is probative of the defendant's receipt of cash and hence, his participation in the charged scheme. The probative value of this type of evidence is enhanced to the extent that the Government can show that the defendant did not generate the cash for these expenditures through legitimate means (cashing salary checks, tax refund checks, dividend checks, etc., or writing checks to cash from an account that appears to be funded by legitimate sources).

5. No Checks or Credit Charges:

Often, the absence of checks or credit charges during the indictment period is extremely probative of the claim that the defendant was spending sums of cash that were derived from his unlawful conduct. Thus, where it can be shown that the defendant took trips or vacations (via an isolated hotel/restaurant bill paid by the defendant in another state or country as evidenced by a credit card charge, personal check, or negotiation of a traveler's check), there is a strong inference that while on these trips, the defendant spent cash (since it takes money to travel and the traceable credit charges or checks, being few in number, do not account for other likely expenditures incurred in the course of such travel). Similarly, where the defendant's checking account and credit card slips reveal no expenditures for daily incurred living expenses (food, clothing, entertainment), it can be argued that the defendant spent his cash bribes/payoffs

on the incidental expenses that everyone incurs in normal living. Likewise, where it can be shown that outside the alleged bribe period the defendant normally charged gasoline, car repairs, restaurant expenses, etc., but such charges do not appear during the indictment period, the Government may argue that the defendant's spending habits reflect an alternate cash source during the relevant period.

6. Safe Deposit Box Activity:

Where it can be shown that a defendant had a safe deposit box, the Government should review the activity concerning entries to the box both during and outside of the charged period. If the safe deposit entry records reflect frequent activity during the indictment period, this provides a strong basis for arguing that the defendant stored his cash bribes in the safe deposit box and withdrew the cash when needed. Also, if the entry records show activity correlating with trips taken by the defendant or dates of large cash purchases, the Government may argue that the cash bribes were concealed in the safe deposit box and were the source of the defendant's personal cash expenditures. The absence of activity outside the period corroborates the claim that the defendant was involved in a bribery scheme during the charged period (and had no need to frequent the safe deposit box outside of the charged period because his bribery scheme was not in effect). Moreover, the absence of entries prior to the charged period will help negate any defense that the defendant had a prior accumulated cash hoard which, the defendant may later attempt to argue, explains his expenditures during the charged period.

7. Use of Third Parties in Financial Transactions:

Evidence of cash or check deposits into third-party/nominee accounts resulting in checks issued from the third-party account to the defendant (which checks are negotiated by the defendant) suggest an attempt to launder bribe or otherwise unlawfully-derived money. Attempts to conceal the payment of money to a public official (through the use of nominees, trust accounts, etc.) are indicative of an unlawful, illegitimate transaction and should be so argued to a jury. See United States v. Isaacs, 493 F.2d 1152 (7th Cir.), cert. denied, 417 U.S. 976 (1974).

There may be circumstances in which the Government will not want to introduce financial evidence in its case-in-chief but would rather use the evidence for purposes of cross-examining a defendant. For example, where there are several defendants and the investigation has uncovered useful financial evidence with respect to only one or two of them (particularly if the financial information is only moderately persuasive), it may be wiser simply to use the evidence for purposes of cross-examination. Otherwise, if the Government highlights such evidence in its case-in-chief against some of the defendants, the other defendants may argue that they are innocent because had they been

accepting bribes, the Government would have been in a position to present financial evidence of their bribe-taking.

## Conducting the Financial Investigation

### Cash Bribe, Payoff, or Kickback Scheme

In conducting a grand jury investigation that is designed to uncover financial evidence of the defendant's receipt of cash bribes, payoffs, kickbacks, or otherwise unlawfully-derived money, the first step should be to secure the defendant's tax returns for the period in which he is alleged to have engaged in the unlawful conduct.

Review the returns to determine the defendant's income sources, deductions, defendant's banks (identified via the listed interest expense or interest income), and other financial information presented on the return. Subpoena the defendant's payroll checks and determine where these checks are cashed or deposited. Subpoena all records of the defendant's financial transactions and relationships with these financial institutions. A standard attachment should accompany every subpoena issued to a financial institution, asking for all records pertaining to the defendant, his wife, or anyone else whose financial affairs may be intertwined with the defendant, reflecting any type of a financial relationship between the defendant (or any of his family members) and the bank. This should include records of a checking account, savings account, certificates of deposit, NOW account, signature card, monthly statements and correspondence, deposit slips, deposited items, cancelled checks, wire transfers, cashier's checks, money orders, traveler's checks, withdrawal slips, Currency Transaction Reports (reports of cash transactions in excess of $10,000), IRS Forms 1099, loan files (including financial statements, credit reports, loan applications), safe deposit information, trust accounts, records of investment, documents relating to any credit card or credit-extending account, and any other financial information involving the defendant.

Subpoena bank information from all banks/financial institutions in the areas where the defendant works, lives, or has a summer cottage or vacation home. It may be that the defendant has accounts at banks separate from those where he deposited his legitimate sources of income.

Subpoena copies of the defendant's cancelled checks (kept on microfilm by the bank) or subpoena the original cancelled checks from the defendant (which may require "act of production" immunity, United States v. Doe, 465 U.S. 605 (1984)). These will provide leads to other financial institutions, business ventures, brokerage houses, travel agencies, credit card companies, girlfriends, boyfriends, flower shops (get underlying records to reflect messages indicating a potential girlfriend or boyfriend),

and stores and restaurants frequented by the defendant. Interviews should be conducted of proprietors of businesses, stores, and restaurants suggested by the review of the cancelled checks to determine the extent of any expenditures made by the defendant, cash or otherwise.

Interview the payees of checks to determine the extent of their financial relationship with the defendant and to preclude any later fabricated testimony that they were the nontaxable sources of funds for the defendant (cashed checks for the defendant, made cash gifts or loans to the defendant, etc.). Secure copies of the defendant's deposit slips as they will reflect whether the deposit was made in cash and may reflect teller notations as to the types of bills used by the defendant in making the cash deposits (e.g, "10 - $100 bills").

The financial statements contained in loan files (listing defendant's assets, including cash on hand, as well as liabilities) will be helpful in establishing a "starting point" and in developing leads to other financial information. A review of credit reports will reflect all instances in which a defendant applied for credit cards (banks, charge companies, car dealers, Saks Fifth Avenue, etc.). Subpoena records from these entities and determine whether the defendant used cash to pay the charges on his accounts. The underlying credit card slips will be useful to determine the locations where the charges were incurred (out-of-state or out-of-the-country vacations, travel).

If the credit card slips reflect the names of out-of-state rental car companies, subpoena the underlying rental agreement; this will reflect where the defendant stayed on his travel. Then subpoena the records of the hotel used by the defendant to determine the manner in which the defendant paid his bill (cash) and any local phone bills made by the defendant (suggesting leads to other expenditures).

Secure the Information Return Program (IRP) transcripts maintained by IRS (computer-generated form reflecting information submitted to IRS by financial organizations that paid interest to the defendant or engaged in another type of financial transaction with the defendant, such as a stock transaction through a brokerage firm). Obtain the defendant's passport (reflecting foreign entry and exit records) and relevant United States Customs Service records (Currency and Monetary Instrument Reports required to be filed whenever an individual transports an amount of currency in excess of $5,000 into or out of the United States).

If the defendant is a member of any professional organization or has access to any campaign funds, secure records of this relationship in order to prevent and/or rebut any subsequent claim that he obtained cash from these sources (as reimbursement for personal expenses) and used this cash during the charged period (explaining away part of the Government's

expenditures evidence). Obtain all statements of economic interest or other disclosure statements that the public official is required to file with the state or any public regulatory agency regarding loans, gifts, lists of creditors, etc. This will commit the defendant to a financial position and limit his ability to provide bogus nontaxable sources of cash later at trial. Review public probate records (inheritances), insurance records (loans against insurance policies, insurance settlements) and any other leads to nontaxable sources.

Make sure that early on in the financial investigation (before the defendant retains an attorney), an attempt is made to interview the defendant. This may lead to admissions regarding the lack of accumulated cash, disclosure of financial information, and possibly false exculpatory statements (false statements offered by the defendant in a futile attempt to explain the source of various cash expenditures). Also, interview the defendant's tax preparer. This individual may be in a position to provide leads to financial institutions, the names of defendant's business associates, and handwritten notes and memos submitted by the defendant to the tax preparer.

There are additional investigative leads that one can pursue. Instituting a mail cover on first class mail addressed to the defendant will produce the names and addresses of financial institutions, businesses, etc., that may have a financial relationship with the defendant. A mail cover is particularly helpful at the beginning of the new year when year-end bank statements are sent to customers. Defendant's telephone records should be subpoenaed disclosing out-of-state calls (toll records) involving business ventures, banks (in which he has deposited his unlawfully-derived profits) and, where available, in-state calls to travel agencies, brokerage firms, real estate offices, financial institutions, etc. Secretary of State records concerning all vehicles registered to the defendant or members of his family should be subpoenaed and reviewed to determine the vehicles owned by the defendant and the dealership that sold the vehicles to the defendant. The dealership's records should be subpoenaed to ascertain the manner in which the defendant purchased the car ($10,000 cash).

If a financial institution does not keep a listing of the individuals who purchased cashier's checks, money orders, or traveler's checks, a manual search of such instruments purchased at defendant's bank should be conducted. In United States v. Ambrose, 740 F.2d 505 (7th Cir. 1984), cert. denied, 472 U.S. 1017 (1985), a corruption case involving ten Chicago police officers who regularly accepted cash bribes from various narcotics dealers, a manual search of the bank's cashier's checks sold during the bribe period resulted in the discovery of numerous cashier's checks purchased in cash by some of the defendant police officers. More importantly, bank employees (whose names appeared on the face of the cashier's checks as having sold the checks to the defendants) were then interviewed

and stated that six of the defendant police officers regularly brought in stacks of old, crumpled bills ($5s, 10s, 20s - the types of bills used by heroin addicts to purchase drugs from the bribe-paying drug dealers) to the bank and exchanged the smaller bills for larger bills ($50s, 100s). At the sentencing of the defendants, the judge who presided over this three month trial referred to this financial evidence in the following manner:

> And, of course, the most telling evidence in this case, in my view, and it was evidence that was never explained, was the evidence of the bank tellers, who testified to the possession of amounts of money by these defendants that corroborated in a very significant way the testimony of the dope peddlers.

Id. at 522. Similarly, in a recent judicial corruption case, United States v. Reynolds, Slip Op. No. 86-2327 (7th Cir., decided June 9, 1987), a manual search of the cashier's checks sold at the defendant's bank produced thousands of dollars in cashier's checks purchased by the defendant. Because the bank did not keep records of the manner in which the cashier's checks were purchased, a manual review of the bank film of all deposited items on the days of the purchase of cashier's checks was done in order to preclude the possibility that the defendant negotiated any instrument to purchase the checks. Because it was determined that the defendant had used no instruments (including any personal checks) to buy the cashier's checks, the obvious inference (argued to the jury) was that the defendant used cash derived from his bribe-taking activities to purchase the cashier's checks.

The Government should subpoena any business-related notes, diaries, appointment books, desk calendars, or other records maintained by the defendant or his co-conspirators. Where the defendant made entries in these records with regularity at or near the time of the described event, these records will qualify as business records under Federal Rule of Evidence 803(6). See, United States v. McPlartin, 595 F.2d 1321, 1347 (7th Cir. 1979); United States v. Hedman, 630 F.2d 1184, 1197-98 (7th Cir. 1980). If the Government is unable to establish a business records foundation for the defendant's records through a qualified witness (defendant's secretary, co-worker, etc.), such entries in the records may be deemed admissions of the defendant and hence admissible (as long as the Government can authenticate the defendant's entries through handwriting analysis, etc.). Such records may provide evidence of the defendant's meetings with co-conspirators, relevant telephone numbers, vacation schedules, travel, leads to expenditures (restaurants, businesses), and

names of business associates. 3/ Also, where the bribe-payer is a Government witness (attorney who paid off judge, businessman who paid off public official, etc.), attempts should be made to secure any notes or records of that individual's payment of bribes to a public official that may corroborate his testimony. Thus, in Hedman, supra, a diary kept by a bribe-paying businessman containing notations of his payment of bribes to Chicago Building Inspection Supervisors was admitted as a business record.

In short, get every available piece of financial information on the defendant in order to have a complete picture of his financial affairs. If this is done, one can present persuasive financial evidence without its being impeached or otherwise explained by the defendant.

Once all of this data is amassed, the investigating agents should prepare summary charts organizing the information in the most effective form. This would include charts showing the defendant's total expenditures, nontaxable sources of income, excess of expenditures over nontaxable sources, excess of cash expenditures over legitimate cash sources, pattern evidence (checks to cash and spending habits during and outside payoff period), cash deposits and large cash expenditures during the bribe period, and any other prejudicial financial information that should be highlighted. 4/

Prior to the indictment, the Government should deliver a letter to the defendant's attorney indicating that the defendant is under investigation for violations concerning the unlawful receipt of money for the years in question. The purpose of this letter is to invite the defendant to provide the Government with leads to any nontaxable sources of funds that were available to the defendant during the years in question. Given the Government's obligation to negate nontaxable sources of income, the Government should attempt to verify the accuracy of any leads

---

3/ The contents of such records should not be deemed privileged since they are business-related and were prepared voluntarily. See Fisher v. United States, 425 U.S. 391, 409-410 (1976). The Government may, however, be required to secure act of production immunity, see, United States v. Doe, 465 U.S. 605 (1984) (the act of providing records may have testimonial aspects relating to the existence, possession, or authenticity of the subpoenaed records), even though the contents of the records are not privileged.

4/ The types of charts will obviously vary depending on what evidence is developed and what methods of proof are utilized, including the various indirect methods of proof referred to earlier.

provided by the defendant. If such leads turn out to be bogus, the Government has strong evidence of false exculpatory statements made by or on behalf of the defendant. 5/ If the defendant fails to provide any leads, the Government has demonstrated the thoroughness of its investigation and the reasonableness of its conclusions as to its method of proof of unreported income.

The Government should put any key financial witnesses before the grand jury in order to lock in their testimony. Failure to do so may result in less favorable testimony (concerning defendant's laundering of money, possession or expenditure of large amounts of cash, use of $100 bills, etc.) at trial because of a witness' reluctance to testify against a public official. Also, one should anticipate possible defense witnesses who may be identified as nontaxable sources of funds of the defendant (friends, associates of the defendant who might say they gave or lent money to the defendant). The prosecutor should attempt to limit their testimony as much as possible by subpoenaing them before the grand jury (before they have a chance later to fabricate a story more beneficial to the defendant) and securing any useful information regarding the defendant.

Finally, there may be situations in which a cooperating Government witness is in a position to consensually monitor incriminating financially-related conversations with a corrupt public official. Although these situations are rare, a potential defendant may attempt to contact a co-conspirator (who, unbeknownst to the defendant, may be cooperating with the Government) and try to secure his silence. The cooperating witness may be able to discuss prior cash bribe/payoff transactions with the defendant utilizing various scenarios ("my lawyer tells me I may be subpoenaed and I'm worried that the Government may be able to trace the cash I paid you"; "you didn't deposit any of the cash I gave you, did you?"; or "what should I say about the cash I paid you if the Government grants me immunity?").

Where the Government has undertaken a complete financial investigation, a potential defendant may feel compelled to react to this investigation (and the resultant exposure of large cash expenditures or changed spending habits during the alleged bribe period) by attempting to "manufacture" false evidence (e.g., provide phony nontaxable sources of funds). Thus, interviewing

---

5/ In United States v. Scott, 660 F.2d 1145 (7th Cir. 1981), cert. denied, 455 U.S. 907 (1982), the defendant provided various leads, including a list of individuals who had supposedly given cash to the defendant in the form of "gifts." These leads proved to be false and were argued to be false exculpatory statements and indicative of Scott's consciousness of guilt.

and subpoenaing certain associates of the defendant may result in an individual's admitting that the defendant approached him and requested that he testify to events that are false. In any event, the Government will be in a better position to expose the falsity of any explanations later offered by the defendant if it has performed a thorough investigation of the defendant's financial affairs.

Other Types of Unlawful Cash Generation Schemes

Not all unlawful cash generation schemes involve the direct payment of cash bribes to public officials from an individual or individuals over whom the official is in a position to exert power and influence. Often, an official will take elaborate steps to conceal his bribe-taking or otherwise unlawful financial enrichment. These types of situations may present special problems in tracing the unlawfully-derived funds to the defendant. Examples include the following:

1. Nominees:

A public official may participate in a scheme whereby he directs an individual to pay a bribe (or funnel money from an official's hidden ownership interest in some entity benefited by the official's public action) through a third party nominee. Thus, in United States v. Isaacs, 493 F.2d 1124 (7th Cir.), cert. denied, 417 U.S. 976 (1974), the ex-Governor of the State of Illinois and the former Illinois Director of Revenue received in excess of $150,000 in cash bribes resulting from the issuance of stock in the names of third-party nominees in exchange for their acting on behalf of certain Illinois racing interests. The stock dividends and the ultimate proceeds of the stock sales were distributed to third parties (checks issued in the names of third parties who deposited the checks into their accounts) who then issued checks to the defendants. As the Seventh Circuit noted, the ex-Governor received the cash benefits of the bribery by having the stock proceeds laundered or "washed" through nominees. 493 F.2d at 1151.

Similarly, in United States v. McPartlin, 595 F.2d 1321 (7th Cir. 1979), an Illinois legislator and other public officials received thousands of dollars in bribes from a business seeking a multi-million dollar city sludge-hauling contract. In order to generate cash to pay the bribes, the businesses caused checks to issue to third-party intermediaries who deposited the checks into a business account, withdrew cash from the same account, and then gave the cash to a business official who paid off the public officials. Other examples of a corrupt official's use of nominees include United States v. Keane, 522 F.2d 534, 538 (7th Cir. 1975)(alderman secretly profited by purchasing tax delinquent properties through nominees, holding the properties in land trusts, and then using his influence in city council affairs

to cause certain encumbrances to be removed from the property, thereby making the property more valuable); and United States v. Bush, 522 F.2d 641, 644 (7th Cir. 1975)(city employee concealed his interest in a company that obtained an advertising contract with the City of Chicago and caused the proceeds of said contract to issue to a third-party nominee who then passed the money on to the defendant city employee).

In these types of unlawful schemes, the Government must interview drawers of checks who may have served as nominees of the defendant, subpoena records of their checking account to determine who funded the account from which the check to the defendant was written, and determine whether the defendant had any ownership interest or relationship with that entity.

2. False Documentation:

In the past, corrupt public officials have exploited their positions by causing false documents to be submitted by a vendor doing business with a municipality or state government to a public agency and billing the agency for goods and services that were never delivered or the value of which has been greatly inflated. The corrupt public official then split the inflated amount with the supplier of the goods or services who did business with the public agency. Thus, in United States v. Kovic, 684 F.2d 512 (7th Cir. 1982), the defendant, an employee of the Chicago Police Department (CPD), was in charge of approving bills for work allegedly done by private companies for the CPD's Motor Maintenance Division. The fraudulent work orders were accompanied by false invoices reflecting goods or services that had not been provided to the city. The defendant approved the bills, causing the city to issue payment in the requested amounts to the vendors who then kickbacked money to Kovic. A similar scheme occurred in United States v. Spitler, 800 F.2d 1267, 1269-70 (4th Cir. 1986).

Another false document-type situation involves the use of fictitious payees and/or padded payrolls. In a fictitious payee situation, a corrupt public official/employee causes salary checks to be issued to a nonexistent person. The checks are then negotiated by the official's endorsing the checks that were sent to an address under the control of the official and/or deposited into the official's account (or an account in the name of the fictitious person but under the control of the official). If the checks are issued to a real individual (who purports to be an employee, but who never appears at work, and in fact, does no work), that individual might kickback a portion of the "salary" to the public official or spend his working hours doing things beneficial to the public official (campaign work, work for some private company in which the defendant has a proprietary interest, etc.).

Likewise, a public official may establish a "padded payroll" in which inflated "salaries" are paid to certain employees

(excess overtime, etc.) who then split the difference between the amount paid and the amount that should have been paid with the public official or use the excess cash for purposes beneficial to the defendant public official (campaign expenses, etc.). In these situations, it is important to not only demonstrate the defendant's cash expenditures in excess of his legitimate sources of income, but also to show the acts of concealment that cause his financial enrichment. Thus, evidence of the role played by the defendant in establishing a fictitious payee ("ghost" payroll) or padded payroll, the disposition of the proceeds of the check issued, the relationship between the defendant and the payees, and the elaborate steps taken to disguise the defendant's participation in the scheme must be developed in order to expose the breadth of defendant's criminal activity.

Often, individuals who wish to improperly influence public officials set up their own cash generation schemes through bogus or fraudulent paperwork. The cash generated in the course of such schemes is then used to pay off a public official. In United States v. Barrett, 505 F.2d 1091 (7th Cir. 1975), the vice president of a company that sold voting machines to the City of Chicago paid cash bribes to the Clerk of Cook County (who was responsible for purchasing voting machines on behalf of the city). The vice president of the company generated the cash by issuing business checks to professional people for services rendered even though no such services had been rendered. The payees cashed the checks, retained a portion of the proceeds both as payment for their check cashing service and to use to pay taxes at the end of the year, and returned the remainder of the proceeds to the vice president who used the cash to pay off defendant Barrett. Although the payments to County Clerk Barrett were made in cash, the Government presented strong corroboration of the payoffs in the form of telephone records (records of calls from vice president Meyers to defendant Barrett's unlisted home telephone number), travel records (showing vice president Meyers' trips from his company's home base in Philadelphia to Chicago to meet with defendant Barrett) and safe deposit records (reflecting entries by vice president Meyers just prior to each meeting with Barrett).

Similarly, in United States v. Neal, 718 F.2d 1505 (10th Cir. 1983), the defendant supplier paid off various county commissioners by generating cash through a phony invoice scheme. In Neal, the defendant issued checks to the owner to a third-party supplier for the purchase of materials or supplies that were never delivered. The payee cashed the check, returned 90% of the cash proceeds to the defendant along with a bogus invoice of undelivered goods, and retained the balance of the cash as a commission. The defendant supplier then used the cash to pay off various county commissioners who ordered supplied from

the defendant's company. [6/] Wherever possible, this type of evidence (or evidence that a bribe-payer wrote checks to cash or withdrew cash from a bank account at or about the time of the alleged payoff) should be developed to buttress the witness's historical testimony that he paid off the defendant public official.

3. False Characterization:

Some public officials have participated in unlawful cash generation schemes by falsely characterizing money paid to them as attorney's fees, campaign contributions, or as some other purportedly legitimate fee. In United States v. Tuchow, 768 F.2d 855 (7th Cir. 1985), defendant Tuchow, a Cook County Commissioner and an attorney, demanded $25,000 from a building contractor in order to guarantee the authorization of a building permit for a condominium rehabilitation project. Tuchow attempted to disguise the payment as a legal fee by sending out a bill for services rendered despite not having performed any legal services for the contractor. The jury rejected this defense because of Tuchow's tape-recorded statements to a Government informant that he needed the money "to take care of some people", "there might be somebody else involved, you know . . . we're grown men" and the absence of any records, documents or other evidence that would have indicated legal services were performed. In United States v. Hunt, 749 F.2d 1078 (4th Cir. 1984), the defendant -- a state court judge in North Carolina -- told the bribe-payer that they should consider bribe payments for protection of certain gambling interests as "campaign contributions." See also, McPartlin, supra 595 F.2d at 1329. Such claims are ordinarily refutable by the manner in which the payments are made (cash paid in secretive manner, use of third party intermediaries, etc.), the absence of any record of the payment, the failure to list such payment on any economic disclosure or campaign contribution statements, prior consistent statements of the bribe-payer and/or prior statements reflective of the bribe-payer's state of mind, or circumstances which tend to show a deviation from standard business practices.

Presentation of Financial Evidence at Trial

Where the Government's investigation has uncovered strong financial evidence of the defendant's corrupt activities, this evidence should be emphasized at every stage of the trial. Given the impeachment problems of testifying co-conspirators who have

---

6/ See also, United States v. Siegel, 717 F.2d 9, 11 (2nd Cir. 1983) in which the defendants generated cash through cash sales of merchandise not recorded on company books and this cash was used to pay off union officials and buyers.

entered into plea agreements with the Government or who have been granted immunity, the financial evidence will provide strong corroboration for otherwise impeachable testimony. The more the jury focuses its attention on the financial benefits accrued by the defendant during the charged period, the more likely it will believe the testimony of witnesses who were involved in the bribery/payoff/unlawful cash generation scheme with the defendant.

Opening Statement

Often, it is worthwhile to begin an opening statement on a powerful note by capsulizing the nature of the case in a manner that will capture the jury's attention. For example: "This case is about bribery, about an individual who was elected to serve the public but who instead chose to violate that trust and engage in criminal conduct." Where the Government has strong financial evidence, an Assistant United States Attorney prosecuting the case might add the following: "...about an individual who regularly received cash bribes, deposited cash bribes into his bank account, used cash bribes in the form of $100 bills to buy items ranging from expensive suits to cashier's checks, and who, during the bribe period, spent approximately $50,000 in cash in excess of his legitimate sources of income. This is a case about public corruption." This tends to focus the jury's attention on the defendant's spending habits and, inferentially, his lucrative bribe-taking activities. Thus, by the time the prosecutor discusses the Government's co-conspirator witnesses (and their impeachable backgrounds and deals), and certainly, by the time the defense attorney stands up to give his opening statement, the jury knows that the defendant must have been receiving bribes -- how else could he have obtained all of this cash to spend?

An example of an effective opening statement that focused the jury's attention on the unimpeachable financial evidence and, in fact, which established the tenor of the entire trial, was the opening statement in the Scott, supra, case. In prosecuting the former Attorney General of the State of Illinois, the Assistant United States Attorney stated the following:

> Mr. Scott would appear to be a government official who earns a salary, and, like all of us, just tries to make ends meet. But that is not the William J. Scott that this case is all about. This case is about a different William J. Scott. This case will tell you the story of the secret life of William J. Scott . . . it involves secret safe deposit boxes. It involves the secret use of campaign funds. It involves secret financial transactions with people who stand to make money with the State of Illinois by currying favor. It involves secret travel around the world. It involves the secret of going for years at a time without using your paycheck, without writing a single check to cash, without needing your paycheck to pay for the ordinary

expenses of life like food, clothes, shelter, entertainment.

Scott, supra, 660 F.2d at 1176-77, footnote 61. Exposure of Scott's "secret" life resulted in his conviction for willfully filing a false income tax return.

Case-in-Chief

Where the Government's evidence includes testimony by a co-conspirator directly involved in bribe/payoff/unlawful cash generation transactions with the defendant, the prosecutor should consider putting on strong financial evidence immediately after such a co-conspirator (who will have been cross-examined extensively about his deal, background, etc.) completes his testimony. A bank officer's testimony concerning the defendant's repeated cash deposits during the charged period (and lack thereof outside the indictment period), the defendant's failure to write checks to cash or withdraw cash during the charged period, and/or defendant's purchases of cashier's checks or traveler's checks with cash will significantly corroborate the co-conspirator's testimony and again, serve to focus the jury's attention on the spending habits of the defendant. While the tax expert or summary financial testimony will be saved until the end of the case-in-chief, interspersing such financial testimony among the more direct, incriminating evidence serves to focus the jury's attention on the unexplainable financial evidence throughout the trial.

When the agent testifies at the end of the case, he should be prepared to testify to the thoroughness of the investigation, the attempts made to negate any leads supplied by the defendant, the mechanics of the total cash/expenditures method of proof (or other method of proof employed), and the pattern evidence (reflecting defendant's changed lifestyle and spending habits during the bribe period -- few checks to cash, few cash withdrawals, paying bills with cash or cashier's checks/money orders instead of by personal check, few loans or financing arrangements, larger cash deposits, use of $100 bills to purchase items, etc.). In order to make the testimony more interesting and understandable (as well as highlighting the key aspects of the financial case), charts should be utilized (notebooks containing reduced copies of the charts should be distributed to the jury) in presenting the agent's testimony.

Defense Case

Even if the Government is unable to do a complete financial analysis of the defendant, financial evidence may provide effective cross-examination material if the defendant chooses to testify. Thus, in Reynolds, supra, the defendant, a Circuit Court Judge in Chicago's First Municipal District, was effectively cross-examined concerning numerous cash expenditures (paying bills in cash, buying cashier's checks and money orders

with cash, travelling extensively with only isolated, traceable credit charges) even though a complete expenditures analysis had not been performed. Defendant's explanation, that he kept approximately $2,500 in cash in his home for emergencies (although he could not recall the source of the house fund or how he was able to replenish it) did not explain thousands of dollars in cash expenditures during the bribe period and was unconvincing insofar as the defendant attempted to deny his involvement in a bribery scheme.

In the same case, the defense called a financial "expert" to testify that he had reviewed the records of a law firm (some of whose members had testified that they had regularly paid off Judge Reynolds) and concluded that the Government's cooperating witnesses could not have been paying off the Judge as they did not have sufficient funds with which to do so. On cross-examination, this "expert" admitted that he had not reviewed all of the attorneys' bank accounts, that he did not even know of the existence of some of the attorneys' bank accounts, and thus, was not in a position to conclude that they could not have been making the regular bribe payments about which they testified. Moreover, he admitted that, of the various checks that had been issued to members of the firm, several had been cashed and thus provided a source of cash that could have been used to pay off the defendant judge.

In another case, United States v. Ambrose, supra, a racketeering and extortion case in which there were no tax charges, one defendant police officer was cross-examined about exchanging small bills for large bills based on the testimony of various bank tellers. The defendant police officer denied that he had ever attempted to launder money or exchange bills at the bank. Such a denial was incredible and was rejected by the jury as the bank tellers had no motive to fabricate their testimony.

Closing Argument

The Government's closing argument provides the opportunity to argue the strength of the financial evidence against the defendant. The prosecutor should stress that the financial evidence is not in any way dependant on any deals made with witnesses and shows conclusively that the defendant received cash bribes/payoffs as testified to by the cooperating co-conspirators who were involved in the charged criminal conduct with the defendant. The prosecutor should emphasize the defendant's changed lifestyle, how the defendant's financial transactions during the bribery period differed from those he conducted both before and after the period, and how the pattern of the defendant's spending habits demonstrate that the defendant was receiving cash bribes during the charged period. Moreover, the Government can argue that the leads supplied by the defendant (in an attempt to explain the source of his excess cash expenditures) proved to be false, and that, as false exculpatory statements, demonstrate the defendant's consciousness of guilt. If the

defendant's explanations as to nontaxable sources have changed either in the course of the trial or from those provided prior to trial, the Government may highlight the changing defenses and argue that innocent people do not have to change defenses or offer phony explanations.

One final note: if the Government has failed to conduct a complete financial analysis of the defendant, it opens itself up to a strong defense closing argument centered on the question "If my client actually accepted cash bribes as the Government alleges, where is the financial evidence showing that he profited?" Although the Government can always argue that cash is difficult to trace, it is more persuasive to be able to point to large cash expenditures or to a pattern of defendant's spending habits that suggest that the defendant did in fact have an illegal source of income during the charged period. In any event, given the delicacy of indicting a public official for allegedly engaging in corrupt conduct, we as prosecutors owe it to ourselves and the people we serve to do as thorough an investigation as possible, including the financial aspects of the investigation, in order to expose and successfully prosecute public corruption cases.

CHAPTER FIFTEEN

# THE USE OF POLYGRAPHS IN CORRUPTION CASES

BY

LEE J. RADEK*

Deputy Chief, Public Integrity Section
Criminal Division

* Lee J. Radek has been Deputy Chief of the Public Integrity Section for the past decade, and is primarily responsible for supervising investigations and prosecutions of state and local officials.

# THE USE OF POLYGRAPHS IN CORRUPTION CASES

At certain points in his career, a prosecutor may be tempted to accede to suggestions that he use the polygraph lie detector as a "helpful investigative tool." While the polygraph may indeed assist investigators and prosecutors in performing some aspects of their duties, this author suggests that lie detection by use of the polygraph is almost never advisable in corruption cases.

Prior to a discussion of the costs and benefits of administering polygraph examinations, some brief discussion of the validity of the technique and evidentiary concerns is necessary.

## The Polygraph Technique

The polygraph machine is an instrument that records, on a continuous sheet, changes in certain involuntary body functions, such as pulse, blood pressure and the resistance of the skin to a mild electric current. It also records changes in breathing. The theory behind the polygraph technique is that fear of detection will cause certain changes in the recorded body functions as a subject attempts to conceal the truth when questioned.

Normally, the polygrapher will formulate a "control" question during a pre-test interview. This question is designed to be one to which the subject will lie, but one that is not directly relevant to the examination. The usual example of a control question is: "Did you ever steal anything?" Ideally, the subject will show mild changes in his recorded physiological responses that can then be compared to relevant questions. Only when the changes exceed those in the control question significantly, is the polygrapher justified in concluding that the subject is being deceptive. Additionally, the polygrapher may give certain weight to other factors, including the subject's demeanor and his attempts to "beat the machine."

A polygraph examination consists of more than the test itself. A pre-test interview in which the relevant and control questions are formulated and discussed is always required before the actual test. Additionally, post-test interviews are used to clarify the reasons for test results and sometimes to obtain admissions and confessions when the subject realizes he has failed to "beat the machine."

Much has been written and litigated about the scientific accuracy of the polygraph technique. Knowledgeable commentators vary in their assessments from 95% accuracy to no better than chance. While an individual prosecutor or investigator should

make his or her own judgment before deciding whether to use polygraph examinations, he or she can clearly rely upon the one point of agreement between proponents and opponents of the technique: The polygraph is not infallible. 1/

Admissibility

With few exceptions, Federal courts have refused to admit the results of polygraph examinations into evidence in criminal trials. These decisions are based primarily upon traditional scientific evidence standards concluding that lie detection by use of the polygraph "has not gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made." Frye v. United States 293 F. 1013, 1014 (D.C. Cir. 1923). While some appellate courts have left the matter to the trial courts' discretion, and some allow for admissibility upon stipulation, few Federal cases allow polygraph results of defendants to be admitted. Similarly, polygraph results that merely bolster the testimony of a witness are generally inadmissible, and reference to polygraph examinations taken or to be taken by Government witnesses may constitute reversible error as improper witness vouching. United States v. Brown, 720 F.2d 1059 (9th Cir. 1983). On the other hand, results that tend to show a Government witness is lying about relevant matters or which tend to impeach the witness must be provided to the defense under Brady v. Maryland, 373 U.S. 83 (1963) and may be admissible. United States v. Hart, 344 F. Supp. 522 (E.D.N.Y. 1971).

Unlike the results of the test itself, statements by the defendant or a witness given before, after or during a polygraph examination can be admissible if otherwise permitted by the rules of evidence. Therefore, an admission or confession made after a subject flunks a polygraph test may become evidence if otherwise admissible. Similarly, admissions that are relevant or constitute impeachment of a Government witness are producible under Brady and may be otherwise admissible.

Admissibility of confessions or admissions by public officials made in conjunction with a polygraph examination is treated in the same manner as if the polygraph were not involved. Determination as to voluntariness, adequacy of warnings and

---

1/ For opposite views on the validity of the polygraph technique, see Reid & Inhau, Truth and Deception (1966) and Lykken, A Tremor in the Blood (1981).

immunity under Garrity v. New Jersey, 385 U.S. 493 (1967) must be made before the defendant's statements can be used against him.

## Advisability of Using Polygraph Tests in Corruption Cases

With the above principles of admissibility and questions relating to validity and accuracy in mind, the prosecutor is in a position to do a hypothetical cost/benefit analysis on the use of polygraphs in a corruption case.

The advantages and disadvantages will vary depending upon the status of the test subject, that is, whether he is an actual or potential witness or whether he is a subject or defendant; and upon the outcome of the test, pass or fail. Therefore, excluding inconclusive tests, there are eight possible outcomes of polygraph exams in corruption cases: a witness in support of the Government's case could (1) pass or (2) fail; a witness opposing the Government's case could (3) pass or (4) fail; a subject or defendant who is actually guilty could (5) pass or (6) fail; and a subject or defendant who is actually not guilty could (7) pass or (8) fail. An examination of the benefits and liabilities of each of these possibilities demonstrates that rarely is a polygraph examination beneficial to the prosecution in a corruption case.

### Witness in Support of the Government's Case

#### Pass:

If a witness whose testimony is consistent with the Government's case should take and pass a polygraph examination, the results of the test are inadmissible, and the prosecutor gains nothing more than his own peace of mind, knowing that the polygraph has confirmed his belief in the witness's testimony. On the negative side, the polygraph exam, including the pre-test interview, has created both additional Jencks material that can be used by the defense in cross-examination, and the existence of potential impeachment material resulting from the formulation of a control question. Remember that a control question is one to which the examinee will lie, but is likely to react less emphatically to than a relevant question. Q: "Did you ever steal anything?" A: "No."

In formulating the control question, the polygrapher must structure it so that the answer is, in fact, false. The likely scenario in formulating the control question is as follows:

During the Pre-Test Interview

Polygrapher: Did you ever steal anything?

Examinee: When I was 12, I stole a yo-yo.

Question: Anything else?

Answer: Five years ago I took some candy.
Question: Anything else?

Answer: No.

Question: Are you sure?

Answer: O.K., last year I stole a calculator from the office.

The control question is then: "Other than the items you told me about, have you ever stolen anything?

The potential for the creation of impeachment material useful to the defense is obvious.

Fail:

The above problems also exist if a Government witness fails the polygraph. In this instance, however, those problems are minor compared to the others that arise. In addition to the interview and control question formulation being producible under Jencks, Brady and Giglio, the results of the examination, which are harmful to the Government's case, are now producible and possibly admissible. United States v. Hart, supra.

Not only has the examination created evidence helpful to the defense, it has deprived the prosecutor of any peace of mind, and replaced it with doubt. Now the prosecutor does not know whether to believe the witness or the polygraph.

If the prosecutor chooses to ignore the polygraph results and use the witness, he is likely to face accusations of misconduct for knowing use of perjured testimony. If he chooses to believe the polygraph and not call the witness, the prosecutor has lost evidence that helped his case.

In only one instance can the failure of a polygraph by a Government witness work to the Government's advantage. This is the rare occurrence where a witness, when faced with the polygraph results, "cracks," or admits his pro-Government testimony was false. This promotes the ends of justice since it will result in either dismissal of a case that should not have been brought or the elimination of perjured testimony from an

otherwise proper case. It is suggested that the likelihood of this benefit is so small as to be completely outweighed by the negative considerations.

Adverse Witness

Pass:

If a witness whose testimony is adverse to the Government's case passes a polygraph examination, the use of the polygraph has created: Jencks material; Brady material in possibly admissible interview statements and test results of an exculpatory nature; doubt in the prosecutor's mind; and misconduct allegations if the case goes forward. There are no positive factors to counterbalance these negatives.

Fail:

If an adverse witness fails the polygraph, no evidence helpful to the Government is created, but peace of mind and the unlikely chance that the witness will "crack" are achieved.

Guilty Subject/Defendant

Pass:

If a defendant who is, in fact, guilty should take and pass a Government-administered polygraph, the results are producible under Brady and Rule 16, Fed. R. Crim. P. They may be admissible, and may cause the prosecutor to erroneously doubt or even dismiss his case. Usually the pre-test interviews in such examinations are filled with exculpatory and self-serving statements that defendants seek to have admitted. Nothing seems to tempt trial courts to admit polygraph evidence more than Brady violations where a pro-Government witness has failed a test or where a defendant has passed a Government-administered test. See e.g., United States v. Zeiger, 475 F.2d 1280 (D.C. Cir. 1972). No advantages are obtained.

Fail:

If the guilty subject fails the polygraph, the prosecutor's peace of mind and the slim chance that the witness will crack and confess must be weighed against the lack of any evidentiary benefit. There is also the chance that any confession obtained could be ruled involuntary, or that the court might find that the confession of a public official was immunized under Garrity v. New Jersey, 385 U.S. 493 (1967), thus tainting the remainder of the case.

Not Guilty Subject/Defendant

Pass:

If a defendant who is, in fact, not guilty passes a polygraph, and if the prosecutor believes the polygraph and dismisses the case, the decision to administer a polygraph exam will result in justice being served by the dismissal of a wrongful case or investigation.

If, however, the prosecutor is unwilling to dismiss the matter, no benefit other than perhaps valid evidence of innocence has been created by the exam.

Fail:

If a guilty defendant fails, the polygraph only serves to promote an injustice in that the prosecutor will now have false peace of mind in a case where it is not justified.

Inconclusive Results

When a polygraph examination of a witness or subject/defendant ends with inconclusive results, most of the aforementioned disadvantages will have been created with none of the advantages having been achieved.

Plea Agreements

Often prosecutors will execute plea agreements with prospective witnesses that require that they take and pass a polygraph examination. If an examination is subsequently administered, the disadvantages listed under "witnesses," above, come into play. If the test is not administered, Government counsel can expect to be faced with the argument that it was not administered because the Government knew the witness was lying and did not want to expose the falsehood. Additionally, admission into evidence of the plea agreement with reference to the polygraph may constitute reversible error as improper witness vouching. United States v. Brown, supra.

Use of Polygraphs as Predication for an Investigation or Reason For Declination

Investigative agents will often urge the prosecutor, as a first step, to agree to have a polygraph examination administered to a witness who makes an allegation against a public official. This examination is then used either as a basis for declining the case, if the witness fails, or as corroboration for the witness

and therefore predication for further investigation if the witness passes. These suggestions should be viewed for what they are: investigative shortcuts. Unless the prosecutor is willing and able to establish that the polygraph approaches 100% accuracy, he is on thin ice when he declines a case solely on the basis of negative polygraph results. Likewise, the existence of inadmissible confirming polygraph results does little to corroborate an allegation that would not otherwise constitute proper predication for undertaking an investigation. Whatever the results, the polygraph examination will result in the creation of all the disadvantages listed under "witnesses," above, if the investigation and case eventually go forward.

## Conclusion

In almost every circumstance, administering a polygraph examination in a corruption case creates factors that work to the Government's disadvantage. The problems created by these examinations are a severe price to pay for the investigative and prosecutive team to merely assure themselves -- perhaps inaccurately -- that their cause is just or to gamble that a liar will suddenly tell the truth when confronted with the fact that he has failed the test.

If a prosecutor or investigator decides to use the polygraph, either on a witness or a subject/defendant, he must be prepared to abide by the results. If a pro-Government witness fails, he must be prepared to cease the investigation, dismiss the case, or do without the testimony. If an anti-Government witness passes, he must be prepared to cease the investigation or dismiss the case. If a subject/defendant passes, he must also be prepared to abandon the investigation or case.

Forcing oneself into these decisions might be proper if there was more to be gained than peace of mind or the chance of a confession or if one were convinced to a certainty that the polygraph results were always accurate. Even proponents, however, do not argue that the latter is true. Polygraphs may have their place in other types of cases, particularly in solving crimes such as theft or embezzlement. In corruption cases, however, the wise prosecutor will generally proceed as if the polygraph did not exist.

# CHAPTER SIXTEEN

# CHARGING DECISIONS

BY

H. MARSHALL JARRETT*

Deputy Chief
Public Integrity Section
Criminal Division

* H. Marshall Jarrett has been a prosecutor with the Public Integrity Section for eight years and Deputy Chief of the Section for the last three years.

## CHARGING DECISIONS

During the course of public corruption investigations prosecutors make many charging decisions. Specifically, they must decide who will be charged, how the charge will be drafted, what will be charged, and when the charge will be made. The purpose of this section is to provide suggestions to prosecutors to assist them in making these difficult charging decisions.

### Who Will Be Charged

Throughout the course of a public corruption investigation prosecutors are called upon to make decisions about who will be charged. During the early phases of the investigation, charging decisions are made when the prosecutor decides whether to grant immunity to a subject of an investigation. Before granting immunity to a subject, the prosecutor should evaluate the request by answering the following questions:

(1) What is the culpability of the subject?

(2) What is the level of evidence against the subject and the likelihood that continued investigation will uncover additional evidence?

(3) What is the value of the information that will be obtained from the subject, can it be corroborated, and can the information be obtained elsewhere?

(4) What will be the credibility of the subject at trial if he or she testifies under a grant of immunity?

(5) What is the likelihood the subject would agree to a plea bargain and cooperate in return for a plea to a lesser criminal offense?

(6) What has been the general progress of the investigation?

Requests for immunity always should be critically evaluated. Such requests made during the early stages of a public corruption investigation usually should be denied as being premature. Often, the best long-term interests of the investigation are served by a decision not to grant immunity until the investigation can no longer advance by other investigative means. While this approach may initially slow the investigation, it can in the long run result in the development of a better case.

At the conclusion of the investigative phase of the case, the prosecutor should consider questions of venue and problems of proof in deciding who should be indicted. While it is generally

desirable to charge several defendants in the same indictment, the prosecutor's preference for a multi-defendant case should not lead the prosecution to use strained theories of venue to bring all defendants into the same case, or to overlook Bruton problems 1/ that may be caused by a joint trial.

How the Charge Will Be Drafted

Before discussing the appropriateness of specific charges, a general discussion of indictment drafting is appropriate. First, the indictment must be legally sufficient. The prosecutor should insure that the indictment charges in the language of the statute, that judicially imposed elements are included, and that the indictment is tailored to the facts of the case. Second, the indictment should be drafted in language that can be understood by the jury. Be aware that the indictment will be read to the jury and in most jurisdictions will be provided to the jury during deliberations. Third, the indictment should be drafted with sufficient latitude to allow the prosecution to make adjustments during trial. Statutes usually set out different means by which criminal conduct can occur. The indictment should charge a violation of the statute by as many different means as the proof will reasonably support. Fourth, the indictment should not include every factual detail, but rather only the most important facts. In every trial, proof will vary in some way from what the prosecutor anticipated. If the indictment includes unnecessary factual details that are not proved during the trial, the defense will use the opportunity to argue to the jury that the prosecution failed to prove what it alleged in the indictment.

What Will Be Charged

Public corruption cases chiefly involve a public official's receipt of money or property in return for the doing of an official act or an act in violation of the public official's lawful duties. The prosecutor's decision regarding how to frame the charge in a public corruption indictment will usually require consideration of four statutes. The four statutes used most often in public corruption prosecutions are the Hobbs Act (18 U.S.C. § 1951), the Federal bribery statute (18 U.S.C. § 201), the RICO statute (18 U.S.C. §§ 1961-63), and the mail and wire fraud statutes (18 U.S.C. §§ 1341, 1343). These charges may be augmented, when appropriate, with charges under any of the

---

1/ Admission of a co-defendant's confession at a joint trial where the co-defendant does not testify and therefore cannot be cross-examined violates a defendant's Sixth Amendment right of confrontation. Bruton v. United States, 391 U.S. 123 (1968).

following statutes: the Travel Act (18 U.S.C. § 1952); interstate transportation of money obtained by fraud (18 U.S.C. § 2314); bribery concerning programs receiving Federal funds (18 U.S.C. § 666); perjury (18 U.S.C. §§ 1621, 1623); conspiracy (18 U.S.C. § 371); and the tax statutes.

A statute well suited to the prosecution of state and local officials is the Hobbs Act (18 U.S.C. § 1951). One advantage of the Hobbs Act is that the prosecution need not prove that the public official performed an official act as a quid pro quo for the property given to the public official. The statute requires only proof that the money was paid to a public official because of the public official's office. A violation of 18 U.S.C. § 666 can be charged in conjunction with the Hobbs Act if the jurisdictional requirement of receipt of a specified amount of Federal funds by the official's employer is met.

The Hobbs Act treats the bribe payer as a victim. Therefore, if a public official is charged under the Hobbs Act, the bribe payer cannot be joined in that charge with the public official. If the prosecution wishes to charge the bribe payer and the public official in the same indictment, then consideration should be given to charging under the mail fraud statute. However, under the mail fraud statute the prosecutor must now prove that a victim suffered a loss of money or of tangible or intangible property. McNally v. United States, 107 S.Ct. 2875 (1987); Carpenter v. United States, 108 S.Ct. 316 (1987).

While it is theoretically possible to charge separate counts of mail fraud and Hobbs Act violations in the same indictment, prosecutors should be cognizant of the inconsistency between the two statutes in the way each treats the bribe payer. Because the Hobbs Act treats bribe payers as victims and the mail fraud statute treats bribe payers as co-schemers and co-defendants, juries can experience difficulty in reaching verdicts where the indictment contains both charges.

If the target of the public corruption investigation is a Federal official, the most applicable charge usually will be a violation of the Federal bribery statute (18 U.S.C. § 201). The use of the Hobbs Act to prosecute corrupt Federal officials is generally discouraged. The Federal bribery and gratuities statute carries penalties of fifteen years (bribery) or two years (gratuities), while the Hobbs Act carries a maximum twenty-year sentence. Charging a Federal official under the Hobbs Act rather than the Federal bribery statute, which describes specific crimes that carry less severe penalties, may engender animosity from trial and appellate courts.

The RICO statute may be used against Federal, state or local public officials. It is a particularly appropriate charge against state or local officials because of the provision that allows certain state crimes (e.g., bribery) to serve as predicate offenses for a RICO charge. The RICO statute also allows the

prosecution to introduce evidence of unlawful conduct during a ten-year period. Thus, using the RICO statute, evidence of criminal conduct that occurred outside the statute of limitations for the predicate offenses can be properly introduced. Finally, RICO contains forfeiture provisions that allow the Government to seize assets of the corrupt enterprise. These unique characteristics of RICO make it an attractive charging statute in public corruption cases.

The addition of a conspiracy count to a public corruption indictment should always be considered because its inclusion will give the prosecution several advantages. First, a conspiracy count will allow the prosecution the opportunity to describe the defendant's conduct in a comprehensive way. Second, a conspiracy count will allow the prosecution to present co-conspirators' statements made during the course of the conspiracy as evidence against all the defendants. Finally, a conspiracy count may solve venue and statute of limitations problems.

The addition of a perjury count should also be considered if the public official testified before the grand jury. Public officials usually testify in their own defense at trial. If the prosecutor can prove that the public official lied to the grand jury, the public official's credibility as a trial witness will be substantially reduced. When including a count of perjury, it is preferable to charge under 18 U.S.C. § 1623 rather than 18 U.S.C. § 1621, because the "two-witness" rule under 18 U.S.C. § 1621 (requiring the prosecution to prove the falsity by two witnesses or one witness with corroborating evidence) is not applicable under section 1623.

## When to Charge

Public corruption investigations usually require extensive use of the grand jury. The grand jury investigation and the attendant notoriety almost always alert the target to the fact that he or she is being investigated. Because of this awareness, there is usually very little to be gained by the pre-indictment arrest of a target of a public corruption investigation. Therefore, the prosecution usually should proceed against public officials by indictment and summons.

In certain circumstances, however, it is advantageous to charge a public official on a complaint and warrant and arrest him. An arrest is appropriate when a target can be caught in the act of committing a crime. An arrest is likewise appropriate when a target, who is unaware of the investigation, can be confronted with clear evidence of his guilt. The objective sought by arresting the target is to strike a plea bargain with him that requires him to cooperate with the investigation by wearing a wire or making recorded telephone calls to other targets of the investigation.

After a public corruption investigation is partially developed, the prosecutor must decide whether to wait until the conclusion of the investigation before returning indictments or whether to indict individual defendants as cases are developed during the investigation. There is no clear answer to which tactic is preferable. Reasons for returning indictments during the course of the investigation include the need to turn an intermediary or a lieutenant, a statute of limitations problem or the need to demonstrate progress and develop momentum in the investigation.

At the conclusion of a public corruption investigation, the timing of the indictment of the public official must be decided by the prosecutor. This decision is particularly difficult if the investigation is concluded near the time of an election. Some prosecutors believe that a public official should not be indicted so near an election that the public official will not have the opportunity for a trial before the election is held. Other prosecutors believe the public has a right to know about the allegations and it is therefore appropriate to return an indictment just before an election.

The rule most prosecutors follow is that the decision to indict the public official should be made without considering its effect on an election. The indictment should be returned when the case is ready -- not earlier or later. To do otherwise is to favor a party or a candidate or to create the appearance of doing so.

# CHAPTER SEVENTEEN

## TRIAL TACTICS

BY

WAYNE A. RICH, JR.*

Acting Deputy Director
Executive Office for United States Attorneys

* Wayne Rich was First Assistant United States Attorney and Chief of the Criminal Division in the Southern District of West Virginia before assuming his post with the Executive Office.

# TRIAL TACTICS

The tactics utilized by Government prosecutors during the trial phase of a public corruption case are as varied as the personalities, style and experience of those prosecutors, and the effectiveness of certain tactics may vary by District and geographical area. Nevertheless, certain basic rules are applicable under all circumstances in every District.

## Courtroom Atmosphere: Prosecutorial Behavior

The creation and maintenance of a professional, fair atmosphere in and outside the courtroom, especially whenever jurors are present, is an absolute prerequisite to a successful jury verdict.

Government prosecutors and agents are "on stage" throughout the trial. Jurors closely observe expressions and behavior of Government counsel and agents at all times and places. Professional behavior and speech must be used in elevators, corridors, cafeterias, etc. of the courthouse and surrounding area during the course of a trial, as well as in the courtroom itself.

If jurors receive the impression that Government counsel or agents are unfair, unprofessional, disagree among themselves or possess a "smart ass" or arrogant personality, then a guilty verdict will frequently not be obtained, no matter how strong the evidence.

Attempts by defendants (public corruption defendants are usually master con artists) and defense counsel to be friendly or "buddy-buddy" with Government counsel or agents must be avoided -- whether in the courtroom or in other public areas to which jurors have access.

Government counsel and agents should normally dress for court in a conservative manner: dark blue or grey suits, white shirts, "quiet" ties, and shined shoes for males and similar attire for females.

The cardinal rule is for counsel to be him or herself in the courtroom and not try to imitate others. If "being yourself" is not sufficient, then counsel should "be nice".

In Districts where the court will permit it, Government counsel should refer to themselves as "the United States" rather than as "the Government". The word "Government" conjures up images of taxes and other unpleasant images whereas

the words "the United States" is synonymous with patriotism, the 4th of July, apple pie and other favorable aspects of our country.

The defendant should be referred to as "the defendant" and not as "the gentleman", "the governor" etc. Counsel for the Government should not point to the defendant with a single finger, rather such a gesture should be made with an entire, open hand.

No matter what occurs during a trial, judges must always be treated professionally and with respect. Jurors like judges. Prosecutors should not show displeasure or disgust no matter how inappropriate or erroneous the rulings from a judge may be.

## Instructions

A complete set of instructions, with an index, should be provided to the court on the earliest possible date prior to or during trial. Instructions should be carefully prepared, utilizing forms available from the Public Integrity Section. One member of the trial team should be assigned this responsibility and should utilize the services of other attorneys and paralegals in the office.

## Memoranda of Law

Short, concise memoranda of law concerning legal issues anticipated to arise during the trial should be prepared as needed. Again, one member of the trial team should be assigned this responsibility and should also utilize other attorneys and paralegals in the office.

## Government Counsel Table

Due to the complexity and stress of a trial in a public corruption case, it is frequently preferable to have two Government counsel present at the counsel table. However, there must be a clear understanding as to which one serves as lead counsel and, as such, has the final authority on all trial decisions.

The decision as to whether a law enforcement agent should also be seated at counsel table during trial depends on both the attitude of the residents of a particular district toward law enforcement, issues that will be raised during trial and preferences of the prosecutors. Some Government attorneys

prefer the case agent to be located in their office preparing witnesses, marshaling evidence, scheduling future witnesses, organizing for the rebuttal case, etc. Other prosecutors prefer having the case agent (unless the agent's conduct is likely to be raised as an issue by defense counsel) or another agent present at counsel table to perform trial functions such as assisting in jury selection, maintaining a current exhibit list, keeping notes for closing argument, noting relevant questions that may have been omitted, observing demeanor and reactions of jurors to trial events, and assisting in organizing and maintaining witness files, documents, and other evidence, particularly in cases with tapes.

## Jury Selection

Jury selection in a public corruption case incorporates many of the standard rules, modifies some and changes others, depending on the background of the defendant and type of public office he or she held. Close attention by Government counsel and agents to facial expressions and body language of jurors can prove beneficial in jury selection. Government counsel frequently scrap the normal desire for older, conservative jurors and instead seek a panel with street-wise, independent, liberal, younger persons. Naturally, the more intelligent and brighter the jury, the better.

It is normally in the interests of the United States for the court to conduct voir dire. Regardless of who asks the questions of the prospective jurors, voir dire is a critical phase of the trial and requires careful preparation by Government counsel. When conducted by counsel, it is the first impression that jurors will have of the professionalism and fairness of Government prosecutors.

Jury selection literature used by defense counsel in such cases should be consulted by the member of the prosecutorial trial team who is in charge of jury selection.

## Opening Statements

Government counsel always makes an opening statement which addresses: (1) the presumption of evidence; (2) the burden of proof (e.g. "As in every criminal case, the United States must prove the guilt of the defendant beyond a reasonable doubt. We certainly accept that obligation and will meet it by evidence that will be presented to you in the form of testimony from witnesses and from various documents that will be introduced as exhibits."); (3) the elements of each charge in the indictment and what "the United States anticipates the evidence will be ..."; (4) any potential surprises to the jury (e.g., "You may (will) hear evidence that...") by covering and explaining weak points in the Government's case (e.g., witnesses

testifying with immunity, as felons, as accomplices, etc.); and (5) such anticipated Government evidence as necessary to counter any anticipated theory of defense.

The first two to three minutes of any statement or argument to the jury are the most important because that is when jurors pay closest attention. Thus, Government counsel must use that initial time period effectively:

> As Judge Right told you earlier, my name is Always Fair and seated with me at counsel table is another Assistant United States Attorney, Usually Wins, and FBI Special Agent Never Loses. The evidence that we anticipate will be introduced during this trial will establish beyond a reasonable doubt that this defendant (gesturing toward him) knowingly committed those illegal acts charged in the ten counts of the indictment: (pause) first, he betrayed the trust placed in him by the the voters and citizens to conduct himself as an honest governor of our state; (pause) second, this defendant chose to extort cash money illegally from highway contractors who wanted contracts for state highway projects; (pause) third, that this defendant was so greedy he did not claim as income those illegal cash moneys that he received as the result of his illegal, extortionist activities . . . How much money did the defendant illegally extort under the color of his official right as governor of this State? We anticipate that the evidence in this case will prove that he extorted approximately fifty . . . thousand . . . dollars, in cash!

(This amount of money should be written ($50,000) on a blackboard by Government counsel, underlined several times and circled).

There is really no need for Government counsel to commence an opening, closing or rebuttal statement with the words "May it please the court". Such language is usually confusing to jurors.

Many Government prosecutors prefer to give the jury as much detail as possible concerning facts that they are sure will be introduced into evidence. Others do not.

The use of visual aides (e.g., graphics and charts -- get prior court approval) and the blackboard is frequently helpful in getting and maintaining the jury's attention and in explaining and emphasizing important aspects of the Government case.

There is no need to scream and shout during opening statement.

## Structure of the Case

In public corruption cases, some prosecutors prefer to force a defendant to take the stand, so they go full blast introducing evidence during the case-in-chief.

But they always save something for rebuttal. Other Government counsel theorize that a public corruption case defendant will have to take the stand anyway, and, thus, hold back as much evidence as possible for the rebuttal case.

Witness lists must remain flexible in order to control the inevitable, unplanned events and issues that arise in almost every trial. Thought should be given to obtaining the testimony of certain key witnesses or the introduction of important documents on other evidence just prior to overnight and weekend recesses.

## Visual Aides

The effective presentation and introduction of evidence through the utilization of visual aides are essential in public corruption cases. Examples include: (1) following a money trail; (2) using telephone records; (3) comparing inconsistent statements testimony of a defendant; and (4) presenting documents to the jury such as handwriting and fingerprint comparisons.

Cases with tape-recorded conversations require detailed pretrial preparation. Prosecutors must: (1) have them pre-marked and ready for introduction; (2) have an accurate transcript prepared with an audibility hearing held prior to trial to eliminate trial objections and (3) prepare a single composite tape and a notebook containing a complete set of transcripts.

Some prosecutors prefer placing copies of exhibits in loose-leaf notebooks for each juror to utilize through the trial (as authorized by the court during a pretrial hearing).

## Treatment of Character Witnesses Testifying for the Defendant

How the character witnesses of a defendant should be treated on cross-examination is frequently debated. Some Government counsel prefer to treat character witnesses very casually, asking almost no questions, in the belief that jurors will also treat such testimony equally casually. These prosecutors prefer to get such witnesses off the stand as quickly as possible. Other prosecutors like to cross-examine such witnesses extensively.

With either approach, certain questions that repeat key Government testimony may be beneficial (e.g., "Were you present at the Governor's Mansion on July 4, 1987, when Joe Contractor was extorted out of $25,000 in cash by your good friend, the defendant?").

Objections should be made to any attempt by the defense team/witness to elicit character testimony concerning specific acts, rather than reputation or personal opinion evidence.

The testimony of character witnesses needs to be handled in closing and/or rebuttal statements (e.g., "The defendant emphasizes his prior good character reputation. The defendant is not charged with having a bad reputation. Without a good reputation, he would not have been elected governor of our state. The important difference is that you now have evidence that his character witness did not -- that he violated his oath of office and trampled on the trust placed in him by the citizens of this state in committing the illegal acts charged in this indictment.")

## Cross-Examination of the Defendant

The cross-examination of a public corruption defendant must be planned from day one of the investigation. Irving Younger's "Ten Commandments of Cross-Examination" video should be reviewed prior to trial.

The personality and preferences of the prosecutor doing the cross-examination will dictate many of the tactics used. A defendant who is a good witness should never be screamed at by the prosecutor. Rather, a restrained (i.e., an appearance of professionalism and fairness) Government counsel will always set up a defendant for subsequent destruction in the Government's rebuttal case.

The introduction of the defendant's executed oath of office should be introduced through the defendant.

## Closing and Rebuttal Statements

An outline of the closing argument should be prepared prior to trial, simultaneously with preparation of the opening statement, and then updated daily at the conclusion of each day's testimony. This method allows the maximum time to prepare and eliminates the problem when the court or circumstances unexpectedly pushes a case to conclusion (e.g., especially if a defendant unexpectedly rests without introducing any evidence).

Giving up a count, where the evidence is weak, builds credibility with the jury when arguing the Government's proof beyond a reasonable doubt on the other counts.

The violation by the defendant of his/her oath of office should be argued.

A defense strategy of putting the Government on trial by charging prosecutorial misconduct (which is the norm rather than the exception), can be handled by arguing: "The defendant's allegation of prosecution misconduct is a mere smokescreen for his illegal misconduct of extortion and greed."

Words to be used by the court in its jury instructions should be woven into the language used by prosecutors in closing and rebuttal statements.

Most prosecutors prefer saving at least three key points for rebuttal argument. A method for keeping track of the time used during final statements should be worked out by the trial team.

Preparation for rebuttal closing can be done by placing the topics, which may be argued in rebuttal, on separate sheets of paper (e.g., "credibility" generally and/or of specific witnesses). Underneath each topic, an outline is made of the response of the prosecutor to such an argument by defense counsel. Prior to commencing rebuttal argument, Government counsel then arranges these sheets in the order he/she wishes to argue them.

Some of the more frequent responses used by prosecutors in rebuttal argument include:

(1) I am not going to scream and shout at you like defense counsel did. The overwhelming evidence of this defendant's extortion and greed does all the screaming and shouting that is necessary. (pause) Let's review some of that evidence that proves the defendant's guilt beyond a reasonable doubt...

(2) The defense counsel has just spent ten minutes telling you about a (hypothetical) case where a person charged with a crime was apparently innocent. And if that (hypothetical) defendant was on trial, I would not be summarizing for you how the evidence has proven his guilt. (pause) But we are not dealing with that (hypothetical) case. (pause) This is a real case that is before you -- with a real defendant who has betrayed his oath of office, (pause) who has illegally extorted cash money from contractors (pause) and who has cheated on his income tax returns.

(3) Defense counsel is appalled that we would bring (witnesses like these) into this courtroom to testify before you. Defense counsel obviously thinks that (these witnesses) are criminals! You know why? Because they dealt in criminal activities with this defendant! (pause) And do you know who picked out (these witnesses) to be brought into this courtroom to testify? This defendant (pointing to the defendant) did -- by his choosing to associate with them in these criminal activities. Did this defendant ask people

like his character witnesses to associate in these crimes with him? No, of course not! They would have refused; they are honorable persons. Instead, this defendant lead two lives -- one in the presence of people like (name a couple of character witnesses) and a second, sordid life of greed and crime in the present of (the witness who testified in this trial). (pause) And now the two lives the defendant has been living are both exposed. And his guilt of these crimes has been proven by the evidence beyond a reasonable doubt!

(4) The attempt by defense counsel to make you feel guilty of finding this defendant guilty does not wash. The word 'verdict' simply means 'to speak the truth'. The evidence that has been proven beyond a reasonable doubt in this case is that this defendant is guilty of each count as charged. (pause) And do you know something? (pause) You are not convicting the defendant when you return 'guilty' verdicts. No, you are just returning the proper verdicts based on the evidence. (pause) Who then convicted the defendant? He did! By his own free will in committing these illegal, extortionist acts. His own greed ate him up! (pause) Not only did he extort cash money from contractors, he even cheated on this 1987 Federal income tax return!

Witness Preparation

Witness preparation for direct, cross and rebuttal examination is even more crucial in a public corruption case than in the routine criminal trial.

With the exception of investigating agents and authorized records custodians, most witnesses are witnesses because of their prior involvement in unethical, if not illegal, activity. That fact should never be forgotten by Government attorneys and agents throughout the investigative and trial stages of a case. Nothing should be said to, or done in the presence of, any witness by any Government attorney or agent that would not be totally acceptable speech or conduct to be heard or related to trial judge and jury.

In the investigative stage of any complex case, small mistakes are made. When agents testify, they should readily admit that they are human and that they were not perfect. No jury expects perfection and jurors like honest people who admit mistakes. Agent witnesses must be told this and encouraged not to be hostile in words or body language and not to be evasive during cross-examination by defense counsel.

Government counsel must "keep their distance" from non-agent witnesses, especially informants. The last event prosecutors need to witness in a courtroom is for an accomplice to be calling them by their first names or shaking hands with Government counsel or agents after leaving the witness stand.

Witnesses should be told as little as possible as to what is known by Government attorneys and agents.

When a convicted perjurer testifies for the Government, it should be brought out on direct examination that this witness: (1) lied to a Federal grand jury about his or her involvement in criminal activities with the defendant - i.e., lied by saying that those criminal activities did not happen; (2) was convicted in Federal court of perjury as a result of that lie; and (3) is now telling the truth, which is different testimony from the perjured testimony that occurred in the grand jury. Thus, the prior conviction of perjury of this witness can be argued as consistent with the Government's theory of the case against the defendant on trial.

## Press Relations

Relations with the media during trial must also be considered from a tactical standpoint. Naturally, the normal restraints of CFR and DOJ press policies still apply. Leaks and off-the-record comments must never be made.

During the course of a trial, no public comments about the case should be made to the media. Case agents must operate under this same rule.

However, the press should be treated with respect and with consideration of their employment obligations. During the trial, there is nothing improper in stating (with a smile) on or off camera, "I am sorry, but Department of Justice regulations and ethical considerations prevent me from commenting about this case during trial." Such a statement is preferable to a snappy "no comment."

Following the conviction, a rare acquittal, or final disposition, prosecutors need to be restrained in their remarks, while also making sure that the agents who worked in the case are praised. Again, coordination with case agents is essential.

# CHAPTER EIGHTEEN

# COMMON DEFENSES

BY

H. MARSHALL JARRETT*

Deputy Chief
Public Integrity Section
Criminal Division

* H. Marshall Jarrett has been a prosecutor with the Public Integrity Section for eight years and Deputy Chief of the Section for the last three years.

## COMMON DEFENSES

Emphasis on public corruption prosecutions by the Department of Justice has contributed to the development of innovative investigative techniques and of new legal theories for prosecuting public corruption cases. However, like Newton's third law of motion, the Department's aggressiveness in public corruption prosecutions has caused an equal and opposite reaction from the white collar defense bar. The purpose of this section is to alert prosecutors to some of the innovative defenses to public corruption cases that have been developed and to provide prosecutors with suggestions on how to counter these defenses.

### The "It Didn't Happen" Defense

The most commonly used defense in public corruption cases is the "it didn't happen" defense. Using this defense, the public official denies that the payoff occurred, and attacks the Government witnesses. For this defense to be effectively advanced, the defense must develop a motive for the cooperating Government witnesses to have lied. Public corruption prosecutions typically feature the testimony of a cooperating Government witness who testifies that he paid a bribe to a public official in return for the public official's performance of an official act for the benefit of the cooperating witness. Usually the witness agrees to cooperate with the Government only after he has become the subject of a criminal investigation. The cooperating witness' potential exposure to criminal prosecution makes him vulnerable to defense attacks on his credibility.

If a case rests on the uncorroborated testimony of a bribe payer, the case will probably be lost. Because payoffs are made in secret, usually with only the cooperating witness and the public official present, meaningful corroboration may be difficult. To effectively rebut the "it didn't happen" defense, the prosecutor must move aggressively during the investigative phase of the case to seek corroboration of the cooperating witness. A good starting point for developing effective corroboration is to establish how the bribe payer obtained the payoff money. The source and amount of the payoff funds can often be established through bank records, loan documents or corporate records. It is even more important to trace the bribe money after it has been delivered to the public official. For example, in some cases, large deposits can be proved to have appeared in the defendant's bank account shortly after the payoff. In other cases, proof can be obtained that credit card obligations or other debts were satisfied or large capital expenditures were incurred after the payoff. All of these

potential sources of corroboration of the payoff must be explored prior to seeking indictment.

The prosecutor should also corroborate all contacts between the cooperating witness and the public official. Telephone toll records, visitors logs, appointment books, and personal diaries can provide valuable proof of communication between the witness and the defendant. Communication also may be established through interviews of secretaries, co-workers and other business associates.

In some cases there may be proof that the cooperating witness showed the payoff money to a third person or told a third person about the payoff before the criminal investigation had been initiated. Prosecutors should prepare that person to testify because his testimony would be admissible at trial if the defense argues that the cooperating witness recently fabricated testimony to gain favorable treatment by the Government. Fed. R. Evid. 801(d).

Another way for the prosecution to rebut the "it didn't happen" defense is through appropriate treatment of the cooperating witness. The cooperating witness should not be perceived by the jury as having escaped punishment for a crime because he agreed to inculpate the defendant. That perception, if accepted by a jury, will cause the complete rejection of the cooperating witness's testimony and may therefore result in the acquittal of the defendant. Generally, a cooperating witness, if criminally culpable, should be required to plead guilty to some crime. As a person who has pleaded guilty to a crime relating to the matter about which he is testifying, a cooperating witness's credibility before the jury will be greatly enhanced.

A frequent component of the "it didn't happen" defense is testimony from "pillars" of the community that the defendant has a reputation in the community for good character. Rebuttal of this character evidence should begin by convincing the judge to place limits on the number of character witnesses the defense may call. Next, the prosecutor should object if a character witness attempts to testify about specific good acts performed by the defendant. This is not admissible under Rule 405, Fed.R. Evid. which limits character evidence to truth and veracity. In rare instances, after a defendant has placed his character in evidence the prosecution may choose to rebut with anti-character witnesses.

Another defense tactic that sometimes accompanies the "it didn't happen" defense is to call businessmen to testify that they dealt successfully with the public official without being extorted by him. The purpose of the defense is to establish that the defendant as a matter of practice did not request bribes.

A rebuttal to this defense tactic is to request the court to rule that testimony about other lawful conduct is not relevant.

Evidence of noncriminal conduct to negate the inference of criminal conduct is generally irrelevant. See United States v. Grim, 568 F.2d 1136, 1138, (5th Cir. 1978); and United States v. Russell 703 F.2d 1243, 1249 (11th Cir. 1983) . For example, if a man is on trial for robbing a bank, evidence that he visited three other banks without robbing any of them is not relevant to the determination of whether he is guilty of the bank robbery in question.

The "I Got the Money But I Was Legally Entitled to It" Defense

Another defense frequently advanced by public officials is the "I got the money, but I was legally entitled to it" defense. Under this defense, the public official admits receipt of a financial benefit, but denies any connection between the financial benefit and any improper use of his office. Common formulations of this defense are:

(1) The money delivered to the public official was payment for services rendered that were unrelated to his public office;

(2) The money delivered to the spouse (or other relative) of the public official was payment for services rendered by the spouse that are unrelated to the defendant's public office;

(3) The financial benefit received by the public official was profit from a business investment that is unrelated to his public office;

(4) The money that was delivered to the public official by a personal friend is a loan unrelated to the public official's office. Because of their friendship, no loan papers were prepared; however, the parties intended that the loan would be repaid with interest; and

(5) The money received by the public official was a campaign contribution, not a bribe.

A corollary to these defenses is that any official act performed by the public official for the provider of the money was a customary constituent service or some other government entitlement for which the citizen qualified. The object of all of these defenses is to disassociate the payment from the public official's office. These defenses can be very difficult to overcome if the public official has a plausible explanation of how he or his relative legally earned the payment.

The best rebuttal to these defenses is evidence that the defendant received the money in return for a specific official

act. Absent direct evidence, the prosecutor should develop evidence that suggests that the purpose of the payment must have been to bribe the public official. For example, evidence that establishes the temporal relationship between the payment of the money and an official act is effective. Evidence that the public official or his relative performed no legitimate service or that the payment is disproportionate to the services rendered is also effective. The defense may be rebutted further by evidence that the public official changed his position on the official action or undertook extraordinary efforts on behalf of the bribe payer. Another effective rebuttal to this defense is evidence that the money paid to the public official was transferred through dummy transactions or otherwise mischaracterized or concealed.

If the defense contends that the payment was a campaign contribution, an effective rebuttal can be made by proof that the payment was never reported as a campaign contribution to the Federal Elections Commission or to the appropriate state election authority, that the payment exceeded campaign contribution limits, or that the payment violated federal or state election law.

## The Diminished Capacity Defense

A defense recently used in public corruption cases is the diminished capacity defense. This defense may be employed when the public official is charged with a crime that requires proof of specific intent. Specific intent crimes are crimes that require proof beyond a reasonable doubt that the defendant entertained specifically a particular criminal objective. Typically, the defense will argue that because of the public official's use of alcohol or drugs, heart disease, stroke, or other medical condition the public official's mental capacity was diminished, and that the public official's diminished mental capacity negated his ability to form the specific intent required to commit the crime for which he is charged.

Rebuttal to this defense should follow three lines. First, the prosecutor should challenge the defendant's evidence of his medical condition and his claimed inability to function during the time period in question. The defendant's treating physician, nurses, associates and employees can be interviewed to obtain relevant information and the defendant's medical records can be examined. Facts developed in this inquiry may establish that the defendant was functioning at a level sufficient to hold him criminally responsible. Secondly, the prosecutor should prepare for cross-examination of the defense expert and the treating physician by hiring an expert to assist in preparing questions for cross-examination. Preparation for cross-examination should include an interview of the defense expert if possible, and a review of the defense expert's writings on the subject in question. Thirdly, the prosecutor should prepare the

Government's expert witness for rebuttal testimony. In some cases, it will be necessary for the prosecution to call its own expert in rebuttal.

## Defenses Deployed in Cases Developed Through Undercover Investigations

The extensive use of undercover operations to investigate public corruption cases has given rise to standard undercover investigation defenses.

### The Con Man Defense

An essential component of many undercover investigations is an informant or other cooperating individual who provides information, makes introductions and sometimes sets up meetings between public officials and agents posing as bribe payers. Individuals who perform these "intermediary" functions, often are motivated by money (paid informants) or by hope of lenient treatment (individuals with criminal exposure who have agreed to cooperate with the Government). A standard defense tactic is to attack the intermediary as a "con man" who tricked the defendant into acting in a way that allows his innocent conduct to be misconstrued by the prosecutor as criminal conduct.

This defense is often employed in cases in which the defendant's conversations have been recorded. It is a standard defense tactic to contend that the "con man" had unrecorded meetings with the defendant outside the presence of Government agents. The defense will contend that during those unrecorded meetings the "con man" tricked the defendant into making statements or acting in a way that appears consistent with the defendant's guilt. After the "con man" had the defendant properly programmed, the "con man" brought the unwitting defendant into a recorded meeting to perform. The motive for the "con man's" conduct is established by his receipt of substantial informant payments or by his own exposure to criminal prosecution. This defense is difficult to rebut if the investigation has not been structured with these potential defenses in mind. To adequately rebut the "con man" defense, the conduct of the intermediary's role must be carefully controlled and substantially limited. All contacts between the intermediary or anyone acting on his behalf (wife, secretary, etc.) and the defendant should be monitored and recorded. To the greatest extent practicable, the role of the intermediary should be reduced and an undercover agent should be insinuated into the operation. At trial, if at all possible, do not call the intermediary as a witness. Instead, introduce the tapes and use the agents as witnesses. If it is essential that the intermediary be called as a witness, do not rely on any aspect of his testimony that cannot be corroborated by independent evidence.

As stated above, an agent should be inserted into the operation so that he can be present when the payoff occurs. Furthermore, all conversations with the defendant about the payoff should be recorded, and it should be stated, if possible, in straightforward, clear terms that the payment is for a specific act. It is much more difficult for the defendant to advance a credible "con man" defense if the recorded conversations discuss the payoff in clear, understandable language.

Lastly, the treatment given the intermediary by the Government must not be perceived by the jury as unduly lenient or otherwise an inducement to lie. If the intermediary has substantial criminal exposure, he should be required to plead to a felony. If the intermediary is entitled to payment as an informant, payments should be reasonable in amount and duration.

The "Outrageous Government Conduct" Defense

A second common defense used in cases developed through undercover investigations is the "outrageous Government conduct" defense. In asserting this defense, the public official contends that the Government improperly targeted him. The public official will claim that he was targeted by the administration because he is a political enemy of the administration or a member of some group or organization deemed to be "undesirable" by the administration. An outrageous Government conduct defense is usually expressed as an entrapment defense, a due process defense, or some combination of the two. The entrapment defense focuses on the subjective predisposition of the defendant, while the due process defense focuses on the objective nature of the Government's conduct.

Entrapment is the conception and planning of an offense by a law enforcement officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer. Sorrells v. United States, 287 U.S. 435, 454 (1932). The entrapment defense is properly raised in the first instance as a jury question. The cases make clear that in entrapment cases the only relevant consideration of Government activity is whether the defendant can show an inducement by the Government, which will then force the Government to prove beyond a reasonable doubt the defendant's predisposition to commit the crime charged.

A defendant is considered predisposed if he is

> "ready and willing to commit the crimes such as are charged in the indictment, whenever opportunity was afforded." If the accused is found to be predisposed, the defense of entrapment may not prevail. The predisposition test reflects an attempt to draw a line between "a trap for the unwary innocent and the trap for the unwary criminal."

W. LaFave and J. Israel, Criminal Procedure 249 (1985) (citations omitted in original). The emphasis is upon the defendant's propensity to commit the offense rather than on the Government's conduct. Predisposition can be established by testimony about the public official's readiness to accept the bribe, reputation, prior convictions, and bad acts.

An "outrageous Government conduct" defense may also be expressed as a Fifth Amendment due process defense. This defense would be available only in cases in which the law enforcement conduct violated "that fundamental 'fairness, shocking to the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment." United States v. Russell, 411 U.S. 423 at 432 (1973). This Constitutional defense is not a jury issue; therefore, the judge has discretion in determining when to hear evidence on this issue. If the judge hears the due process motion prior to trial, the discovery allowed by the hearing can be very damaging to the Government's case; therefore, it is in the prosecution's interest to persuade the judge to hear the motion after the trial. The hearing itself can be a painful, protracted affair from the prosecution's point of view. Typically, the defense will subpoena Government documents and Government agents (including the prosecutors) in its attempt to prove outrageous Government conduct.

The prosecution should attempt to prevent the hearing from becoming a never-ending fishing expedition by the defense. The prosecution should ask the court to require the defendant to sign an affidavit that supports every allegation of outrageous Government conduct made by him. The prosecution also should ask the court to require a proffer before the defense is allowed to call a Government employee as a witness. Based on the proffer, the prosecutor may be able to object on the grounds of relevance, privilege or other basis to some Government employees being called.

The best protection from the outrageous Government conduct allegations will be had by following the FBI guidelines on undercover investigations. A separate section of this manual discusses in detail covert techniques in corruption investigations.

The "I Was Conducting My Own Investigation" Defense.

A third defense advanced by public officials (particularly by officials associated in some way with law enforcement) in undercover cases is to contend that the public official's intention was to undertake his own investigation of an attempted bribe by playing along and accepting the payoff money.

A rebuttal to this defense should establish the following points: (1) the public official's job did not include investigating this type of crime; (2) no steps were taken by the

official to notify the law enforcement agency properly charged with investigation of this type of crime of the official's investigation; and (3) no investigative steps were in fact taken by the public official. Most importantly, the prosecution must obtain the return of the bribe currency paid to the public official. Return of the currency usually can be achieved by sending a demand letter to the defendant's counsel. If that fails, obtain a court order or issue a subpoena for return of the currency. An examination of the serial numbers on the returned currency often reveals that some of the serial numbers do not match the serial numbers that were recorded from the payoff currency. The public official's inability to return all of the original currency allows the prosecution to argue that the contention by the public official that he was conducting an "undercover investigation" is a sham in that the public official would have retained as evidence all of the currency, rather than spend or exchange part of it, had he been conducting an authentic undercover investigation.

## Defenses Employed by Federal Employees Accused of Voucher and Time and Attendance Fraud

As part of the crackdown on waste, fraud and abuse, frauds committed by Federal Government employees through the submission of false expense vouchers are being prosecuted more frequently. Typically, these cases involve claims for reimbursement for travel or other expenses incurred by Government employees or claims for overtime.

The defenses to voucher fraud or overtime fraud prosecutions are usually not legal defenses, but rather equitable defenses that urge jury nullification. Examples of the more typical defenses are:

(1) I spent personal funds on other Government business for which I was not reimbursed. Therefore, I submitted an inaccurate voucher to recoup these unreimbursed expenditures.

(2) Yes, the voucher is technically in violation of Government regulations, but I did not cost the Government any more than if I pursued an alternative I was entitled to choose. (An example is staying with a relative while on travel rather than staying in a hotel, for which no lodging payments are made or incurred. The employee nonetheless claims falsely that he spent a certain amount for lodging, and defends on the ground that the Government lost nothing because the Government would have been required to pay that amount if the traveler had stayed in a hotel.)

(3) My boss (or someone else in a position of authority) said what I was doing was permissible (or did not prohibit me from doing it).

(4) Everyone in the agency is doing it. They just singled me out for prosecution.

(5) I am overworked and underpaid. I was denied a raise which I deserved; I worked overtime for which I was never paid.

These equitable defenses can be rebutted by evidence that the regulations are clearly written and the employee had been properly informed of his responsibilities to comply with the regulations. In many cases the conduct is itself so egregious (e.g., forged receipts) as to rebut a claim that any agency employee authorized the conduct. In appropriate cases, call the defendant's supervisor or other appropriate official to establish that the defendant was not given permission to engage in the unlawful conduct. The selective prosecution claim is legally invalid unless the defense can establish an invidious basis for the selection (e.g., race). Efforts to subpoena agency personnel to testify about other persons who committed offenses but were not prosecuted should be vigorously opposed. Investigation of the defendant's work history, including examining leave records and interviewing co-workers and supervisors, can lead to valuable evidence that the defendant did not work extra hours or "deserve" a self-help raise.

## The "Attorney Advice" Defense

A public corruption defendant may assert the defense that he was relying on the advice given by an attorney when he committed the act or acts that form the basis of the indictment.

For the attorney advice defense to be properly raised, the defendant is required to have provided full facts to the attorney, to have believed the advice to be accurate and to have sought the advice in order to comply with and not avoid the law. The assertion of the attorney advice defense acts as a waiver of any attorney/client privilege that existed with the attorney on whom the defendant claims reliance. Therefore, upon notification that the defendant intends to assert the attorney advice defense, the prosecutor should interview the attorney. Usually, an interview with the attorney will establish that either the attorney did not render legal advice as claimed by the defendant or that the legal advice was based on the defendant's misrepresentation of the operative facts. In either circumstance the attorney should be called as a Government witness to rebut the defendant's claim of advice of counsel.

In those rare instances in which the attorney supports the defendant's claim of reliance on professional advice, the prosecutor should employ a legal expert who will testify that the legal advice provided was inaccurate, absurd or unpersuasive to an intelligent public official. Alternatively, the role of the

attorney who provided the advice should be carefully examined to determine whether he participated in a criminal conspiracy.

## The Speech or Debate Privilege

The Speech or Debate clause of the Constitution grants absolute use immunity to United States Senators and Representatives while they are engaged in legislative acts. This Constitutional privilege prohibits prosecutors from introducing in the prosecution of a U.S. Senator or Representative evidence of any legislative act. Therefore, proof of criminal conduct by a member of the United States Congress must be established without testimony regarding conduct that occurred in relation to preparing, introducing, voting on or enacting legislation. This privilege is treated in detail in the section of this manual relating to the prosecution of Legislative Branch Officials.

## Parallel Proceedings

With increasing frequency, criminal defendants find themselves simultaneously involved in civil proceedings that relate to the matter that is the subject of the criminal prosecution. These parallel proceedings may involve bankruptcy litigation, regulatory hearings, license revocation, personnel actions, shareholder suits or other civil litigation. Though parallel proceedings may pose some risks for defendants, often the proceedings can present tremendous opportunities to defendants for discovering details about the Government's case.

Some defense attorneys advocate filing an action under 42 U.S.C. § 1983 to enjoin the grand jury as a means of obtaining free discovery of the Government's case. Other defense counsel routinely file Freedom of Information Act requests in attempts to discover details about the Government's case.

Prosecutors should monitor all parallel proceedings to guard against discovery of the Government's case and to discover details about the defendant. Prosecutors should seek stays or protective orders if the parallel proceeding threatens the criminal case.

110028

# CHAPTER NINETEEN

## SENTENCING ADVOCACY

BY

ERIC H. HOLDER*

Trial Attorney
Public Integrity Section
Criminal Division

* Eric Holder has been a trial attorney with the Public Integrity Section for twelve years.

# SENTENCING ADVOCACY

The trial is over. You're elated. You're tired. You're glad you've won and satisfied that you've done a good, complete job. You feel that your job is done. You're wrong.

You've actually only completed a phase of your work. As prosecutors, we acknowledge our responsibilities in thoroughly investigating matters, bringing them to indictment and trying them to conviction. Too many of us, however, devote too little time to an equally important aspect of the process: obtaining an appropriate sentence. We are too ready to cede to the judge and others all responsibility for finding relevant sentencing data and then determining how to apply that data to the convicted defendant. Most of us like to get up at sentencing and say a few, obligatory things in the hope that the judge will "do the right thing." Far too few of us put in the necessary work to actually have an impact upon the judge's sentencing decision.

Set out over the following pages are a few thoughts about the way in which a prosecutor can have some meaningful input into the sentencing determination. Under the new guidelines that took effect for crimes committed after November 1, 1987, the possible range within which a judge can impose a sentence has been narrowed considerably. As a result, the relative impact that a prosecutor can have is also reduced. A range does still exist, however, and it is the view of the writer that prosecutors should do all that they can to insure that appropriate sentences are imposed.

There are a variety of ways in which the prosecutor can attempt to influence the sentencing decision. If you have waited until the day that the sentence is to be imposed you have probably already lost your best hope of having any significant impact. No matter how persuasive you think your remarks are at the hearing, it is the rare case where a judge will be so moved by your statements that he or she will do something other than what was planned well before the sentencing date. How then, and when, can a prosecutor really put himself in a position to make a difference? The simple answer to the second part of the question just posed is as soon as possible. Delay in advancing your arguments or presenting materials you consider relevant can only negatively impact your contentions. Except in very rare instances, this is not akin to a trial situation where delay in introduction may enhance the impact of a particular piece of evidence. Your goal should be to get to the judge as soon as possible with as much relevant information as possible. It is while the judge is first starting to consider a sentence that your information will have its greatest effect.

Too little use is made in corruption cases of the sentencing memorandum. Though each case must inevitably be treated uniquely and though you must try to guess what will affect your particular judge, it is hard to see the down side to this infrequently used tactic. The memorandum need not have any specific form nor is there any regulation as to its content. In essence, you are given a free hand in what you might include in the document. This is a memorandum that the judge can hold, review and use as the basis for further inquiry. It is a uniquely useful tool in corruption cases where the sentencing determination is almost by definition a complicated one. The public official stands before the judge not as the usual "street type" but, almost inevitably, as one of the pillars of the community. A sentencing memorandum allows you to attack that good reputation before the date on which sentence will be imposed (too late anyway!) and in ways you could not at trial.

In a case involving an Assistant United States Attorney convicted of the theft of massive quantities of both heroin and cocaine from an evidence safe, the memorandum, though very lengthy, was essentially a factual recitation of the charged crimes. The basis for the factual representations was the debriefing of the defendant that had occurred over the course of some thirty hours. Instead of merely presenting a bald indictment that said the Assistant United States Attorney had stolen two kilograms of cocaine, and relying on the probation officer to flesh out the incident, we were able to have a direct and substantial impact. The defendant's attempts to minimize the thefts ran headlong into factual assertions he could not really dispute. Similarly, the standard protestations of prior good reputation and the isolated nature of the crime advanced by the defendant were belied by the memorandum's excruciatingly detailed description of each of his many trips to the evidence safe and what he did with the drugs he stole. It is highly unlikely a judge would have allowed us to go into such detail on the day of sentencing and doubtful that the impact would have been as great. By submitting the memorandum well in advance of sentencing, however, the judge was given time to read and digest its contents at his own pace with no need to be mindful of the impact this long presentation was having on his court schedule on a particular day.

Sentencing memoranda are also useful as a way to put before the judge, in advance of the sentencing date, relevant information that you accumulated during the investigation but could not, for some reason, introduce at trial. In a Hobbs Act trial in Guam involving the island's purchasing department head, we were only able to convince two vendors to testify that they had to make payoffs. These payoffs totaled $7,000. We had good reason to suspect that the public official had demanded and received much more than that from more vendors. An examination of his bank accounts showed that he had, without any legitimate business or personal reason, made cash deposits of over $800,000 during the relevant time period. Through careful use of a

sentencing memorandum we were able to put this damaging fact in front of the judge and allow him to draw all of the equally damaging conclusions we hoped for. By submitting the memorandum prior to the sentencing date the fact of the deposits was magnified and allowed the judge to incorporate it into his thinking about an appropriate sentence. The submission of a sentencing memorandum affords the prosecutor an opportunity to place data before the judge when the prosecutor wants to. It gives to the prosecutor a degree of control with regard to timing that is not otherwise available. It also allows the prosecutor direct, unfiltered access to the judge. The value of this control and this access is considerable.

The content of the sentencing memorandum must, of necessity, be determined on a case-by-case basis. All relevant factual material should, obviously, be included. However, one should not forget to draw logical, provable inferences from this data. The same rules apply to what should be contained in the prosecutor's allocution at sentencing. We tend to be too conservative at this stage of the proceeding, very often only restating what we have proved at trial. If you are in possession of other information that is damaging to the defendant, it makes little sense to place it in your closed file without sharing it with the judge and the community that put its faith in the public official.

There are obvious limitations that must be considered before making a presentation, Rule 6(e) among them. But these are restrictions that should not, if they can be properly overcome, unduly inhibit your desire to inform fully the court and community. In this regard, the requirement that your assertions be factually based can work to your benefit. In organized crime prosecutions, sentencing memoranda frequently note that the defendant is a member of a Mafia family responsible for a variety of illegal operations. If the defense objects to these contentions it is entitled to a Faticco hearing. At that proceeding, the Government frequently puts FBI agents on the stand to testify about what their informants have told them about the defendant. This hearing is designed to afford some protection to the defendant from unsubstantiated Government charges, but, used properly, it is a great opportunity for the prosecutor to get before the judge relevant, yet uncharged, facts about the defendant.

The applicability of this procedure to corruption cases is obvious. If, for instance, the prosecutor is in possession of evidence tying a convicted public official to a kickback scheme for years before the charged incidents, this is information that should be brought to the attention of the judge. If called upon to prove its contentions, the Government is free to introduce whatever reliable data, including hearsay from credible sources, it possesses.

It is imperative that in any sentencing-related submission, either by memorandum or allocution, the Government go beyond the mere facts of the case and stress the harm done to, at least, the organization with which the defendant was connected and, at most, the community at large. We tend to be myopic in our view of the harm inflicted because our focus at trial must be narrow. Sentencing is the time to expand our vision and search for the larger meanings in the defendant's conduct. There are very real costs associated with official misconduct. Politicians who demand kickbacks from vendors frequently receive them because the businessman increases, by the cost of the kickback, the sale price of his service to the contracting authority. In cases that we have prosecuted we have seen school buses that sold for $10,000 more than the fair retail price, back hoes for $5,000 more and wrenches at twice their value. This is a direct drain on the public coffers and (logical assumption) is one of the reasons why the community pays as much as it does for its government.

One of the frequently unseen costs to the community is the loss of productive, ongoing businesses. One of the real tragedies involved in the corruption area is the honest businessman who, refusing to make the payoff demanded, receives no government contracts and is forced to liquidate his business. His employees are then out of jobs, the community's tax base is probably decreased and the local, state and possibly Federal governments become responsible for a variety of unnecessary expenses from unemployment compensation to welfare. It is our job as prosecutors to make corruption real, tangible and understandable to both judge and community. We can do this by pointing out the real, direct and unexpected costs of corruption.

Among the best ways of doing this is to use the victims of the corrupt public official. These are people who can probably best explain the effects of corruption and in doing so have the most dramatic impact. Too often, but perhaps understandably, these people, though willing to talk to you or the FBI, do not want to testify in public. In cases such as these you should consider the use of affidavits or, if the information is of the informant variety, the testimony of the agent who developed the informant.

Public corruption cases present unique problems in attempts to portray the convicted defendant as a threat to the community. He or she is usually seen as a community leader, is a first time offender and enjoys a good reputation in the community. At a recent sentencing in Philadelphia over 300 witnesses came forward to attest to the good reputation and works of some convicted union officials. It is usually a fact that the official is, at least to outward appearances, a model citizen. She or he is not the demented rapist or murderer whose mere existence is likely to produce nightmares for adults as well as children. How then to attack this positive image?

As a threshold matter, the corrupt politician usually cannot advance the sociological reasons for his behavior that truly may be contributing factors with regard to the conduct of the rapist/murderer. On the contrary, we must point out, the official is likely to have led a somewhat charmed life. Even if from humble beginnings, through hard work and determination the official has achieved a privileged place in society. This is the key to the prosecution attack. The public has placed trust in this person, elevated him or her, and had this trust betrayed. For every defense contention about the good the public official has done, there should be a Government response noting not only the harm done but the positive works not realized due to the official's misconduct: "The defendant is a pillar of the community" -- only to those who do not know the secret, corrupt, behind-the-scenes real man or woman. Ask yourself, are there any people who can be used as anti-character witnesses, who will say his reputation is not that good? You must also point out to the court how the defendant misused his sterling reputation as a cover that allowed him to participate in the illegal schemes of which he stands convicted.

"The defendant stands before you, your honor, a humbled, broken, contrite person" -- so what? Too frequently in the past political corruption defendants have received disproportionately favorable treatment because they are able to cite the "look how far I've fallen" plea. Though there is an element of truth to this -- the average criminal usually does not have his crime so widely reported or his respectable life so thoroughly altered -- the average criminal was not the repository of the public's faith. The public official was probably also not very humble or contrite when he was engaged in his illegal activity. We must strive for consistency here and not allow a convicted public official to trade upon the very thing he betrayed as a means to escape the punishment he deserves. You cannot, however, be too strident or unrealistic. Not <u>every</u> public official deserves the maximum sentence and not <u>every</u> corruption case is the worst thing since Watergate. In attacking the "broken person" plea you have to acknowledge what may be obvious, the good works done by the official, for example, but stress the negative, point out where the defendant deviated from the lawful course and suggest logical reasons why (greed for a better lifestyle?) the official lost his way.

"The defendant is a first time offender, unlikely to appear in this court again." This is advanced in almost all corruption cases and may, in fact, be true. The most direct way to get at this contention is to point out the seriousness of <u>this</u> offense. Most public officials do not get, and should to be allowed, more than one bite of the apple. The defense will try to assert, in essence, that the official only did it once, will not do it again (most likely because he will not be in a position to do so, we might add) and that no purpose would be served by punishing him in ways greater than his loss of reputation already has. Would

an argument such as this be persuasive or even considered in any other kind of serious felony case? The answer is almost invariably no, and the question we must put to the court is why should a public official be considered differently? The "first offender" contention is also subject to attack, perhaps most effectively, by bringing to the attention of the court, any provable, uncharged, incidents. This reduces the "first offender" claim to "first time caught" reality.

The time between conviction and sentencing is a period where you must remain active and can attempt to put pressure on the defendant for sentencing purposes. By submitting a sentencing memorandum that tries to anticipate and defuse his claims, the Government lessens the impact of the defense contentions. We should, however, try to be more than reactive. Corruption cases often allow the Government to offer the defendant an opportunity to cooperate in a meaningful way. More often than not, the convicted public official was not the only culpable person involved in the corrupt scheme. He may have split the payoff with other officials on his level or higher. He may be able to identify vendors and contractors who, though they denied any involvement to the Government, paid him off. By offering the defendant a chance to cooperate by providing information two purposes are served. The most obvious is that the receipt of this information could be useful in fully determining the extent of the corruption and bringing to justice all of those involved. For sentencing purposes, a refusal to cooperate by the public official undercuts virtually all of his claims. He can be portrayed not as contrite but as unrepentant, as a person still involved in the criminal activity. It is fairly easy to put in writing a request for cooperation early in the case. The defendant's failure to answer or to cooperate is then easily documented and should be brought to the attention of the court. The defense claims that, absent immunity, no cooperation is possible or appropriate do not seriously lessen the impact of the refusal.

We cannot view the return of a guilty verdict as the end of our responsibility in the criminal process. We must bring to bear all of the tactical skill and enthusiasm that we marshaled for the investigation and trial to the sentencing process in order to fully do our jobs as prosecutors. In the corruption area, we are faced at that phase with claims from the defendants that are, compared to the average non-corruption criminal, more complex, more likely to be true and more likely to have an effect at sentencing. Our failure to anticipate and to meet these claims in an aggressive manner can severely undercut our efforts to root out corruption.

CHAPTER TWENTY

# MEDIA RELATIONS

BY

ROBERT C. BONNER*

United States Attorney
Central District of California

* Robert Bonner has been United States Attorney for the past four years and has guided his office through a number of prosecutions that attracted intense media attention. Richard E. Drooyan, a former prosecutor in the U. S. Attorney's Office, contributed to this article.

## MEDIA RELATIONS

Political corruption investigations often focus on well-known or influential members of the community, and as a result generate intense media interest and scrutiny. Furthermore, these investigations and the attendant publicity have political ramifications that are not present in most other criminal investigations. The identification of a public official as the subject of an investigation can destroy a political career or affect the outcome of an election. Leaks and rumors can be used for partisan political advantage and thereby undermine the credibility and impartiality of any resulting prosecutions. Consequently, great care must be exercised in dealing with the media in connection with public corruption matters.

### Designating a Spokesperson

Whenever possible, someone in the United States Attorney's Office should be designated to act as the single spokesperson for the Government for purposes of responding to media inquiries regarding the corruption investigation. A complex investigation may have several investigating agencies, each of which is a potential source of information about the investigation. A single spokesperson in the United States Attorney's Office will insure accuracy and consistency in responding to inquiries and help insure that confidential information is not disclosed inadvertently or improperly to the media. Furthermore, there may be less of a problem with rumors if there is a single authoritative spokesperson to respond to media inquiries.

It is desirable to designate someone other than the attorneys in charge of the investigation to act as the spokesperson. Although the attorneys in charge will have the most knowledge about the investigation, there are several reasons to designate someone else (such as the First Assistant or a Public Affairs Officer) as the media spokesperson. Responding to media inquiries can be extremely time-consuming in a high profile matter. In the absence of a press conference, there will be multiple media inquiries each time there is a newsworthy event or a published report concerning the investigation. Having a media spokesperson will allow the attorneys in charge to concentrate on the investigation or prosecution of the corruption instead of repeatedly providing the same information to different members of the media. A media spokesperson can also screen the media inquiries and thereby give the United States Attorney and the attorneys handling the investigation an opportunity to discuss how to respond to the inquiries. This will reduce the element of surprise, allow the attorneys to consider how various possible responses might affect the investigation and insure that the responses comply with all applicable Department of Justice guidelines and regulations.

Whether or not a spokesperson has been designated, it is important to coordinate responses to media inquiries. The United States Attorney, the investigating agencies, the attorneys handling the investigation, and, in cases with national interest, the Department of Justice in Washington, D.C., must be informed about developments in corruption cases that may become public and must be consulted before responding to media inquiries. They must also be advised in advance of public events such as indictments and sentencings. This will help insure accuracy and consistency in the responses. A designated spokesperson can be responsible for contacting the affected individuals and organizations and thereafter responding to the media inquiries.

## The Decision to Confirm an Investigation

The decision to confirm the existence of an investigation or the identity of the targets in a corruption investigation involves a number of considerations that may not be present in other investigations. Of course, if there is an ongoing undercover investigation involving wiretaps, confidential informants or undercover agents, there is a need to keep the existence of the investigation confidential. Since there should not be any public disclosure of the investigation to anyone, there presumably will not be any pressure from the media (or public officials) to confirm the existence of the investigation.

However, at some point in the investigation (upon the issuance of grand jury subpoenas, the execution of search warrants, the commencement of interviews by investigators or some other public activity such as an announcement by an agency that the matter has been referred to the United States Attorney's Office for investigation), media representatives will ask for information about the investigation. Although the existence of the investigation is public knowledge, accurate information about the investigation may not be widespread. Once the existence of the investigation has been officially confirmed to someone in the media, however, fairness (and good media relations) requires that every media representative receive the same information. This will, in turn, result in a significant increase in publicity (and media inquiries) regarding the existence of the investigation. Thus, if there is an investigative reason to limit information about the investigation (such as interviewing prospective witnesses before they contact the targets), the spokesperson should refuse to confirm or deny the existence of the investigation even if there have been published reports about the investigation. Furthermore, the spokesperson should not confirm the existence of the investigation if it will necessarily disclose the identity of the targets to their political detriment.

## The Identity of Targets

Perhaps the most sensitive and difficult problem in public corruption investigations involves responding to requests for information regarding the identity of targets. Care should always be exercised to avoid unnecessarily disclosing the identity of the targets of any investigation. Certain consequences (such as loss of employment, credit or friendships) may result from publicity concerning an investigation even though no charges are ever brought. This is particularly true in political corruption investigations where, as noted above, identifying a public official as a subject or target (the media and public do not necessarily recognize the distinction) can adversely affect or even destroy a political career.

The identity of the targets should rarely, if ever, be confirmed by the spokesperson for the investigation, even if the existence of the investigation is widely known. Statements by an official spokesperson will be interpreted by the media and the public as somehow confirming the truth of the allegations. Furthermore, the statements will be used for partisan purposes by political opponents and could affect the outcome of an election. Identifying targets can create the appearance that an investigation is motivated by partisan considerations, which undermines the credibility of the investigation and any resulting prosecutions.

It should be the policy of the United States Attorney's Office to refuse to confirm or deny that particular individuals (whether or not they are public officials) are targets or subjects of the investigation. Representatives of the media will frequently ask about the status of individuals who have been publicly associated (usually by the media or political opponents) with the investigations. The effect of denying that an individual is a subject or target (or confirming that the individual is not a subject or target) of the investigation will necessarily create the inference that others are the targets or subjects of the investigation.

If the spokesperson does deny that a particular public official is a target, fairness requires that the status of every person who is not a target be confirmed as such in response to media inquiries. It would be highly prejudicial to leave the impression with a "no comment" that a non-target was a target. This will, however, ultimately identify, albeit indirectly, the actual targets or subjects. The only answer short of confirming that someone is a target in response to inquiries about an actual target is a "no comment." If the spokesperson confirms the status of everyone who is not a target, a "no comment" will be interpreted as confirmation that other individuals are targets. Thus, the better practice is to simply refuse to confirm or deny the status of a particular individual and explain to the media representatives

why the Government cannot confirm or deny the status of anyone, even if they are not targets.

A similar problem occurs when a public official asserts that his or her political opponent has engaged in illegal conduct which is the subject of a Federal corruption investigation. For the reasons stated above, the spokesperson should refuse to confirm or deny the accuracy of the allegations. The more difficult problem occurs when the public official falsely asserts (knowingly or unknowingly) that his or her opponent is the target or subject of the investigation. This may be a situation in which there should be an exception to the general policy, particularly if there is evidence that the official knowingly made the false assertion, although denying the allegation undeniably may have political repercussions. It also may be necessary to make an exception when there are allegations of misconduct about the investigation (e.g., all of the targets are from one political party, defense counsel for certain targets are former AUSAs who are receiving favored treatment). Under these circumstances, providing limited information about the investigation to demonstrate that it is fair and impartial may ultimately enhance the credibility of the investigation.

## Final Considerations

Care must be taken to avoid violating the grand jury secrecy provisions of Rule 6(e) of the Federal Rules of Criminal Procedure. Since witnesses are not subject to the secrecy requirements, the witnesses will often disclose, directly or indirectly, to media representatives that they have appeared, or received a subpoena to appear, before the grand jury. Media representatives will often seek confirmation of this information from the spokesperson. Although the information may be public, confirmation by a representative of the Government would violate Rule 6(e).

There are a number of ways to enhance coverage of public corruption cases and improve media relations. Government representatives should always be consistent in their treatment of the media. Thus, all representatives of the media should have equal access to provide coverage of the case and should receive the same information. Representatives of the media will always contact the Government's spokesperson for comments or information when there are public developments or events in a case. Every effort should be made to respond to these inquiries in a timely manner, with due regard to media deadlines, even if the response is nothing more than a "no comment." The best way of insuring that each member of the media has the same information is through a written press release or a press conference open to all representatives of the media.

In order to increase coverage, the media spokesperson should seek to identify matters of particular interest to individual media representatives. For example, a smaller newspaper that does not have a regular court reporter may have an interest in a local public official or a political issue before a local governmental body. The media spokesperson should contact the newspaper whenever there are newsworthy events affecting communities in the areas it serves. The media spokesperson should also keep track of media inquiries so that he or she will be in a position to provide information concerning matters of interest when the information becomes publicly available.

CHAPTER TWENTY-ONE

# ORGANIZING A PUBLIC CORRUPTION INVESTIGATIONS AND PROSECUTIONS UNIT

BY

JEREMIAH T. O'SULLIVAN*

Chief, New England Strike Force Office
Organized Crime and Racketeering Section
Criminal Division

* Jeremiah O'Sullivan has been Chief of the Boston Strike Force since 1979, and before that was Chief of the Public Corruption Unit for the United States Attorney's Office, District of Massachusetts.

## ORGANIZING A PUBLIC CORRUPTION INVESTIGATIONS AND PROSECUTIONS UNIT

The decision whether or not to form a specialized unit to investigate and prosecute political corruption cases is one of the most important that a United States Attorney will make during his or her term of office. On the one hand, the formation of such a unit requires the dedication of substantial resources over a long period of time with no firm guarantee of immediate success. It also may raise public expectations of major indictments being returned by a grand jury at a time when information regarding corruption available to the unit is limited, risking embarrassment for all concerned. On the other hand, the decision not to form such an unit may very well be one that permits extensive patterns of corruption to continue unabated in a particular District. In 1981, one District abolished its public corruption unit, presumably because of a belief that public corruption was not a substantial problem. Subsequent events have proven that action to have been ill-advised. Recently, the head of the city Transportation Department, the Deputy Director of the Parking Violations Bureau, a local Democratic leader, the Chairman of the Taxi and Limousine Commission, as well as a number of other city officials and businessmen have all been indicted, and in many cases convicted, for offenses involving abuse of the public trust. More indictments are expected.

### Determining Whether There is a Systemic Corruption Problem Within a District

Because of the nature of the problem of governmental corruption, a United States Attorney must be willing to act in forming a political corruption unit on a quantum of information that is far less substantial than that used to assess more traditional criminal activities. In the case of political corruption, the public usually does not realize that it is being victimized. The prototypical case of political corruption -- one in which a public official accepts money in exchange for bringing about a certain result in the course of his official duties -- involves two individuals: the official who accepted the money and the person who paid the money, neither of whom are likely to complain about their participation in the conduct. Not only is there often a question about who committed the crime, but there is also often a question as to what crime, if any, was committed.

## Formation and Staffing of a Political Corruption Investigations and Prosecution Unit

### Selection of a Unit Chief

The key decision that the United States Attorney will make, once he has decided to form such a unit, is the selection of the person to head it. The ultimate success or failure of the unit is directly related to this selection. The importance of this selection cannot be overestimated. The person selected should possess the following qualifications:

1. Be a first rate trial lawyer;
2. Possess outstanding legal and analytical skills;
3. Possess mature judgment;
4. Have the ability to protect sensitive information;
5. Have a personal commitment to the program; and
6. Have the ability to work with investigators on a partnership basis.

1. First Rate Trial Lawyer:

Any defendants indicted by the unit will be represented by the best defense attorneys money can buy. The head of the unit must be equally competent as a prosecutor. Political corruption cases are by their very nature difficult cases for the Government to prosecute. In order to win such cases, the Government must be represented by skillful prosecutors who represent the public interest and the rule of law.

2. Outstanding Legal and Analytical Skills:

The ability to investigate and prosecute political corruption cases involves the innovative use of statutes, case precedent and general legal theory. Every political corruption case will be hard fought by the defense from the very inception of the investigation. Outstanding legal and analytical skills will be required of the prosecutor at every stage. The use of the Hobbs Act (18 U.S.C. § 1951) by then Assistant United States Attorney Herbert Stern against the corrupt political machine in Jersey City, New Jersey, in the early 1970s is one example of how a creative prosecutor utilized a statute that had never before been used to support a political corruption prosecution. 1/

---

1/ Ruff, Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy, 65 Geo. L.J. 1171 (1977); J. Noonan, Jr., Bribes, 584-987 (1984).

3. Mature Judgment:

The investigation and prosecution of public corruption is, by its very nature, high profile litigation. Just the decision to open such an investigation or even to issue a grand jury subpoena can cause severe damage to the reputation of the subject of the investigation.

> [T]hose who would adopt existing legal tools to meet unique and challenging situations must be appreciative of the possible consequences of their efforts. Newly developed legal theories are certain to be attacked and carefully scrutinized by the judiciary; mistakes will be treated harshly and often with severe repercussions. Since what one office does will affect the potential of others, each carries a substantial burden in making an effort to break new ground. 2/

The decision of the Supreme Court in McNally v. United States, ___ U.S. ___, 107 S. Ct. 2875 (1987), in which the Court held that the mail fraud statute (18 U.S.C. § 1341) is limited in scope to the protection of money or property rights and does not extend to the intangible right of the citizenry to honest government, is the most recent example of the difficult analytical problems that arise in political corruption prosecutions.

4. Ability to Protect Sensitive Information:

Many times the unit chief will find himself or herself in possession of information regarding an investigative subject which, for whatever reason, cannot support an indictment. The public disclosure of such information, however, could ruin a political career. The unit chief must be the type of person who allows the results of the inquiry to speak publicly only in the form of an indictment and who resists the temptation to enter public debate in any other forum. The unit chief must also have the ability to instill this concept into other members of the unit.

5. Personal Commitment:

The head of the unit will probably never hold another job that requires him or her to work harder over extended periods of time under such intense pressure. The issue of sufficient investigative resources to address adequately the problem in the district will never be resolved completely. Only the unit chief's commitment to the importance of the subject matter will carry him or her through all of the problems that will arise.

---

2/ Blakey, Goldstock and Rogovin, Rackets Bureaus: Investigation and Prosecution of Organized Crime 31 (U.S. Dept. of Justice, Law Enforcement Assistance Administration, 1978).

6. Ability to Work with Investigators on a Partnership Basis:

It takes a very special type of prosecutor who is both willing and able to work with investigators on a partnership basis.

Of course, every prosecutor works with investigators in preparing a case for trial. Such relationships, however, are usually of short duration and involve very specific tasks that must be accomplished in order to get ready for trial. Political corruption investigations are sui generis. At the inception of such an investigation, no one may know for certain that a crime has even been committed. Enormous efforts are required just to determine if there is ongoing criminal activity. Voluminous records usually have to be examined, sometimes literally rooms full of records. An investigative plan has to be drafted and followed. Extensive grand jury proceedings usually are required. The grand jury proceedings need to be coordinated with critical witness interviews that are carried out by the investigating agents.

All of this requires mutual respect for each person's professional standing. More than that, it requires a suppression of individual ego and emphasis on team effort. Some tasks in the investigation are distinctly those of the prosecutor; others, those of the investigator. Many can be done by either, and the workload must be shared. The unit will not be successful unless the prosecutor and the investigator have formed a partnership. Some prosecutors, who may excel in the courtroom, do not possess the requisite interpersonal skills to enter into such a partnership and make it work. If a unit chief does not possess these skills, then the unit will almost certainly fail.

Selection of Other Unit Prosecutors

A United States Attorney faces a difficult decision in staffing a public corruption unit. He will probably be starting such an unit on limited information about the public corruption problem in the district. The tendency will therefore be to understaff the unit. But a public corruption unit that is little more than a sign on a door may do as much harm as good; it may lead the public into thinking that something is being accomplished when, in fact, it is not. Consequently, a careful inventory should be taken of the resources that can be employed in addressing the problem.

At a minimum at least two other prosecutors, in addition to the unit chief, should be assigned full-time to the unit. Experience has taught that unless this minimum commitment of manpower is made at the inception of the unit's operation, the chances of the unit's ultimate success are problematic at best. First, prosecutors are the requisite catalysts to stir up investigative activity across the spectrum of investigative

agencies. Second, and as importantly, the commitment of these resources in an age where criminal justice resources are at a premium is a clear signal to the investigative agencies that the office is fully committed to public corruption prosecutions as a major priority. The investigative agencies are more likely to respond with their own manpower commitments when they see the commitment of resources by the United States Attorney's Office.

The natural inclination is to staff such an unit completely with experienced prosecutors. This is not always necessary. Assuming the unit chief meets the criteria set out above, the other prosecutors assigned to the unit need not necessarily be senior prosecutors. Unlike the majority of the cases in a United States Attorney's Office, public corruption cases frequently take years to develop and involve the analysis of extensive quantities of documents. Accordingly, it is more important that the prosecutors in the unit show a commitment to the importance of the work of the unit, that this commitment take the form of a promise to work in the unit for at least three years and that they have the capacity to work long hours on complicated "paper" cases requiring enormous attention to detail. At the early stages of the unit's life, these qualities are more important than general trial skills. The young attorney will get on-the-job experience in his area of specialization. A judicial clerkship and three years' experience in a major law firm learning how to do complicated paper cases can be just as important, perhaps more so, than a similar amount of time spent prosecuting hand-to-hand narcotics cases.

Paralegals

Paralegals can be of invaluable assistance in such tasks as preparing a chronology of important dates with respect to a contract award.

At the inception of the unit's existence, at least one full-time paralegal should be assigned to the unit. The paralegal should possess excellent organizational skills in order to be able to manage the large amount of documentary materials that the unit will be handling. The paralegal should also be a person with initiative who can contribute ideas as to how the unit can operate more efficiently.

Among the tasks that the paralegal should be responsible for are the following:

1. Document Control:

The paralegal can establish and implement systems to handle all the documents that will be subpoenaed by the unit. It is preferable that the paralegal be familiar with computers and computer software programs in aid of this task.

2. Document Analysis:

The paralegal can prepare fact chronologies based on analyses of the records.

3. Exhibits:

The paralegal can be of great help in preparing and controlling grand jury and trial exhibits.

A second paralegal may need to be added to the unit as the workload requires.

Other Support Personnel

There is not enough space in this chapter to discuss other support staff issues such as the resources generated by work-study students and volunteer law clerks. It must be pointed out, however, that Rule 6(e) of the Federal Rules of Criminal Procedure raises substantial barriers to the disclosure of grand jury materials to work-study and volunteer students working in a United States Attorney's Office.

Space and Security

The unit should be housed in office space that allows for at least the following:

a) Each prosecutor in the unit should have his or her own office. This arrangement is conducive both to attorney productivity and to the security of investigations.

b) A large, secure file room should be set aside to store the voluminous records that will be subpoenaed and analyzed by the unit.

c) There should also be at least one room set aside for the investigating agents to work on intelligence files, as well as to analyze the subpoenaed records. The presence of the investigators in the unit's office space should be encouraged at all times.

d) There should be a conference room where witnesses can be interviewed in private. At least some of these witnesses may be hostile and it can be a mistake to interview them in a prosecutor's office where there may be sensitive documentary materials in plain view.

e) There should be a room available for defense counsel to examine voluminous trial exhibits without disturbing the routine of the office. If possible, this room should be physically separate from the unit's operational offices for security reasons.

Since a substantial portion of the unit's work involves interviewing confidential witnesses and the grand jury examination of persons not publically identified, there should be a private entrance to the offices. Persons who seek to hide the fact of their cooperation will more readily appear in a location they believe is secure.

Consideration should be given to periodic sweeps of the unit's offices for unlawful electronic surveillance devices. Consideration should also be given to installing security alarms in the unit's offices.

All of these security concerns militate in favor of physically locating the unit's office in space that is in some way separate from the main United States Attorney's Office. Consideration should therefore be given, for example, to locating the unit on a different floor of the building which houses the United States Attorney's Office, or at least in office space that is self-contained in some fashion.

## Development of a Unit Strategy

### Importance of a Written Plan

After the initial evaluation by the United States Attorney and the formation and staffing of the unit, the next most important step is defining in detail the nature of the corruption problem to be addressed and, with the investigators, developing and documenting an investigative strategy. This will insure that all of the unit's investigations support the strategy adopted and allows the unit chief to review the unit's cases periodically to determine if the cases further the unit's strategy or if corrective action is needed. If the unit chief is lucky, there may be some "walk-in" cases. However, such cases rarely will lead to the uncovering of systemic, pervasive corruption in a governmental organization or have long-term impact. More often than not, such cases will be one-shot deals that can distract the unit from its stated objectives. In order to guard against the very real tendency to view the prosecution of such "walk-in" cases as resulting in the accomplishment of the unit's goals, the unit chief should devise a written strategy setting out the goals of the unit, focusing on systemic problems of corruption, rather than on individual cases. This written strategy need not be elaborate and should be reviewed from time to time as more information is developed.

The first steps in devising this written strategy already will have been undertaken by the United States Attorney's initial survey determining whether to establish a public corruption unit in his office. This information can be the first step in helping to establish the goals for the unit. There are several other steps listed below that also should be undertaken in developing

this written strategy. Before turning to these additional steps, one other issue should be addressed.

The investigation of public corruption matters is an unique area of investigative activity. The Federal investigative agencies initially may not have much hard information in their files concerning public corruption in the district. This is in large measure because traditional criminal informants usually are not in a position to provide this type of information or have not been asked the right questions. Many times, the type of informant who can best provide information on public corruption matters is, for example, a legislator who is a member of the political party out of power, a lawyer who deals in regulatory matters or a newspaper reporter. This type of source may be more willing to provide such information to the United States Attorney or to one of his assistants rather than to a criminal investigator. Therefore, it is very important that the United States Attorney, the unit chief and members of the unit actively engage in intelligence gathering if the program is to be successful.

Intelligence Leads

Without an adequate intelligence base, the unit probably will fail to be effective. Case development is not based on haphazard findings and rarely will informants come knocking at the door. Reading current and back issues of local newspapers is a basic approach that can be helpful in establishing goals and then in developing cases for the unit. Such newspapers, especially those that may be published only once a week and cover a particular city or town or, in the case of a large city, a particular section of the municipality, can provide leads on potential areas for investigation. Articles may point to allegations of corruption or irregularities in such areas as municipal zoning disputes, significant structural problems on recently constructed government buildings, or cable television franchise awards that raise questions concerning the failure of a particular city or town to follow established procedures in awarding franchise contracts.

Liaison with State and Local Agencies

Establish a close working relationship with agencies concerned with integrity in government, and with other law enforcement agencies, since these agencies frequently unearth information about political corruption. Agencies that might be contacted include the following:

- office of the state attorney general;
- local district attorneys;
- state ethics commissions;

- offices of inspectors general;

- crime commissions; and

- boards of bar overseers.

## Organization of Prosecutor Workload

The size of the unit necessarily dictates the organizational structure of the unit. The internal organizational framework of the unit will depend more on the personalities and capacities of the chief and the staff rather than on any formal organizational chart.

### Role of the Unit Chief

The unit chief's major responsibilities are:

- o In consultation with the United States Attorney, establish the goals of the unit and insure the implementation of these goals;

- o Along with the United States Attorney, develop an ongoing liaison with state and local agencies and with individuals concerned with the issue of public corruption;

- o Establish a close working relationship with the Federal investigatory agencies responsible for investigating public corruption cases; and

- o Closely supervise all of the investigations in the unit, not just those upon which he is working directly.

The need to establish the unit's goals and to work with outside agencies and individuals has been detailed and emphasized. These issues are critical to the success of the unit. It is vitally important that the unit chief carve out a period of time each week to work on these functions. The unit chief should not be so tied down with his own caseload that these matters are ignored. The unit chief is the one person who must be constantly asking whether the unit's limited resources continue to be directed toward the unit's goals.

Without a close working relationship with the Federal investigative agencies, very little can be accomplished in the investigation and prosecution of public corruption matters. This relationship should begin with input from these agencies in establishing the unit's strategy and goals. The unit chief should arrange to meet at least weekly with the squad supervisors in the investigative agencies having responsibility for the unit's subject matter. At these weekly meetings, a detailed review should be conducted of the past week's progress in the

various investigations, and plans for the next week's investigative activities should be made. These planning sessions should be very detailed and should include such things as what grand jury subpoenas are to be issued over the next week, what interviews are to be conducted and similar matters. It is extremely important that the investigative agencies' activities and the unit's activities be closely coordinated. While no prosecutor should assume the role of a Federal agent, corruption investigations are unique and require closer cooperation and coordination between investigators and prosecutors than other types of criminal investigations. A symbiotic relationship between prosecutors and investigators furthers the success of the unit. "A poor relationship, or one that is dysfunctional, will usually be a guarantor of failure." 3/

It is also very important that the unit chief allocate a substantial portion of his or her time each week to the supervision of the prosecutors in the unit. A weekly staff meeting of all the prosecutors in the unit should be held. At this meeting, unit members should brief each other on the progress, or lack thereof, of the investigations upon which they are working and seek input from the other members of the unit on problems or issues that have arisen during the course of a specific investigation. Discussion of legal issues, including recently decided cases, should also take place at these meetings. Since the unit's members should not be discussing their cases with persons outside of the unit, these weekly staff meetings are extremely important and should be held regularly, whatever the press of business.

Role of Unit Prosecutors

Because of the small size of a political corruption unit, it generally will not be efficient to utilize a team approach with a senior and junior prosecutor assigned to each specific investigation. Therefore, each member of the unit should be assigned specific investigations to work on. Because there will be various levels of experience in the unit, it is important that the unit chief pay careful attention to such assignments and that he or she monitor the progress of such assignments closely. The unit chief and the prosecutor assigned to the case should set specific objectives in a particular investigation, as well as time limits within which these objectives should be met. If a particular objective is not met within the specified time limit, then the unit chief should make an evaluation as to whether or not the investigation should be terminated. The unit chief should not allow an inexperienced prosecutor to waste time on an unattainable objective. Because of the limited resources available to the unit, investigative efforts should be carefully monitored to maximize resources. A unit chief must not be afraid to cut his or her losses when such action is warranted.

---

3/ Blakey, Goldstock and Rogavin, supra note 4, at 39.

CHAPTER TWENTY-TWO

# LEARNING THE PLAYERS AND IDENTIFYING TARGETS: TACTICS FOR SMALLER OFFICES

BY

JOSEPH M. LAWLESS*

Trial Attorney
Public Integrity Section

* Joseph Lawless has been a prosecutor with the Public Integrity Section for ten years.

## LEARNING THE PLAYERS AND IDENTIFYING TARGETS: TACTICS FOR SMALLER OFFICES

Having made the decision to attack the public corruption problem in your District, the next step is to determine how to begin the attack. For those medium-to-large size U. S. Attorney's Offices that have set up formal corruption units, as described in the preceding chapter, areas of investigation already may have been formulated during the decision process that establishes the unit. But what about the smaller offices (less than fifteen attorneys) that still wish to target public corruption but cannot afford to focus exclusive efforts on one aspect of law enforcement in their District? These offices can make, and many have made, significant contributions to the fight against corrupt public officials. All it takes is the commitment and a willingness to use all available resources.

A good starting point for the U. S. Attorney or senior prosecutor interested in stimulating serious pursuit of corruption offenses is to take the time to talk to each person in your own office, to individually pick each person's brain for ideas on where public corruption may be, and how to go about attacking it. Do not overlook your long term employees, like the paralegals, administrative assistants and secretaries. You will probably also find that several of the Assistants have a very good idea of what is going on in the District, but had not pursued their knowledge because they did not consider it an office priority.

You can also use your own staff to find out which investigative agencies -- and individual agents -- may be really interested in pursuing public corruption cases. While all agencies will, almost certainly, give lip service to an interest in fighting the corrupt public official, those that are truly interested are the ones you must recruit to your cases. Like the Assistants in the office, you will undoubtedly find some who will grudgingly accept the job if it is assigned to them. In contrast, to succeed you must find the ones who share your view that the corrupt public official -- whether a politician, sheriff or district attorney -- must be found out and prosecuted. An agent, or attorney, interested only in the short, quick and easy case is not going to be suited to the long, often dull and never certain public corruption investigation. The choice of the attorneys within the office to assign to the public corruption cases will be as important as finding the right agents to work these cases.

This is not to understate the importance of meeting with the heads of all the major investigative agencies in the District. The fact that public corruption cases are going to be a priority in your office must be emphasized, and you should get a commitment from the FBI Special Agent-in-Charge, the Chief Postal

Inspector, and the heads of each criminal investigative agency for the necessary manpower support. ATF, the Secret Service, the IRS, DEA, Labor Department and others -- if committed -- can provide invaluable assistance and support. Nor can you afford to overlook the other available, specialized resources. (If you are investigating highway fraud, for example, agents from the Department of Transportation can provide both insight and investigative skills that can make the differences between success and failure).

Finally, you should not overlook state and local resources. The persons most affected by a corrupt local district attorney or state court judge will be the sheriff or local police. They can be a very effective partner in your investigation.

In the process of recruiting the investigative team of attorneys and agents, you will probably, from their knowledge, have some very good leads to pursue. One source is to turn to those who have been recently convicted of operations that may have flourished because of "protection" from the police or other local law enforcement officials. Where gambling is illegal, but exists fairly openly, it is frequently with the consent of the local cops. The same is true in dry counties with clubs that nonetheless sell alcohol; and the ever-present prostitution rings. Lottery operations also provide a fruitful source for payoffs to the local corrupt sheriff, district attorney or politician. And, of course, do not overlook the major source of such corruption -- drugs.

When a successful prosecution occurs and convictions are obtained, you should always consider trying to obtain the cooperation of the defendants in turning on their former protectors. This can be accomplished in a variety of ways. If the defendant wants to make make a deal, the plea agreement may require cooperation. Depending on the situation, the defendant may even go undercover, wear a wire or introduce agents to his or her contacts.

If the defendant has no interest in a deal, and is convicted, an immediate immunity order and grand jury appearance prior to sentencing -- and the fear that the sentencing judge will consider that he is an unrepentant, uncooperative and perhaps lying defendant -- may bring around even the hardened criminal defendant. Finally, if the defendant refuses to testify at all, a contempt citation will seriously affect his parole eligibility, not to mention the "dead time" served under the contempt citation. No prosecutor seriously interested in rooting out public corruption can afford to overlook these avenues of information.

A remarkably successful application of this follow-through was achieved during the mid-1970s in the small U. S. Attorney's Office in Macon, Georgia (which consisted of the U. S. Attorney and seven Assistants, two of whom were exclusively civil).

Building on a gambling prosecution (United States v. Hawes, 529 F.2d 472 (5th Cir. 1976)), the U. S. Attorney turned several of the key witnesses and developed other aspects of ongoing investigations into the Macon police case (United States v. Brown, 555 F.2d 407 (5th Cir.) reh. denied, 559 F.2d 29, cert. denied, 435 U.S. 904 (1977)). The U. S. Attorney charged, under the RICO statute, the police department vice squad as an enterprise operating through a pattern of bribery and extortion in protecting illegal activities, including alcohol, gambling, lotteries and prostitution. From the Brown case came the prosecution of the local "Dixie Mafia," the J.C. Hawkins gang (United States v. Elliott, 571 F.2d 880, reh. denied, 575 F.2d 300 (5th Cir. 1978)). In that case, the U. S. Attorney charged the Hawkins "gang" as a group of individuals acting as an enterprise through a pattern of racketeering activities including murder, interstate thefts, drugs, counterfeit securities (the forged certificates of title on stolen automobiles) and arson. The three prosecutions were all interrelated; and all began with the follow-through on the gambling investigation. They are an example of innovative use of manpower (attorneys were borrowed from the Criminal Division for a four-month task force to keep the office functioning, help with the briefing of the appeals, and to help draft the indictments and provide prosecution theories). The U. S. Attorney and his Assistants acted as a team with the FBI agents, closely assisted by agents from the ATF (the extent to which firearm violations contributed to turning witnesses cannot be overstated) and deputies from the local sheriff's office.

It is instructive that the close teamwork, without rivalry, among the law enforcement agents (local and Federal) with the U. S. Attorney acting as a partner in the investigation, combined with his willingness to call on the Division attorneys for expertise and manpower, resulted not only in successful prosecutions but established some early and extremely beneficial precedents in interpreting the then-newly-passed RICO legislation. The full circle, from what many would consider the relatively harmless activity of gambling, led to the corrupt cops which in turn led to the drug ring where theft, arson and murder were all part of protecting the "gang."

Several other interesting and informative lessons could be learned from studying these prosecutions. The team concept of the investigation was fully utilized, with the prosecutors participating with the agents in developing and executing investigative steps and with the agents participating with the prosecutors in developing grand jury strategies, helping draft the indictment and marshaling the evidence, and in preparing for the trial. Decisions on care and feeding of witnesses (including immunities, witness protection, the meeting places for interviews, etc.) were jointly made, and both attorneys and agents shared the responsibility of keeping the witnesses safe and cooperative.

In my opinion, a complex, multi-agent, multi-prosecutor investigation cannot succeed if it fails to follow the team concept. The agents cannot exclude the attorney from investigative decisions, guarding their plans like a dog with a bone. The attorney cannot direct an agent in the investigative steps to be taken. Never refer to a special agent as "my agent" -- it invites an immediate and frequently intense reaction. An attorney who does not want the input of the agents on matters such as granting immunity or deciding on the terms of plea agreements or proffers is missing a valuable resource. Each part of the team brings an unique perspective to the investigation -- it is literally an invitation to failure if those unique viewpoints are not shared and a common strategy and plan developed based on their joint analysis of the situation.

Once a decision is reached, the team must support it -- to succeed, the team must remain exactly that, a team. If there are rivalries between different members of the team, they must be resolved. That responsibility will most frequently fall to the prosecutor. No long-term investigation will always be smooth -- one agent will feel more qualified, or be annoyed by another's desire to emphasize his agency's violations rather than the overall investigation. Such rival views cannot be avoided, but must not be allowed to get out of hand. Diplomatic team direction can usually smooth over such differences and put the investigation back on track. The prosecutor must be sensitive to the agents' needs, however, in recognizing his agency's interest. You may not use IRS agents for two years and then return only Title 18 indictments. Nor can you bring only a Title 26 indictment after the FBI spearheaded your investigation.

When records are received in the investigation, both the agents and the attorneys must review them. As one of my colleagues once observed to an attorney working with him on a case, "It is not enough, my dear, to get the records -- you have to read them." There are few moments more embarrassing than having an important and relevant document that was in your possession for months suddenly appear to destroy your theory of prosecution when you had never seen the document. Divisions of responsibility may and must occur (thus, not every team member must review every record, but every record should be seen by an attorney and agent). And, of course, the attorney must read all FD-302s or memoranda of interviews -- just as the case agent must read the transcripts of grand jury witnesses. For major witness interviews, it is often appropriate for both attorney and agent to conduct joint interviews. A final important consideration in a political corruption prosecution is to anticipate defenses and to deal with them in preparing the prosecution's case. If you think that the defense will call certain witnesses, go ahead and interview them before you return an indictment.

There are other avenues to review in trying to track down the existence of public corruption in the District. A simple rule may be -- follow the money. If contracts are awarded on any

basis other than competitive bidding (or if you suspect the bids are being rigged), it may be appropriate to review who is getting the work. If it appears one firm -- or one group -- is benefiting in a disproportionate manner, it may be appropriate to issue some grand jury subpoenas for the corporate or business records of those receiving the contracts. Payments by those firms often take the form of "consulting fees," or maybe gifts, trips paid by the company, or even "campaign contributions." Be especially alert for "percent" of the contract, even if the corporate records show only cash withdrawals or checks to cash for a specific "percent" of the contract.

The follow-the-money scenario is useful in many areas of state government. You may wish to concentrate on the state deparments that have the money (transportation, especially in the highway construction and maintenance areas; health and human services, where the procurement of medical supplies and technology allow for staggering kickbacks; administration, where the leasing of buildings and maintenance and procurement of supplies, and computer services, provide opportunities for corruption; the school system, where everything from books to maintenance supplies can be the subject of kickbacks; and any other area where money is spent for non-competitively bid services). If your District is in a state that has a generous retirement or pension system, with the millions of dollars such funds generate, the opportunities for corruption abound. Nor should you overlook the way in which the state provides for its insurance requirements. In Kentucky, it was discovered that several hundred thousand dollars in insurance "commissions" on the state's workman's compensation insurance were "kicked back" at the direction of the State Democratic Party chairman. In Boston, the U. S. Attorney found that the pension system was used to reward the faithful, with "slip-and-falls" used as payoffs.

A final, and frequently very fruitful source, is the local press. If a story appears that the state is selling a property to a cohort of the Governor at a bargain price, or that land is being purchased by the state at a highly inflated price, or that bizarre zoning decisions are being rendered that substantially affect property values, you may wish to go out and shake that particular tree to see what may fall out. Not every area of investigation will develop into a criminal prosecution. Some circumstances that appear highly questionable may be, on investigation, legitimate. An investigation that discloses proper conduct is not a failure -- it is a legitimate exercise of your responsibility to guard the interests of the public in the District and to be able to guarantee the system is working properly. The very fact that you are willing to investigate suspicious expenditures may deter others from some scheme that would otherwise have been attempted.

# CHAPTER TWENTY-THREE

## THE FBI'S PERSPECTIVE

In the summer of 1987, the Criminal Division requested the views of the Federal Bureau of Investigation as to its perspective on the problem of corruption. It was also asked for its suggestions as to the steps it would like an Assistant U. S. Attorney to take in beginning a corruption investigation. The FBI's reply to Assistant Attorney General Weld is reprinted herein.

*Washington, D.C. 20535*

August 4, 1987

Honorable William F. Weld
Assistant Attorney General
Criminal Division
Department of Justice
Washington, D.C.

Dear Bill:

Acting Director Otto has asked me to respond to your letter of June 15, 1987 requesting information from the FBI to assist in formulating national initiatives to further investigations and prosecutions within the area of public corruption.

Also, in connection with your publication of a working corruption manual for Federal prosecutors, this letter will address your request to me for advice, assistance, and participation from the FBI perspective. We appreciate the opportunity to contribute.

Because FBI organization, policy and procedure significantly affects FBI conduct in such investigations, I have included pertinent aspects. Our policy may be affected by any issuance of revised Attorney General Guidelines.

The FBI defines a public corruption case as a criminal investigation wherein it is alleged that a public official has abused the position of trust in violation of Federal criminal law. A public official is defined as an individual elected or appointed to a position of trust in a governmental entity or political subdivision thereof. FBI corruption cases can involve officials ranging from local government regulatory inspectors to officials at the highest levels of the Federal Government.

High-impact public corruption cases include matters involving present or former high-ranking Federal or state officials.

The objective of an FBI public corruption investigation is, where possible, to resolve allegations of wrongdoing either through prosecution or by disproving the veracity of the allegation.

Honorable William F. Weld

Corruption investigations transcend several FBI investigative programs handled within the Criminal Investigative Division (CID) at FBI Headquarters (FBIHQ) with most falling within the White-Collar, Organized Crime, and Narcotics Programs. Regardless of the investigative program involved or special policy and investigative procedure associated with that program, once a matter is identified as being corruption related, special provisions apply.

Public corruption cases are sensitive investigations since they may adversely affect the reputation of those in the public spotlight and frequently attract intense media attention. Due to this and the fact that the possibility exists that allegations may be made for the sole purpose of discrediting a political opponent, we have notified our field offices that a sound basis must exist for initiating these investigations.

Under FBI policy, a public corruption investigation must be personally approved by the SAC, or in his absence, the ASAC, after a consideration of facts or circumstances which reasonably indicate a Federal violation for which the FBI has jurisdiction may have occurred, is occurring, or will occur. This standard of predication takes the following into consideration:

(1) The source of the allegation;

(2) The credibility and motivation of the source;

(3) Whether the source was in a position to know the information furnished;

(4) Whether independent information exists to corroborate or lend credence to the allegation;

(5) Whether the allegation can be identified as a violation of Federal criminal law; and

(6) Whether the allegation received or developed is sufficient to support specific leads.

Although the above factors are certainly not all-inclusive, nor does the FBI believe they should represent ironclad "tests" required prior to initiation of a case, they do provide a guide as to the type of investigation to be initiated and the investigative course of action to be taken. Full investigations are opened when the combined strength of the above factors indicate such is warranted.

Allegations received or developed which are hearsay, anonymous or somewhat nebulous in nature, but cannot be discounted are treated as an inquiry under Attorney General Guidelines provided the information lends itself to conducting specific leads. Under the inquiry, limited interviews, source contacts, and/or record reviews can be accomplished which, to the extent possible, avoid adverse consequences to a public official's privacy and damage to reputation.

Although the term predication infers a beginning, we believe it is the final stage of a process by which information has been gathered surrounding a suspected area of corruption. Our field offices with the most effective corruption programs gather information predicating full investigations through a solid intelligence base including but not limited to:

(1) Public source information and/or other corruption related information contained in FBI records.

(2) Liaison with past and present officials, law enforcement and regulatory agencies, and prosecutors including the United States Attorney (USA).

(3) Information from informants, cooperative witnesses (CW) and confidential sources.

Regardless as to whether a case is opened as an investigation or inquiry, the decision as to what initial investigative steps to employ is directly related to the strength of the predication and the need to collect evidence in a timely and effective manner. We have found it successful to first obtain relevant facts which can be obtained in a discreet or covert manner. Once the investigation has reached the stage where it has been identified to the public, sufficient manpower and other investigative resources must be employed in a manner to bring the investigation to a timely conclusion.

Only under unusual circumstances, do we recommend that arrest warrants be sought for high ranking officials in lieu of summons. Such a situation would exist when information has been received that the subject contemplates fleeing to avoid legal process. While it is recognized that the final decision to issue a warrant or summons is the responsibility of the court and the USA's Office, FBI policy in this regard is made known by our field offices to the prosecutor.

Honorable William F. Weld

The typical FBI corruption supervisor would like Federal prosecutors to consider the following at the onset of an investigation:

Public corruption investigations require the full implementation of the team concept between the FBI and the USA's Office. The FBI requires contact with the prosecutor as soon as practical for an opinion as to Federal jurisdiction and commitment to prosecute if facts developed substantiate the allegation. This opinion is confirmed in writing.

The manner and direction of the investigation must correspond to a prosecutive plan. This requires an agreed upon course of action in which the roles of the prosecutor and investigator are compatible. There should be an understanding that these roles differ by way of the method of gathering evidence and the determination as to what evidence and how much is necessary to sustain a successful prosecution. An appropriate balance and distinction fosters professional team environment.

The predicating facts presented to the prosecutor by the FBI should be of sufficient clarity as to suggest possible theories of prosecution involving specific statutes. Although specific details of the alleged corruption may be unclear, the prosecutor should set up guideposts as to what kind of factual situation would be prosecutable. As the investigation develops additional facts the prosecutor should refine the opinion in an ongoing process until the indictment stage.

The FBI believes that the manner and intensity of the investigation can only proceed as fast as the facts present themselves. In some cases where a multitude of unclear facts suggest several possible courses of action, it may be necessary to proceed slowly with careful deliberation and allow one step in the investigation provide the direction (and predication) for the next. Eventually, the case hopefully can be developed to the point where it can proceed vigorously and with confidence along a decisive course of action.

Although we strongly believe that the Federal grand jury (FGJ) is a key resource of a corruption investigation, it may not be practical to employ the full resources of the FGJ before enough facts exist to know what to ask, from whom, and what records to subpoena. At the early stages of an investigation this may prove detrimental to a successful resolution of the case as it may signal early warning to potential subjects and communicate strategy prematurely.

Honorable William F. Weld

I know you are aware of case-by-case conflicts between the FBI and USAs relating to issues of supervision and direction of certain corruption investigations. Strict philosophical role distinctions do not necessarily apply in these matters. At times, compromise is in order. Early and continuous communication, coordination and concurrence is essential. FBI policy, however, requires that the SAC closely follow and supervise these investigations to insure they are conducted in a manner which insures conduct in an impartial way in the least intrusive manner possible given the predicate. SACs are required to notify FBIHQ upon initiation of corruption investigations setting forth (1) the predicate facts, (2) investigation contemplated, (3) the opinion of the responsible prosecutor as to Federal jurisdiction and (4) commitment to prosecute if facts developed substantiate the allegation. I require that the responsible FBIHQ program managers review the matter for appropriate predication and to ensure the manner and direction of the investigation are appropriate given the sensitivity of issues involved. The opinion of the prosecutor is always a major consideration in this review. In addition, in certain high-impact cases, I personally review and must approve of the use of certain investigative techniques, particularly undercover operations (UCOs) and the use of payoffs to public officials. Accordingly, and consistent with current and proposed Attorney General Guidelines, we have included in our policy to field offices that although close coordination and concurrence in investigative strategy is essential, this does not imply that the responsible Federal prosecutor authorizes or directs the investigation.

On occasion, perhaps due to the potential sensitive impact of the matter, or the fact that the predicate originated with the prosecutor, the prosecutor may act in a manner we believe is inconsistent with the partnership concept. Generally this manifests itself with a prosecutor personally conducting the investigation which may be in direct conflict with FBI investigative policy. Each SAC or his designee is obligated to bring this to the attention of responsible supervising attorneys.

You requested field input as to the best method of addressing public corruption crime problems. Contacts were made with field public corruption supervisors and former supervisors assigned to FBIHQ. The consensus was as anticipated. The recommended investigative course of action in FBI corruption matters is the use of consensual and Title III monitoring, CW and UCOs. Although not all investigations lend themselves to the use of unconventional investigative techniques, we encourage field

offices to explore their possibility where the corruption is believed to be ongoing given the problems associated with conventional "historic" approaches. Experience has demonstrated that historical investigations are the least likely to produce a quantum of clear and convincing evidence to support prosecutions. Too often, investigations following a paper trail with less than convincing credible witnesses do not present a jury the clear facts necessary to prove that payments received by officials were in exchange for an official act. Common defenses that payoffs were rendered for consulting fees, attorney's fees or as campaign contributions can not often be negated without their use. While unconventional investigative techniques are more intrusive than traditional approaches, such techniques allow for fact gathering without surfacing the investigation to the public.

In particular, the use of CWs engaged in FBI controlled, supervised activities, has been extremely productive in the corruption area. Although subject to potential risk, recent investigations have demonstrated the value of the technique. The best CW from the standpoint of jury appeal is one which approaches law enforcement as a victim following a demand from a public official for something of value in exchange for an official act. On other occasions usually associated with an agreement involving criminal process, an offer for cooperation in exchange for a variety of considerations is made by a subject. These range from dismissal of charges to consideration upon time of sentencing. In the FBI's point of view, these offers must be viewed by the prosecutor with caution and given thorough consideration before an agreement is reached. Consultation with the FBI is requested to corroborate evidence of the alleged criminal activity and establish the necessary predication to move forward. A polygraph examination should be considered to establish truthfulness before an investigative/prosecutive scenario is established or any written agreement finalized. It is essential that the government, not the witness, be in control. Additionally, the agreement must be in balance with the crimes already committed by the cooperating subject to avoid a successful attack on the government by diverting attention to the "deal" given the witness. Immunity should be considered only as a last resort, especially when the cooperating subject is ultimately to testify against those with lesser culpability.

Controlled payoffs by FBI undercover agents or CWs to public officials pursuant to extortionate demand have been extremely successful in corruption matters. This technique has come under constant scrutiny by congressional committees and has fostered the common defense of entrapment. Therefore, the use of

this technique is subjected to a close review by FBI management at field and FBIHQ levels. SACs are authorized to expend funds pursuant to solicitations by public officials serving in a position less than managerial or executive. Generally, these include systemic corruption matters such as those involving low level law enforcement officers and regulatory inspectors. The illegal demand here is normally very clear. Payoffs, other than the above, must be approved at FBIHQ by way of communication that sets forth (1) the full facts, (2) the USA's opinion as to entrapment and (3) the USA's opinion that the payment is needed to fulfill elements necessary for the successful prosecution of a specific Federal crime.

When considering a request for approval of a bribe payment, the reviewing FBI official must be satisfied that the case is well predicated and that the request is founded on information that has been corroborated. Payments requested by middlemen, often attorneys, who have represented their ability and intent to deliver bribe money to public officials are closely evaluated. The possibility that the representations comprise a confidence scheme are apparent in addition to the fact that such payments do not normally constitute a Federal crime. Under these circumstances, we encourage field offices to develop investigative senarios to bypass the middleman in order to record demands from the involved official. Payments to middlemen are authorized only on rare occasions when appropriate justification is documented. Generally, such payments must be based on corroborative information concurrent with electronic or physical surveillance of the middleman.

As a general rule, when bribe payment requests are reviewed at FBIHQ, the field office is required to provide information relating to previously recorded conversations with the subject official in which predisposition to demand and/or accept bribes has been clearly established. The language used during the recording of the conversation(s) must be sufficiently clear, not only to establish predisposition, but it should also be sufficiently clear to lay persons who ultimately will sit in judgment of the transaction as part of a jury. The scenario must be designed to clearly demonstrate an understanding and must present a clear opportunity for the subject to knowingly accept or reject payment.

You requested a poll of our SACs to determine what they consider are the most serious public corruption problems in their areas of responsibility. Periodically, our SACs are requested to submit to FBIHQ the status of various investigative programs

within their divisions to include prioritization of these programs as they perceive crime problems. This was last accomplished in February 1987. We have consolidated these responses in general terms as they bear on corruption matters.

Within our White-Collar Crimes Program, where the majority of our corruption cases fall, the most serious problems have been identified in the northeast and certain areas of the midwest. A variety of prohibited activity involving judicial, legislative, municipal and law enforcement corruption has been identified predominantly in major cities where historically old line political systems have dominated various segments of government. The common theme remains the same, i.e., something of value is offered, accepted or extorted in return for official action or lack of action. Chicago, Detroit and Philadelphia have identified serious judicial corruption in their respective territories involving payoffs to fix felony cases within local court jurisdiction. New York, Newark, Chicago, Detroit, Boston and Philadelphia have surfaced problems within municipal and other local government entities involving payoffs concerning contracts, licensing and zoning. White-collar crime law enforcement corruption involving systemic corruption involving case fixing, protection concerning prostitution, gambling and liquor laws has been identified by Chicago, Boston and Philadelphia.

Our field divisions in southern states have identified White-collar crime corruption in old political systems commonly characterized as the "good ole boy" network. Election law violations consisting of ballot box stuffing through absentee voter abuses and payment for votes are predominantly in the states of North Carolina, Alabama, Mississippi, Georgia and Louisiana. The political patronage system is as strong or stronger in the south as the northeast. Corruption at the county level is particularly severe in states such as Oklahoma and Mississippi wherein county commissioners have abused their trust by demanding kickbacks from suppliers in exchange for county contracts. The control of liquor regulation in the south has provided opportunities for corruption within state and local regulatory agencies not identified in the northeast. Growth trends stimulated by a healthy economy have spawned new opportunities to corrupt officials involved with licensing and zoning.

Although white-collar corruption in the northwest and southwest involves the entire spectrum of prohibited activities found in other areas of the country, the frequency and intensity

of the problem identified to date has been less. Although this may be attributed to less population and thus less government, other factors include the lack of ingrained old line political systems which spawn corruption as a cost of doing business and the numerous overlapping law enforcement and prosecutorial jurisdictions. These jurisdictions, at county and state levels, tend to keep systemic corruption from gaining a solid foothold.

Within the FBI's Organized Crime Program, corruption matters arise due to public official interaction with traditional organized crime groups such as the La Cosa Nostra (LCN). LCN related corruption crime problems again are centered in the northeast and sections of the midwest in major cities such as Chicago, Detroit, New York, Philadelphia and Buffalo, where major LCN families are headquartered. Other families are located in Boston; Rochester, New York; Cleveland; Milwaukee; Newark; Pittsburgh; Pittston, Pennsylvania; St. Louis; Madison, Wisconsin; and Kansas City. In the south, LCN families are located in Tampa and New Orleans. In the west, LCN families are located in Denver, Tucson, San Francisco, San Jose and Los Angeles.

Public corruption activities involving traditional organized crime can include the entire spectrum of "legitimate" business and illegal activities in which the LCN is involved. Payoffs to local and state officials to obtain government contracts, licensing, zoning and other government regulated areas occur for example in the food, construction, trucking and legal gambling industries which are known to have LCN involvement. Illegal activities such as bookmaking, prostitution and loansharking require payoffs in the form of protection to law enforcement.

The FBI's Drug Program cases are another source of public corruption matters. After many months of extensive research and development, the FBI implemented the National Drug Strategy (NDS) in May 1986. The NDS is specifically designed to focus our limited drug-related investigative resources on those multinational organizations which control a substantial share of the illegal drug market. The FBI's point of reference is the trafficking network, and the course of our investigation follows the flow of drugs through that network. As in any large scale activity, drug trafficking requires extraordinary support structures to ensure that the illegal product reaches the end user.

It has been our experience that the support required by trafficking networks necessarily involves some public corruption

at the threshold level of local police or sheriff's office personnel. In the majority of FBI drug-related investigations, corruption has been found to be ancillary to the trafficking activity; however, in a small number of cases, corrupt activities by law enforcement personnel have been significant. Our course of action in all drug investigations is determined by the identity of the original trafficking organization and by the scope of public corruption.

The FBI has encountered pervasive corruption in two geographic areas of the United States: border states and rural cultivation and importation areas. Widespread public corruption has been discovered throughout the southwest border, from Brownsville, Texas, north to San Diego, California. Virtually all levels of Federal, state and local law enforcement corruption has been encountered and is being pursued as it relates to major Mexican Trafficking Organizations. Similarly, state and local corruption has been discovered in rural areas of the south and southeast: Georgia, Florida, Louisiana and Alabama, as well as in Kentucky, West Virginia and Tennessee. This course of corruption has followed the path of traffickers who are increasingly forced to seek sparsely populated areas for drug importation and cultivation.

You requested information as to how to go about mobilizing the investigative agencies, including state and local resources. Frequently, the FBI conducts joint investigations in the corruption area with other Federal, state and local agencies. This occurs most often when the area of corruption concerns violations for which the FBI does not have primary Federal jurisdiction and/or violations of state law are present. There are several reasons why joint investigations are advantageous but there are disadvantages.

On the positive side, joint investigations:

(1) Provide a greater amount of investigative resources.

(2) Combine predicate information available to all agencies to allow a clearer course of investigation.

(3) Provide for individual areas of expertise.

On the other hand, joint investigations:

(1) Require an increased amount of investigative and prosecutive coordination particularly when policy and administrative procedure differ between agencies.

(2) Require a clear early understanding of the role each agency is to play in the investigation which may include written agreements.

(3) Increase the possibility of compromise or leaks based on the necessity to disseminate information on a wider basis.

In matters relating to Federal corruption involving the executive branch departments, the FBI almost always joins with the appropriate office of the Inspector General (IG). We have expended a considerable effort in promoting joint investigations with IGs and have written agreements with most to implement joint investigations quickly. Inasmuch as most corruption matters involve the secretive payment of something of value in exchange for an official act, the IRS and the FBI have become strong allies in numerous cases which have been successfully prosecuted. Our experience has taught us that if criminal tax violations are to be a part of the prosecutive plan, that IRS involvement must be encouraged very early in the investigation due to the administrative requirements and lengthy approval processes required by the IRS. Joint corruption investigations are frequently entertained with postal inspectors and the Drug Enforcement Agency.

State and local agency involvement in corruption matters, for which the FBI has jurisdiction, is generally encouraged when the corruption area centers upon non-Federal officials. The FBI is investigating hundreds of cases in this area, running the entire spectrum of level of official from systematic corruption involving local regulatory inspectors to senior state officials. In general, our policy is not to interject the FBI into state or local investigations which are being appropriately addressed with sufficient investigative resources in a competent manner with aggressive local prosecutive support. When the above factors are not present, we encourage our field divisions to address only serious offenses having a significant impact upon the community and which are believed to involve entire governmental entities. We stress the need to fully explore the extent of the corruption as it involves

managerial or executive officials and not terminate or surface a covert investigation without consideration of investigative techniques to determine the full extent of systemic corruption.

It is likely that where the FBI is conducting an investigation into state or local corruption, we have been invited to do so or there are clear indications that local and state resources are inadequate, directly or indirectly involved in the corruption, or prevented from addressing the criminal problem due to political considerations. Obviously, the decision to involve state or local investigative agencies must be made at the field FBI/USA level after full consideration of positive and negative factors. Most FBI joint corruption investigations with local and state agencies have resulted from established liaison in which an understanding of mutual trust has developed. Our field offices, with the best corruption programs, have instituted this liaison as part of their intelligence base. These offices routinely bring to their USA crime problems and recommended courses of action which include involvement of other agencies.

In districts where this is not occurring, I believe it is appropriate for the USA to stimulate activity by gathering together the agencies for a discussion of corruption crime problems and how they can effectively be addressed. As a suggestion, it may be beneficial for the USA to first get the views of internal staff. Depending on the size of the district and office organization, there may be a wealth of information that is corruption related but not routinely coordinated. Following this, separate meetings with appropriate agencies are recommended, one for Federal corruption issues and one for state and local problems because of the jurisdictional aspects involved.

Due to the special policy considerations to include Attorney General Guidelines, I believe we must possess at least equal investigative decision making authority in multiagency cases. In joint investigations involving the use of certain methodology, especially the undercover technique directed toward high level officials, the FBI must serve as the lead agency responsible for the investigative course of action.

Given unique variables, it is difficult to make specific recommendations as to common pervasive corruption problems that can be addressed nationwide. FBI criminal investigations are organized along program lines which generally

target broad areas of violations or known organized crime groups. We have avoided any suggestion of national investigative initiatives which could imply or encourage investigation directed toward generic governmental entities nationwide at any level for any Federal offense. We must be careful not to signal any false impressions which could encourage field investigations without proper predication.

We would appreciate playing an active role in the development and implementation of Department of Justice sponsored initiatives nationwide. As you have outlined, there is an increased need to clearly communicate methods that have been successful to eliminate "re-inventing the wheel" and to help prevent potential problems by disseminating "lessons learned." The complexity and sensitivity of ongoing selective initiatives, especially in the area of judicial and legislative corruption, require this. The manual you envision is an outstanding initiative.

Coincidentally, we are also preparing an FBI manual directed for practical use by field case agents and supervisors. It will include a guide for the development of a public corruption intelligence base and the conduct of individual public corruption investigations. In addition to policy and administrative procedure, it will communicate advice and suggestions to include relationships with the USA.

I hope our perspective has been informative, and to whatever extent possible, FBI policy formed through experience can be incorporated into your proposed manual.

Other detailed information in the form of written policy and guidance to our field divisions has been separately furnished by Thomas W. Rupprath, Chief of our Public Corruption Unit, White-Collar Crimes Section, to Mark Robinson of your staff and to JoAnn Farrington of the Public Integrity Section. We look forward to supporting your initiatives and working with you and your staff on a continuing basis during this process.

Sincerely,

Floyd I. Clarke
Assistant Director
Criminal Investigative Division

APPENDIX A

# BRIBERY AND GRATUITIES

BY

SUSAN M. KUZMA*

Trial Attorney
Public Integrity Section
Criminal Division

* Susan Kuzma has been a prosecutor with the Public Integrity Section for six years.

## BRIBERY AND GRATUITIES

The conduct most corrosive to the integrity of public servants is bribery, proscribed by 18 U.S.C. § 201(b) and 18 U.S.C. § 666. This section of the Manual will discuss the legal requirements necessary to establish a charge of bribery under Section 201(b) and the lesser offense, a gratuity violation, proscribed by Section 201(c). 1/ It will further discuss the elements of Section 666.

### Sections 201(b) and 201(c)

Section 201(b) punishes equally both ends of a bribery transaction. Thus, both the giving and the taking of a bribe are punishable. Likewise, unsuccessful or incomplete bribery transactions are prohibited. Thus, the offering and the soliciting of a bribe are criminal. Section 201(b) makes bribery a felony, punishable by fifteen years' imprisonment, a fine of not more than three times the amount of the bribe, or both, and disqualification from holding public office. 2/

Section 201(b) embraces bribery of or by a public official (or person selected to be a public official), and of or by a witness. As to witness bribery, Section 201(b)(3) prohibits: (1) corruptly giving, offering or promising anything of value to any person; or (2) offering or promising that person to give anything of value to another person or entity, if, in either case, the offender acts with intent to: (a) influence the testimony under oath or affirmation of the person "as a witness" upon a court proceeding, congressional hearing, agency proceeding or before an officer authorized by the laws of the United States to take testimony or hear evidence; or (b) influence the person to absent himself from the hearing or proceeding at issue. The statute applies whether the conduct is done directly or indirectly. The mirror-image of Section 201(b)(3) is Section 201(b)(4), which prohibits the witness from seeking or accepting a bribe in return for being influenced in his or her testimony or

---

1/ The bribery statute was amended effective December 10, 1986, resulting in a renumbering of the internal segments of Section 201(b). The current bribery Section, 201(b), embraces former Sections 201(b), (c), (d), and (e). The current gratuity Section, 201(c), embraces former Sections 201(f), (g), (h), and (i).

2/ In addition, bribery money is forfeitable to the United States under 18 U.S.C. § 3612 (§ 3666 after November 1, 1987).

for absenting him or herself from the court hearing or proceeding. The statute specifically exempts witness fees and travel expenses, expenses, 18 U.S.C. § 201(d), and it expressly makes its offenses and penalties separate from and in addition to the offenses and penalties spelled out in the obstruction statutes, 18 U.S.C. §§ 1503, 1504, and 1505. 18 U.S.C. § 201(e).

Turning next to bribery of public officials (or prospective public officials), the statute prohibits the following conduct:

1. corruptly giving, offering, or promising anything of value to a public official (or person selected to be a public official); or

2. offering or promising a public official (or person selected to be a public official) to give anything of value to another person or entity, when the offender acts with the intent to:

   a. influence any official act; or

   b. influence the public official (or person selected to be a public official) to commit or aid in committing any fraud on the United States; or

   c. to induce the public official (or person selected to be a public official) to do or omit to do any act in violation of his or her lawful duty.

The conduct described above is punishable whether the offender acts directly or indirectly. 18 U.S.C §201(b)(1).

As to bribery by public officials (or persons selected to be public officials), the statute prohibits corruptly demanding, seeking, receiving, accepting, or agreeing to receive or accept anything of value, either personally or for another person or entity, in return for:

1. being influenced in the performance of any official act; or

2. being influenced to commit or aid in committing any fraud on the United States; or

3. being induced to do or omit to do any act in violation of his or her lawful duties.

Once again, the conduct is proscribed whether done directly or indirectly. 18 U.S.C. § 201(b)(2).

The terms "public official," "person who has been selected to be a public official," and "official act," are all defined in Section 201(a). "Public official" includes any garden-variety Federal employee, regardless of the branch of Government involved, employees of the District of Columbia, Members of Congress, and Federal jurors. The breadth of the definition should be noted, for it includes any "person acting for or on behalf of the United States, or any department, agency, or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government." 18 U.S.C § 201(a)(1). 3/ The Supreme Court has liberally interpreted this language to include persons who are not Federal employees, but who have the power to allocate and expend Federal monies under grant programs. Dixson v. United States, 465 U.S. 482 (1984).

Even if the broad definition of "public official" under Section 201 cannot be met, a charge under 18 U.S.C. § 666 may nonetheless be appropriate if the solicitor or intended recipient of the bribe is a person who acts as an agent of an organization that receives in one year $10,000 in Federal grant, loan, contract, or insurance funds. Section 666 is discussed in greater detail below.

The term "thing of value" is used throughout Title 18, and is broadly construed to include intangibles as well as tangible items. See United States v. Girard, 601 F.2d 69, 71 (2d Cir.), cert. denied, 444 U.S. 871 (1979). It has been broadly construed to focus on the worth attached to the bribe by the defendant, rather than its commercial value. United States v. Williams, 705 F.2d 603, 622-23 (2d Cir.), cert. denied, 464 U.S. 1007 (1983).

"Official act" for the purposes of Section 201(b) and (c) is broadly defined to mean:

> any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

18 U.S.C. § 201(a)(3). In order for an act to fall within this definition, it need not be specified by statute, rule, or

---

3/ The terms "department" and "agency" are defined in 18 U.S.C. § 6.

regulation; established practice within the department is sufficient to prove official action. United States v. Birdsall, 233 U.S. 223 (1914).

It is not essential to a bribery charge against a public official that he or she have the authority to make a final decision on an official matter. When the advice and recommendation of the public official would be influential, a violation of Section 201(b) may be established. United States v. Heffler, 402 F.2d 924 (3d Cir.), cert. denied, 394 U.S. 946 (1968); Wilson v. United States, 230 F.2d 521 (4th Cir.), cert. denied, 351 U.S. 931 (1956); Krogmann v. United States, 225 F.2d 220 (6th Cir. 1955).

It is also possible in some circuits to convict either the giver or the taker of a bribe (or both) under the bribery statute even if the public official does not have the power to bring about the result that prompted the bribe. It is sufficient as to a charge against the public official that the public official represented that the official act in question was within his or her power, United States v. Arroyo, 581 F.2d 649 (7th Cir. 1978), cert. denied, 439 U.S. 1069 (1979); or as to the giver of the bribe that the giver believed the recipient had the power to bring about the desired result. United States v. Hsieh Hui Mei Chen, 754 F.2d 817 (9th Cir.), cert. denied, 471 U.S. 1139 (1985); United States v. Gjieli, 717 F.2d 968 (6th Cir. 1983), cert. denied, 465 U.S. 1101 (1984). If, however, the public official has no authority at all to act in the matter and his or her acts in response to the payment of a bribe are unauthorized and illegal, it has been held that the "official act" component is lacking. Blunden v. United States, 169 F.2d 991 (6th Cir. 1948). Such a case could nonetheless be charged as an effort to induce a public official to commit a fraud on the United States or to do an act in violation of official duty. United States v. Gjieli.

Thus, under Section 201(b), the intent of the donor need not be the same as the intent of the recipient in order to convict. One may be convicted of offering or giving a bribe regardless of whether the public official is charged, convicted, or even culpable. E.g., United States v. Anderson, 509 F.2d 312 (D.C. Cir. 1974), cert. denied, 420 U.S. 991 (1975); United States v. Jacobs, 431 F.2d 754 (2d Cir. 1970), cert. denied, 402 U.S. 950 (1971).

The intent element under Section 201(b) has two components. First, the offender must have acted "corruptly." The word "corruptly" is frequently defined to mean the same thing as "willfully," and thus to connote "specific intent." See, e.g., 1 Devitt & Blackman, Federal Jury Practice and Instructions, §§ 14.03, 14.06, 34.08. A number of cases speak of Section 201(b) as a specific intent crime; however, this reference is sometimes to the second component of intent, namely intent to

influence or be influenced. Given the confusion over the use of the term "specific intent," it is preferable to refer directly to the two intent components found in the statute. Moreover, careful attention must be paid to the specific formulation of intent approved within the applicable district and circuit, because discussions of the intent requirement vary from circuit to circuit.

The second component is the requirement of proof that the offender acted with the intent (as to the giver of a bribe) to influence or (as to the taker of a bribe) to be influenced. Thus, the bribery statute requires proof of an actual or intended quid pro quo; i.e., one thing given in exchange for another. E.g., United States v. Strand, 574 F.2d 993 (9th Cir. 1978); United States v. Brewster, 506 F.2d 62 (D.C. Cir. 1974). This requirement can be met by proof of a pattern of payments and official acts flowing between the giver and the taker of bribes. See United States v. Campbell, 684 F.2d 141 (D.C. Cir. 1982).

This heightened intent requirement is the factor that chiefly distinguishes bribery from the lesser offense, a gratuity violation. E.g., United States v. Hsieh Hui Mei Chen. Section 201(c) prohibits both the offering or giving and the soliciting or accepting of a gratuity, making it a felony punishable by a fine of not more than $250,000, 4/ imprisonment for not more than two years, or both. As with the bribery section, Section 201(c) applies to gratuities to public officials (and prospective public officials) and to witnesses. Unlike the bribery statute, the thing of value must be sought or accepted by a public official "personally."

The intent element under the gratuity statute is that the person must act "otherwise than as provided by law for the proper discharge of official duty," and, as to gratuities involving a public official (or prospective public official), that the thing of value be given or received "for or because of any official act performed or to be performed" by the public official. As to gratuities involving witnesses, the statute has a parallel requirement that the payment be taken or given "for or because of the testimony" of the witness or "for or because of the [witness'] absence" from the hearing or proceeding.

The intent requirement under the gratuity statute has been interpreted not to require proof of a quid pro quo as for the

---

4/ The fine is provided by 18 U.S.C. § 3623, which is in effect for crimes committed on or before September 30, 1987. Thereafter, the maximum fine will be found in 18 U.S.C. § 3571. These fines are applicable to individuals; fines of entities are also set forth in 18 U.S.C. § 3623 and § 3571.

bribery statute, but rather of a lesser connection between the payment and an official act (or testimony or absence). United States v. Niederberger, 580 F.2d 63 (3d Cir.), cert. denied, 439 U.S. 980 (1978); United States v. Allessio, 528 F.2d 1079 (9th Cir.), cert. denied, 426 U.S. 948 (1976); United States v. Brewster, 506 F.2d 62 (D.C. Cir. 1974). Indeed, under the most liberal interpretation of the gratuity statute, the link is really between the payment and the official position of the recipient. United States v. Evans, 572 F.2d 455 (5th Cir.), cert. denied, 439 U.S. 870 (1978). Under this interpretation, it is unnecessary to show that the payments were "earmarked for a particular matter then pending" before the public official and over which the public official had authority. Id. at 481. Thus, if the motivating factor for the payment is even "to keep [the public official] 'happy,'" id., or to "create a better working atmosphere" with a public official, the payment can form the basis of a gratuity charge. United States v. Standefer, 452 F. Supp. 1178, 1183 (W.D. Pa. 1978), aff'd, 610 F.2d 1076 (3d Cir. 1979), aff'd, 447 U.S. 10 (1980); United States v. Niederberger; United States v. Barash, 412 F.2d 26 (2d Cir.), cert. denied, 396 U.S. 832 (1969).

Note, however, that there must be some connection between the receipt of the thing of value and the official position of the public official. In United States v. Muntain, 610 F.2d 964 (D.C. Cir. 1979), the court held the proof insufficient to establish a gratuity charge when the defendant public official accepted commissions from a private company to steer business to that company. The official's efforts to profit from his contacts as a Government official with potential customers of the company were held not to constitute a gratuity violation because these acts were "totally unrelated to his official duties." 610 F.2d at 970.

An aphorism sometimes used to epitomize the distinction between a bribe and a gratuity is that a bribe says "please" and a gratuity says "thank you." But this analysis is incomplete because a gratuity can precede the official action that prompted it, as the "to be performed" language in the statute attests. What, then, is the difference between a bribe and a gratuity in the context of future official action?

The difference is one of intent, and thus ultimately one of proof. When a case involves, for example, a contract proposal pending before a Government contracting officer, and the prospective contractor takes the contracting officer on an all-expense paid cruise the week before the contract is to be awarded, it would be difficult, assuming that the prospective contractor and the contracting officer do not otherwise know each other, to successfully argue that the cruise is anything other than a bribe or a gratuity. But which? Absent direct evidence of an agreement between the prospective contractor and the

contracting officer, the answer may well depend on other factual circumstances, such as the following considerations:

1. Did the prospective contractor get the contract?

2. Did the contracting officer have the power to decide who received the contract? If not, what role did the contracting officer play in making the decision?

3. What is the value of the cruise?

4. How much competition did the prospective contractor have?

5. How qualified was the prospective contractor to get the contract? How did the contractor rank in relation to the competitors?

6. How important financially or otherwise was the contract to the prospective contractor?

7. How important was the cruise to the contracting officer?

8. Are there contemporaneous admissions from either the contracting officer or the prospective contractor or both regarding the purpose of the cruise?

Absent good proof of incriminating admissions, or the lack of qualifications of the prospective contractor, or the essential nature of the contract to the business of the prospective contractor, this scenario will likely end up charged or convicted as a gratuity. However, the addition of one or more of the above facts may convince a jury that the intent of the donor was to influence official action, or that the intent of the donee was to be influenced, and thus sustain a bribery charge.

Treated below are several common problems or questions in trying to apply the bribery and gratuity statutes.

1. Does Wharton's Rule preclude a charge under 18 U.S.C. § 371 of conspiring to commit bribery?

Not if the agreement involved more participants than were necessary for the commission of the substantive offense. See, e.g., United States v. Benter, 457 F.2d 1174 (2d Cir.), cert. denied, 409 U.S. 842 (1972). Moreover, the Rule has been held not to apply in any event because the gratuity statutes (in the particular case, but the observation is also true of bribery statutes) do not require the culpable participation of two persons. United States v. Previte, 648 F.2d 73 (1st Cir. 1981).

2. Can a conspiracy to commit bribery or a gratuity violation as well as a conspiracy to defraud the United States of the honest services of its employee by means of bribery both be charged?

A good question. There is no clear answer in the caselaw, although there are cases in which convictions on indictments charging both have been upheld without comment or challenge. E.g., United States v. Previte. Strictly speaking, the Supreme Court's analysis of separate offenses in Whalen v. United States, 445 U.S. 684 (1980), should render such charges viable since proving a conspiracy to defraud does not require proof of intent to commit the technical elements of bribery, and proof of intent to commit bribery does not necessarily require proof of intent to defraud.

3. Will a bribery charge lie if the payer acted out of economic duress?

Economic coercion is a factor that bears on the existence of specific intent under the bribery provisions. United States v. Barash, 365 F.2d 395 (2d Cir. 1966). It is irrelevant to a gratuity charge. United States v. Barash, 412 F.2d 26 (2d Cir.), cert. denied, 396 U.S. 832 (1969).

4. Can both bribery and extortion be charged for the same act?

These charges are usually held to be mutually exclusive under state law, although Federal authority on this question is scant. Remember that extortion carries only a three-year sentence.

5. Is it necessary to prove that the offender knew he was paying a Federal official?

No. Although the Government must prove that the payee was a Federal official and that the offender believed the person he attempted to bribe has official authority to act in a particular matter, it is not necessary to prove that the offender believed the official was exercising Federal authority. United States v. Jennings, 471 F.2d 1310 (2d Cir.), cert. denied, 411 U.S. 935 (1973).

6. Can a bribery or gratuity charge be premised upon a campaign contribution?

Yes. However, the application of Section 201 in

this area is tricky, because any charge must clearly distinguish between a lawful campaign contribution (which frequently is given with the hope if not expectation that the recipient will vote in a particular way, or is received with some degree of knowledge of the payer's hope), and an unlawful bribe or gratuity. The lead case in this area is United States v. Brewster, 506 F.2d 62 (D.C. Cir. 1974), which attempts, albeit with marginal success, to define these distinctions. If a payment is made to a committee to elect the candidate rather than to the candidate himself, proving a gratuity may be virtually impossible. Id. Remember also that the Speech or Debate Clause of the Constitution precludes evidentiary use of legislative acts. Thus, proving a quid pro quo may be difficult. See United States v. Brewster, 408 U.S. 501 (1972).

Section 666

A relatively new statute, Section 666 prohibits bribery of or by one category of "quasi-Federal" officials, namely persons who dole out Federal funds. The statute applies to bribery 5/ of or by any "agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof," 18 U.S.C. § 666(a), if that organization, government, or agency "receives in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. § 666(b). Violation of Section 666 is a felony punishable by ten years' imprisonment and a fine of $250,000 or both. 6/

The bribery aspect of Section 666 imposes a $5,000 minimum in order to trigger the statute: the bribery offer or solicitation must be "in connection with any business, transaction, or series of transactions" of the entity "involving anything of value of $5,000 or more." Note, however, that the $5,000 does not have to comprise Federal funds.

As to the bribery aspect of Section 666, it is notable because it prohibits giving a thing of value if the intent is

---

5/ The statute also prohibits embezzlement, theft, conversion, or misapplications of funds by such persons.

6/ This fine is applicable to individuals, and is set forth in 18 U.S.C § 3623. For crimes committed after November 1, 1987, the fines will be found in 18 U.S.C. § 3571.

either "to influence or reward," and receiving a thing of value if the intent is either "to be influenced or rewarded." (Emphasis added). Thus, Section 666 incorporates both gratuity and bribery concepts.

APPENDIX B

# CONFLICTS OF INTEREST STATUTES

BY

G. ALLEN CARVER, JR.*

Director, Conflicts of Interest Crimes Branch
Public Integrity Section
Criminal Division

* G. Allen Carver, Jr., has been the Director of the Conflicts of Interest Crimes Branch since it was established in 1981. Notable conflicts cases he has tried in recent years include the convictions of the EPA Assistant Administrator, the HHS Chief of Staff and the Senior Assistant Postmaster General. He also handled the preliminary investigation, under the Ethics in Government Act, of former White House Chief of Staff Michael Deaver on conflicts allegations; Deaver has since been convicted by an Independent Counsel.

# CONFLICTS OF INTEREST STATUTES

## Introduction

The Federal conflicts of interest crimes most likely to be of concern to a Federal prosecutor are 18 U.S.C. §§ 203, 205, 207, 208, and 209. Definitions of key terms used in those statutes, and the statutes themselves, will be discussed in this section.

## Definitions

### "Officer" and "Employee"

The terms "officer" and "employee," terms appearing throughout the conflicts of interest statutes, are not defined in Chapter 11; however, 5 U.S.C. §§ 2104 and 2105 define "officer" and "employee" respectively, for purposes of Title 5, to mean persons who (1) are appointed by a Federal officer or employee; (2) are engaged in the performance of a Federal function under authority of law; and (3) are subject to the supervision of a Federal officer or employee. The Title 5 definitions routinely have been applied by the Office of Legal Counsel and the Criminal Division in examining issues relating to interpretation of these terms. Ordinarily, there should be no difficulty in determining whether or not a person is an "officer" or "employee." Proof may be accomplished through agency personnel records, or, more easily, through the testimony of a supervisor or co-worker. 1/

### "Special Government Employee"

The term "special Government employee" is defined in 18 U.S.C. § 202(a). Section 202(a) was designed to relax the restrictions of several conflicts of interest statutes for certain part-time or temporary Federal workers under some circumstances, but such employees are fully subject to the prohibitions set forth in 18 U.S.C. § 208(a).

### "Official Responsibility"

The term "official responsibility," appearing in both Section 205 and Section 207, is defined in 18 U.S.C. § 202(b) to mean "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with

---

1/ Enlisted members of the Armed Forces are not subject to Sections 203, 205, 207 through 209, and 218. 18 U.S.C. § 202(a).

others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action."

The scope of an employee's official responsibility is ordinarily to be determined by those areas assigned by statute, regulation, executive order, job description or delegation of authority; the term includes authority for planning, organizing and controlling matters, rather than authority to review or make decisions on ancillary aspects of a matter. 5 C.F.R. § 737.7(b).

"Independent Agency of the United States"

The term "independent agency of the United States" is not defined in Chapter 11, however, the term "agency" is defined in 18 U.S.C. § 6 to include any independent establishment of the United States. "Independent establishment" is defined, for purposes of Title 5, United States Code, to mean:

> (1) an establishment in the executive branch (other than the United States Postal Service or the Postal Rate Commission) which is not an Executive Department, military department, Government Corporation, or part thereof, or part of an independent establishment; and
>
> (2) the General Accounting Office.

5 U.S.C. § 104.

"Personally and Substantially"

The term "personally and substantially" appears in 18 U.S.C. §§ 203, 205, 207, and 208. Congress did not define the term. The Office of Government Ethics' regulations concerning Section 207 explain the meaning of the term "personally and substantially" as follows:

> [t]o participate "personally" means directly, and includes the participation of a subordinate when actually directed by the . . . Government employee in the matter.
>
> . . . .
>
> "Substantially" means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on a administrative or peripheral issue. A finding of substantially should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be

> insubstantial, the single act of approving or participating in a critical step may be substantial[.]

5 C.F.R. § 737.5(d)(1). Thus, the word "substantial" incorporates both the magnitude of the involvement and its importance. See United States v. Irons, 640 F.2d 872 (7th Cir. 1981) (phrase broadly construed); compare with United States v. Muntain, 198 U.S. App. D.C. 22, 610 F.2d 964 (1979) (reversing a conviction under 18 U.S.C. §§ 201(g), 209 after determining that the Federal official's acts were outside the scope of his official duties and responsibilities).

"Other Particular Matter"

The term "other particular matter" appears in 18 U.S.C. §§ 203(a), 205(2), 207(c), 207(g) and 208. This term is to be distinguished from the term "particular matter involving a specific party or parties," which will be discussed later.

Congress intended that this term would cover virtually every kind of matter of interest to a Federal agency:

> The list of proceedings to which the disqualifications of [former] section 281 attaches is extended to section 203 . . . to make clear that the enumeration is comprehensive of all matters that come before a Federal department or agency.

H.R. Rep. No. 748, 87th Cong., 1st Sess. 20 (1961). Likewise, the Senate Report states that "particular matter" covers "the whole range of matters in which the government has an interest." S. Rep. No. 2213, 87th Cong., 2d Sess. 12 (1961), reprinted in 1962 U.S. Code Cong & Ad. News 3861.

In a published opinion, the Office of Legal Counsel of the Justice Department states that the term encompasses even rule making proceedings and advisory committee deliberations of general applicability where the outcome may have a direct and predictable effect on a firm with which the Government employee is affiliated even though all other firms similarly situated will be affected in a like manner:

> [W]e have consistently interpreted §208(a) to apply to rule making proceedings or advisory committee deliberations of general applicability where the outcome may have a "direct and predictable effect" on a firm with which the Government employee is affiliated, even though other firms similarly situated will be affected in a like manner. An example might be the drafting or review of environmental regulations which would require considerable expenditures by all firms in

the particular industry of which the company is a part. 2/

5 C.F.R. § 737 includes several parts addressing what is meant by the term "particular matter." According to 5 C.F.R. § 737.11(d):

> [T]he restriction [18 U.S.C. § 207(c)] does not encompass every kind of matter, but only a particular one similar to those cited in the statutory language, i.e., any judicial or other proceeding, application, request for a ruling or determination, contract, claim, controversy, investigation, charge, accusation, or arrest. Rule-making is specifically included. Thus such matters as the proposed adoption of a regulation or interpretive ruling, or an agency's determination to undertake a particular project or to open such a project to competitive bidding are covered. Not included are broad technical areas and policy issues and conceptual work done before a program has become particularized into one or more specific projects. (emphasis supplied)

"Particular Matter Involving a Specific Party or Parties"

The special Government employee provisions of 18 U.S.C. § 203 include the term "particular matter involving a specific party or parties," a term appearing also in 18 U.S.C. §§ 205, 207. This term requires proof of discrete and isolatable transactions between identifiable parties. See United States v. Medico Industries, Inc., 784 F.2d 840, 843 (7th Cir. 1986) (construing Subsection 207(a)'s immediate predecessor, Subsection 207(a) (1976)). See also, B. Manning, Federal Conflict of Interest Law 70 (1964); OGE 84X15 (November 19, 1984); 5 C.F.R. § 737.5(c)(1); cf. ABA Formal Opinion No. 342 (1975). It does not encompass, for example, general rulemaking, formulation of

---

2/ Opinions of the Office of Legal Counsel of the United States Department of Justice, Volume 2 (January 11, 1978 - December 31, 1978), page 155. Accord, "Memorandum for the Solicitor of the Interior," Office of Legal Counsel (January 12, 1987). The term was construed in the context of a section 203 prosecution in United States v. Williams, 705 F.2d 603, 622 (2d Cir.) (noting that the term applies to a particular category of items, such as, for example contracts in the future for titanium), cert. denied, 464 U.S. 1007 (1983). The term encompasses general rulemaking and formulations of general standards, S. Rep. No. 170, 95th Cong., 1st Sess. 153, reprinted in 1978 U.S. Code Cong & Ad. News 4369, but does not extend to legislative activities, Id. at 49, 153 [4265, 4369].

general policy or standards, other similar administrative matters, and legislative activities. See, S. Rep. No. 170, 95th Cong., 1st Sess. (1977) 48, 51, reprinted in 1978 U.S. Code Cong. & Ad. News 4264, 4267. See also Memorandum re the Conflict of Interest Provisions of Public Law 87-849, 76 Stat. 1119, Approved October 23, 1962 (reprinted in U.S.C.A. following 18 U.S.C. §201); OGE 81X26 (August 7, 1981).

"Same Particular Matter"

Although the term "same particular matter" does not appear in the statutes discussed in this section, several of the conflicts statutes require that the particular matter involving a specific party or parties as to which the former official represented another, or communicated with the intent to influence, was the same as one in which the former official had participated personally and substantially as an official. According to 5 C.F.R. §737.5(c)(4):

> The same particular matter may continue in another form or in part. In determining whether two particular matters are the same, the agency should consider the extent to which the matters involve the same basic facts, related issues, the same or related parties, time elapsed, the same confidential information, and the continuing existence of an important Federal interest.

In finding that a modification to a contract was the same as the contract itself, the Seventh Circuit noted:

> These restrictions [subsection 207(a) (1976)] make it plausible to read 'contract . . . or other particular matter' more broadly than the four corners of a single document, to treat the language as covering a 'nucleus of operative facts' (to borrow from the law of res judicata), for this will not jeopardize the government's ability to attract capable employees.

Medico Industries, Inc., 784 F.2d at 844.

"Financial Interest"

The third essential element of a subsection 208(a) offense involves the term "financial interest." The term is not defined in Subsection 208(a) or elsewhere in the conflicts of interest statutes.

In an opinion dealing with the question whether, or under what circumstances, a Government employee's vested rights in a

private corporation's pension plan would give the employee a financial interest in a particular matter, the Office of Government Ethics stated:

> A government employee has a financial interest in a particular matter when there is a real possibility that he may gain or lose as a result of developments in or resolution of the matter. Section 208 does not require that the financial interest be substantial. It is not necessary that the potential gain or loss be of any particular magnitude. Nor must the potential gain or loss be probable for the prohibition against official action to apply. All that is required is that there be a real, as opposed to speculative, possibility of benefit or detriment.

83 OGE 1, page 2 (January 7, 1983). Accord, United States v. Gorman, 807 F.2d 1299, 1303 (6th Cir. 1986), cert. denied, 108 S. Ct. 68 (1987).

Since the term "financial interest" appears in Subsection 208(a) without qualification or modification, any financial interest, regardless of how remote or inconsequential it might be, is within the scope of the statute's terms. See Exchange National Bank of Chicago v. Abramson, 295 F. Supp. 87, 91 (D. Minn. 1969) (the district judge determined that section 208 "was intended to prohibit and does by its words prohibit a government employee from having any present or prospective financial interest in government decisions in which he participates").

According to one respected commentator:

> Under this language in subsection (a) of the section [§208], any financial interest will do; the statute does not stipulate that the interest must be a 'substantial' interest. Indeed, the special provisions contained in subsection (b) of Section 208 makes (sic) it clear that subsection (a) is to be strictly construed to require the employee to disqualify himself even where his financial interest in the transaction is slender.

B. Manning, Federal Conflict of Interest Law 131 (1964).

"Negotiating or Arrangement Concerning Prospective Employment"

The language in the third element of Subsection 208(a), "any person or organization with whom he is negotiating or has any arrangement concerning prospective employment," is not defined in section 208 or in the legislative history of section 208. The Sixth Circuit, however, has held that "'negotiation' is to be

given its common, everyday meaning for purposes of Section 208(a)." Gorman, 807 F.2d at 1302 (citing United States v. Conlon, 628 F.2d 150, 154 (D.C. Cir. 1980)). On the other hand, CACI, Inc. - Federal v. United States, 719 F.2d 1567 (Fed. Cir. 1983), gave a rather narrow reading to the phrase in dictum.

In a memorandum dated January 19, 1983, from Ralph W. Tarr, Deputy Assistant Attorney General, Office of Legal Counsel, to William Taft IV, General Counsel, Department of Defense, Mr. Tarr construed an ongoing consulting arrangement as an employment relationship within the meaning of Subsection 208(a). The Office of Government Ethics concurred with OLC's memorandum before it was published.

Acting as "Agent"

The term "agent," appearing in both Subsection 205(1) and Subsection 205(2), appears to have a broader scope than the common-law definition of the term. See Refine Const. Co., Inc. v. United States, 12 Cl. Ct. 56 (Cl. Ct. 1987); see also United States v. Sweig, 316 F. Supp. 1148, 1157 (S.D.N.Y. 1970).

The United States Court of Appeals for the District of Columbia Circuit has held that Section 205 bars Federal employees studying law from entering a court appearance on behalf of indigent criminal appellants in the District of Columbia. United States v. Bailey, 162 U.S. App. D.C. 135, 498 F.2d 677 (1974). One commentator believes that "one is acting as an agent . . . in contemplation of the statute if he acts or appears personally on behalf of another person." B. Manning, Federal Conflict of Interest Law 205 (1964).

United States is a "Party" or has a "Direct and Substantial Interest"

18 U.S.C. §§ 203, 205(2), 207(a), 207(b), 207(c) and 207(g) employ one or the other, or both, of the terms "party" and "direct and substantial interest." Congress did not define those terms for purposes of those statutes.

The "direct and substantial interest" language contained in Section 207(a) was derived from the phrase "directly or indirectly interested" which appeared in 18 U.S.C. § 281, a predecessor of another modern conflict of interest statute, 18 U.S.C. § 203, and has an expansive reach. Burton v. United States, 202 U.S. 344, 371 (1906) (a prosecution under § 281; the United States held to be directly and indirectly interested in the enforcement of a statute regulating the use of the mails). "In its broadest meaning the word 'party' includes one concerned with, conducting, or taking part in any matter or proceeding, whether he is named or participates as a formal party or not." Fong Sik Leung v. Dullas, 226 F.2d 74, 81 (9th Cir. 1955).

"Actually Pending"

The term "actually pending," which appears in 18 U.S.C. § 207(b)(i), makes that provision applicable only if the same particular matter actually was referred to or was under consideration by the official or the official's subordinates. The provision does not apply merely because the official's official responsibility includes responsibility for the same general types of matter so that theoretically a particular matter could have come under the official's supervisory authority. See 5 C.F.R. § 737.7(c). A recusal from involvement in a particular matter does not remove it from an official's official responsibility. United States v. Dorfman, 542 F. Supp. 402 (N.D. Ill. 1982); OGE 81x34 (November 23, 1981).

"Pending Before" and "Pending In"

Subsection 207(c) requires proof that the agency where the former official worked had a direct and substantial interest in the particular matter or, alternatively, that the particular matter was pending before that agency. The word "pending" means "awaiting decision or settlement." The Random House College Dictionary, p. 982 (1982). The word "before" means, in part, "under the jurisdiction or consideration of." Id. at p. 121.

Subsections 203 and 205 employ a similar term "pending in." The Office of Legal Counsel ("OLC") in a letter addressed to Independent Counsel Lawrence E. Walsh, dated April 29, 1987, advised that a matter pending in court is no longer pending in the Department of Justice for purposes of Sections 203 and 205. Likewise, OLC advised the Independent Counsel that a matter before a grand jury is no longer pending in the Department. 3/

The Statutes

This part of this section will discuss 18 U.S.C. §§ 203, 205, 207, 208 and 209, respectively, and will provide sample indictments.

---

3/ The effect of this interpretation of the statute is rather limited; it allows special Government employees to represent private clients before the department of agency employing them in connection with an investigation or other matter being handled by officials of a department of agency if the investigation or other matter has reached the point where a grand jury is involved or a court is involved.

## 18 U.S.C. § 203 - Prohibition Against Private Compensation For Services Before Government Agencies

1. Overview of Section 203:

Section 203 rests on the principle that except for their Government salary, Federal officials should not share in the proceeds derived from compensation paid for services provided to the Government. The gravamen of the offense is the giving or receiving, etc., of compensation, other than regular Government pay, for services rendered (ordinarily services of a representational nature) or to be rendered before (in) one of the forums specified in the statute and in relation to a matter before one of those forums. See Perkins, The New Federal Conflict of Interest Law, 76 Harv. L. Rev. 1113, 1120-21 (1963).

In the context of a case involving compensation for a Government official for the official's services, not the services of a third party, the United States Court of Appeals for the Fifth Circuit described the purpose of the statute as follows:

> The purpose of [§§ 201(g), 203] is to reach any situation in which the judgment of a Government agent might be clouded because of payments or gifts made to him by reason of his position 'otherwise than as provided by law for the proper discharge of official duty.' Even if corruption is not intended by either the donor or the donee, there is still a tendency in such a situation to provide conscious or unconscious preferential treatment of the donor by the donee, or the inefficient management of public affairs. These statutes, like the predecessor legislation, are a congressional effort to eliminate the temptation inherent in such a situation.

United States v. Evans, 572 F.2d 455, 480-81 (5th Cir.), cert. denied, 439 U.S. 870. In such cases, whether or not the official is actually influenced is immaterial. The statute is designed to avoid even the risk of such influence.

Section 203 would reach, for example, both a private person who makes, and the Government official who receives, a payment made for or because of the official's approval or recommendation of a Government contract for the payer (a situation covered also, by the current gratuity provisions 18 U.S.C. §§ 201(c)(1)(A), 201(c)(1)(B) and their immediate predecessors, 18 U.S.C. §§ 201(f), 201(g)). See e.g., United States v. Evans, 572 F.2d at 480-81; see also United States v. Freeman, 813 F.2d 303 (10th Cir. 1987).

It is not necessary for purposes of Section 203, however, that the services were rendered or were to be rendered by a Federal official, nor is it necessary to prove that the Govern-

ment official defendant had anything to do with providing the services. In addition, it is not necessary to prove that the illegal compensation was offered or received at a time when the intended recipient was a Government official. It is necessary, however, to prove that the services were rendered or were to be rendered while the intended recipient or recipient of the compensation was one of the officials listed in Section 203. Section 203 applies, for example, where such an official is paid part of the monies earned by the official's private business partner for the partner's representation of clients of the partnership before a forum listed in the statute, provided the official was aware of the source and nature of the payment. See, United States v. Quinn, 141 F. Supp. 622, 627 (S.D.N.Y. 1956) (in a case involving Section 203's immediate predecessor, 18 U.S.C. § 281, the court held that consciousness of wrongdoing is not an element of the offense, but knowledge of the attendant circumstance of the source of the payment must be proved). 4/

It has been held, however, that Section 203 does not prohibit the payment/receipt of compensation for merely providing advice to a private party in relation to a particular matter in which the United States is a party or has a direct and substantial interest. United States v. Myers, 692 F.2d, 823, 853-58 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983); see also United States v. Williams, 705 F.2d 603, 622 (2d Cir.), cert. denied, 104 S. Ct. 524, 525 (1983) (noting that Section 203's coverage is limited to services of a representational nature); but see United States v. Freeman, 813 F.2d 303 (10th Cir. 1987) (the Court of Appeals distinguished Williams, but went on to suggest that there is no such "representational services" limitation).

In Myers, the Court of Appeals determined that the phrase "before any department . . ., or naval commission" modifies not only the category of covered proceedings, but also the category

---

4/ The term "knowingly" modifies "gives," "promises," etc. (see Section 203(a)(2)), but is not used to modify "demands," "seeks," etc. (see Section 203(a)(1)); hence, it may appear that a payer must act with a greater degree of intent than a Government official payee in order to commit a Section 203 offense. But case law seems to treat payer and payee alike. Proof of an intent to influence or to be influenced is not required in order to establish a Section 203 offense. United States v. Evans, 572 F.2d at 481. See also, United States v. Eilberg, 465 F.Supp. 1076, 1078 (E.D. Pa. 1979).

Knowledge or awareness of illegality is not an element of a Section 203 offense. United States v. Myers, 692 F.2d 823, 853-58 (2d. Cir. 1982), cert. denied, 461 U.S. 961 (1983); Evans, 572 F.2d at 481; United States v. Podell, 519 F.2d 144, 150 n.7. See also, Quinn, 141 F. Supp. at 627.

of covered services. Myers, 692 F.2d at 853-57. Thus, the Government must prove that the services were provided or were to be provided before a Federal forum listed in the statute. Id. at 857. Freeman, supra, however, could be read as supporting a contrary, more expansive view of the statute, which would not require such proof. The interpretation of the statute contained in the Myers decision comports with the view of the statute long held by the Department of Justice, and the Myers decision was the first to squarely decide the point. It is not necessary to prove, however, that the services were provided or were to be provided by an agent or attorney or in a formal appearance before an agency; informal contacts, as well as formal appearances, comprising "any services . . . in relation to" the proceedings listed in the statute which are rendered or are to be rendered "before" the listed forums are within the scope of Section 203. Id. at 858.

Section 203 covers Members of Congress but does not proscribe the receipt of compensation for services provided in relation to a matter before a court. See Memorandum Re the Conflict of Interest Provisions of Public Law 87-849, 76 Stat. 1119, Approved October 23, 1962, published following the text of 18 U.S.C.A. § 201. Section 205 does not cover Members of Congress but does proscribe rendering services in court. Congress drafted Sections 203 and 205 in this fashion in order to continue the long-standing practice of allowing Members of Congress to represent constituents or other clients in court. 5/ See B. Manning, Federal Conflict of Interest Law 53, 55, 56, 65 (1964).

Section 203 does not prohibit Federal officials from receiving compensation for the preparation of tax returns. Signing a tax return as the preparer does not constitute services within the meaning of Section 203. OGE 81X21 (June 25, 1981).

Subsection 203(a) applies to a special Government employee (defined in 18 U.S.C. § 202) only in relation to a particular matter involving a specific party or parties (1) in which the special Government employee participated personally and substantially as a Government employee or (2) which is pending in the agency where the special Government employee is employed. However, the clause numbered "(2)" is not applicable unless the special Government employee has performed services for the agency on more than sixty days during the 365 consecutive days immediately preceding the solicitation, offer, etc. of compensation.

---

5/ It should be noted, however, that 18 U.S.C. § 204 prohibits Members of Congress from practicing in the United States Claims Court or the United States Court of Appeals for the Federal Circuit.

In calculating the number of days worked for purposes of the sixty day standard, a partial day of work counts as a full day. Federal Personnel Manual, Chapter 735, Appendix C. A determination about whether more than 60 days have been served is made by reference to the date of the employee's questionable conduct. Federal Personnel Manual, Appendix C.

A regular Government employee who leaves Federal service, but immediately rejoins the Government as a special Government employee will be immediately subject to the "pending-in" provision in that the employee's regular service must be included with the number of days served as a special Government employee when computing the number of days for purposes of the "pending-in" provision. OGE 84X9 (June 11, 1984) See also February 11, 1964 Memorandum from Assistant Attorney General Schlei, Office of Legal Counsel, to Assistant Attorney General Oberdorfer, Tax Division (advising that a Department of Justice attorney who leaves regular employment and immediately is reemployed as a special Government employee is immediately subject to the "pending-in" provision).

2. Sample Section 203 Indictments:

a. Indictment Charging the Public Official

On or about [date], in the [district], otherwise than as provided by law for the proper discharge of official duties, [the defendant] did knowingly [demand, seek, etc.] compensation from [payer] for services rendered and to be rendered by [defendant or someone else], at a time when the defendant was [Government position], before [Government agency], in relation to [the particular matter] in which the [Government agency] was a party and had a direct and substantial interest; to wit, [additional details regarding the services to be supplied or which were supplied].

b. Indictment Charging the Private Party

On or about [date], in [the district], otherwise than as provided by law for the proper discharge of official duties, [the defendant] did knowingly [offer, pay, etc.] compensation to [Government official] for services rendered and to be rendered [the person who performed or was to perform the services], at a time when the defendant was [Government position], before [Government agency], in relation to [the particular matter] in which the United States was a party and had

a direct and substantial interest; to wit [details regarding the services].

18 U.S.C. § 205 - Prohibition Against Representing Others in Claims Against and in Other Matters Affecting the United States

1. Overview of Section 205:

Section 205 embodies the principle that a Federal official ordinarily should not serve as the representative of a private party before the Government, whether or not compensation is paid for the representational services. According to Roswell Perkins, as a rule, "public officials should not . . . be permitted to step outside of their official roles to assist private entities or persons in their dealings with government." Perkins, supra at 1120.

Section 205 defines several different offenses. The statute prohibits an official from acting as agent or attorney for prosecuting a claim against the United States, prohibits an official from receiving a gratuity in consideration of assistance in the prosecution of such a claim, and prohibits an official from receiving any share of or interest in such a claim in consideration of assistance in the prosecution of such claim (see 18 U.S.C. § 205(1)). The statute furthermore prohibits an official from acting as anyone's agent or attorney before the forums listed in the statute in connection with any particular matter in which the United States is a party or has a direct and substantial interest. (see, 18 U.S.C. § 205(2)). Like Section 203, Section 205 imposes less restrictive prohibitions on special Government employees (see 18 U.S.C. § 205, immediately following 18 U.S.C. § 205(2)).

Like Section 203, Section 205 does not prohibit a Federal employee from preparing income tax returns for others and signing the returns. OGE 81x21 (June 25, 1981). However, Section 205 would prohibit such a preparer from representing a taxpayer in a tax audit. Id.

Section 205 has long been construed not to include self-representation. For example, the Office of Government Ethics has advised that a Government official could apply for a loan from a Federal agency for the official personally, but could not do so for a corporation, partnership or some other party. OGE 84x14 (October 31, 1984).

Section 205 has long been construed not to cover services provided as an expert witness. In this regard, the Office of Government Ethics issued an opinion noting that based on prior interpretation by the Department of Justice, the exception in Section 205 for testimony under oath would permit a Government

employee to testify as an expert witness for a plaintiff in a case in which the United States was a defendant. OGE 83x1 (January 27, 1983). OGE further opined, however, that the standards of conduct, mainly 5 C.F.R. § 735.201, would prohibit such testimony. Id.

Section 205 includes an exception allowing acting without compensation as agent or attorney for any person who is the subject of personnel administrative proceedings, including court proceedings, in connection with those proceedings, provided such conduct is consistent with the faithful performance of the actor's duties. OGE 82x19 (December 9, 1982). But see, Bachman v. Pertschuk, 437 F. Supp. 973 (D.D.C. 1977) (in-court representation not permitted).

Section 205 does not specifically provide any criminal penalty for any participant in the conduct proscribed by the statute except the Federal official. Section 207 and Section 208, likewise, do not specify any criminal penalty for accessories. There appears to be no bar, however, to prosecuting accessories under 18 U.S.C. § 2. 6/ Indeed, accessories have been successfully prosecuted under Section 208, although there is an absence of definitive case law applicable to prosecuting such accessories. If a prosecution of an accessory is undertaken, the prosecutor should anticipate legal defenses advancing the following arguments: 1) that the lack of any penalty in the statute for accessories reflects an affirmative legislative policy to preclude application of 18 U.S.C. § 2; 2) that the statute is part of a legislative scheme to hold private parties liable only as expressly provided in the statute; and 3) that the purposes of the statute are consistent with excluding accessories from liability.

If prosecution of an accessory to an 18 U.S.C. §§ 205, 207 or 208 offense is anticipated, early consultation with the Public Integrity Section's Conflicts of Interest Crimes Branch (FTS 786-5077 or (202) 786-5077) should be accomplished.

Section 205 does not expressly require proof of consciousness of wrongdoing or bad purpose to disobey or disregard the law. Moreover, the evident intent of Congress in passing this conflict of interest statute and its close companions was to prohibit absolutely certain forms of conduct which Congress had determined to be harmful per se; Section 205 is a regulatory offense, having no common law parallel.

---

6/ The Seventh Circuit has held that 18 U.S.C. § 371 may not be used to prosecute the client of an attorney who violates 18 U.S.C. §207(a) (1964), but has expressly declined to address the
(Footnote Continued)

A number of courts reviewing conflicts of interest cases have specifically held that consciousness of wrongdoing is not an element of the offense at issue. See, e.g., United States v. Mississippi Valley Generating Co., 354 U.S. 520, 549-50 (1961) (involving Section 208's immediate predecessor, 18 U.S.C. § 434); United States v. Gorman, 807 F.2d 1299, 1304 (6th Cir. 1986), cert. denied, 108 S. Ct. 68 (1987); United States v. Myers, 692 F.2d 823, 853-58 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983) (involving 18 U.S.C. § 203); United States v. Evans, 572 F.2d 455, 480-81 (5th Cir.), cert. denied, 439 U.S. 870 (1978) (involving 18 U.S.C. §§ 201(f), 201(g), 203).

2. Sample Section 205 Indictments:

a. Indictment Charging an Offense Under 18 U.S.C. § 205(1) (Receiving a Gratuity) and Involving a Regular Government Official

On or about[date], in the [district], [defendant], being an officer and employee of the United States Department of ....., that is, a ....., knowingly did receive money and other things of value, otherwise than in the proper discharge of [defendant's] official duties, as a gratuity, from [payer] in consider of [defendant's] assistance in the prosecution of a claim of [payer] against the United States in the amount of ..... for personal services rendered the United States by [payer]. [Defendant's] assistance consisted of meetings and consultations with officials of the United States Department of ..... for the purpose of effecting settlement of said claim.

(Modification of sample indictment published in Volume I, GUIDES FOR DRAFTING INDICTMENTS, a March 1973 Criminal Division publication).

b. Indictment Charging an Offense Under 18 U.S.C. § 205(2) and Involving a Regular Government Official

On or about [date], in the [district], [defendant], being an officer and employee of the United States Department of ....., that is, a ....., knowingly did act otherwise than in the proper discharge of [defendant's]

---

(Footnote Continued)
possible application of 18 U.S.C. § 2. United States v. Nasser, 476 F.2d 1111, 1120 (7th Cir. 1973).

official duties by acting as attorney for [client] before the United States Department of .....in connection with a contract, dated [date], between the United States and [client] for the furnishing of ..... to the United States, a particular matter in which the United States [was a party] [had a direct and substantial interest] [was a party and had a direct and substantial interest].

(Modification of sample indictment published in Volume I, GUIDES FOR DRAFTING INDICTMENTS)

18 U.S.C. § 207 - Restrictions on Post Federal Employment Activities

1. Overview of Section 207:

The Senate Report accompanying the 1978 amendments to 18 U.S.C. § 207 (S. Rep. No. 170, 95th Cong., 1st Sess. 31-32, reprinted in 1978 U.S. Code Cong. & Ad. News 4247-48) states the purpose of the statute as follows:

> Title V [amended section 207] of this bill [Ethics in Government Act] has several important objectives. The restrictions are imposed to insure government efficiency, eliminate official corruption, and promote even-handed exercise of administrative discretion. Former officers should not be permitted to exercise undue influence over former colleagues, still in office, in matters pending before the agencies; they should not be permitted to utilize information on specific cases gained during government service for their own benefit and that of private clients. Both are forms of unfair advantage. Honest government, and decisions made in an impartial manner, are the objectives of this Title.
>
> Title V is an attempt to prevent corruption and other official misconduct before it occurs, as well as penalizing it once it is uncovered.
>
> . . . .
>
> 18 U.S.C. § 207, like other conflict of interest statutes, seeks to avoid even the appearance of public office being used for personal or private gain. In striving for public confidence in the integrity of government, it is imperative to remember that what appears to be true is often as important as what is true. Thus

and substantially as officers or employees, or which particular matter is the subject of their official responsibility.

Lastly, Subsection 207(j) establishes a basis for administrative disciplinary action, pursuant to regulations promulgated under the authority of the subsection, and following a determination by the head of the department or agency in which the former officer or employee served that such former officer or employee violated Subsection 207(a), 207(b)(i), 207(b)(ii) or 207(c). Under Subsection 207(j), an offender may be barred from having any communications with, or from making any appearances before, the offender's former agency on any pending matter for up to five years, or may be subject to other appropriate disciplinary action. General procedures applicable to such administrative enforcement of 18 U.S.C. § 207 are published as 5 C.F.R § 737.27. The Department of Justice's implementing regulations covering its former officers and employees are published as 28 C.F.R. § 45.735-7a. One important feature of the administrative disciplinary remedy is that it must be taken by the agency that employed the former government official, regardless of what agency is the subject of the former official's communication or appearance in violation of the statute.

According to S. Rep. No. 170, supra, the virtual absence of criminal prosecution under 18 U.S.C. § 207 (1976) warranted providing an administrative mechanism that would enable departments and agencies to determine violations, then impose a meaningful penalty on the violator. Id. at 34 [4250]. 8/

2. Subsection 207(a) Offense:

Generally, Subsection 207(a) prohibits, for the life of a particular matter involving a specific party or parties, any covered person from representing anyone except the United States before specified Federal entities, or before Federal officials of those entities, in connection with any particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and in which the covered person participated personally and substantially as an official.

Subsection 207(a) requires proof of an act as an agent or attorney or as some other representative in an informal or formal appearance before a Federal entity or official or, alternatively, the making of a communication to a Federal entity or official with the intent to influence. The terms "agent or attorney, or otherwise represents" were intended by Congress to include

---

8/ The bracketed numbers refer to the pertinent page number(s) in the U.S. Code Cong. & Ad. News.

> government in its dealings must make every reasonable effort to avoid even the appearance of conflict of interest and favoritism.
>
> But, as with other desirable policies, it can be pressed too far. Conflict of interest standards must be balanced with the government's objective in attracting experienced and qualified persons to public service. Both are important and a conflicts policy cannot focus on one to the detriment of the other. There can be no doubt that overly stringent restrictions have a decidedly adverse impact on the government's ability to attract and retain able and experienced persons in Federal office.

Subsection 207(a) and Subsection 207(b)(i) each cover all former officers and employees, including special Government employees, of the executive branch, independent agencies, and the District of Columbia, except officers and employees who left government employment before July 1, 1979. 7/ Subsection 207(b)(ii) and Subsection 207(c) each cover persons as set forth in Subsection 207(d), except such persons who left Government employment before July 1, 1979, or, in the case of individuals who occupied designated positions, prior to the effective date of such designation. In addition, Subsection 207(c) does not cover a special Government employee serving less than sixty days in a given calendar year.

Specific exceptions to the applicability of Subsections 207(a), 207(b)(i) and 207(b)(ii) are contained in Subsection 207(f). Likewise, exceptions to the applicability of Subsection 207(c) are contained in Subsections 207(d)(2), 207(e), 207(f), 207(h), and 207(i).

In addition to its four felony provisions, Section 207 includes a misdemeanor provision that regulates the conduct of partners of officers and employees of the executive branch, independent Federal agencies and the District of Columbia, including special Government employees. Such partners are barred from acting as agents or attorneys for anyone except the United States before certain Federal agencies, or officers or employees thereof, in connection with a particular matter in which the United States or the District of Columbia is a party or has a direct and substantial interest and in which such officers or employees are participating, or have participated, personally

---

7/ Those officers or employees who left their employment prior to July 1, 1979 remain subject to the former 18 U.S.C. § 207(a) (1976). Section 502, Pub. L. 95-521, October 26, 1978.

Like 18 U.S.C. § 207(a), Section 207(b)(i) does not preclude postemployment activities that consist merely of aiding and assisting in the representation of another without direct contact with the Government in the form of an appearance or a communication with the intent to influence, but prohibits both 1) knowingly acting as a representative and 2) making communications with the intent to influence.

4. Subsection 207(b)(ii) Offense:

Generally, Subsection 207(b)(ii), for two years after their Government employment has ceased, bars covered persons, 9/ for two years after their Government service has ceased, from representing, aiding, counseling, advising, consulting, or assisting in representing anyone except the United States by personal presence at any formal or informal appearance before specified Federal entities, or officials thereof, in connection with particular matters involving a specific party or parties in which such covered persons participated personally and substantially as Government officials.

"Assisting in representing . . . by personal presence," would appear to prohibit even mere presence at a representational kind of appearance. See United States v. Coleman, 805 F.2d 474 (3d Cir. 1986). The prohibition would not apply, however, to oral or written communications comprising merely conveying material to the United States, telephone calls, correspondence, or aiding in the preparation of a brief. H.R. Rep. No. 115, 96th Cong., 1st Sess. 6, reprinted in 1979 U.S. Code Cong. & Ad. News 328-333. Such communications, however, might be barred under 18 U.S.C. § 207(a) in the context of a particular case.

5. Subsection 207(c) Offense:

a. The Offense. Subsection 207(c), unlike Subsections 207(a), 207(b)(i) and 207(b)(ii), embraces particular matters that do not involve specific parties and particular matters coming into existence after the covered person has left government service. The subsection, generally, prohibits a covered person, for one year after leaving Government employment, from representing anyone except the United States before the department or agency where such person served, or before any official thereof, in connection with any particular matter pending before such department or agency or in which it has a direct and substantial interest. Like Subsection 207(a) and Subsection 207(b)(i), Subsection 207(c) prohibits not only knowingly appearing as agent or attorney, but also prohibits making communications with the intent to influence.

---

9/ See the discussion infra about 18 U.S.C. §§ 207(d), 207(e).

appearances in any professional capacity, whether as attorney, consultant, expert witness, or otherwise. H.R. Rep. No. 1756, 95th Cong., 2d Sess. 74, reprinted in 1978 U.S. Code Cong. & Ad. News 4390.

The subsection prohibits not only representational acts made in a physical appearance in a Federal forum or before a Federal agency, but also prohibits letters, telephone calls, conveyances of materials and other communications provided they are made with the intent to influence. It should be noted that the term "with the intent to influence" modifies only oral or written communications, not representation. Likewise, the word knowingly modifies only acting as agent or attorney, or otherwise representing; it does not modify making oral or written communications:

> It should be noted that subsection (c)(2) requires that oral or written communications must be made with the intent to influence that proceeding, but subsection (c)(1) on appearance and attendance has no such intent requirement.

S. Rep. No. 170, 95th Cong., 1st Sess. 152-3 (1977). Subsection 207(a), therefore, requires proof either that the defendant knowingly acted as agent or attorney for or otherwise represented, or, alternatively, communicated with the intent to influence. (emphasis supplied) The underscored words are the only words in the statute that specifically state what intent must be proved, and indicate that Congress did not intend to require proof of a consciousness of wrongdoing.

Subsection 207(a) does not prohibit post-employment activities that may fairly be characterized as no more than aiding and assisting in the representation of another, so long as such assistance is entirely in-house and involves no direct contact with the Government in the form of an appearance or a communication.

3. Subsection 207(b)(i) Offense:

Generally, Subsection 207(b)(i) prohibits a covered person from representing anyone except the United States before specified Federal entities, or before Federal officials of those entities, in connection with a particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and which particular matter was actually pending under the covered person's official responsibility as a Federal official within a period of one year prior to the termination of such responsibility. This prohibition is limited to the two years following a former official's Federal employment or, in cases where the former official's responsibilities changed before the official left government service, the two years following the change.

such separate components of agencies pursuant to 18 U.S.C. § 207(d)(1)(C) are published as 5 C.F.R. § 737.32. A second mechanism for limiting the operation of 18 U.S.C. § 207(c), 18 U.S.C. § 207(e), provides that the Director of the Office of Government Ethics may accomplish the same effect as under 18 U.S.C. § 207(d)(1)(C) by designating as separate a statutory agency or bureau that exercises distinct and separate functions from those of other organizational units within its parent agency. A former senior employee of such a designated unit would then be free of the restrictions of 18 U.S.C. § 207(c) with regard to the rest of the official's former agency. 18 U.S.C. § 207(e) specifically provides, however, that such a designation would not apply to a former head of the designated unit or to a former senior employee whose official responsibilities included the designated unit; they would still be fully bound by the prohibition of 18 U.S.C. § 207(c). The designations permitted by 18 U.S.C. § 207(e) are published as 5 C.F.R. § 737.31.

c. Exceptions to 18 U.S.C. §§ 207(a), 207(b), and 207(c). Subsection 207(f) allows former Government officials to make communications solely for the purpose of furnishing scientific or technological information to the Government without regard to the various disqualifications imposed by 18 U.S.C. § 207, provided the former official complies with the procedures for such communications promulgated by the particular department or agency with which the official is communication. Congress, however, intended that this exemption would not apply to communications made with the intent to influence. H.R. Rep. No. 1756, supra at 76 [4392].

Similarly, where a former official has outstanding qualifications in a scientific, technological, or other technical discipline, subsection 207(f) permits such a former official to communicate with a department or agency if the head of the department or agency publishes a certification in the Federal Register 1) that the former official is so qualified, 2) that the former official is acting with respect to a particular matter that requires such qualifications, and 3) that the national interest would be served by such former official's participation.

Subsection 207(h) provides that nothing in Section 207 prohibits a former officer or employee from giving testimony under oath, or from making statements required to be made under penalty of perjury.

d. Persons Subject to 18 U.S.C. § 207(c) and 18 U.S.C. § 207(b)(ii). 18 U.S.C. § 207(d) defines three classes of officials who may be subject to Subsections 207(b)(ii) and 207(c):

i. 18 U.S.C. § 207(d)(1)(A): Officials Paid Under the Executive Schedule Pay Rates or at a Comparable or Greater Pate of Pay Under Other Authority: Executive Schedule pay rates are listed in 5 U.S.C. §§ 5311 to 5318, and are to be

Subsection 207(c) employs the term "particular matter" without the modifier, "involving a specific party or parties." The matters covered by the subsection, therefore, are like those which are covered by Subsection 208(a); Subsection 207(c) encompasses, for example, general rulemaking and formulations of general standards, but not legislative activities. S. Rep. No. 170, supra at 153 [4369].

There is no requirement under Subsection 207(c) of proof of prior participation as an officer or employee in the particular matter; Subsection 207(c) is applicable regardless of the degree of association the former official had with the particular matter as an official.

b. Exceptions to Subsection 207(c). There are several significant exceptions that apply only to the prohibition of Subsection 207(c). The subsection does not apply to a former special Government employee, provided that the former special Government employee served in a Government position for less than sixty days in a given calendar year. It does not apply to a former official who is an elected official of a state or local government, or to a former official who is principally occupied or employed with a state or local agency, an accredited institution of higher education, or certain hospitals or medical research organizations, provided the official's appearance or communication is on behalf of such agency, institution, or organization.

Subsection 207(c) does not prevent a former official from appearing before or communicating with the official's former agency on matters of a personal and individual nature, such as personal income tax or pension benefits, nor is a former official prohibited from making or providing a statement based on the official's own special knowledge in the particular area that is the subject matter of the statement, provided that the official receives no unauthorized compensation in connection with the statement. A former official, therefore, is not barred from expressing personal views to the official's former agency, from providing information when requested by the official's former agency on a matter in which the official had been involved as a Government employee, or from recommending someone for employment with the official's former agency based on the official's own personal knowledge of that person. 5 C.F.R. § 737.11(i).

Finally, the operation of the Subsection 207(c) bar can be limited to less than the entirety of a department or agency. 18 U.S.C. § 207(d)(1)(C), provides that the Director of the Office of Government Ethics may limit the operation of 18 U.S.C. § 207(c) to permit former officials of a separate bureau or department within an agency to have communications with and appearances before other separate and unrelated bureaus and departments within the same parent agency. To do so, the Director must determine that there exists no potential for the use of undue influence or unfair advantage. The designations of

represented [identify the person or entity represented], in an appearance before [identify the department, agency . . . or officer or employee thereof], in connection with [identify the particular matter involving a specific party or parties], a particular matter involving a specific party, [identify the party], in which the United States was a party [alternatively, or in addition to alleging the United States was a party, allege that the United States had a direct and substantial interest], and in which Defendant [name] had participated personally and substantially as such officer and employee through [generally describe the mode(s) of participation].

b. Indictment Charging a Subsection 207(a) Offense (With the Intent to Influence, Making an Oral or Written Communication)

On or about [date], in the [district], the Defendant, [defendant's name], being a former officer and employee of the executive branch of the United States Government, that is, [describe position and employing organization], with the intent to influence, did converse with [identify department, etc., official], on behalf of [identify person or entity on whose behalf the conversation occurred], in connection with [identify the particular matter involving a specific party or parties], a particular matter involving a specific party, [identify the party], in which the United States was a party [alternatively, or in addition to alleging the United States was a party, allege that the United States had a direct and substantial interest], and in which Defendant [name] had participated personally and substantially as such officer and employee through [generally describe the mode(s) of participation].

c. Indictments Charging a Subsection 207(b)(i) Offense

(1) On or about January 18, 1985, in or near Lewes, in the State and District of Delaware, Anderson J. Coleman, defendant herein, having been an employee of the executive branch of the United States Government, that is, a Revenue Officer with the Internal Revenue Service, within two years after that employment ceased in December, 1984, knowingly acted as agent and otherwise represented Louis Ianire in an

distinguished from the General Schedule pay rates, or "GS Levels" that are published as 5 U.S.C. § 5331, et seq. The term "under other authority" does not include any official paid under the General Schedule. 5 C.F.R § 737.25.

ii. 18 U.S.C. § 207(d)(1)(B): Senior Commissioned Officers of the Uniformed Services: These are the officers in pay grades 0-9 and 0-10 as set forth in 37 U.S.C. § 201. That statute defines the following positions: 0-9 includes the ranks of Lieutenant General in the Army, Air Force, and Marine Corps, the rank of Vice Admiral in the Navy, Coast Guard, and National Oceanic and Atmospheric Administration, and the position of Surgeon General in the Public Health Service; 0-10 includes the ranks of General in the Army, Air Force and Marine Corps, and Admiral in the Navy, Coast Guard and National Oceanic and Atmospheric Administration.

iii. 18 U.S.C. § 207(d)(1)(C): Employees in Positions Involving Significant Decision-making or Supervisory Responsibility; These positions are designated by the Director of the Office of Government Ethics. However, the Director may only designate positions from within certain classes of positions that involve significant decision-making or supervisory responsibility. Those designations are published as 5 C.F.R. § 737.33 for each Federal agency.

6. Subsection 207(g) Offense:

Subsection 207(g) prohibits a partner of an officer or employee of the executive branch, independent agency, or of the District of Columbia, including a special Government employee, from acting as agent or attorney for anyone before the United States in connection with any particular matter in which the United States is a party or has a direct and substantial interest, and in which the Government official is participating or has participated personally and substantially as a Government official; or, which is the subject of his/her official responsibility. Subsection 207(g) is not limited to particular matters involving a specific party or parties. Unlike Subsections 207(a) and 207(b), which extend only to particular matters involving specific parties, the disqualification in Subsection 207(g), like Subsection 207(c), extends to any particular matter whether or not a party has been identified.

7. Sample Section 207 Indictments:

a. Indictment Charging a Subsection 207(a) Offense (Knowingly Representing)

On or about [date], in the [district], the Defendant, [defendant's name], being a former officer and employee of the executive branch of the United States Government, that is, [describe position and employing organization], knowingly

d. Indictment Charging a Subsection 207(b)(ii) Offense

On or about [date] in the [district], the Defendant, [defendant's name], having been employed as an officer of the executive branch of the United States Government, that is, [describe position and employing organization], and having been employed as specified in subsection (d) of Section 207, Title 18, United States Code, that is, at a rate of pay fixed according to subchapter II of Chapter 53 of Title 5 of the United States Code, within two years after that employment ceased, knowingly aided and assisted [identify person or entity aided and assisted] by [defendant's] personal presence at an appearance before an officer and employee of an agency of the United States, that is, [identify the official and the agency], in connection with [identify the particular matter involving a specific party], a particular matter involving a specific party, [identify the party], in which the United States was a party [alternatively, or in addition to alleging the United States was a party, allege that the United States had a direct and substantial interest], and in which Defendant [name] had participated personally and substantially as such officer through [generally describe mode(s) of participation].

e. Indictment Charging a Subsection 207(c) Offense

On or about [date] in [district], the Defendant, [defendant's name], having been so employed as specified in Subsections 207(c) and 207(d) of Title 18, United States Code, that is, as [describe position and employing organization], within one year after such employment ceased [date employment ceased], with the intent to influence spoke with [identify the person the defendant spoke with], an employee of [name the organization], the agency where [defendant] had been employed as [position], in connection with the particular matter of [identify the particular matter], which particular matter was pending before [name the organization] [alternatively, or in addition to alleging "pending before," allege that the particular matter was of direct and substantial interest to the organization].

informal appearance before an employee of an agency of the United States, that is, Revenue Officer Gloria Dendy of the Internal Revenue Service, in connection with an attempt to collect Federal taxes due and owing to the United States, a matter which was actually pending under the official responsibility of Anderson J. Coleman as a Revenue Officer within a period of one year prior to the termination of his employment as a Revenue Officer, in violation of 18 U.S.C. §207(b)(i). 10/

(2) On or about [date] in the [district], the Defendant, [defendant's name], being a former officer and employee of the executive branch of the United States Government, that is, [describe position and employing organization], within two years after that employment ceased [alternatively, when official responsibility terminates before employment terminates, allege - after that employment had ceased and within two years after [defendant's name] official responsibility for [identify the particular matter involving a specific party or parties] had ceased], with the intent to influence made a written communication, that is, a letter dated [date], on behalf of [client], to [identify addressee official/organization], in connection with [identify the particular matter involving a specific party or parties], a particular matter involving a specific party, [identify the party], in which the United States was a party [alternatively, or in addition to alleging the United States was a party, allege that the United States had a direct and substantial interest], and which was actually pending under the official responsibility of [defendant] as such officer and employee within a period of one year prior to the termination of [defendant] employment [or, alternatively, use official responsibility in place of "employment" when responsibility ends before employment ends] as such officer and employee.

---

10/ This sample is a copy of Count IX of the indictment involved in United States v. Coleman 805 F.2d 774 (3d Cir. 1986).

f. Information Charging a Subsection 207(g) Offense

On or about [date], in [district], the Defendant, [defendant's name], being a partner of [partner's name], an officer of the executive branch of the United States Government, that is, [identify the position and organization], acted as attorney for [client] before [identify the Federal official/ organization], in connection with [identify the particular matter], a particular matter in which the United States was a party [alternatively, or in addition to alleging the United States was a party, allege that the United States had a direct and substantial interest] and in which [Government partner's name] was participating [or had participated] personally and substantially as [identify the official's position and organization] through [describe mode(s) of participation]. 11/

18 U.S.C. § 208 - Prohibition Against Official Participation When a Disqualifying Financial Interest Exists

1. Overview of Section 208:

In its most serious form, a Section 208 offense is indistinguishable from a bribe involving performance of an official act by the corrupt official in return for something of value from the briber. But a Section 208 offense may occur in the absence of such positive corruption. Typically, prosecutions under the statute have involved as defendants officials who have participated in contract matters affecting a company of their own, affecting their spouse's financial interests, or affecting financial interests of a person or organization with which they are negotiating or have an arrangement concerning prospective employment.

Section 208 bars a Federal official from personally and substantially participating as an official in a matter in which the official has a financial interest. In addition, it bars such participation even where the official has no financial interest in the matter but certain other persons, like the official's spouse or partner; or entities, like an organization with which the official is negotiating concerning prospective employment, have such a financial interest.

---

11/ Where the Federal official partner has not personally participated in the particular matter, but actually had it under

(Footnote Continued)

The statute is designed to promote the integrity of government actions by assuring that they will not be unduly affected by an official's consideration of the official's financial interests or those of persons or entities who, because of their close relationship with the official, might influence the official's actions.

According to the Sixth Circuit, "Section 208 sets forth an objective standard of conduct which is directed not only at dishonor but also at conduct which tempts dishonor." United States v. Gorman, 807 F.2d 1299, 1304 (6th Cir. 1986), cert. denied, 108 S. Ct. 68 (1987); see also United States v. Conlon, 628 F.2d 150 (D.C. Cir. 1980), rev'g in part, United States v. Conlon, 481 F. Supp. 654 (D.D.C. 1979). The statute, therefore, does not require proof that there actually was a financial gain or loss or that an official participated in a matter with knowledge or an awareness that such participation was illegal. Gorman, 807 F.2d at 1304. Discussing Section 208's predecessor statute, the Supreme Court stated:

> [T]he statute [section 208's immediate predecessor, section 434] does not specify as elements of the crime that there be actual corruption or that there be any actual loss suffered by the Government as a result of the defendant's conflict of interest. This omission indicates that the statute establishes an objective standard of conduct, in that whenever a Government agent fails to act in accordance with the standard, he is guilty of violating the statute, regardless of whether there is positive corruption. The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government. To this extent, therefore, the statute is more concerned with what might have happened in a given situation then with what actually happened. It attempts to prevent honest Government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation.
> . . . .

---

(Footnote Continued)
his or her official responsibility, the information should be modified accordingly.

knowingly did participate personally and substantially as such officer and employee, through decision, recommendation, and the rendering of advice, in a proposal of the American Bank Note Company for a Security Signature System for U.S. Currency, a particular matter in which to his knowledge the American Bank Note Company, a company with which he was negotiating and had an arrangement concerning prospective employment, had a financial interest.

This indictment was found to be sufficient by the United States Court of Appeals for the District of Columbia Circuit in United States v. Conlon, 628 F.2d 150, 155-56 (D.C. Cir. 1980), rev'g in part United States v. Conlon, 481 F. Supp. 654 (D.D.C. 1979). The use of the terms "unlawfully" and "knowingly" in the indictment, however, was probably unnecessary. See Gorman, 807 F.2d at 1304.

b. Indictment Where the Financial Interest is That of the Prospective Employer and the Prospective Employer is Charged as an Aider and Abettor.

1. At all times material to this indictment a bankruptcy matter involving James R. Hartley et al., was pending in the United States Bankruptcy Court, Northern District of Ohio, Western Division.

2. At all times material to this indictment PAUL G. GORMAN, defendant herein, was employed by the United States Department of Justice as an Assistant United States Attorney for the Northern District of Ohio, assigned to the Western Division, investigating alleged criminal activity of James R. Hartley and others.

3. At all times material to this indictment MERLE C. WEBER, defendant herein, was a representative of certain creditors in the bankruptcy matter of James Hartley, et al., and in that capacity was to receive a percentage of whatever monies were ultimately paid to those creditors in the course of the resolution of said bankruptcy matter.

4. During the period August 1982, through April 1983, PAUL G. GORMAN was negotiating concerning prospective employment with MERLE C. WEBER.

> [E]ven assuming that Wenzell [a part-time, unpaid Government consultant] did not think there was a conflict [between his Government employment and his private interests], that fact is irrelevant. As we have shown, the statute [section 434] establishes an objective, not a subjective, standard, and it is therefore of little moment whether the agent thought he was violating the statute, if the objective facts show that there was a conflict of interest.

United States v. Mississippi Valley Generating Co., 364 U.S. 520, 549-50 (1961).

Section 208 applies to officials from the executive branch, independent agencies, a Federal Reserve bank and the District of Columbia. The statute consists of two subsections. The first, Subsection 208(a), describes the offense. The second, Subsection 208(b), specifies two methods by which an exemption from the coverage of the statute may be effectuated. First, the person who appointed the official to the official's Federal job can provide a written exemption if the statutory requirements for such an exemption have been met. These requirements are, first, that the official advises the appointing official of the nature and circumstances of the particular matter and, second, that the official makes full disclosure of the financial interest to the appointing official and receives a written waiver from the appointing official in advance of participating in the particular matter. The second means of exempting an official from Subsection 208(a) is to publish a general rule or regulation in the Federal Register exempting a particular interest as too remote or inconsequential to affect the integrity of Government officers' and employees' services. The defendant should be required to bear the burden of establishing a Subsection 208(b) exemption as a bar to prosecution. See McKelvey v. United States, 260 U.S. 353 (1922); see also United States v. Cook, 84 U.S. 168, 173-74 (1872).

## Sample Section 208 Indictments

### a. Indictment Where the Government Official Participates in a Matter in Which the Official's Potential Employer, but not the Official, Has a Financial Interest.

> In the period from on or about December 1976 through June 1977, in the District of Columbia, JAMES A. CONLON, the Defendant, being an officer and employee of the executive branch of the United States Government, that is, the Director of the United States Bureau of Engraving and Printing, unlawfully and

5. From in or about August 1982, through in or about April 1983, in the Northern District of Ohio and elsewhere, PAUL G. GORMAN being an officer and employee of the United States Department of Justice, that is an Assistant United States Attorney, while being aided and abetted by MERLE C. WEBER, knowingly did participate personally and substantially, as such officer and employee, through decision, approval, recommendation, investigation and otherwise, in that he performed acts including causing grand jury subpoenas to be issued, questioning witnesses before the grand jury, supervising the investigation, and interviewing witnesses in the criminal investigation of James R. Hartley and others, an investigation in which to the knowledge of PAUL G. GORMAN and MERLE C. WEBER, MERLE C. WEBER had a financial interest.

This indictment was used in United States v. Paul Gorman, Criminal No. 84-752 (N.D. Ohio, Western Division). The use of the term "knowingly" was probably unnecessary. See Gorman, 807 F.2d at 1304.

c. Indictment Where the Defendant's Partner, and Prospective Employer, has the Financial Interest.

From on or about April 1, 1982, to on or about June 30, 1982, in the Fort Worth Division of the Northern District of Texas, FRED A. MITCHELL, Defendant, being an employee of the General Services Administration, an agency of the Executive Branch of the United States Government, did knowingly participate personally and substantially as such an employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation and otherwise, in a controversy, charge, accusation and investigation, all involving Lois Hilton Ford, in which, to his knowledge: a) his partner, Lois Hilton Ford, had a financial interest, and b) a person he was negotiating with concerning prospective employment, that is, Lois Hilton Ford, had a financial interest, and c) a person he had an arrangement with concerning prospective employment, that is, Lois Hilton Ford, had a financial interest.

This indictment was used in United States v. Fred Mitchell, Criminal No. 4-85-128 (N.D. Tx., Fort Worth Division). (Mitchell pleaded guilty to this charge.)

d. Indictment Where the Defendant has the Financial Interest and an Aider and Abettor is Involved.

> On or about June 17, 1981, in the District of Nevada, RICHARD C. JEWELL, being an officer and employee of the Executive Branch of the United States Government, that is, a GS-12 hydrologist for the United States Department of the Interior, Bureau of Land Management, Reno, Nevada, aided and abetted by DAVID T. HODDER, unlawfully and knowingly did participate personally and substantially as a Government officer and employee, through decision, approval and recommendation, in signing a Certificate For Contract Payment/Invoice submitted by Geoscientific Systems and Consulting pursuant to contract number YA-553-CT1-1017 awarded by the Bureau of Land Management, a contract, claim and matter in which, to the knowledge of RICHARD C. JEWELL, he had a financial interest.

This charge was one of several Subsection 208(a) charges alleged in the indictment returned in United States v. Richard Jewell, Case No. CR-R-85-42-ECR (District of Nevada) aff'd on one count, ___ F.2d ___ (No. 86-1360, 9th Cir., decided September 8, 1987)(remaining counts reversed for multiplicity). The use of the terms "unlawfully" and "knowingly" was probably unnecessary. See Gorman, 807 F.2d at 1304.

18 U.S.C. § 209 - Prohibition Against Compensation By Private Parties for Official Services of Regular Government Officials

1. Overview of Section 209:

Section 209 is based on the principle that Government officials should not be paid for their official acts by private parties having the discretion to terminate such payments at will. One concern is that Government officials whose salaries are supplemented by private parties will tend to show favoritism to their paymasters even in the absence of any specific quid pro quo. See Perkins, "The New Federal Conflict-of-Interest Law," 76 Harv. L. Rev. 1113, 1119, 1137-38, (1963). Curiously, however, the statute contains an exception, Subsection 209(c), making it inapplicable to a Government official working for the United States without receiving any compensation from the Government.

For the most part, convictions under 18 U.S.C. § 209 have resulted from guilty pleas entered pursuant to plea agreements. There are, therefore, few published opinions involving the statute. Section 209 is discussed, however, in United States v. Muntain, 610 F.2d 964 (D.C. Cir. 1979). The Muntain case illustrates that it is critical to demonstrate that the payment was made specifically for the officer's or employee's services as such an officer or employee; the statute, for example, does not prohibit the receipt by an officer or employee of payment made for the official's nongovernmental work nor gifts unrelated to Government service. See also United States v. Boeing Co., 653 F. Supp. 1381 (E.D. Va. 1987), appeal docketed, (trial judge determined that "severance" payments made by Boeing were not illegal supplementations); Jordan v. Axicom Systems, Inc., 351 F. Supp. 1134 (D.D.C. 1972); Exchange National Bank of Chicago v. Abramson, 295 F. Supp. 87 (D. Minn. 1969); United States v. Martel, 792 F.2d 630 (7th Cir. 1986) (upholding conviction of defendant contractor under 18 U.S.C. § 209).

A recurring question under Section 209 concerns whether or not a payment made to a Federal official upon entry into Federal service from private industry, ostensibly as a termination payment for past services to the private employer, was made truly as a payment for past services or was made instead to supplement the official's Federal salary. (See, e.g., Boeing supra) Evaluating any termination payment involves ascertaining the subjective intent for which the payment was made. According to one commentator:

> To test its own intent the Board of Directors of the corporation from which the executive is departing should ask itself, would we make the same severance payment if the corporate executive was leaving with no idea of returning to accept the presidency of a college, or a charitable foundation, or to enter the ministry? If the answer is in the affirmative, it is virtually indisputable that there is a legitimate severance payment.

Perkins, "The New Federal Conflict-of-Interest Law," supra at 1139. The form of the payment -- whether it is a lump sum or an indefinite arrangement for monthly payments -- is a relevant, but not necessarily dispositive factor. Another relevant factor is the presence of "dealings" between the former employer and the Federal official's agency.

Another recurring question involving Section 209 concerns whether or not the statute applies to an unsolicited, unrestricted cash award, or bequest, made as a recognition of an officer's or employee's work as such an officer or employee. The Office of Government Ethics has determined that the receipt of a bequest by all the present employees of an office within an agency would not violate Subsection 209(a), provided the bequest

was made without the intent to influence the employees and services had been provided by the employees to the deceased without any expectation of reward. OGE 81x31 (October 2, 1981). See also OGE 83x10 (July 21, 1983) (approving the acceptance of an award from an organization that did no business with and was not regulated by the employee-recipient).

Another issue involving Section 209 concerns whether or not an official may accept payment of travel expenses, subsistence, and lodging from a private group in connection with a speech or some other activity which relates to the official's Federal employment. This issue was addressed in detail in OGE 84x5 (issued May 1, 1984, amended August 24, 1984). 12/

Sample Section 209 Information

a. Information Charging the Payee (Modification of the Sample Charge Published in Volume I of GUIDES FOR DRAFTING INDICTMENTS)

On or about [date], in the [District], the Defendant, [defendant's name], received a contribution to and supplementation of, [defendant's] salary as compensation for [defendant's] services as purchasing agent for the United States Department of [organization], from the [name] Corporation.

b. Information Charging the Payer

On or about [date], in the [District], the Defendant, [defendant's name], under circumstances making its receipt a violation of Subsection 209(a) of Title 18, United States Code, made a contribution to, and supplementation of, [Government official's] salary as compensation for [Government official's] services as purchasing agent for the United States Department of _____.

---

12/ Interested Federal prosecutors may obtain a copy of OGE 84x5 from the Office of Government Ethics or the Public Integrity Section.

APPENDIX C

# PERJURY

BY

JOHN C. CAMPBELL*

Trial Attorney
Public Integrity Section
Criminal Division

* John Campbell has been a trial attorney with the Public Integrity Section for three years.

# PERJURY

## I. The Statutes

Sections 1621 and 1623 define the crime of perjury before Federal tribunals. (Section 1622, subornation of perjury, is a separate offense closely related to obstruction of justice.)

A. Section 1621 codifies the common law of perjury. It covers sworn statements before any "competent tribunal, officer or person," and thus subsumes the more specific offense detailed in section 1623.

B. Section 1623, added in 1970, is confined to false declarations made during court or grand jury proceedings. In key respects (see below), it eases the Government's evidentiary burden, making it somewhat simpler to prove and punish perjury in these vital arenas.

## II. Differences

A. Breadth of Coverage. Section 1621 covers any sworn statement before any competent tribunal, officer or person. Section 1623 covers only statements before (or "ancillary to") a Federal court or grand jury.

B. Two-Witness Rule. Section 1621 prosecutions are subject to the common law "two witness" rule. Section 1623 explicitly abolishes that rule for prosecutions brought under it. 18 U.S.C. § 1623(e).

C. Inconsistent Statements. Section 1623 expressly permits conviction on proof of two mutually inconsistent statements, without proof of which one is false. 18 U.S.C. § 1623(c). Section 1621 does not encompass inconsistent statements.

D. Recantation. Section 1623 provides that under certain circumstances recantation is a bar to prosecution. 18 U.S.C. § 1623(d). Section 1621 is not subject to a recantation defense.

## III. Elements

The substantive elements of proof under sections 1621 and 1623 are essentially equivalent, except for the intent requirement:

A. An oath.

B. Intent - "willfully" under section 1621, "knowingly" under section 1623.

C. Declarant's belief that his statement is false.

D. Materiality.

## IV. Laying the Groundwork

If you are in control of a proceeding at which sworn testimony is being taken -- i.e. any grand jury session, court hearing, or trial -- think ahead. Take care to protect the possibility of a later perjury prosecution.

### A. Giving Warnings

1. Full Miranda warnings, and specific perjury warnings, are probably not required by law.

   - United States v. Mandujano, 425 U.S. 564 (1976).

   - U.S. v. D'Auria, 672 F.2d 1085, 1093 (2d Cir. 1982).

2. But: DOJ guidelines require (1) advice of Fifth Amendment rights and (2) advice of target status.

3. Giving a perjury warning at the beginning of testimony is helpful later, if you are attacked for unfairly luring the defendant into a "perjury trap," as a means of illustrating the fairness of the Government's conduct.

   - U.S. v. Simone, 627 F.Supp. 1264, 1266-71 (D.N.J. 1986).

   - U.S. v. Gonzales, 620 F.Supp. 1143, 1148-49 (N.D. Ill. 1985).

### B. The Questions You Ask

1. Keep them simple.

   a. Avoid complex questions, which could leave your case vulnerable to a claim that the witness was confused.

   b. Avoid compound questions, which might not make clear what query the declarant was answering.

2. Keep them clear and unambiguous.

a. If the question is so vague or ineptly phrased that one of several equally plausible meanings might have been understood, a later perjury indictment may be dismissed or the conviction overturned.

- United States v. Tonelli, 577 F.2d 194, 199-200 (3d Cir. 1978) (question whether accused "handled" checks could have been understood to ask whether he "touched" them).

- United States v. Wall, 371 F.2d 398 (6th Cir. 1967) (question "Have you ever been on trips with Mr. X?" could have been understood to ask either whether accused had traveled from one spot to another with Mr. X or whether he had been at the same foreign location with Mr. X, the first of which would make his denial truthful).

b. In most cases of ambiguity in question or answer, the issue of whether defendant's answer was false is for the jury, so your indictment will survive, but why invite such an issue?

- U.S. v. Finucan, 708 F.2d 838, 848 (1st Cir. 1983).

- U.S. v. Matthews, 589 F.2d 442, 445 (9th Cir. 1978), cert. denied, 440 U.S. 972 (1979).

3. Avoid double negatives.

Do not ask questions, even follow-up questions, in the form, "So you never said/did X?" or "Didn't you say/do X?" A negative answer results, to the pedantic mind, in a double negative -- "no, I didn't never say X" (i.e., "maybe I did".) See United States v. Spalliero, 602 F.Supp. 417, 424 (C.D.Cal.1984) (dismissing counts for double negatives).

True, this result contradicts all common sense and accepted usage in favor of cramped formalism. See United States v. Andrews, 370 F.Supp. 365, 367 (D.Conn. 1974) (double negative argument "borders on pure sophistry" and ignores reality and context). It also ignores the principle that words are to be understood as the defendant, from

context, meant them. See, e.g., Government of the Canal Zone v. Thrush, 616 F.2d 188, 190-91 (5th Cir. 1980); United States v. Bonacorsa, 528 F.2d 1218, 1221 (2d Cir.), cert. denied, 426 U.S. 935 (1976).

Nevertheless -- it could happen to you. In a recent (and ultimately successful) prosecution in the District of Rhode Island, the judge dismissed six of seven specifications of perjury in one count on this ground. United States v. Glantz, Cr. No. 86-024B (D.R.I.). (See attached sample indictment, Count Three -- only the first specification of perjury survived).

C. The Answers You Get

1. Make sure the defendant responds to your simple, clear, and unambiguous question with a direct and responsive answer.

2. An "unresponsive answer, true and complete on its face" cannot support a perjury indictment even if it implies something false or misleading by omission. Bronston v. United States, 409 U.S. 352, 359 (1973).

3. Be careful not to let Bronston's "literal truth" principle be used incorrectly.

   a. Used properly, the phrase "literal truth" is essentially a term of art describing a specific sort of problem. It applies to a complete declarative statement that, although unresponsive to the question and therefore possibly misleading by implication, is nonetheless true standing alone. An example, based on Bronston: "Q: Do you have a Swiss bank account? A. My company has such an account." The answer is not responsive -- the questioner was asking whether the individual had a Swiss account -- but it is true: his company does have such an account. The declarant therefore cannot be prosecuted for perjury, even though his truthful but unresponsive answer implied something false -- that while his company had an account, he did not.

   b. Bronston does not apply every time a defendant makes a "truth" defense to a perjury charge. Just because a defendant claims that his answer was "completely" or

"perfectly" -- or "literally" true does not mean he is basing his defense on Bronston. The huge majority of truth defenses present a simple question of fact for the jury. Bronston has nothing to do with this.

c. Maintaining this line may seem silly and simplistic, but neglecting it can breed all sorts of dangerous confusion. Using the "literal truth" phrase invokes Bronston, and implies that Bronston is relevant to your case; that in turn permits the defense to smuggle in context-specific (and generally irrelevant) dicta from that opinion. For example, Bronston speaks disparagingly of "perjury by implication" and emphasizes the primacy of "literal truth." In context, all this means is that the Government may not create perjury, making an otherwise true statement false by resorting to what it implies. But -- if stated as general propositions of perjury law, away from their context in Bronston, such phrases seem to suggest that you may not resort to the context in which a statement occurs to determine its meaning and, therefore, its truth. That is not the law, (after all, how do we ever figure out what somebody means, if not by considering context?) but loose quotation from Bronston suggests otherwise.

d. Remember the following principles when a Bronston comes up:

i) The jury is perfectly entitled to look to the context in which a statement was made (previous questions, etc.) to decide what a particular statement means and, therefore, whether it is true. This general principle holds except in the narrow circumstance dealt with in Bronston: a complete declarative statement that is true on its face.

- U.S. v. Cuesta, 597 F.2d 903, 919-20 (5th Cir. 1979).

- U.S. Nixon, 816 F.2d 1022, 1029-30 (5th Cir. 1987).

ii) The Bronston analysis because it deals with unresponsive answers, has absolutely no relevance where the questions are clear and the answers responsive.

- U.S. Anderson, 798 F.2d 919, 929-30 (7th Cir. 1986).

- U.S. v. Fulbright, 807 F.2d 847, 849 (5th Cir. 1986).

- U.S. v. Kehoe, 562 F.2d 65, 68-69 (1st Cir. 1977).

- U.S. v. Phillips, 540 F.2d 319, 329 (8th Cir.), cert. denied, 429 U.S. 1000 (1976).

iii) Bronston is inapplicable to "yes/no" answers because they are, by definition, responsive.

- U.S. v. Anderson, 798 F.2d at 930-31.

- U.S. v. Cuesta, 597 F.2d at 919-20.

- U.S. v. Matthews, 589 F.2d at 444-45.

iv) In a prosecution based on questions in the form "Did you ever say" or "Did you ever tell anyone," answers are not "literally true" under Bronston simply because the words used in the question do not exactly duplicate the words that defendant used in saying or telling whatever it was. Again, context determines what defendant meant.

- U.S. v. Phillips, 540 F.2d at 329-30.

- U.S. v. Isaacs, 493 F.2d 1124, 1155 (7th Cir.), cert. denied, 417 U.S. 976 (1974).

D. Your Purposes in Asking

1. It is impermissible to subpoena a witness to a grand jury for the sole purpose of extracting perjury with which to indict him.

- U.S. v. Vesich, 724 F.2d 451, 460 (5th Cir. 1984).

a. It is a complete answer to such a claim to show that the questioning was material to the grand jury inquiry, i.e., that it had a legitimate purpose.

- U.S. v. Vesich, 724 F.2d at 460-61.

- U.S. v. Nickels, 502 F.2d 1173, 1176 (7th Cir. 1974).

b. The prosecution is under no obligation to disclose to a witness that it possesses evidence contradicting his testimony.

- U.S. v. Goguen, 723 F.2d 1012, 1018 (1st Cir. 1983).

- U.S. v. Chevoor, 526 F.2d 178, 185 (1st Cir. 1975).

V. Charging Considerations

A. It is acceptable (as well as prudent and efficient) to charge several false declarations pertaining to a particular subject matter in a simple count.

- U.S. Bonacorsa, 528 F.2d at 1221.

- U.S. v. Isaacs, 493 F.2d at 1155.

1. Proof of the falsity of any one of the several will sustain a conviction on that count.

- U.S. v. Bonacorsa, 528 F.2d at 1221.

- U.S. v. Dilworth, 524 F.2d 470, 471 n.1 (5th Cir. 1975).

2. Be sure to request a jury instruction on unanimity in this regard - all must agree on which specification of several they found to be false.

- Vitello v. United States, 425 F.2d 416, 419 (9th Cir. 1970).

3. Even if all but one specification is struck from the count, the count survives.

- U.S. v. Miller, 105 S.Ct. 1811 (1985).

B. It is acceptable (and helpful) to put into the indictment sufficient surrounding testimony to place the defendant's allegedly false statements in context, making them understandable.

- U.S. v. Bonacorsa, 528 F.2d at 1221.

C. Be careful to ensure that the "truth" paragraph in the indictment "tracks" the allegedly false testimony; that is, what the indictment says the defendant "knew and believed" to be true must squarely contradict the declarations charged to be false.

- U.S. v. Finucan, 708 F.2d 838, 847 (1st Cir. 1983).

- U.S. v. Brumley, 560 F.2d 1268 (5th Cir. 1977).

## VI. Aspects of Proof

### A. Two-Witness Rule

1. Section 1621 (but not section 1623) requires that the falsity of the statement be proved either by testimony of two independent witnesses or by one witness and independent corroborating evidence inconsistent with innocence.

- U.S. v. Forrest, 639 F.2d 1224, 1226 (5th Cir. 1981).

### B. Inconsistent Statements

1. In section 1623 prosecutions, conviction is permitted upon proof of two inconsistent statements, one of which is necessarily false. The Government need not prove which.

- In re Grand Jury Proceedings (Greentree), 644 F.2d, 348, 348-50 (5th Cir. 1981).

### C. Materiality

1. This is an issue for the court, not the jury.

   - U.S. v. Finucan, 708 F.2d at 848.

2. Make sure the judge knows it is his/her decision; it is unusual for an element of the offense to be set apart for the court to decide, and the judge may not realize it.

3. The test for materiality is broad: a statement is material if it has the capacity or potential to influence or impede the tribunal.

   - U.S. v. Goguen, 723 F.2d at 1019.

4. A statement may be material even if it relates to a collateral issue, or merely to the credibility of witnesses.

- U.S. v. Scivola, 766 F.2d 37, 44 (1st Cir. 1985).

5. Materiality may be proved to the satisfaction of the court in a variety of ways:

   a. By introducing the transcript of the full grand jury proceeding.

   b. By producing testimony from the foreperson.

   c. By introducing the defendant's testimony.

   - U.S. v. Berardi, 629 F.2d 723, 727 (2d Cir.), cert. denied, 449 U.S. 995 (1980).

   - U.S. v. Ostertag, 671 F.2d 262, 265 (8th Cir. 1982.

   - U.S. v. Cosby, 601 F.2d 754, 756-57 (5th Cir. 1979).

VII. Recantation

A. A violation of section 1621 is not remediable by recantation.

- U.S. v. Del Toro, 513 F.2d 656, 665 (2d Cir.), cert. denied, 433 U.S. 826 (1975).

B. Under section 1623, recantation may bar prosecution if each of three conditions is met:

   1. the recantation was made in the same continuous court or grand jury proceeding as the false statement;

   2. at time of recantation, the false statements had not materially affected the proceedings; and

   3. at time of recantation, the falsity of the previous declaration had not become manifest.

C. There is no duty to advise of the right to recant.

- U.S. v. D'Auria, 672 F.2d at 1093.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF RHODE ISLAND

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | |
| | ) | |
| Plaintiff | ) | |
| | ) | Crim No. 86-248 |
| v. | ) | Violations: 18 U.S.C. |
| | ) | §§371, 1623 |
| RONALD HENRY GLANTZ | ) | |
| | ) | |
| Defendant | ) | |

INDICTMENT

The Grand Jury charges:

COUNT ONE

1. From in or about January 1983 until the present, federal grand juries sitting in the District of Rhode Island have been conducting an investigation into allegations that during 1982 RONALD HENRY GLANTZ and Michael Farina committed violations of Title 18, United States Code, Sections 1341 (frauds and swindles), 1343 (fraud by wire), 371 (conspiracy), and other criminal statutes of the United States in the District of Rhode Island, in their roles in the purchase of lots 38 and 52, plat 275, Warwick, Rhode Island, by Young Sik Woo and Hung Sik Woo on or about July 1, 1982.

2. Beginning in or about January 1983 (the exact date being unknown to the grand jury) and continuing until on or about April 28, 1983, in the District of Rhode Island and elsewhere, defendant RONALD HENRY GLANTZ did knowingly combine, conspire, confederate, and agree with two unindicted co-conspirators known to this Grand Jury to violate Title 18, United States Code, Section 1503, in

that they knowingly and unlawfully conspired to obstruct and impede the due administration of justice by hindering the investigation, then being conducted by a grand jury in the District of Rhode Island, of the fraud and conspiracy allegations stated in paragraph 1 of Count One.

3. It was the object of said conspiracy that RONALD HENRY GLANTZ and said unindicted co-conspirators would frustrate the investigative efforts of the grand jury by preventing the grand jury from receiving truthful and complete testimony concerning the fraud and conspiracy allegations it was investigating.

4. It was part of said conspiracy that the defendant RONALD HENRY GLANTZ and said unindicted co-conspirators would conceal from the grand jury the fact that RONALD HENRY GLANTZ had received $70,350 from Michael Farina in July 1982 for RONALD HENRY GLANTZ's role in arranging the transaction by which Michael Farina was able to realize more than $140,000 in profit on the sale of the aforesaid property in Warwick, Rhode Island, to Young Sik Woo and Hung Sik Woo.

5. It was further a part of said conspiracy that RONALD HENRY GLANTZ and said unindicted co-conspirators would give the grand jury a false explanation for RONALD HENRY GLANTZ's receipt of $70,350 from Michael Farina in July 1982.

OVERT ACTS

6. In furtherance of said conspiracy the following overt acts, among others, were committed:

a. Between in or about January 1983 and on or about March 31, 1983, the exact dates being unknown to the

grand jury, the defendant RONALD HENRY GLANTZ met with said unindicted co-conspirators in the District of Rhode Island and discussed a plan to give false testimony to the grand jury about the reason for the $70,350 payment to RONALD HENRY GLANTZ by Michael Farina in July 1982.

b. On March 31, 1983, the defendant RONALD HENRY GLANTZ testified falsely before the grand jury.

c. On April 28, 1983, one of said unindicted co-conspirators testified falsely before the grand jury.

d. On April 28, 1983, the other of said unindicted co-conspirator testified falsely before the grand jury.

All in violation of Title 18, United States Code, Section 371.

COUNT TWO

1. On or about March 31, 1983, in the District of Rhode Island, defendant RONALD HENRY GLANTZ, having duly taken an oath that he would testify truthfully in proceedings before a grand jury of the United States, did knowingly and contrary to said oath make false material declarations, that is to say:

2. At the time and place aforesaid in paragraph 1 of Count Two, the grand jury was conducting an investigation into allegations that RONALD HENRY GLANTZ and Michael Farina had committed violations of Title 18 of the United States Code, Sections 1341 (frauds and swindles), 1343 (fraud by wire), 371 (conspiracy), and other criminal statutes of the United States, in the District of Rhode Island during 1982.

3. It was material to the grand jury's investigation described in paragraph 2 of Count Two to determine the nature and purpose of a payment of $70,350 received by RONALD HENRY GLANTZ from Michael Farina in July of 1982.

4. At the time and place aforesaid in paragraph 1 of Count Two, RONALD HENRY GLANTZ, appearing as a witness under oath before said grand jury, was asked the following questions and gave the following answers, knowing the underscored material declarations to be false:

Q. [A]re you aware of the purchase of some property in Warwick, Rhode Island, on or about July 1, 1982?

A. Yes.

* * *

Q. Now, was this closing on July 1, 1982?

A. I believe so. Whatever date appears on the closing document would be the date.

* * *

Q. Is it correct that Michael Farina sold that land to the Woos?

A. Michael Farina sold that land to the Woos.

Q. And is it correct that after he paid his expenses in purchasing the land and then the taxes and legal fees, et cetera, there was approximately $140,000 left?

A. There could have been. I don't know the exact amount.

Q. And is it correct that you received approximately one-half of that money, somewhat in excess of $70,000, shortly after that closing?

THE WITNESS: As a result of that $140,000?

MR. DiGIOIA: Yes.

A. The answer to that is two parts. I did receive in excess of $70,000. It was unrelated to the closing.

* * *

Q. Now, can you tell us who Michael Farina is?

A. Michael Farina is a real estate broker in the State of Rhode Island. He was past Director of Public Property for the City of Providence and worked with me, when I worked with the City, up through '78, I believe.

* * *

Q. How about consulting work, have you ever done any of that for him?

A. Yes.

Q. What type of work is that?

A. I put together a package for him based upon which the $70,000 payment was due me.

Q. And what kind of a package was that?

A. Mr. Farina owned a parcel of property in -- across the street from Warwick Mall. . . . There was a piece of property, that was directly on the corner, about 4,000, 5,000 square feet of property, which actually made the parcel of land even more valuable. In 1976, late '76, around Thanksgiving or after, Mr. Farina tried to buy that piece of property. He tried to buy it for quite a bit of time, and he could not buy the property from a man by the name of Mr. Joyal. I met Mr. Joyal on a number of occasions to influence him to sell the property to Mr. Farina, which he, in fact, did.

Q. When did he sell the property?

A. In 1977, early 1977. . . . The arrangement we had, at that time, was that it would be leased out, on a triple net lease, and there were companies, which Mr. Farina certainly has the records and certainly can tell you that the -- the companies that were involved, and I was to get approximately 25% of that deal, which would have meant to me about $5,000 to $6,000 a year for about twenty years. These were places like Pizza Hut and et cetera.

What happened was in approximately 1980 or just some time in 1980, there was a flood in that area, and Mr.

Farina lost his buildings or lost an apartment house complex he had there and applied for a disaster loan, et cetera, and got the loan, but that was his income. He told me that he could no longer keep the agreement with regard to selling off or giving me my share on the triple net lease.

Ultimately, he sold the property to Color Title, that's where Color Tile is located now, right in Warwick Mall, and I received -- and he wanted three years at which to pay me, and we agreed that he would pay me in one-third that purchase price at an interest rate. I believe the interest rate was 10 1/2%, and he paid me when -- he paid me. He paid me after that closing.

Q. So the money, that he paid you shortly after that closing, I believe it was $70,350, is that correct?

A. Approximately.

Q. The money, that he paid you, that was for this consulting work that you've told us about?

A. That is correct.

5. The underscored segments of the material testimony of RONALD HENRY GLANTZ, as he then and there well knew and believed, were false in that his receipt of $70,350 in July of 1982 from Michael Farina was RONALD HENRY GLANTZ's share of the secret profits gained by Michael Farina's sale of land in July of 1982 to Young Sik Woo and Hung Sik Woo, and was not a fee for any consulting services performed by RONALD HENRY GLANTZ for Michael Farina in 1976 or 1977.

All in violation of Title 18, United States Code, Section 1623.

COUNT THREE

1. On or about March 31, 1983, in the District of Rhode Island, defendant RONALD HENRY GLANTZ, having duly taken an oath that he would testify truthfully in proceedings before a grand

jury of the United States, did knowingly and contrary to said oath make false material declarations, that is to say:

2. At the time and place aforesaid in paragraph 1 of Count Three, the grand jury was conducting an investigation into allegations that RONALD HENRY GLANTZ and Michael Farina had committed violations of Title 18 of the United States Code, Sections 1341 (frauds and swindles), 1343 (fraud by wire), 371 (conspiracy), and other criminal statutes of the United States, in the District of Rhode Island during 1982.

3. It was material to the grand jury's investigation described in paragraph 2 of Count Three to determine, among other things, (1) whether RONALD HENRY GLANTZ, during a meeting held on or about November 18, 1982, had made certain representations to the participants in the meeting concerning Michael Farina's receipt of approximately $140,000 as a result of Michael Farina's sale of land to Young Sik Woo and Hung Sik Woo in July of 1982, and (2) whether, if RONALD HENRY GLANTZ did make such representations at the November 18, 1982 meeting, those representations were true or false.

4. At the time and place aforesaid in paragraph 1 of Count Three, RONALD HENRY GLANTZ, appearing as a witness under oath before said grand jury, was asked the following questions and gave the following answers, knowing the underscored material declarations to be false:

> Q. Were you aware that Mr. Farina was going to receive approximately $140,000?

A. I knew he was making a profit on the land. Yes.

Q. In the vicinity of $140,000?

A. Whatever the number is. I don't know what the number is

Q. Was that $140,000 ever passed on to the Migliaccios or the Capuanos, in any way passed to them?

THE WITNESS: You mean by way of payment to them?

MR. DiGIOIA: That's right.

A. No.

Q. Did you ever tell anyone that that money was passed on to them?

A. Absolutely not.

* * *

Q. Now, was there a meeting after this property was sold in July, was there a meeting at your office with Mr. Woo, Mr. Perl, Mr. Guido, concerning the sale of this property?

THE WITNESS: And this would be when, sir?

MR. DiGIOIA: Approximately November, November 18, perhaps I can refresh your recollection?

A. I don't recall the date. I mean, I know --

Q. An associate of yours, Mr. Picerno, sat in on that meeting with you?

A. I recall, I recall a meeting. I don't know the date.

Q. In November, approximately, does that sound right to you?

A. Yes. It would have, it could have. It probably would have been. I'm relating it to what happened in October. So I would say yes. It probably would be November.

Q. Now, didn't you, at that meeting -- weren't you, at that meeting, questioned by Mr. Perl and Mr. Guido and Mr. Woo about the $140,000 that Mr. Farina made on this deal?

A. Absolutely not.

Q. You were not questioned at all, no one asked you, "Why did that guy make $140,000 on the deal"?

A. No, no one asked me that.

Q. And you didn't tell anybody that Farina didn't make that money on the deal, that that was a pass through, that the money went right to the sellers of the land, and it was done to avoid taxes?

A. Absolutely not. Avoid whose -- if I may say, the reason I wouldn't make a statement like that is somebody has to pay income taxes on it. So how does it avoid taxes, and the answer to your question is no.

Q. No, you never made a statement to that effect?

A. Never made a statement like that.

* * *

Q. Mr. Glantz, at this meeting in November or thereabouts, that we've been discussing, you never said that there was a double closing on the land, and the money went through, went through for governmental reasons, for tax reasons, that they were paid $314,000 for the property?

A. I did not. I've said that before.

Q. You never said that it went right back to the people in cash?

A. Absolutely, unequivocally no. Anna Migliaccio is an old lady, with due respect, I'm not -- she's not that old, I mean, with due respect. I mean, her husband passed away. She's a widow.

5. The underscored segments of the material testimony of RONALD HENRY GLANTZ, as he then and there well knew and believed, were false in that (1) he was questioned at the November 18, 1982 meeting about the approximately $140,000 that Michael Farina received on the July 1982 sale of land, (2) he did then represent that Michael Farina had passed the money on to the sellers, and

(3) he did then represent that the "pass through" involving Michael Farina was done for tax reasons.

All in violation of Title 18, United States Code, Section 1623.

A TRUE BILL

FOREPERSON

United States Attorney
District of Rhode Island

APPENDIX D

# FALSE STATEMENTS

BY

JOHN C. CAMPBELL*

Trial Attorney
Public Integrity Section
Criminal Division

* John Campbell has been a trial attorney with the Public Integrity Section for three years.

# FALSE STATEMENTS

## I. The Statute

Section 1001 is the general Federal statute governing false statements. Although Title 18 and other Titles contain numerous other sections proscribing all manner of false statements in particular contexts, section 1001 is the most frequently used. It applies to virtually all false statements; it requires no proof of any particular purpose for the falsification; and it provides a substantial penalty (five years' imprisonment).

## II. Offenses Covered

Section 1001 comprises three distinct offenses:

A. Falsifying, concealing, or covering up a material fact by any trick, scheme, or device.

B. Making false, fictitious, or fraudulent statements or representations.

C. Making or using any false document or writing knowing it to contain a false statement or entry.

Each offense must have been done knowingly and willfully, in a matter "within the jurisdiction of any department or agency of the United States."

## III. Elements

A. The elements of making a false statement or using a false document (the offenses listed second and third in the statute) are:

1. A statement or representation (or a document or writing)

2. that is false

3. that is material

4. that is made "knowingly and willfully"

5. that is made in a matter within the "jurisdiction" of a Federal department or agency.

These two falsification offenses are the most commonly charged of the three offenses comprised in section 1001.

B. The elements of concealing or covering up a material fact by a trick, scheme, or artifice (the first clause of section 1001) are different in important respects. The elements are:

1. An action constituting a trick, scheme, or device

2. that conceals, covers up, or results in the failure to disclose a fact

3. that is material

4. which action is taken knowingly and willfully

5. in a matter within the jurisdiction of a Federal department or agency.

Proof of this concealment offense thus requires no statement and no proof of falsity. Note, however, that unlike the other two clauses of section 1001, it requires proof of the use of some trick, scheme, or device accomplished by means of an affirmative act.

## IV. Use of Section 1001 Against Public Corruption

A. Because of its broad applicability and relatively simple elements of proof, section 1001 is an effective weapon for use against underlying corrupt activity that might not otherwise be reachable.

B. Note that section 1001 requires no explicit proof of some other underlying criminality: a material false statement is enough. Nevertheless, underlying misconduct is frequently the reason for the defendant's indictment, with section 1001 merely being the vehicle for prosecution because of proof problems with more obviously applicable statutes. Moreover, even though that underlying misconduct is not charged, it is normally vital to prove it to the extent possible, not only to show the defendant's intent in making the false statement, but also to explain to the jury why the defendant is in the dock at all.

C. In some instances, a false statement may be the direct means of accomplishing some other corrupt act, as when a false claim is made for payment not due, or when records are falsified to permit a successful embezzlement. Each of these crimes might be

prosecuted under other sections of Title 18 (sections 287 or 641, for example). Section 1001, however, may be a useful alternative if there are problems proving these more specific offenses.

D. In other cases, the false statement occurs on some document not directly related to any underlying offense, prompted by the fact that the document calls for information that would reveal hidden crimes. This is the case with financial disclosure forms in general and, for Federal officials, with the disclosures required under the Ethics in Government Act (EIGA) in particular. EIGA forms can be one of the most fruitful items of evidence available to a public corruption investigation, both because of what financial relationships they reveal and because, if false, they will support a section 1001 prosecution. See United States v. Hansen, 566 F.Supp. 162 (D.D.C. 1983), aff'd, 772 F.2d 940 (D.C. Cir. 1985). False information on financial disclosure forms frequently masks such underlying offenses as receipt of bribes or gratuities, or conflicts of interest. When prosecution for those offenses is not practicable, section 1001 is an alternative. Considerations to remember:

1. It is DOJ policy not to prosecute an EIGA violation under section 1001 unless the nondisclosure conceals significant underlying wrongdoing.

2. Although EIGA violations are frequently discussed (as they are here) in terms of "nondisclosure" or "concealment," this does not mean that they should be prosecuted under the "concealing a material fact" provision of section 1001. Remember that a "concealment" offense under section 1001 requires proof of affirmative acts constituting a "trick, scheme, or device," See United States v. London, 550 F.2d 206, 213-14 (5th Cir. 1977) (passive nondisclosure is not a trick, scheme, or device). Such proof frequently is not to be found, or greatly complicates the prosecution's task. The false information on a disclosure form will usually support a charge of falsification under the second or third clauses of section 1001, as was done in the Hansen prosecution. Even a blank space where the truth would call for a response constitutes a "statement." See United States v. Mattox, 689 F.2d 531, 532-33 (5th Cir. 1982) (per curiam); United States v. Irwin, 654 F.2d 671, 676 (10th Cir. 1981).

V. Charging Considerations

A. "Making false statements" versus "concealing material facts." As noted, although charging a "concealment" offense under the statute's first clause avoids having to prove either that a statement was made or that it was false, this advantage is counterbalanced by the necessity of proving a trick, scheme, or device accomplished by means of an affirmative action.

B. Specific versus general offenses. Charge section 1001 where proof problems complicate prosecution under a more specific provision.

C. "Single document" rule. Multiple false statements made in a single document should be charged as a single count. If the same false statement appears in multiple documents, multiple counts are appropriate.

VI. Aspects of Proof

A. "Statements"

1. The statements or representations covered by section 1001 can take virtually any form -- written or oral, signed or unsigned, sworn or unsworn, voluntary or required by law.

2. They need not have been made directly to the Federal government -- they can be made to some entity that implements Federal programs, or even to oneself (as, for example, false business records that are subject to Federal inspection) -- as long as the elements of materiality and agency jurisdiction are satisfied.

3. Special Problems

a. Statements to investigative agencies:

- After United States v. Rodgers, 104 S. Ct. 1942 (1984), it is clear that false statements to investigate bodies, such as the FBI, can be charged as violations of section 1001.

- However, Rodgers involved only false statements volunteered to the FBI to initiate an investigation ("My wife has been kidnapped"), not false statements during an interview in an ongoing investigation. Be aware of the law in your circuit.

b. The "exculpatory 'no'"

A subset of the previous problem involves denials of guilt, unaccompanied by other false statements, made to investigative agencies. The circuits differ widely in their approaches, some holding flatly that such exculpatory denials are not covered by section 1001. Check your circuit's law.

B. Intent - "Knowingly and Willfully"

1. - You do not have to prove "fraudulent intent" on the defendant's part -- knowledge and willfulness are sufficient. The statute speaks in the disjunctive: "false, fictitious, or fraudulent statements."

- However, if you plead that the statement was fraudulent (as opposed to merely false or fictitious) then you must prove it.

- United States v. Ramos, 725 F.2d 1323, 1324 (11th Cir. 1984).

- United States v. Lichenstein, 610 F.2d 1272, 1276-77 (5th Cir.), cert. denied, 447 U.S. 907 (1980).

2. You do not have to prove that the defendant knew that the statement would affect some matter that involved the Government.

- United States v. Yermian, 104 S. Ct 2936 (1984).

C. Materiality

1. This is a question of law for the court to decide.

2. Although the statute notes materiality as a requirement only for the first offense listed (concealing a material fact), most courts require it for all section 1001 offenses.

3. Materiality is broadly defined, encompassing almost anything -- but it still has to be proved.

4. A false statement is material if it "had a natural tendency to influence, or was capable of influencing, the decision of a governmental agency in making a determination required to be made." United States v. Brack, 747 F.2d 1142, 1150 (7th

Cir. 1984), cert. denied, 105 S. Ct. 1193 (1985). Other formulations are easy to find, all emphasizing the breadth of the concept. See e.g., United States v. Greenwood, 796 F.2d 49, 55 (4th Cir. 1986).

5. In particular, the Government does not have to prove any of the following:

- that the Government actually relied on, or even was influenced by, the statement.

- United States v. Goldfine, 538 F.2d 815, 820-21 (9th Cir. 1976).

- that the Government actually suffered any loss, or even had any pecuniary interest capable of being affected.

- United States v. Gilliland, 312 U.S. 86, 93 (1941).

- that the statement was made directly to the Government.

- United States v. Baker, 626 F.2d 512, 514-15 (5th Cir. 1980).

6. A statement is non-material only if it was literally and by its nature incapable of influencing the agency to do anything. See e.g., United States v. Radetsky, 535 F.2d 556, 571-77 (10th Cir. 1976) (false statements seeking payment for Medicare claims were immaterial because they pertained to drugs that were non-compensable anyway).

D. Within the "Jurisdiction" of a "Department or Agency"

1. Although executive branch agencies are most commonly involved, the statute covers false statements to all three branches.

- U.S. v. Bramblett, 348 U.S. 503 (1955).

a. Legislative branch:

- United States v. Hansen, 566 F.Supp 162, 163 (D.D.C. 1983), aff'd, 772 F.2d 940 (D.C. Cir. 1985).

- Diggs v. United States, 613 F.2d 988, 999 (D.C. Cir. 1979), cert. denied, 446 U.S. 982 (1980).

b. Judicial branch (limited application):

- United States v. Morgan, 309 F.2d 234 (D.C. Cir. 1962), cert. denied, 373 U.S. 917 (1963) (limited to "administrative" or "housekeeping" functions, such as a license to practice law).

- U.S. v. Erhardt, 381 F.2d 173, 175 (6th Cir. 1967) (introduction of false documents in criminal proceeding not covered by section 1001).

2. "Matter within the jurisdiction" is given a very broad interpretation -- it covers "all matters confided to the authority of an agency or department." United States v. Rodgers, 104 S. Ct. 1942, 1946 (1984).

3. The statement may be within an agency's jurisdiction even if it was not submitted to the Government and even if it was never conveyed to the agency at all.

- U.S. v. Notorantonio, 758 F.2d 777, 787 (1st Cir. 1985).

- U.S. v. Petullo, 709 F.2d 1178, 1180-81 (7th Cir. 1983).

4. If the statement was submitted to a non-Federal agency, the "jurisdiction" element is satisfied even if the Federal agency simply provides financial support, as long as it retains authority "to see that the Federal funds are properly spent." United States v. Stanford, 589 F.2d 285, 297 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979).

APPENDIX E

# ELECTION CRIMES STATUTES

BY

CRAIG C. DONSANTO*

Director, Election Crimes Branch
Public Integrity Section

* Craig C. Donsanto has been the Director of the Election Crimes Branch since its inception in 1980, and has been involved in the Federal prosecution of election crimes since 1971.

18 U.S.C. § 241

This statute prohibits conspiracies to violate rights secured by the United States Constitution. Violations are Federal felonies punishable by imprisonment for up to 10 years and/or by fines of up to ten years.

Section 241 was originally enacted immediately after the Civil War, and until recently it was the principal -- and in many instances the only -- Federal criminal law that applied to ballot fraud schemes. Section 241 can be used to prosecute any ballot fraud scheme that involves more than one person, and which results in the deprivation of a right recognized as guaranteed and protected by the United States Constitution.

Specifically, section 241 has been held to embrace conspiracies to stuff a ballot box with forged ballots, United States v. Saylor, 332 U.S. 385 (1944); to impersonate qualified voters, Crolich v. United States, 196 F.2d 879 (5th Cir. 1952), cert. denied, 344 U.S. 830; to alter legal ballots, United States v. Powell, 81 F. Supp. 288 (E.D. Mo. 1948); to fail to count votes and to alter votes counted, United States v. Ryan, 99 F.2d 864 (8th Cir. 1938), cert. denied, 306 U.S. 635 (1939); Walker v. United States, 93 F.2d 383 (8th Cir. 1937), cert. denied, 303 U.S. 644 (1938); to prevent the official count of ballots in primary elections, United States v. Classic, supra; to illegally register voters and cast absentee ballots in their names, United States v. Weston, 417 F.2d 181 (4th Cir. 1969), cert. denied, 406 U.S. 917 (1972); Fields v. United States, 228 F.2d 544 (4th Cir. 1955); and to injure, threaten or intimidate a voter in the exercise of his right to vote, Wilkins v. United States, 376 F.2d 552 (5th Cir. 1967). However, section 241 cannot be used to prosecute voter bribery schemes. United States v. Bathgate, 246 U.S. 220 (1918); United States v. McLean, 808 F.2d 1044 (4th Cir. 1987). It has been held that section 241 reaches vote fraud even when the fraud does not affect the actual outcome of the election, Anderson v. United States, 417 U.S. 211 (1974); United States v. Morado, 454 F.2d 167 (5th Cir. 1972), cert. denied, 406 U.S. 916 (1972); and that the vote fraud conspiracy need not be successful to violate this statute, United States v. Bradberry, 517 F.2d 498 (7th Cir. 1975). The courts have also held that this statute does not require proof of an overt act, Williams v. United States, 179 F.2d 644 (5th Cir. 1950), aff'd on other grounds, 341 U.S. 70 (1951).

In practice, section 241 is useful in the prosecution of voter fraud matters in two situations:

Conspiracies to Corrupt the "Federal Right to Vote"

The United States Constitution confers a right to vote for candidates running for the Federal offices of Member of the House of Representatives, Senator and Presidential Elector. Ballot frauds that can be shown to have actually affected the vote count for such Federal contests can be prosecuted under section 241. See, e.g., United States v. Saylor, 344 U.S. 385 (1944); United States v. Classic, 313 U.S. 299 (1941); United States v. Olinger, 759 F.2d 1272 (7th Cir. 1986); Ex parte Siebold, 100 U.S. 371 (1880).

Conspiracies to Corrupt the Official Duties of Election Officers

Election officers are usually appointed under, and discharge functions imposed by, state law. Conspiracies to cast fraudulent ballots through corrupting the statutory duties imposed on such officers to safeguard the integrity of the polling places under their supervision violate the "one-person-one-vote" principle of the equal protection clause of the Constitution, and such schemes have been held to be actionable under section 241. See, e.g., United States v. Howard, 774 F.2d 838 (7th Cir. 1986); United States v. Olinger, supra; United States v. Stollings, 501 F.2d 954 (4th Cir. 1974); United States v. Anderson, 481 F.2d 685 (4th Cir. 1973), aff'd on other grounds, 417 U.S. 211 (1974). This theory of prosecution is most useful in prosecuting ballot box stuffing schemes, which necessarily rely for their success on the official access that election officers have to voting equipment. This prosecutive theory can be used to address voter frauds that are aimed at purely local elections, where no Federal candidates were on the ballot. See, Olinger, supra.

18 U.S.C. § 242

This statute makes it unlawful for anyone acting "under color of law, statute, ordinance, regulation or custom" to willfully deprive a person of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States. Prosecutions under section 242 need not demonstrate the existence of a conspiracy; however, the defendants must have acted illegally "under color of law." Election law violations under section 242 are misdemeanors punishable by fines up to $1,000 and/or imprisonment up to one year. In ballot fraud cases, violations of section 242 are almost always substantive violations of conspiracies actionable under 18 U.S.C. § 241.

42 U.S.C. § 1973i(c)

This statute prohibits three specific types of fraudulent voting practices that occur in connection with elections where

Federal candidates (Members of Congress, Senators, and Presidential Electors) are voted upon. Violations are felonies, punishable by fines of up to $10,000 and/or by imprisonment for up to five years. To make out an offense under this statute, it is not necessary to prove that the fraudulent voting practice was intended to affect the outcome of the Federal race, or that the vote count in the Federal race was adversely affected by the fraud. The presence of a Federal race on the ballot at the time the fraud occurred is sufficient to confer Federal jurisdiction. Section 1973i(c) can, therefore, be used to prosecute any of the covered fraudulent practices that take place during "mixed" Federal-state elections. See, e.g., United States v. Olinger, 759 F.2d 1272 (7th Cir. 1986); United States v. Garcia, 719 F.2d 99 (5th Cir. 1984); United States v. Bowman, 636 F.2d 1003 (5th Cir. 1980); United States v. Carmichael, 685 F.2d 903 (4th Cir. 1982). The three fraudulent voting practices covered by section 1973i(c) are:

o Giving something having pecuniary value to prospective voters to induce them to or reward them for registering to vote in a "mixed" election. Since nearly all voter registration in this country is "unitary," in that a person registers only once to vote for both non-Federal and Federal candidates, section 1973i(c) can be used to prosecute virtually all payments made to induce or reward voter registration. See, e.g., United States v. Lewin, 467 F.2d 1132 (7th Cir. 1972); United States v. Ciancuilli, 482 F. Supp. 585 (E.D. Pa. 1979).

o Schemes to furnish false information concerning name, address and/or period of residence in an elective district for the purpose of establishing eligibility to register or vote in a "mixed" election. This aspect of the statute covers voter impersonation schemes, schemes to cast ballots in the names of absent voters, schemes to exploit the franchise of nursing home patients, ballot box stuffing schemes, migratory voting schemes, and schemes to register and vote people in places where they do not maintain a bona fide residence. See, e.g., United States v. Ciancuilli, supra.

o Conspiracies to register and/or vote people in violation of applicable state laws. This aspect of section 1973i(c) permits the Federal prosecution of such things as schemes to register and vote felons in states where felon status results in loss of the franchise, and schemes to register and vote aliens.

42 U.S.C. § 1983i(e)

This statute prohibits "voting more than once" in elections where Federal candidates are on the ballot. Violations are felonies, punishable by fines of up to $10,000 and/or by imprisonment for up to five years. As with its companion statute, section 1973i(c), the mere existence of a Federal

candidate on the ballot is sufficient to confer Federal jurisdiction to prosecute multiple voting in Federal court, without regard to whether the Federal contest was adversely affected by the fraud. Prosecutions under this multiple voting law generally require that the defendant have actually marked, or participated in marking, more than one ballot. See, United States v. Odom, 736 F.2d 104 (4th Cir. 1984); United States v. Lewis, 514 F. Supp. 169 (M.D. Pa. 1981). Section 1973i(e) is particularly useful in prosecuting ballot box stuffing schemes, and schemes to exploit the franchise of the mentally infirm.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | |
| | ) | |
| v. | ) | No. _____ |
| | ) | Violation: Title 18, United |
| EDWARD HOWARD, also known as | ) | States Code, Sections 2, 241, |
| "Captain Eddie" and | ) | 371 and 1341; Title 42, United |
| THOMAS CUSACK | ) | States Code, Sections 1973i(c) |
| | ) | and 1973i(e) |

The SPECIAL APRIL 1980 GRAND JURY charges:

1. On November 2, 1982, pursuant to the laws of the United States and of the State of Illinois, an election was held for the purpose of electing, among others, candidates for the office of Member of the United States House of Representatives from the 11th Congressional District of Illinois, in which the 44th Precinct of the 39th Ward of the City of Chicago was located, and for the offices of Governor of the State of Illinois, Chairman of the Cook County Board and other state and county offices. At this election the names of candidates for these offices were on the ballot of election in the 44th Precinct of the 39th Ward of the City of Chicago.

2. On November 2, 1982, many persons in Cook County, Illinois, and the State of Illinois were duly registered as voters and possessed the necessary requisite qualifications as provided by law to entitle them to vote in the general election on that day for the candidates referred to in paragraph one. Many of these persons duly voted for a candidate for one or more of the aforesaid federal, state and county offices, and their votes were certified and counted as part of the total number of votes cast for such candidates at said election. These voters will hereinafter be referred to as qualified voters.

3. Each of the qualified voters, then and there possessed the right and privilege guaranteed and secured by the Constitution and laws of the United States to vote at said election for a candidate for the federal office described in paragraph one and the further right and privilege to have each of their votes recorded, counted and given full effect, that is to say, that the value and effect of each of their votes and expressions of choice should not be impaired, lessened, diminished, diluted or destroyed by illegal votes falsely or fraudulently cast, counted, recorded and certified.

4. On the occasion of the November 2, 1982, general election referred to above, defendant EDWARD HOWARD was a Democratic Precinct Captain in the 44th Precinct of the 39th Ward; the polling place for said precinct was located at the Volta School, 4950 N. Avers in Chicago, Illinois.

5. On the occasion of the November 2, 1982, general election referred to above, defendant THOMAS CUSACK was an Assistant Democratic Precinct Captain in the 44th Precinct of the 39th Ward.

6. On the occasion of the November 2, 1982, general election referred to above, Grace Cusack was a registered voter in the 44th Precinct of the 39th Ward.

7. On the occasion of the November 2, 1982, general election referred to above, unindicted co-conspirator Darryl Cunningham was a Democratic precinct worker in the 44th Precinct of the 39th Ward.

8. On the occasion of the November 2, 1982, general election referred to above, unindicted co-conspirator Charlotte Watson and Geraldine Watson were judges of election along with Cecilia Webster, Minnie Karch and Mary Franzen, who were also judges of election, having been selected for said position by virtue of the laws of

the State of Illinois, in the 44th Precinct of the 39th Ward and had access to and control over ballots and voting paraphernalia in connection with said election.

9. From on or about February 16, 1982, to on or about November 2, 1982, at Chicago, in the Northern District of Illinois, Eastern Division,

EDWARD HOWARD, also known as
"Captain Eddie", and
THOMAS CUSACK,

defendants herein, did unlawfully, wilfully and knowingly combine, conspire, confederate and agree with each other and with Darryl Cunningham and Charlotte Watson, named as co-conspirators but not as defendants herein, and with other persons to the Grand Jury known and unknown, to injure and oppress the aforesaid qualified voters in the free exercise and enjoyment of certain rights and privileges secured to each of them by the Constitution and laws of the United States, to wit:

a. The right guaranteed to said qualified voters in the aforesaid election under Article One, Sections Two and Four to have their votes in the aforesaid election for the candidates of their choice for the above described federal office cast and tabulated fairly and free from dilution by ballots illegal and improperly cast.

b. The right guaranteed to said qualified voters by and under the Equal Protection and the Due Process Clauses of the Fourteenth Amendment to have their votes in the aforesaid election cast and tabulated fairly and free from dilution by ballots illegally and improperly cast and tabulated by persons charged under Illinois law with the operation and safe-keeping of the poll for said Precinct.

10. The object of this conspiracy, among other things, was to secure the election of candidates supported by the defendants by causing judges of election to

corruptly discharge their official duties in the management of the polling place for the 44th Precinct in the 39th Ward and by other means.

11. It was a part of said conspiracy that unindicted co-conspirator Charlotte Watson became a Republican Judge of Election, and Geraldine Watson, her mother, became a Democratic Judge of Election, in the 44th Precinct of the 39th Ward for the November 2, 1982, general election.

12. It was a part of said conspiracy that unindicted co-conspirator Darryl Cunningham was hired as a Democratic precinct worker in the 44th Precinct of the 39th Ward prior to said the election by defendant EDWARD HOWARD.

13. It was further a part of the conspiracy that unindicted co-conspirator Darryl Cunningham and one or more of the defendants, and other persons to the grand jury unknown, conducted a canvass of residence addresses of registered voters in the 44th Precinct of the 39th Ward of the City of Chicago to determine, among other things, which registered voters did not intend to vote on November 2, 1982.

14. It was further a part of said conspiracy that on the occasion of the November 2, 1982, general election, the defendants EDWARD HOWARD and THOMAS CUSACK did cause ballots to be fraudulently and illegally cast in the names of persons who did not apply for ballots in the 44th Precinct of the 39th Ward.

15. It was further a part of said conspiracy that the defendant THOMAS CUSACK and his wife Grace Cusack did falsely register to vote in the 44th Precinct of the 39th Ward by falsely listing as their residence 4924 N. Avers, Chicago, Illinois.

16. It was further a part of said conspiracy that defendant EDWARD HOWARD gave unindicted co-conspirator Darryl Cunningham the name of Leonard Watson who was a registered voter in the 44th Precinct of the 39th Ward and caused unindicted co-conspirator Darryl Cunningham to fill out an application for ballot, number 054, in the name of Leonard Watson, which ballot application unindicted co-conspirator Darryl Cunningham then presented to unindicted co-conspirator Geraldine Watson, who was Leonard Watson's mother and a Democratic Judge of Election.

17. It was further a part of said conspiracy that EDWARD HOWARD and THOMAS CUSACK caused unindicted co-conspirator Darryl Cunningham to punch out the "straight 10" (that is, straight democratic) designation of candidates on the official ballot thereby casting an illegal ballot in the name of Leonard Watson.

18. It was further a part of said conspiracy that defendants EDWARD HOWARD and THOMAS CUSACK caused unindicted co-conspirator Charlotte Watson to illegally complete applications for ballot and illegally vote, to wit:

a. During the conduct of the election, defendants EDWARD HOWARD and THOMAS CUSACK gave Charlotte Watson names of registered voters who precinct workers identified as individuals who were not expected to vote in the general election.

b. The names of said voters were delivered to Charlotte Watson on small slips of paper by defendant EDWARD HOWARD while she was acting as a Judge of Election on November 2, 1982 and Charlotte Watson placed the slips of paper in her shoe.

c. At various times during the conduct of the election, Charlotte Watson did remove the slips of paper from her shoe and did falsely sign the

names of the following registered voters on the following official ballot applications and did illegally vote a straight Democratic ballot in the name of these registered voters.

| Application Number | Registered Voter |
|---|---|
| 152 | Libby Katz |
| 184 | Kirby Spearin |
| 185 | Vickie L. Schmidt |
| 186 | Robert Schmidt |
| 242 | Grace Cusack |
| 366 | Malcolm Vice |
| 367 | Mary E. Piper |

d. At or about the conclusion of the election on November 2, 1982, Charlotte Watson did remove additional small slips of paper from her shoe and did falsely sign the names of the following registered voters on the following official ballot applications and did deliver approximately seven (7) official ballots to defendants EDWARD HOWARD and THOMAS CUSACK, who removed these ballots from the voting area and then returned and caused the ballots to be fraudulently voted.

| Application Number | Registered Voter |
|---|---|
| 379 | Nancy Lemke |
| 380 | Mercedes Almaguer |
| 381 | Tarja Anderson |
| 382 | Ae Ran Choi |
| 383 | Hyung Choi |
| 384 | Dennis Petrie |
| 385 | Demetres Livaditis |

19. It was further a part of said conspiracy that defendant EDWARD HOWARD did order and direct unindicted co-conspirator Darryl Cunningham to deliver to defendant EDWARD HOWARD unmarked absentee ballots which ballots had been obtained by registered voters.

20. It was further a part of said conspiracy that unindicted co-conspirator Darryl Cunningham did, pursuant to his duties as a precinct worker and at the

direction of defendant EDWARD HOWARD, ask the following registered voters and others to apply for absentee ballots and did ask said registered voters to deliver to Darryl Cunningham the unmarked ballot sent through the mail to the registered voter by officials at the Chicago Board of Elections Commissioners.

Registered Voter

Darryl Cunningham
Rose Cunningham
Concetta Malone
Elsie Mitrovich
Carlito Morales
Maria Morales

21. It was further a part of said conspiracy that unindicted co-conspirator Darryl Cunningham did deliver to EDWARD HOWARD unmarked absentee ballots, which Darryl Cunningham had received pursuant to his requests from the following registered voters:

Registered Voter

Darryl Cunningham
Rose Cunningham
Concetta Malone
Carlito Morales
Maria Morales

which defendant EDWARD HOWARD then voted and caused to be voted in the 44th Precinct of the 39th Ward of the City of Chicago for the November 2, 1982, general election.

22. It was further a part of the scheme and artifice to defraud that Darryl Cunningham advised to EDWARD HOWARD that a marked absentee ballot Darryl Cunningham had received pursuant to his request from Elsie Mitrovich was not voted "straight ten" (that is, straight Democratic) and defendant EDWARD HOWARD, upon being so advised, caused the ballot to be destroyed.

23. It was a further part of said conspiracy that said defendants EDWARD HOWARD and THOMAS CUSACK would misrepresent, conceal and hide, and cause to be misrepresented, concealed and hidden, the purpose of and the acts done in furtherance of the conspiracy.

24. It was a part of said conspiracy that said defendants would cause, permit and attempt to cause votes to be cast for candidates for said federal, office on ballots in the 44th Precinct of the 39th Ward of the City of Chicago, in Cook County, Illinois, by procedures and methods in violation of the laws of the State of Illinois pertaining to voting in elections, and the defendants would permit, cause and attempt to cause fraudulent and illegal votes to be cast for candidates for said federal office on ballots in the aforesaid precinct, all with the purpose and intent that said illegal and fraudulent ballots would be counted, returned and certified as a part of the total votes cast for candidates for said federal office at said election, thereby impairing, lessening, diminishing, diluting and destroying the value and effect of votes legally, properly and honestly cast for such candidates in said election, in Chicago, Illinois;

In violation of Title 18, United States Code, Section 241.

## COUNT TWO

The SPECIAL APRIL 1980 GRAND JURY further charges:

1. Paragraphs one through eight of Count One are hereby realleged and incorporated herein as if fully set forth.

2. From on or about February 16, 1982, until on or about November 2, 1982, at Chicago, in the Northern District of Illinois, Eastern Division,

EDWARD HOWARD, also known as
"Captain Eddie", and
THOMAS CUSACK,

defendants herein, knowingly and wilfully did combine, conspire, confederate, and agree with each other, with Darryl Cunningham and Charlotte Watson, named as co-conspirators but not as defendants herein, and with others known and unknown to this grand jury, to commit offenses against the United States, to wit: to vote more than once in a general election held in part for the purpose of electing a candidate for the office of Member of the United States House of Representatives, in violation of Title 42, United States Code, Section 1973i(e); and to knowingly and wilfully give false information as to a voter's name for the purpose of establishing the voter's eligibility to vote in a general election held in part for the purpose of electing a candidate for the office of Member of United States House of Representatives, in violation of Title 42, United States Code, Section 1973i(c).

3. The object of this conspiracy, among other things, was to secure the election of candidates supported by the defendants by causing the corrupt discharge of the official duties of the judges of election in the management of the poll for the 44th Precinct in the 39th Ward and by other means.

4. It was further a part of the conspiracy that unindicted co-conspirator Darryl Cunningham and one or more of the defendants and other persons to the grand jury unknown, conducted a canvass of residence addresses of registered voters in the 44th Precinct of the 39th Ward of the City of Chicago to determine, among other things, which registered voters did not intend vote on November 2, 1982.

5. It was further a part of said conspiracy that on the occasion of the November 2, 1982, general election, the defendants EDWARD HOWARD and THOMAS CUSACK did cause ballots to be cast in the names of persons who did not apply for ballots in the 44th Precinct of the 39th Ward.

6. It was a further part of said conspiracy that said defendants EDWARD HOWARD and THOMAS CUSACK would misrepresent, conceal and hide, and cause to be misrepresented, concealed and hidden, the purpose of and the acts done in furtherance of the conspiracy.

7. In furtherance of the conspiracy and to effect the objects thereof, the defendants did commit, at the times mentioned, in the Northern District of Illinois the following:

OVERT ACTS

1. On or about March 16, 1982, in Chicago, Illinois, unindicted co-conspirator Charlotte Watson became a Republican Judge of Election and Geraldine Watson, her mother, became a Democratic Judge of Election in the 44th Precinct of the 39th Ward for the November 2, 1982, general election.

2. In or about September 1982, in Chicago, Illinois, unindicted co-conspirator Darryl Cunningham was hired as a Democratic precinct worker in the 44th Precinct of the 39th Ward prior to the election by defendant EDWARD HOWARD.

3. On or about February 16, 1982, the defendants THOMAS CUSACK and his wife Grace Cusack did falsely register to vote in the 44th Precinct of the 39th Ward by falsely listing as their residence 4924 N. Avers, Chicago, Illinois.

4. On November 2, 1982, in Chicago, Illinois, the defendant EDWARD HOWARD gave named but unindicted co-conspirator Darryl Cunningham the name of Leonard Watson who was a registered voter in the 44th Precinct of the 39th Ward and caused unindicted co-conspirator Darryl Cunningham to fill out an application for ballot, number 054, in the name of Leonard Watson which ballot application unindicted co-conspirator Darryl Cunningham then presented to Geraldine Watson who was Leonard Watson's mother and a Democratic Judge of Election.

5. On November 2, 1982, in Chicago, Illinois, the defendants EDWARD HOWARD and THOMAS CUSACK caused unindicted co-conspirator Darryl Cunningham to punch out the "straight 10" designation of candidates on the official ballot thereby casting an illegal ballot in the name of Leonard Watson.

6. On November 2, 1982, in Chicago, Illinois, the defendants EDWARD HOWARD and THOMAS CUSACK caused unindicted co-conspirator Charlotte Watson to illegally complete applications for ballot and illegally vote, to wit:

a. During the conduct of the election, defendants EDWARD HOWARD and THOMAS CUSACK gave Charlotte Watson names of registered voters who precinct workers identified as individuals who were not expected to vote in the general election.

b. The names of said voters were delivered to Charlotte Watson on small slips of paper by defendant EDWARD HOWARD while she was acting as a Judge of Election on November 2, 1982 and Charlotte Watson placed the slips of paper in her shoe.

c. At various times during the conduct of the election, Charlotte Watson did remove the slips of paper from her shoe and did falsely sign the names of the following registered voters on the following official ballot applications and did illegally vote a straight Democratic ballot in the name of these registered voters.

| Application Number | Registered Voter |
|---|---|
| 152 | Libby Katz |
| 184 | Kirby Spearin |
| 185 | Vickie L. Schmidt |
| 186 | Robert Schmidt |
| 242 | Grace Cusack |
| 366 | Malcolm Vice |
| 367 | Mary E. Piper |

d. At or about the conclusion of the election on November 2, 1982, Charlotte Watson did remove additional small slips of paper from her shoe and did falsely sign the names of the following registered voters on the following official ballot applications and did deliver approximately seven (7) official ballots to defendants EDWARD HOWARD and THOMAS CUSACK, who removed these ballots from the voting area and then returned and caused these ballots to be fraudulently voted.

| Application Number | Registered Voter |
|---|---|
| 379 | Nancy Lemke |
| 380 | Mercedes Almaguer |
| 381 | Tarja Anderson |
| 382 | Ae Ran Choi |
| 383 | Hyung Choi |
| 384 | Dennis Petrie |
| 385 | Demetres Livaditis |

7. In or about September 1982 the defendant EDWARD HOWARD did order and direct unindicted co-conspirator Darryl Cunningham to deliver to defendant EDWARD HOWARD unmarked absentee ballots which ballots had been obtained by registered voters.

8. In or about September or October 1982, in Chicago, Illinois, unindicted co-conspirator Darryl Cunningham did, pursuant to his duties as a precinct worker and at the direction of defendant EDWARD HOWARD, ask the following registered voters and others to apply for absentee ballots and did ask said registered voters to deliver to Darryl Cunningham the unmarked ballot sent through the mail to the registered voter by officials at the Chicago Board of Elections Commissioners.

Registered Voter

Darryl Cunningham
Rose Cunningham
Concetta Malone
Elsie Mitrovich
Carlito Morales
Maria Morales

9. In or about September or October 1982, in Chicago, Illinois, unindicted co-conspirator Darryl Cunningham did deliver to EDWARD HOWARD unmarked absentee ballots, which Darryl Cunningham had received pursuant to his requests from the following registered voters:

Registered Voter

Darryl Cunningham
Rose Cunningham
Concetta Malone
Carlito Morales
Maria Morales

which defendant EDWARD HOWARD then voted and caused to be voted in the 44th Precinct of the 39th Ward of the City of Chicago for the November 2, 1982, general election.

10. It was further a part of the scheme and artifice to defraud that Darryl Cunningham advised to EDWARD HOWARD that a marked absentee ballot Darryl Cunningham had received pursuant to his request from Elsie Mitrovich was not voted "straight ten" (that is, straight Democratic) and defendant EDWARD HOWARD, upon being so advised, caused the ballot to be destroyed.

In violation of Title 18, United States Code, Section 371.

## COUNT THREE

The SPECIAL APRIL 1980 GRAND JURY further charges:

On or about November 2, 1982, at Chicago, in the Northern District of Illinois, Eastern Division,

EDWARD HOWARD, also known as
"Captain Eddie", and
THOMAS CUSACK,

defendants herein, did vote more than once in the November 2, 1982, general election, which was held in part for the purpose of electing a candidate for the office of Member of the United States House of Representatives, in that during said election in the 44th Precinct of the 39th Ward of the City of Chicago the defendants, EDWARD HOWARD and THOMAS CUSACK, voted approximately twenty ballots as described in paragraphs 16 through 21 of Count One.

In violation of Title 42, United States Code, Section 1973i(e) and Title 18, United States Code, Section 2.

## COUNT FOUR

The SPECIAL APRIL 1980 GRAND JURY further charges:

On or about February 16, 1982, at Chicago, in the Northern District of Illinois, Eastern Division,

THOMAS CUSACK,

defendant herein, knowingly and wilfully did give and cause to be given false information as to his address in the voting district of the 44th Precinct of the 39th Ward of the City of Chicago for the purpose of establishing his eligibility to register and to vote at elections in the State of Illinois, including general and primary elections held for the purpose of selecting and electing candidates for the office of Member of the United States House of Representatives;

In violation of Title 42, United States Code, Section 1973i(c).

## COUNT FIVE

The SPECIAL APRIL 1980 GRAND JURY further charges:

On or about November 2, 1982, at Chicago, in the Northern District of Illinois, Eastern Division,

EDWARD HOWARD, also known as
"Captain Eddie", and
THOMAS CUSACK,

defendants herein, knowingly and wilfully did aid, abet, counsel, command, induce, procure, and cause Darryl Cunningham to give false information as to his name, for the purpose of establishing his eligibility to vote in the November 2, 1982, general election, which was held in part for the purpose of electing a candidate for the office of Member of the United States House of Representatives, in that defendants knowingly did aid, abet, counsel, command, induce, procure, and cause Darryl Cunningham to falsely make and forge an application for ballot in the name of Leonard Watson, in the 44th Precinct of the 39th Ward of the City of Chicago;

In violation of Title 42, United States Code, Section 1973i(c) and Title 18, United States Code, Section 2.

## COUNT TWENTY

The SPECIAL 1980 GRAND JURY further charges:

1. Paragraphs one through eight of Count One are hereby realleged and incorporated herein as if fully set forth.

2. From in or about September 1982 until on or about November 2, 1982, at Chicago, in the Northern District of Illinois, Eastern Division,

EDWARD HOWARD, also known as
"Captain Eddie", and
THOMAS CUSACK,

defendants herein, and others known and unknown to this grand jury, devised and intended to devise a scheme and artifice to defraud:

(1) the candidates appearing on the ballot for the November 2, 1982, general election in the 44th Precinct of the 39th Ward of the City of Chicago, and the authorized voters for said election in the 44th Precinct of the 39th Ward of the City of Chicago, the County of Cook, the State of Illinois, and the 11th United States Congressional District of their right to a fair and impartially conducted election, free from dilution from the intentional casting of false, fictitious, spurious and non-secret and improperly cast absentee ballots, free from the false and fraudulent acquisition of absentee ballots, and free from the unlawful screening of absentee ballots to assure that only absentee ballots cast for a particular set of candidates would be submitted for tabulation; and

(2) the Chicago Board of Election Commissioners of the honest, fair, and proper administration of absentee ballots in the City of Chicago for the November 2, 1982, general election, free from craft, trickery, deceit, corruption, dishonesty, fraud, and false and fraudulent representations.

3. It was a part of the scheme and artifice to defraud that defendant EDWARD HOWARD did order and direct Darryl Cunningham to deliver to defendant EDWARD HOWARD unmarked absentee ballots which ballots had been obtained from lawfully registered voters without regard to whether these voters were eligible for absentee ballots.

4. It was further a part of the scheme and artifice to defraud that Darryl Cunningham, at the direction of defendant EDWARD HOWARD, asked the following lawfully registered voters and others to apply for absentee ballots and to deliver to Darryl Cunningham the unmarked ballots sent through the mail to the registered voter by officials at the Chicago Board of Election Commissioners.

Registered Voter

Concetta Malone
Darryl Cunningham
Rose Cunningham
Elsie Mitrovich
Carilto Morales
Maria Morales

5. To comply with the requests of defendant EDWARD HOWARD and Darryl Cunningham, at least four of the above-named voters had to and did submit false and fraudulent information to the Chicago Board of Election Commissioners in order to appear to qualify for absentee ballots.

6. It was further a part of the scheme and artifice to defraud that Darryl Cunningham did deliver to EDWARD HOWARD unmarked absentee ballots, which Darryl Cunningham had received pursuant to his requests from the following registered voters:

Registered Voter

Concetta Malone
Darryl Cunningham
Rose Cunningham
Carilto Morales
Maria Morales

which defendant EDWARD HOWARD then voted and caused to be voted in the 44th Precinct of the 39th Ward of the City of Chicago for the November 2, 1982, general election.

7. It was further a part of the scheme and artifice to defraud that Darryl Cunningham advised to EDWARD HOWARD that a marked absentee ballot Darryl Cunningham had received pursuant to his request from Elsie Mitrovich was not voted "straight ten" (that is, straight Democratic) and defendant EDWARD HOWARD, upon being so advised, caused the ballot to be destroyed.

8. In or about September or October 1982,

EDWARD HOWARD, also known as
"Captain Eddie", and
THOMAS CUSACK,

defendants herein, for the purpose of executing the aforesaid scheme and artifice to defraud, did knowingly cause to be placed in an authorized depository for mail matter to be sent and delivered by the United States Postal Service, according to the directions thereon, an envelope containing an absentee ballot, said envelope being addressed to:

Gladys Devalle
4906 N. Springfield Ave.
Chicago, Illinois

In violation of Title 18, United States Code, Section 1341.

## COUNT TWENTY-ONE

The SPECIAL APRIL 1980 GRAND JURY further charges:

1. Paragraphs 1 through 7 of Count 20 of this Indictment are realleged and incorporated herein as if fully set forth.

2. In or about September or October 1982,

EDWARD HOWARD, also known as
"Captain Eddie", and
THOMAS CUSACK,

defendants herein, for the purpose of executing the aforesaid scheme and artifice to defraud, did knowingly cause to be placed in an authorized depository for mail matter to be sent and delivered by the United States Postal Service, according to the directions thereon, an envelope containing an absentee ballot, said envelope being addressed to:

Michael Mitovich
4918 N. Springfield Ave.
Chicago, Illinois

In violation of Title 18, United States Code, Section 1341.

## COUNT TWENTY-TWO

The SPECIAL APRIL 1980 GRAND JURY further charges:

1. Paragraphs 1 through 7 of Count 20 of this Indictment are realleged and incorporated herein as if fully set forth.

2. In or about September or October 1982,

EDWARD HOWARD, also known as
"Captain Eddie", and
THOMAS CUSACK,

defendants herein, for the purpose of executing the aforesaid scheme and artifice to defraud, did knowingly cause to be placed in an authorized depository for mail matter to be sent and delivered by the United States Postal Service, according to the directions thereon, an envelope containing an absentee ballot, said envelope being addressed to:

Carlito Morales
4906 N. Springfield
Chicago, Illinois

In violation of Title 18, United States Code, Section 1341.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | * | |
| Plaintiff | * | |
| VS. | * | CRIMINAL NO. 79-20031-01,02 & 03 |
| EDWIN L. CABRA, | * | 18 U.S.C. § 371 |
| CLAUDE "BUDDY" LEACH, and | * | 42 U.S.C. § 1973i(c) |
| JULIOUS ROBINSON, JR. | * | 18 U.S.C. § 2 |
| | * | 2 U.S.C. §§ 441a, 441g and 441j |
| Defendants | * | |

# I N D I C T M E N T

THE GRAND JURY CHARGES:

## COUNT ONE

(18 U.S.C. § 371)

1. That on or about November 7, 1978, in Vernon Parish, Western District of Louisiana, a general election was held in part for the purpose of selecting and electing a candidate for the office of Member of the United States House of Representatives.

2. In connection with the aforesaid election:

a. CLAUDE "BUDDY" LEACH, a defendant herein, was a candidate for the United States House of Representatives.

b. Hubert Monk was a candidate for City Marshal, City Court of Leesville.

c. Ralph D. McRae, Jr. was the Mayor of Leesville, Louisiana.

d. Gene Koury was a candidate for Parish School Board.

e. JULIOUS ROBINSON, JR., a defendant herein, assisted in the operation of locations where voters were paid.

f. EDWIN L. CABRA, a defendant herein, assisted in the campaign of the defendant CLAUDE "BUDDY" LEACH.

3. Beginning on or about September 16, 1978, and continuing to on or about November 15, 1978, in Vernon Parish, Western District of Louisiana, the defendants herein,

EDWIN L. CABRA,
CLAUDE "BUDDY" LEACH, and
JULIOUS ROBINSON, JR.

knowingly, wilfully and unlawfully did combine, conspire and agree together, and with other persons to the Grand Jury known and unknown, to commit the following offenses against the United States: to knowingly and wilfully pay and offer to pay, and cause other persons to pay voters for voting in the aforesaid election, in violation of Title 42, United States Code, Section 1973i(c), and Title 18, United States Code, Section 2, all in violation of Title 18, United States Code, Section 371.

PURPOSE OF THE CONSPIRACY

4. Among the purposes of the conspiracy were:

a. To secure the election of Hubert Monk in connection with the aforesaid election; and

b. To secure the election of the defendant CLAUDE "BUDDY" LEACH in connection with the aforesaid election.

5. The means by which the conspiracy was executed included the following:

a. Drivers would be retained for the purpose of driving registered voters in Ward 1, Vernon Parish, Louisiana, to the polls in connection with the aforesaid election.

b. Said voters would be offered $5.00 to vote in the aforesaid election.

c. Said drivers would give or show to the voters a slip of paper containing the voting machine numbers of the candidates being supported.

d. Said drivers would be responsible to determine that each voter driven to the polls did in fact vote.

e. The voters, after voting, would be taken by the drivers to the residence of either Eligah Moore or the defendant, JULIOUS ROBINSON, JR., where the names of the voters would be checked off on a list of registered voters maintained therein, and where the voters then would be paid $5.00.

f. Receipts and disbursements of money necessary to accomplish the objects of the conspiracy would be by currency, that is, cash.

OVERT ACTS

In furtherance of the conspiracy, and to effect the object thereof, the defendants and coconspirators performed the following overt acts, among others:

1. Between on or about September 16, 1978, and on or about October 30, 1978, in the Western District of Louisiana, the defendant, CLAUDE "BUDDY" LEACH, had a conversation with Ralph D. McRae, Jr. concerning a budget for the commercial black vote in Leesville, Louisiana.

2. Between on or about September 16, 1978, and on or about October 30, 1978, in the Western District of Louisiana, Ralph D. McRae, Jr. had a conversation with Willie Fisher concerning the need to organize approximately 20 drivers for the November 7, 1978, election.

3. On or about September 17, 1978, in the Western District of Louisiana, Willie Fisher received approximately $80 in cash.

4. Between on or about October 1, 1978, and on or about October 30, 1978, in the Western District of Louisiana, the defendant CLAUDE "BUDDY" LEACH met with Willie Fisher and discussed, among other matters, the anticipated budget for paying voters.

5. Between on or about October 16, 1978, and on or about November 1, 1978, in the Western District of Louisiana, the defendant CLAUDE "BUDDY" LEACH had a conversation with Ralph D. McRae, Jr. and gave to him $500 in cash.

6. Between on or about October 16, 1978, and on or about November 1, 1978, in the Western District of Louisiana, the defendant CLAUDE "BUDDY" LEACH met with Willie Fisher and gave to him $500 in cash.

7. Between on or about November 2, 1978, and on or about November 4, 1978, in the Western District of Louisiana, the defendant CLAUDE "BUDDY" LEACH had a conversation with Ralph D. McRae, Jr. and gave to him approximately $1,000 in cash.

8. On or about November 5, 1978, in the Western District of Louisiana, a meeting was held at the residence of Willie Fisher. Among the matters discussed at the meeting were the instructions for the drivers to follow on election day, November 7, 1978.

9. On or about November 6, 1978, in the Western District of Louisiana, Willie Fisher received approximately $100 in $5 bills.

10. On or about November 6, 1978, in the Western District of Louisiana, the defendant CLAUDE "BUDDY" LEACH had a conversation with Robert Pynes concerning the need to take $1,000 to Willie Fisher.

11. On or about November 7, 1978, in the Western District of Louisiana, a meeting was held at the residence of Eligah Moore, in part for the purpose of paying the drivers.

12. On or about November 7, 1978, in the Western District of Louisiana, the defendant, CLAUDE "BUDDY" LEACH met with Willie Fisher and gave to him approximately $1,100 in cash.

13. On or about November 7, 1978, in the Western District of Louisiana, the defendant CLAUDE "BUDDY" LEACH had a telephone conversation with Hubert Monk concerning Willie Fisher.

14. On or about November 7, 1978, in the Western District of Louisiana, the defendant EDWIN L. CABRA had a conversation with Willie Fisher concerning money for the payment of voters.

15. On or about November 7, 1978, in the Western District of Louisiana, the defendant CLAUDE "BUDDY" LEACH met with Ralph D. McRae, Jr. concerning the presence of Republican poll watchers in Leesville, Louisiana.

16. On or about November 7, 1978, in the Western District of Louisiana, the defendant CLAUDE "BUDDY" LEACH met with Chauncy Wilson concerning the presence of Federal agents in Leesville, Louisiana.

17. On or about November 7, 1978, in the Western District of Louisiana, the defendant CLAUDE "BUDDY" LEACH met with Ralph D. McRae, Jr. concerning the presence of Agents of the Federal Bureau of Investigation in Leesville, Louisiana.

18. On or about November 7, 1978, in the Western District of Louisiana, the defendants CLAUDE "BUDDY" LEACH and EDWIN L. CABRA met with Ralph D. McRae, Jr. and gave to Ralph D. McRae, Jr. approximately $1,000 in cash.

19. On or about November 7, 1978, approximately 440 voters in Vernon Parish were driven by drivers to the polls and were then taken to the residence of either Eligah Moore or the defendant JULIOUS ROBINSON, JR., where the names of the voters were enrolled in a notebook and where $5 was tendered to each voter.

20. The Grand Jury specifically realleges and adopts by reference each and every allegation contained in Counts Two through Fifteen of this indictment as overt acts in furtherance of the conspiracy.

COUNT TWO

(42 U.S.C. § 1973i(c) and 18 U.S.C. § 2)

1. That on or about November 7, 1978, in Vernon Parish, Western District of Louisiana, a general election was held in part for the purpose of selecting and electing a candidate for the office of Member of the United States House of Representatives.

2. On or about November 7, 1978, in Vernon Parish, Western District of Louisiana, the defendants,

EDWIN L. CABRA,
CLAUDE "BUDDY" LEACH, and
JULIOUS ROBINSON, JR.,

and a coconspirator known to the Grand Jury but not named as a defendant herein, did knowingly and wilfully pay and offer to pay, and did aid and abet other persons to pay and wilfully cause each other and other persons to pay, L. B. Collins, a voter, to vote and for voting in the aforesaid election, in violation of Title 42, United States Code, Section 1973i(c) and Title 18, United States Code, Section 2.

COUNT THREE

(42 U.S.C. § 1973i(c) and 18 U.S.C. § 2)

1. That on or about November 7, 1978, in Vernon Parish, Western District of Louisiana, a general election was held in part for the purpose of selecting and electing a candidate for the office of Member of the United States House of Representatives.

2. On or about November 7, 1978, in Vernon Parish, Western District of Louisiana, the defendants,

EDWIN L. CABRA,
CLAUDE "BUDDY" LEACH, and
JULIOUS ROBINSON, JR.,

and a coconspirator known to the Grand Jury but not named as a defendant herein, did knowingly and wilfully pay and offer to pay, and did aid and abet other persons to pay and wilfully cause each other and other persons to pay, Elvis Green, a voter, to vote and for voting in the aforesaid election, in violation of Title 42, United States Code, Section 1973i(c) and Title 18, United States Code, Section 2.

COUNT FOUR

(42 U.S.C. § 1973i(c) and 18 U.S.C. § 2)

1. That on or about November 7, 1978, in Vernon Parish, Western District of Louisiana, a general election was held in part for the purpose of selecting and electing a candidate for the office of Member of the United States House of Representatives.

2. On or about November 7, 1978, in Vernon Parish, Western District of Louisiana, the defendants,

EDWIN L. CABRA,
CLAUDE "BUDDY" LEACH, and
JULIOUS ROBINSON, JR.,

and a coconspirator known to the Grand Jury but not named as a defendant herein, did knowingly and wilfully pay and offer to pay, and did aid and abet other persons to pay and wilfully cause each other and other persons to pay, Clement Robinson, a voter, to vote and for voting in the aforesaid election, in violation of Title 42, United States Code, Section 1973i(c) and Title 18, United States Code, Section 2.

COUNT FIVE

(42 U.S.C. § 1973i(c) and 18 U.S.C. § 2)

1. That on or about November 7, 1978, in Vernon Parish, Western District of Louisiana, a general election was held in part for the purpose of selecting and electing a candidate for the office of Member of the United States House of Representatives.

2. On or about November 7, 1978, in Vernon Parish, Western District of Louisiana, the defendants,

EDWIN L. CABRA,
CLAUDE "BUDDY" LEACH, and
JULIOUS ROBINSON, JR.,

and a coconspirator known to the Grand Jury but not named as a defendant herein, did knowingly and wilfully pay and offer to pay, and did aid and abet other persons to pay and wilfully cause each other and other persons to pay, Jimmie Carl Calvin, a voter, to vote and for voting in the aforesaid election, in violation of Title 42, United States Code, Section 1973i(c) and Title 18, United States Code, Section 2.

COUNT SIX

(42 U.S.C. § 1973i(c) and 18 U.S.C. § 2)

1. That on or about November 7, 1978, in Vernon Parish, Western District of Louisiana, a general election was held in part for the purpose of selecting and electing a candidate for the office of Member of the United States House of Representatives.

2. On or about November 7, 1978, in Vernon Parish, Western District of Louisiana, the defendants,

EDWIN L. CABRA,
CLAUDE "BUDDY" LEACH, and
JULIOUS ROBINSON, JR.,

and a coconspirator known to the Grand Jury but not named as a defendant herein, did knowingly and wilfully pay and offer to pay, and did aid and abet other persons to pay and wilfully cause each other and other persons to pay, David Wayne Woods, a voter, to vote and for voting in the aforesaid election, in violation of Title 42, United States Code, Section 1973i(c) and Title 18, United States Code, Section 2.

COUNT SEVEN

(42 U.S.C. § 1973i(c) and 18 U.S.C. § 2)

1. That on or about November 7, 1978, in Vernon Parish, Western District of Louisiana, a general election was held in part for the purpose of selecting and electin a candidate for the office of Member of the United States House of Representatives.

2. On or about November 7, 1978, in Vernon Parish, Western District of Louisiana, the defendants,

EDWIN L. CABRA,
CLAUDE "BUDDY" LEACH, and
JULIOUS ROBINSON, JR.,

and a coconspirator known to the Grand Jury but not named as a defendant herein, did knowingly and wilfully pay and offer to pay, and did aid and abet other persons to pay and wilfully cause each other and other persons to pay, Joe King, a voter, to vote and for voting in the aforesaid election, in violation of Title 42, United States Code, Section 1973i(c) and Title 18, United States Code, Section 2.

COUNT EIGHT

(42 U.S.C. § 1973i(c) and 18 U.S.C. § 2)

1. That on or about November 7, 1978, in Vernon Parish, Western District of Louisiana, a general election was held in part for the purpose of selecting and electing a candidate for the office of Member of the United States House of Representatives.

2. On or about November 7, 1978, in Vernon Parish, Western District of Louisiana, the defendants,

EDWIN L. CABRA,
CLAUDE "BUDDY" LEACH, and
JULIOUS ROBINSON, JR.,

and a coconspirator known to the Grand Jury but not named as a defendant herein, did knowingly and wilfully pay and offer to pay, and did aid and abet other persons to pay and wilfully cause each other and other persons to pay, Denise H. Farmer, a voter, to vote and for voting in the aforesaid election, in violation of Title 42, United States Code, Section 1973i(c) and Title 18, United States Code, Section 2.

COUNT NINE

(42 U.S.C. § 1973i(c) and 18 U.S.C. § 2)

1. That on or about November 7, 1978, in Vernon Parish, Western District of Louisiana, a general election was held in part for the purpose of selecting and electing a candidate for the office of Member of the United States House of Representatives.

2. On or about November 7, 1978, in Vernon Parish, Western District of Louisiana, the defendants,

EDWIN L. CABRA,
CLAUDE "BUDDY" LEACH, and
JULIOUS ROBINSON, JR.,

and a coconspirator known to the Grand Jury but not named as a defendant herein, did knowingly and wilfully pay and offer to pay, and did aid and abet other persons to pay and wilfully cause each other and other persons to pay, Napoleon Manson, a voter, to vote and for voting in the aforesaid election, in violation of Title 42, United States Code, Section 1973i(c) and Title 18, United States Code, Section 2.

COUNT TEN

(42 U.S.C. § 1973i(c) and 18 U.S.C. § 2)

1. That on or about November 7, 1978, in Vernon Parish, Western District of Louisiana, a general election was held in part for the purpose of selecting and electing a candidate for the office of Member of the United States House of Representatives.

2. On or about November 7, 1978, in Vernon Parish, Western District of Louisiana, the defendants,

EDWIN L. CABRA,
CLAUDE "BUDDY" LEACH, and
JULIOUS ROBINSON, JR.,

and a coconspirator known to the Grand Jury but not named as a defendant herein, did knowingly and wilfully pay and offer to pay, and did aid and abet other persons to pay and wilfully cause each other and other persons to pay, Terry Williams, a voter, to vote and for voting in the aforesaid election, in violation of Title 42, United States Code, Section 1973i(c) and Title 18, United States Code, Section 2.

COUNT ELEVEN

(42 U.S.C. § 1973i(c) and 18 U.S.C. § 2)

1. That on or about November 7, 1978, in Vernon Parish, Western District of Louisiana, a general election was held in part for the purpose of selecting and electing a candidate for the office of Member of the United States House of Representatives.

2. On or about November 7, 1978, in Vernon Parish, Western District of Louisiana, the defendants,

EDWIN L. CABRA,
CLAUDE "BUDDY" LEACH, and
JULIOUS ROBINSON, JR.,

and a coconspirator known to the Grand Jury but not named as a defendant herein, did knowingly and wilfully pay and offer to pay, and did aid and abet other persons to pay and wilfully cause each other and other persons to pay, William Shaw, a voter, to vote and for voting in the aforesaid election, in violation of Title 42, United States Code, Section 1973i(c) and Title 18, United States Code, Section 2.

COUNT TWELVE

(2 U.S.C. § 441a and j)

Between on or about September 16, 1978, and on or about November 7, 1978, in the Western District of Louisiana, the defendant, CLAUDE "BUDDY" LEACH, a candidate for election to the office of Representative in the Congress of the United States, did knowingly and wilfully accept a contribution in excess of $1,000, to wit: an aggregate contribution of $5,000 from Ralph D. McRae, Sr., in violation of Title 2, United States Code, Sections 441a(a) and (f), and 441j.

COUNT THIRTEEN

(2 U.S.C. § 441g and j and 18 U.S.C. § 2)

Between on or about September 16, 1978, and on or about November 7, 1978, in the Western District of Louisiana, the defendant CLAUDE "BUDDY" LEACH did knowingly and wilfully aid, abet and cause John Ford to make a contribution through Ralph D. McRae, Jr. of currency of the United States in excess of $100, to wit: an aggregate contribution of $500 in cash, to and for the benefit of the defendant, CLAUDE "BUDDY" LEACH, a candidate for election to the office of Representative in the Congress of the United States, in violation of Title 2, United States Code, Sections 441g and 441j and Title 18, United States Code, Section 2.

COUNT FOURTEEN

(2 U.S.C. § 441g and j and 18 U.S.C. § 2)

Between on or about September 16, 1978, and on or about November 7, 1978, in the Western District of Louisiana, the defendant CLAUDE "BUDDY" LEACH did knowingly and wilfully aid, abet and cause Ralph D. McRae, Sr. to make a contribution of currency of the United States in excess of $100, to wit: $4,000, in cash, to and for the benefit of the defendant, CLAUDE "BUDDY" LEACH, a candidate for election to the office of Representative in the Congress of the United States, in violation of Title 2, United States Code, Sections 441g and 441j and Title 18, United States Code, Section 2.

COUNT FIFTEEN

(2 U.S.C. § 441g and j and 18 U.S.C. § 2)

On or about November 6, 1978, in the Western District of Louisiana, the defendant CLAUDE "BUDDY" LEACH did knowingly and wilfully aid, abet and cause Robert Pynes to make a contribution of currency of the United States in excess of $100, to wit: an aggregate contribution of $1,000 in cash, to and for the benefit of the defendant, CLAUDE "BUDDY" LEACH, a candidate for election to the office of Representative in the Congress of the United States, in violation of Title 2, United States Code, Sections 441g and 441j and Title 18, United States Code, Section 2.

A TRUE BILL:

FOREMAN

J. RANSDELL KEENE
United States Attorney

JOHN P. LYDICK
Assistant United States Attorney

MICHAEL H. WAINWRIGHT
Assistant United States Attorney

CRAIG C. DONSANTO
Attorney
Public Integrity Section
Department of Justice

APPENDIX F

# HOBBS ACT

BY

LEE J. RADEK*

Deputy Chief
Public Integrity Section
Criminal Division

* Lee J. Radek has been Deputy Chief of the Public Integrity Section for the past decade, and is primarily responsible for supervising investigations and prosecutions of state and local officials.

# HOBBS ACT

Despite the fact that the Travel Act (18 U.S.C. § 1952), RICO (18 U.S.C. § 1962), and 18 U.S.C. § 666 provide for more direct Federal jurisdiction over bribery of state and local officials, the most popular statutory tool used by Federal law enforcement for combating state and local corruption continues to be the prohibition against extortion contained in the Hobbs Act. The reasons for this popularity are basic: ease of proof and severity of penalty. These advantages, however, also could foster judicial animosity. For this reason it is important for Department personnel to exercise extreme care in the use of this powerful tool so that its continuing availability is insured.

## Background

The Hobbs Act was an amendment to the Anti-Racketeering Act of 1934. A 1945 Supreme Court decision excluding certain types of labor racketeering from coverage under the statute led to the enactment of the Hobbs Act in 1946. No debate centered on official corruption, since the concern of the Congress at the time of passage was labor racketeering. Nevertheless, Congress adopted language contained in the New York Code in defining extortion. Included within that definition was the obtaining of property "under color of official right." The Hobbs Act as enacted thus codified the English common law crime of extortion, an offense that could be committed only by public officials, and that consisted of the taking of property by such an official which was not due him or his office. Unlike the other activity prohibited by the Hobbs Act, which generally fell within the common law prohibitions against blackmail or assault, extortion by public officials was a misdemeanor at common law.

## Elements

The Hobbs Act consists of two primary elements:

I. An obstruction, delay or effect on interstate or foreign commerce

II. by robbery or extortion. (The robbery provision is of little use in corruption cases, and will not be discussed here). Additional elements of the offense may be found in the statute's definition of extortion:

   A. The obtaining of property from another,

   B. with his consent

1. induced by the wrongful use of actual or threatened

   a. force,
   b. violence, or
   c. fear; or

2. under color of official right.

Commerce

The effect on commerce element is the easiest to prove, but as a result, it is often assumed to exist and therefore is not adequately investigated or proven. The commerce element of the Hobbs Act focuses upon the interstate nature of the victim. It thus differs from that in RICO, (which focuses upon the interstate nature of the defendant's enterprise) and that in the Travel Act (which focuses upon the interstate nature of the prohibited activity).

The effect on commerce is sufficient if it is direct or indirect, and if it is actual or potential. Examples help to explain these concepts:

1. Actual:

If a contractor refuses to pay a bribe to obtain a public works contract, and as a result he does not obtain the contract and therefore does not cause building materials to be brought in from another state, there is an actual (and direct) effect upon commerce.

2. Potential:

If the same contractor pays the bribe and obtains the contract, there is still a potential effect on commerce because if he had not paid the bribe, the supplies would not have moved in interstate commerce.

3. Direct:

Either of the above examples is also a direct effect.

4. Indirect:

This type of effect is generally referred to as the "diminution of assets" theory. If the above contractor was generally involved in the purchase of commodities and goods from outside the state, any money which he pays to the public official as a bribe becomes unavailable for him to use to purchase those goods and commodities.

The courts have held that any effect, no matter how small or indirect can satisfy the commerce element of the Hobbs Act, recognizing that the Congress intended to extend the statute's jurisdiction to the full depth and breadth of the Commerce Clause. Nevertheless, the Hobbs Act generally requires that the victim or bribe payer be commercial, and involved in interstate commerce. 1/ This requirement is often missing from matters involving case-fixing by state and local law enforcement or judicial officers. A burglar who bribes a local official to avoid prosecution or conviction is neither commercial nor interstate. In most instances this type of bribe will not meet the jurisdictional requirement of the Hobbs Act.

Extortion

As previously stated, the Hobbs Act defines extortion in terms of several elements, some of which are included alternatively.

---

1/ Three exceptions to this general rule exist. In United States v. Boston, 718 F.2d 1511 (10th Cir. 1983), the Circuit Court of Appeals for the Tenth Circuit held that where a purely intrastate vendor had added the cost of a kickback to his bill, which was then paid by the purchasing county, the bribe diminished the assets of the county that it otherwise would have otherwise used to purchase goods from interstate commerce.

In United States v. Wright, 797 F.2d 245 (5th Cir. 1986), the Fifth Circuit held that bribes in return for fixing drunk driving tickets issued to private individuals constituted an effect on commerce because the bribes resulted in more drunk drivers impeding interstate highways. While neither case focuses upon the interstate or commercial nature of the bribe payer, each at least is able to define an actual effect on commerce.

In United States v. Capo, 791 F.2d 1054 (2d Cir. 1986), a fear of economic loss case, two employees of Kodak were convicted for selling jobs to prospective employees. The court "had little difficulty in concluding that . . . hirings by . . . Kodak involve 'commerce over which the United States has jurisdiction.'" The case was subsequently reversed on the grounds that the prospective employees were not paying to avoid loss but to achieve gain. Unfortunately, no further analysis of the commerce element was undertaken.

1. The Obtaining of Property From Another:

The concept of property contained in the Hobbs Act distinguishes it from most other bribery/gratuity statutes that generally prohibit (as in 18 U.S.C. § 201, Bribery of Federal Officials) the obtaining of a thing of value or benefit. The thing or things obtained, as in post-McNally mail fraud cases, must fit within traditional concepts of property or property rights. Thus, sexual favors may be within the definition of "thing of value" under Section 201, but are not within "property" under the Hobbs Act.

The other part of this element, that the property be obtained from another, connotes that extortion is a larceny-type offense. That is, there must be both a giving up and a taking. It is not sufficient that property be merely destroyed or that some advantage is obtained without a parallel loss. However, it is not necessary that the extortionist has obtained the property for himself. Extortions that benefit third parties are also prohibited.

2. With His Consent:

This element distinguishes extortion from theft or embezzlement. An extortionate transaction is one in which the victim knows that he is giving up property and does so because the activity of the extortionist has induced his consent. It is this element which distinguishes extortion by color of official right from embezzlement of public monies. Even though both situations involve the obtaining of property by a public official that is not due him or his office, in the latter case the governmental victim is not consenting to giving up its property.

3. Induced by the Wrongful Use of Actual or Threatened:

The word wrongful has been judicially defined to mean that the defendant has no lawful claim to the property. The term "use" means that the extortionist need not be the one to create or induce the force violence or fear, only that he must use it in some way calculated to obtain the property by:

a. force;
b. violence; or
c. fear.

The term fear includes not just fear of death or injury, but also fear of economic loss. Prior to development of the "under color of official right" provision in 1973, fear of economic loss was the Hobbs Act provision used to combat state and local bribery. Whenever a public official made a demand for property which, if not paid would result in a financial loss to the

prospective payer, extortion through fear of economic loss existed.

The theory was and is limited, however, by the requirement that the payer was in fear of an actual loss of something he had some claim upon. Thus, a willing briber who pays a public official to obtain a contract is not actually in fear of loss. Only a briber who pays to keep from losing a contract which he could otherwise expect to obtain or retain can be said to be in fear of economic loss.

The limitations of this theory kept the Hobbs Act from being used in those situations where the extent of corruption was such that all contractors knew they had to pay bribes to obtain local public works contracts. Thus, no demands were necessary and none were made. Contractors simply paid a going rate to the responsible public official on each and every contract they sought. Since they were merely seeking to obtain an undeserved advantage, they could not be said to be in fear of economic loss. In 1973 and afterward, this state of affairs caused resourceful prosecutors to develop a new theory of Hobbs Act prosecutions based upon the previously unused clause: "or under color of official right."

4. Or Under Color of Official Right:

As stated above, extortion under color of official right is based upon the common law misdemeanor of extortion defined as the obtaining of property by a public official that was not due him or his office.

As initially interpreted, this provision did not require a demand, the influencing of an official act, a relationship to an official act, or the threatened loss of property to which there was some right or expectancy. It required only that the property was paid to the public official because of his office.

No quid pro quo was required to be shown for an offense to exist, United States v. Trotta, 525 F.2 1096 (2d Cir. 1975), and the public official was not even required to have de jure power to perform any official act paid for as long as it was reasonable to believe that he had the de facto power to perform, United States v. Mazzei, 521 F.2 639 (3d Cir.), cert. denied, 96 S. Ct. 446 (1975). It has even been held that non-public officials can be convicted under this provision if they caused public officials to perform official acts in return for payments to the non-public official. United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982).

One can see what an extremely powerful tool this provision can be in combating state and local corruption, for it punishes activity with a 20-year maximum sentence which, if engaged in by Federal officials and prosecuted under 18 U.S.C. § 201, would be

punishable by fifteen years for bribery or two years for gratuity.

It is perhaps this incongruity in punishments that has led to two significant adverse opinions in this area. In United States v. O'Grady, 742 F.2d 682 (2d Cir. 1984) (en banc), the Circuit Court of Appeals for the Second Circuit held that mere gratuities to a public official are not prohibited by the Hobbs Act unless that public official induces the payments. Similarly, in United States v. Aguon, 813 F.2d 1413 (9th Cir. 1987), the Ninth Circuit held that payments to public officials are not prohibited unless there is a demand for payment. While rehearing en banc has been granted in Aguon, both of these cases can be characterized as demonstrating a trend of judicial hostility toward the continued expansive use of the Hobbs Act.

Some policy and statutory idiosyncrasies exist in the Hobbs Act:

o As a matter of policy, campaign contributions will not be authorized as the subject of a Hobbs Act prosecution unless they can be proven to have been given in return for the performance of or abstaining from an official act; otherwise any campaign contribution might constitute a violation.

o Generally, only the public official or bribe-taker and others on his side of the transaction are prosecutable under the Act. A bribe-payer, even though a willing participant, is in the class of people protected by the statute and defined as victims. 2/

o The Hobbs Act has its own conspiracy provision that does not require the Government to plead or prove overt acts.

o The Act has an attempt provision that should always be used in cases where Government money is used to make a payoff. This answers the arguments that commerce was not affected because the undercover or cooperating bribe-payer was not engaged in

---

2/ In United States v. Wright, supra, and United States v. Spitler, 800 F.2d 1267 (4th Cir. 1986), the Circuit Courts of Appeals for the Fifth and Fourth Circuits have held that bribe-payers can be prosecuted with the bribe-takers. In Wright the payer was a partner in a law firm which was named as the victim. In Spitler, however, the Court confronts the issue squarely and decides that a bribe-payer who is truly the instigator of the transaction can be convicted of aiding and abetting the public official and conspiring with him to commit the extortion.

commerce, or that the Government created the jurisdictional element of commerce, in violation of United States v. Archer, 486 F.2d 670 (2d Cir. 1973).

o Criminal Division approval is required before an arrest or indictment in all Hobbs Act cases that do not involve force or violence. The Public Integrity Section has responsibility for all official corruption Hobbs Act approvals.

## Conclusion

The "under color of official right" provision of the Hobbs Act has yet to be ruled upon by the United States Supreme Court. In light of that Court's apparent restrictive attitude toward Federal prosecution of state and local corruption as expressed in United States v. McNally, and in light of the previously mentioned appellate court hostility to Hobbs Act expansion, the Department must exercise extreme caution in its application of this powerful tool. The Hobbs Act is as useful as it is today because innovative prosecutors and investigators brought sound cases based upon compelling facts when propounding a new theory of prosecution. Continued judicious use of the statute will insure its continued viability.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

| | |
|---|---|
| UNITED STATES OF AMERICA | ) Criminal No. |
| | ) VIOLATION: |
| | ) 18 U.S.C. §1951 - |
| v. | ) Extortion |
| | ) |
| | ) |
| MICHAEL TIRELLA | ) |

# I N D I C T M E N T

The Grand Jury charges that:

COUNT ONE

1. At all times material to this indictment, the Department of Inspectional Services ("DIS") was a department of the government of the City of Boston (the "City").

2. The functions of DIS included the review of building permit applications and the issuance of building permits for construction and renovation work being done in the City, consistent with the City's zoning code, City ordinances, and the State Building Code.

3. At all times material to this indictment, the defendant,

MICHAEL TIRELLA

was an employee of DIS, holding the position of Senior Structural and Safety Engineer. The defendant's official duties as Senior Structual and Safety Engineer included the review of building permit applications.

4. The building permit application review process relating to proposed building renovations, included a determination by DIS of the legal use and occupancy of the

building to be renovated. If the proposed renovation would result in a use or occupancy different than the current legal use of the building, and if that new use was inconsistent with the City's zoning code, a zoning variance from the Zoning Board of Appeals was required before a permit could be issued.

5. At all times material to this indictment, the East Coast Construction Company, Inc., ("East Coast") was a construction company doing renovation work in the City. Its president was Thomas Aikens, and its vice president was William Lojek. Through its purchase of building materials, supplies and labor from outside of Massachusetts, East Coast was engaged in interstate commerce.

6. In or about July, 1983, East Coast entered a contract with the 521 Columbus Avenue Limited Partnership, to renovate a building located at 521A-521 Columbus Avenue, in the City, into six (6) apartment units. In addition to being the general contractor, East Coast was also a limited partner in the project.

7. In or about July, 1983, Willam Lojek, on behalf of East Coast and the 521 Columbus Avenue Limited Partnership, submitted to DIS a building permit application to renovate 521A-521 Columbus Avenue into six (6) apartments. The defendant, MICHAEL TIRELLA, was responsible for reviewing this building permit application.

8. In or about July of 1983, in the District of Massachusetts, the defendant,

MICHAEL TIRELLA,

acting in concert with others, did knowingly, willfully and unlawfully commit extortion, which extortion obstructed, delayed and affected commerce, as the terms "extortion" and "commerce" are defined in 18 U.S.C. §1951(b)(2) and (3) respectively, in that the defendant TIRELLA, in connection with his review and issuance of the aforesaid building permit, did obtain payments of money, not due him or his office, in the amount of $5,000, more or less, from East Coast Construction Company, Inc., through its vice president, with their consent, induced by the wrongful use of fear of economic harm and under color of official right.

All in violation of 18 United States Code, Section 1951.

COUNT TWO

The Grand Jury further charges that:

1. Paragraphs 1-3 and 5 of Count One of this indictment are hereby realleged and incorporated herein by reference.

2. As part of the building permit application process, the applicant was required to furnish to DIS an estimated cost figure for the proposed construction or renovation work. This estimated cost figure had to be reviewed and approved by an employee of DIS, and the amount of the permit fee charged the applicant was based on the approved estimated cost figure.

3. In 1983, the fee charged for the issuance of a building permit was seven hundred dollars ($700) for the first one hundred thousand dollars ($100,000) of estimated cost, and ten dollars ($10) for each additional one thousand dollars ($1,000) of estimated cost.

4. In or about November, 1983, East Coast entered two contracts with Allen Realty Inc., to do approximately $580,000 of renovation work at 25 Huntington Avenue, Boston, MA, in the City.

5. In or about November, 1983, William Lojek, acting on behalf of East Coast and Allen Realty, Inc., submitted to DIS a building permit application to do the renovation work at 25 Huntington Avenue, which application included an estimated cost of construction of $200,000. The defendant MICHAEL TIRELLA was responsible for reviewing this building permit application.

6. In or about November, 1983, in the District of Massachusetts, the defendant,

MICHAEL TIRELLA,

did knowingly, willfully and unlawfully commit extortion, which extortion obstructed, delayed and affected commerce, as the terms "extortion" and "commerce" are defined in 18 U.S.C. §1951(b)(2) and (3) respectively, in that the defendant TIRELLA, in connection with his review and issuance of the aforesaid building permit, did obtain a payment of money not due him or his office, in the amount of $700 more or less, from the East Coast Construction Company, through its vice-president, with their consent, induced under color of official right.

All in violation of 18 United States Code, Section 1951.

A TRUE BILL

_____

Foreman of the Grand Jury

_____

Assistant United States Attorney

DISTRICT OF MASSACHUSETTS: , 19

eturned into the District Court by the Grand Jurors and filed.

_____

Deputy Clerk

APPENDIX G

# RICO AND THE TRAVEL ACT

BY

PAUL E. COFFEY*

Deputy Chief
Organized Crime and Racketeering Section
Criminal Division

* Paul Coffey has spent seven years as the Deputy Chief of the Organized Crime and Racketeering Section. He is responsible for reviewing all RICO prosecutions under the Section's guidelines.

# RICO AND THE TRAVEL ACT

In recent years, two statutes that were enacted primarily for the purpose of fighting organized crime have proven to be very effective in prosecuting cases involving official corruption: the Travel Act (18 U.S.C. § 1952) and the Racketeer Influenced and Corrupt Organizations (RICO) statute (18 U.S.C. § 1961 et seq.). Both of these statutes provide a jurisdictional basis for the prosecution of criminal activity that has an interstate nexus but does not ordinarily fall within the purview of a Federal criminal statute. Both statutes allow a Federal prosecution to be predicated on violations of state statutes, including state bribery statutes. As a result, these statutes, especially RICO in recent years, have been used to prosecute corrupt state and local officials.

This chapter will provide a short introduction to RICO and the Travel Act statutes and discuss their application in public corruption cases. For a detailed discussion of the RICO statute, the Criminal Division has published a monograph entitled Racketeer Influenced and Corrupt Organizations (RICO): A Manual for Federal Prosecutors. This monograph may be obtained from the Organized Crime and Racketeering Section. A comprehensive discussion of the Travel Act can be found at 24 American Criminal Law Review 125 (Summer 1986).

## RICO

The most frequently used provision of the RICO statute makes it unlawful for a person employed by or associated with an enterprise to conduct or participate in the affairs of the enterprise through a pattern of racketeering activity. 18 U.S.C. § 1962(c). In order to establish a Federal nexus, a RICO count must allege an enterprise that is engaged in or the activities of which affect interstate commerce.

It is now clearly established in RICO caselaw that a government entity can be an enterprise within the meaning of RICO. For example, where a public official has accepted bribes, extorted money, or participated in mail frauds in connection with the affairs of his governmental entity or political office, the public official's governmental entity or political office may constitute the necessary enterprise. State judicial circuits and courts have been upheld as enterprises within the meaning of RICO, as have state legislatures. To show the diversity of RICO, examples of RICO enterprises include: the Chicago Police Department; the Circuit Court of Cook County, Illinois; the Office of the Mayor of Syracuse, New York; the Lake County, Indiana, Prosecuting Attorney's Office; and the Chicago City Council.

In addition to the enterprise element, a RICO charge must also allege that the defendant conducted the affairs of the enterprise through a pattern of racketeering activity. A pattern of racketeering activity consists of two or more of the acts included in the definition of racketeering activity found in § 1961(1). Racketeering activity is defined as certain acts or threats that are chargeable under state law as felonies, and certain acts that are indictable under provisions of the United States Code. The most common state law felonies used in prosecutions involving public officials are bribery and extortion. Acts indictable under the United States Code that are most often used in RICO prosecutions of public officials include mail fraud, wire fraud, extortion under the Hobbs Act, and violations of the Travel Act. A "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which must have occurred within ten years of a prior act of racketeering activity. 18 U.S.C. § 1961(5).

The RICO statute has been used to prosecute public officials at all levels of the government. The mayors of Syracuse, New York; Chester, Pennsylvania; and the Village of Fox Lake, Illinois, have all been convicted of RICO, as have two members of the Philadelphia City Council and a Pennsylvania State Representative. Police officers in Chicago, Philadelphia and Miami have been convicted of conducting the affairs of their respective police departments through a pattern of racketeering activity. RICO has been used successfully to prosecute judicial corruption in Chicago, New York, Philadelphia and Florida. Other public officials convicted of RICO include a deputy commissioner of the Cook County, Illinois, Board of Tax Appeals; a commissioner on the West Virginia Alcohol Beverage Control Commission; and the warden of the Dauphin County, Pennsylvania prison.

While other Federal statutes have been effectively used against corrupt public officials, RICO is unique in that it allows for the presentation of the whole modus operandi of the corrupt activity. Through a RICO count, a prosecutor can lay out the RICO enterprise, the defendant's position in the enterprise and how the defendant abused his position in the enterprise through a pattern of corrupt activity. When public officials use their office as a vehicle for crime, a RICO count charges them with exactly that: using their office as a racketeering enterprise. RICO is an effective vehicle for presenting to a jury how a public official exploited his position. RICO is also unique in that it allows the prosecutor to charge a combination of crimes, both state and Federal, as part of a single racketeering scheme. While some cases involve only one kind of corrupt activity, such as bribery, other cases involve an abuse of office in a variety of ways such as fraud, narcotics, extortion, or obstruction of justice. RICO allows all of these offenses, if related to the defendant's position in the enterprise, to be presented as part of one pattern of racketeering. By using RICO, a prosecutor can paint a full

picture of the defendant's systematic exploitation of his official position.

## Advantages of RICO Prosecutions

There are several advantages to be gained by charging a RICO count in a public corruption prosecution. First, RICO allows for Federal prosecution of local officials based on state charges even if there are no other applicable or easily provable Federal charges. For example, in a series of RICO prosecutions involving Chicago police officers who extorted money from citizens involved in hit-and-run accidents, extortion under the Hobbs Act was not a viable charge because the extortions had no appreciable effect on interstate commerce. However, the interstate nexus was supplied in the RICO counts by the RICO enterprise -- the Chicago Police Department -- which did have an effect on interstate commerce. The RICO charges in these cases were predicated on violations of the state bribery statute.

This advantage of RICO in public corruption cases becomes even more important in light of the limitations recently placed on the mail fraud statute in McNally v. United States, ___ U.S. ___, 107 S. Ct. 2875 (1987). In kickback schemes such as the one in McNally, which are common in public corruption cases, there is often no tangible or provable loss to the government. However, the activity in such cases may well involve a violation of the state bribery statute. For example, kickbacks received in McNally by defendant Gray, who was a public official during the time of the kickback scheme, may possibly have constituted violations of the Kentucky bribery statute, violations that were aided and abetted by the other two defendants. If this were the case, the defendants in McNally could have been charged with RICO predicated on state bribery charges. A RICO count should be given serious consideration in kickback cases such as this, either instead of or in addition to, mail fraud charges.

A second advantage of using RICO in public corruption cases is that RICO allows the Government to charge offenses that might otherwise be barred by the statute of limitations. A RICO count falls within the limitations period as long as one of the racketeering acts falls within the five-year limitations period. As long as one act falls within the limitations period, other related offenses can be included as long as the last act was committed within ten years of a prior act (excluding any period of imprisonment). This aspect of RICO is very important in cases where the statute of limitations is about to run out on a corruption scheme that has lasted over a lengthy period. While it is possible that evidence of time-barred acts might be admissible under Rule 404 of the Federal Rules of Evidence, a properly pleaded RICO count insures the admissibility of this evidence.

A good example of this situation occurred in the Southern District of New York, where an employee of the New York City Department of Sanitation was found to be accepting bribes in return for allowing businesses to dump unauthorized toxic wastes into municipal landfills. The defendant had allegedly been accepting bribes over a twelve-year period, but only one payment clearly fell within the limitations period. By using RICO, the Government was able to present proof of the whole twelve-year pattern of racketeering. 1/ However, it should be noted in such a case that if only one act in the pattern occurred within the limitations period, the jury must find the defendant guilty of that particular act in order to convict the defendant of RICO. Otherwise a RICO violation within the limitations period will not be established.

A third advantage of using RICO in a public corruption case is that a RICO count can be used to present the whole corrupt scheme as a criminal enterprise and provide a unifying effect to an indictment. Additionally, a RICO count can allow for the presentation of charges in different ways to show all sides of the criminal activity. This approach was used in many of the Operation Greylord cases in Chicago. Operation Greylord was an investigation into corruption in the Cook County court system. As a result of this investigation, at least eight judges and numerous attorneys have been convicted. Most of the judges were charged with RICO, mail fraud and extortion. A good example of the use of RICO is the case of Judge Reginald Holzer, who was convicted of RICO and sentenced to a term of eighteen years. 2/ The RICO count covered a fifteen-year pattern of racketeering activity consisting of mail fraud, bribery, and extortion. Charging the offenses in alternative ways allows a jury to see all sides of the corrupt scheme.

Another extremely effective tactic, which was used in the case of Judge John Murphy, another Operation Greylord case, is to charge illegal payments received by a judge as state bribery violations in the RICO count and also as substantive Hobbs Act extortion counts. 3/ Charging the same payments as both bribery

---

1/ Additionally, a recent case in the Second Circuit has held that a RICO conspiracy, under 18 U.S.C. § 1962(d), may fall within the limitations period if the evidence establishes that the conspiracy continued into the limitations period, notwithstanding the fact that the defendant committed no predicate acts within the limitations period. See United States v. Persico, 832 F.2d 705, 713 (2d Cir. 1987).

2/ See United States v. Holzer, 816 F.2d 304 (7th Cir.), vacated and remanded in light of McNally, 108 S. Ct. 53 (1987). 108 S.

3/ See United States v. Murphy, 768 F.2d 1518 (7th Cir. 1985).

and extortion presents both sides of the corrupt activity. However, it should be noted that the Organized Crime and Racketeering Section does not encourage RICO prosecutions based solely on activity that is equally encompassed by the Hobbs Act. The penalties are similar in each statute and the Hobbs Act charge does not require proof of an enterprise or a pattern, so there is a lesser burden in a Hobbs Act prosecution. However, if there is a justification for using RICO, such as a statute of limitations problem with otherwise solid Hobbs Act charges, a RICO prosecution ordinarily will be authorized. Additionally, if the facts raise an issue as to whether the activity constitutes bribery or extortion, a RICO/bribery count juxtaposed with Hobbs Act counts can be effectively used to prevent the case from slipping through the bribery/extortion crack.

Still another advantage of a RICO prosecution is that a RICO count in an indictment allows the joinder of several corrupt schemes that might otherwise be subject to a motion for severance. An example of the effective use of RICO in such a case is the recent indictment of a county sheriff in West Virginia. The RICO count in that indictment, which charged that the defendant conducted the affairs of the Sheriff's Office through a pattern of racketeering activity, included predicates charging that the defendant paid bribes to attain the position of sheriff, participated in narcotics trafficking, extorted protection money from narcotics dealers, engaged in two mail fraud schemes, and attempted to obstruct justice. Since all of these offenses were related to the RICO enterprise and to the defendant's position of sheriff, they were properly included in the RICO count and the related substantive counts were properly joined. Without the RICO count, the defendant might have had a plausible argument that at least some of the schemes should be tried separately.

Finally, the serious penalties and potential forfeiture available under RICO are important factors to take into consideration. Under the new Sentencing Guidelines, RICO has a minimum base offense level of 19. While an equally high offense level may be available under the Hobbs Act, the RICO minimum level will probably be higher than the offense level for mail fraud or violations of the Federal bribery statutes. The alternative base offense level for RICO, under § 2E1.1 of the Guidelines, is the base offense level of the underlying racketeering activity. In some cases this level will be higher than 19. However, the minimum level of 19 is an important factor to consider in making a decision on what offenses to charge in a case.

The RICO forfeiture provisions can be used to forfeit the proceeds of racketeering activity, such as bribes, and in some cases can be used to forfeit pension, retirement benefits, salaries, and even the defendant's position in the enterprise. In cases involving state and local officials, however, it is generally the policy of the Department of Justice not to seek

forfeiture of political or public offices if the state has a mechanism for removing the defendant from his position upon conviction.

## Considerations in RICO Prosecutions

While there are many potential advantages in using RICO, there are also several factors to consider before charging a RICO count. First, RICO is a selective statute and should only be used where it meets a special need that would not be met by prosecution on only the underlying charges. In order to insure that RICO is used only in appropriate cases, all RICO indictments must be approved by the Organized Crime and Racketeering Section before the indictment can be presented to a grand jury. The RICO Guidelines, which are set forth in Chapter 110 of Title 9 of the United States Attorneys' Manual, describe the possible justifications for the use of RICO. Inclusion of a RICO count in an indictment solely or even primarily to create a bargaining tool for later plea negotiations on lesser counts is not appropriate.

With regard to the "pattern" element in RICO, it should be noted that a RICO count will only be authorized if there are at least two separate and distinct criminal episodes. Of all of the issues that arise between the Organized Crime Section and prosecutors, the "single episode" issue is by far the most common. This issue has not been addressed often by the courts in the context of criminal cases, primarily because the Organized Crime and Racketeering Section, in reviewing proposed criminal RICO prosecutions, has consistently taken a strict approach to the single episode issue. However, as a result of the recent surge in civil RICO litigation and a footnote in the Supreme Court's decision in Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275, 3285 n.14 (1985), this issue has seen a sudden burst of development in the courts. After Sedima, courts seized upon the single episode analysis to limit the reach of RICO in private civil RICO suits by finding that multiple acts of racketeering activity do not constitute a "pattern" under RICO when the acts all relate to a single scheme or episode. Courts are now using this analysis in evaluating criminal RICO indictments as well as civil RICO complaints.

The single episode rule is a grey area with no clear-cut guidelines. However, some examples can afford general guidance. Generally, a RICO count will not be approved that contains more than one predicate act arising from a single criminal episode. For example, if there is one bribe paid but five interstate telephone calls were made to arrange the bribe, this would constitute only one episode (and thus one racketeering act), even though several criminal offenses might be charged. Similarly, if one large bribe is paid in several installments, this will also

probably constitute one episode. 4/ In each case, at least one additional criminal episode will be necessary in order to charge a RICO count. However, the overlapping predicates in each racketeering act may be charged as sub-parts of a single racketeering act, thereby giving the prosecutor several opportunities to prove each racketeering act. This area can be confusing, and consultation with the Organized Crime and Racketeering Section is encouraged to analyze these issues. The more accurately a prosecutor can identify the single episode and sub-predicate issues, the more quickly the review of the RICO authorization request will be completed.

With regard to the RICO predicate acts, the Government must not only prove the acts but also establish a nexus between the acts and the affairs of the enterprise. This requires a showing that the facilities and services of the enterprises were utilized to make possible or facilitate the racketeering activity. In United States v. Kaye, 586 F. Supp. 1395 (N.D. Ill. 1984), a RICO count was dismissed because the indictment did not establish that the defendant, a part-time deputy sheriff, participated in the conduct of the Circuit Court's affairs. The indictment alleged that he solicited bribes from defendants in criminal cases but did not allege that he actually passed bribes on to judges.

With regard to predicate acts alleging violations of state law, RICO requires only that the offense be one that was chargeable generically under state law at the time it was committed. The fact that a state criminal statute does not classify offenses exactly the way they are classified under RICO does not prevent the statute from being used as a RICO predicate; state law is incorporated within RICO for definitional purposes only. For example, an Illinois statute entitled "Official Misconduct" proscribes conduct that could be generally defined as bribery. The Seventh Circuit recently ruled that a violation of the Official Misconduct statute is an act involving bribery for purposes of RICO. However, care must be taken to insure that the conduct charged is covered by the state statute. For example, the West Virginia bribery statute makes it an offense to "agree" to confer a pecuniary benefit to a public official, but does not make clear whether the agreement must be between the payer and the public official or can simply be between the payer and a co-conspirator. The state courts have never construed this aspect of the statute, thereby leaving the question open for the Federal court.

---

4/ On the other hand, in a case where a public official requests more money to carry out further actions, or agrees to receive a certain amount of money per month on a continuing basis, this may satisfy the pattern requirement.

## Drafting a RICO Indictment

If a decision is made to include a RICO count in a prosecution, it may be advisable to contact the Organized Crime and Racketeering Section for preliminary advice in drafting the RICO count. The Section has seen and reviewed more than 500 RICO prosecutions, of which approximately 25 percent have been public corruption cases, and it has a good background in determining where RICO works well or where RICO is redundant or counterproductive. Therefore, an initial consultation may be productive in determining whether to pursue RICO charges. Additionally, the Organized Crime and Racketeering Section has a large number of sample indictments that are available for review.

While every indictment must be drafted according to the nature of the individual case, there are certain drafting guidelines which, if followed, will facilitate the reviewing process. These guidelines were developed from successful prior prosecutions and are intended to promote uniformity in RICO indictments, which, in turn, should promote uniformity in the development of RICO case law.

The first guideline is to keep the RICO count as clear and simple as possible. There is a tendency to equate RICO's effectiveness with complex pleading. Actually, the reverse is true. RICO is effective in maintaining joinder among diverse crimes or in dealing with crimes barred by the statute of limitations, but there is no need for a RICO count to be complex in order to deal with these issues. The more complex the RICO pleading is, the more likely it will encounter judicial hostility because RICO is still an unfamiliar statute to many judges. To the greatest extent possible, predicate crimes should remain as simple as if they were separate counts to which an enterprise element has been added. If the pattern of racketeering consists of offenses that are also alleged as separate counts of the indictment, these counts can be incorporated by reference into the RICO count. In such a case the RICO count should be very concise.

If the racketeering acts consist of state offenses, or Federal offenses that are not charged in separate counts, then they must be set out in the RICO count. In such a case, each predicate act should be clearly set out so that it could stand as a separate count of an indictment, including venue, date of the offense, the defendants charged with that offense, and citation of the statute which was violated. If possible, each racketeering act should be designated and numbered as a predicate act or an act of racketeering so that the structure of the pattern of racketeering is evident. If there are multiple defendants who are not all charged with all of the predicate acts, it is useful to include a chart indicating which acts each defendant is charged with. This will make it easier for the judge and jury to grasp the nature of the RICO violation.

If both a substantive RICO count and a RICO conspiracy count are to be charged, the pattern of racketeering activity from the substantive RICO count can be incorporated by reference into the RICO conspiracy count. In our view, this approach is preferable to incorporating portions of the conspiracy count into the substantive count. However, it is legally permissible to incorporate language from a conspiracy count into a substantive count.

Incorporating conspiracy language, with its references to agreement and other features of conspiracy doctrine, can confuse the jury by making it appear that the substantive count contains unnecessary elements and language. There have been cases where a jury, faced with an association-in-fact enterprise to begin with, has during its deliberations operated on the mistaken belief that, to be guilty of a RICO substantive count, a defendant must have conspired or worked jointly with others. This mistaken notion is reinforced when RICO conspiracy language is incorporated into a substantive RICO count. In fact, as every prosecutor knows, a defendant can be guilty under section 1962(c) without having conspired with anyone to do anything. The chances for such confusion can be reduced if the substantive RICO count is incorporated into the RICO conspiracy count.

RICO conspiracy counts pose special drafting problems. There is no requirement that a RICO conspiracy charge include overt acts. There is no clear legal requirement that a RICO conspiracy count allege the details of the specific acts that make up the pattern of racketeering activity, but it is the policy of the Organized Crime and Racketeering Section that such details be included. It is unlikely that a RICO conspiracy count will be authorized unless a pattern of racketeering activity is alleged in specific detail, to the extent that the evidence will permit. If the evidence is such that it is difficult to allege specific details, the RICO count can be tailored to fit the circumstances.

If after reviewing the case a prosecutor believes that use of the RICO statute is warranted, a prosecutive memorandum and a copy of the proposed indictment, information, civil complaint, or civil investigative demand should be sent to the Organized Crime and Racketeering Section, in accordance with the provisions of Chapter 110 of Title 9 of the United States Attorneys' Manual. For further information, contact the Organized Crime and Racketeering Section at FTS 633-1564.

## The Travel Act

The Travel Act, 18 U.S.C. § 1952, like RICO, is another jurisdictional statute which is predicated on underlying criminal activity. The Travel Act proscribes interstate travel or the use of a facility in interstate commerce with the intent to promote, manage, establish, or facilitate unlawful activity, or to

distribute the proceeds of unlawful activity. In addition, the statute requires that the defendant commit an act in furtherance of the unlawful activity after the interstate travel occurs or the interstate facility is used. The statute provides a definition of unlawful activity that includes, inter alia, extortion or bribery in violation of state or Federal law. While the Travel Act has not been used extensively in public corruption cases since the use of RICO has increased, it still remains a viable alternative. Also, the Travel Act itself is a RICO predicate.

In many respects the Travel Act is similar to the RICO statute. The underlying criminal predicates are defined by reference to state law and to other Federal law. The role of state law under the Travel Act is definitional and only serves to identify generically the unlawful activity involved. For example, in United States v. Karigiannis, 430 F.2d 148 (7th Cir.), cert. denied, 400 U.S. 904 (1970), the court found that a portion of the Illinois theft statute was generically extortionate. However, one important distinction between RICO and the Travel Act is that, for purposes of the Travel Act, it does not matter that the predicate offense is only a misdemeanor under state law. United States v. Garramone, 380 F. Supp. 590 (E.D. Pa. 1974), aff'd, 506 F.2d 1053 (3rd Cir. 1974), cert. denied, 420 U.S. 992 (1975).

Bribery under the Travel Act includes bribery of a public official to influence the performance of an official act. It is not necessary that the official agree to perform a corrupt act; the bribe may be in return for that which it was the official's duty to do anyway. The influence purchased with the bribe could be informal influence attached to a prestigious office, rather than formal authority or control. The "bribery" continues not only until the bribed official receives payment, but also until any intermediary carrying the bribe is reimbursed by those providing the money for the bribe. United States v. Peskin, 527 F.2d 71 (7th Cir. 1975), cert. denied, 429 U.S. 818 (1976). This may be important if the reimbursements are interstate transactions or if they are the overt acts which follow the interstate travel.

Once an underlying unlawful act has been committed, the Travel Act has been violated whenever three elements are present: 1) interstate travel or use of an interstate facility; 2) with intent to promote the unlawful activity; and 3) a subsequent overt act in furtherance of the unlawful activity. A separate violation of the Travel Act occurs each time interstate travel occurs or an interstate facility is used, provided that the requisite intent is present and a later overt act occurs.

Virtually any facility may be used as a basis for a Travel Act prosecution as long as it is used in a way that touches two

or more states. A letter mailed between states, [5/] an interstate Federal Express delivery, an interstate telephone call, an interstate telegram wiring money, and even the use of interstate banking facilities are uses of commerce facilities sufficient for the Travel Act. For any use, however, an interstate transaction is required. Thus, using the interstate banking system to clear a check between two banks is insufficient unless the banks are in different states.

Under the Travel Act, the interstate act itself need not be illegal to constitute a violation. However, there is a split among the Circuits concerning the degree to which the interstate act must contribute to the unlawful activity. A number of Circuits have read the Travel Act narrowly to require that the strength of the relationship between the interstate act and the unlawful activity exceed a certain threshold. For example, the Seventh Circuit requires that the nature of the interstate activity be more than "fortuitous" and that the degree of the activity be more than "minimal" or "incidental." In United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1974), the court held that the fact that checks used in a bribery scheme were drawn on and deposited in banks in one state, but cleared through a Federal Reserve Bank in another state, was "fortuitous" and not a basis for a Travel Act violation. The Second Circuit, in United States v. Archer, 486 F.2d 670 (2nd Cir. 1970), adopted an approach similar to that of the Seventh Circuit. The Second Circuit may be moderating its stance in recent years, however. It commented in a later opinion that "unsavory" police practices "colored" its opinion in Archer. See United States v. Herrera, 584 F.2d 1137, 1146 (2nd Cir. 1978).

Several circuits have refused to adopt a rule requiring that use of a facility in interstate commerce be substantial or integral to the illegal scheme. The Fifth Circuit, in United States v. Garrett, 716 F.2d 257 (5th Cir. 1983), cert. denied, 466 U.S. 937 (1984), found no requirement that the degree of interstate activity be more than casual or incidental. In Garrett, the defendant made an interstate telephone call to a Government agent requesting funds to bribe a city councilman. The court rejected the defendant's argument that the telephone call was merely incidental to the commission of the offense. [6/]

---

5/ A recent Second Circuit case has held that when a Travel Act violation is based on an use of the mail, it is not necessary that the letter be mailed interstate. See United States v. Riccardelli, 794 F.2d 834 (2d Cir. 1986).

6/ However, the court noted that if the Government agent had traveled out-of-state for the sole purpose of artificially creating Travel Act jurisdiction, the outcome might have been different. 716 F.2d 266-68.

The Fourth, Sixth, and Eleventh Circuits have followed the broad interpretation of the Fifth Circuit. The rulings of several Circuits are as yet unsettled, having partially incorporated aspects of both the relaxed standard and the stricter standard.

One additional issue worthy of note is that of vicarious liability. By its own terms, the Travel Act applies only to those who personally travel or use facilities in interstate commerce. The courts are unanimous, however, in holding that when the interstate act is performed by the defendant's agents or employees at the request of the defendant, there is a sufficient nexus to convict the defendant of aiding and abetting the Travel Act violation. Similarly, co-conspirators are liable for each other's interstate acts when they further a common purpose, whether or not each co-conspirator actually knows of the interstate acts. The result is the same regardless of whether the co-conspirator is charged with conspiracy to violate the Travel Act or with a substantive violation of the Act. United States v. Barbieri, 614 F.2d 715, 720 (10th Cir. 1980).

The requisite nexus is not so clear when the interstate activity is performed by the defendant's customers or victims. In cases where the defendant clearly caused the interstate activity, courts have imposed liability. For example, in United States v. Hathaway, 534 F.2d 386 (1st Cir.), cert. denied, 429 U.S. 819 (1976), the court found sufficient causation where the defendant supplied the bribe payer with blank invoices addressed to an out-of-state location. Similarly, in United States v. Marquez, 449 F.2d 89 (2nd Cir. 1971), cert. denied, 405 U.S. 963 (1972), sufficient causation was found when the defendant sent the victim to Puerto Rico to secure funds to make the extortion payment. However, in United States v. Altobella, 442 F.2d 310 (7th Cir. 1971), the Seventh Circuit held that an extortionist did not violate the Travel Act by having a victim cash an out-of-state check.

Finally, to sustain a Travel Act conviction, the Government must show that the defendant, after traveling or using a facility in interstate commerce with the intent to conduct or facilitate unlawful activity, thereafter engaged in or attempted to engage in such activity. Thus, there must be an overt act after the interstate travel and it must be done by or on behalf of the defendant. However, this performance element need not necessarily be illegal in itself. This requirement can be met by the commission of a legal act as long as the act facilitates the illegal activity. United States v. Davis, 780 F.2d 838 (10th Cir. 1985).

In drafting a Travel Act indictment, care should be used to clearly set out each of the three elements of the offense: 1) interstate travel or use of an interstate facility; 2) with the intent to promote an unlawful activity; and 3) a subsequent overt act in furtherance of the unlawful activity. The general rule is that indictments that substantially track the statutory language

are acceptable provided that the indictment gives the defendant a description of the charge against him sufficient to enable him both to prepare his defense and to plead double jeopardy against a second prosecution. There is no need to specify whether the defendant is charged with "promoting," "carrying on," or "facilitating" an unlawful activity. The indictment need not cite the particular state or Federal statute on which the "unlawful activity" definition is based. Venue under the Travel Act is governed by section 3237 of Title 18, which states that prosecution may be initiated in any District in which the travel occurred. This includes the District in which the travel originated, any District through which the travel occurred even though no criminal activity was performed there, and the District in which the travel terminates.

APPENDIX H

# MAIL AND WIRE FRAUD

BY

JAMES M. COLE*

Trial Attorney
Public Integrity Section
Criminal Division

* James Cole has been a prosecutor with the Public Integrity Section for seven years.

The mail and wire fraud statutes have traditionally been an effective tool in prosecuting state and local corruption cases on a Federal level. Up until 1987, those statutes could reach any scheme by a public official to deprive the citizenry of its intangible rights to the public officials' honest and faithful services and to have their government institutions provided with all information material to their business.

In 1987 the Supreme Court's opinion in McNally v. United States, ____ U.S.____, 107 S. Ct. 2875 (June 24, 1987), worked a change in the law. The court found that a jury instruction that allows a conviction for depriving "the intangible rights of the citizenry to good government," Id. at 2879, was defective. This change, however, is not nearly as extreme as many have thought.

McNally held that the mail fraud state is "limited in scope to the protection of property rights." Id. at 2881 (emphasis added). Accordingly, the only mail fraud that can be perpetuated on a government is one that affects that government's interests as a property holder. Id. at 2881 n.8. Property rights, of course, include money. But as the opinion itself suggests, property also includes a broad spectrum of "rights". As stated in Curley v. United States, 130 F. 1 (1st Cir. 1904) (cited with approval in McNally), "the word (defraud) in legal acceptation refers to rights, as well as to property and money." Id. at 11. When interpreting what property rights are, the McNally Court stated:

> Durland v. United States, 161 U.S. 306, 16 S.Ct. 508, 40 L.Ed. 709 (1896), the first case in which this Court construed the meaning of the phrase "any scheme or artifice to defraud," held that the phrase is to be interpreted broadly insofar as property rights are concerned[.]

McNally v. United States, supra, at 2879-80.

A close reading of McNally and cases both before and after it show that several property rights of state and local government still exist in the area once covered by the traditional "intangible rights" theory.

## Salary

The most obvious property right the state has is in the salary it pays a public official for his services. One of the

early cases to articulate this theory was a concurrence by Judge Garwood in United States v. Curry, 681 F.2d 406 (5th Cir. 1982). The majority opinion in Curry recognized the validity of the intangible rights theory of mail fraud prosecution, but reversed the case because the trial court had failed to give a good faith instruction. Id. at 418. While concurring in the result, Judge Garwood wrote separately to criticize the broad intangible rights theory. He felt that to support a mail fraud conviction it must be shown that the scheme contemplated that the defendant gain or the victim lose something tangible or of actual or potential economic benefit. Id. In commenting on mail fraud cases involving corruption of public officials, Judge Garwood explicitly recognized that:

> [I]n all these cases where public officials and employees are corrupted, the government is deprived of something of an actual or potential economic worth, namely, the services of the official or employee whose compensation, office, and expenses are paid for by the government.

Id. at 419-20.

In Curley v. United States, supra, the court found that a scheme to use fraud to obtain a government job involved the deprivation of property.

> The purpose of the conspiracy here was not to secure an opportunity for a qualified person to discharge gratuitously the duties of an office under the federal government, but through fraud and deception to avoid the requirements of the law in respect to qualifications, and to secure, without such examination as the law and governmental regulations require, the privileges, immunities, and emoluments of an office for the duties of which the person was not qualified, the chief incentive and leading idea, of course, being to secure the statutory pay intended by the government as compensation for an official answering the requirements and qualifications of the law; and in this sense surely the object of the conspiracy had reference to money and property of the government.

Id. at 12-13.

Finally, as Justice Stevens stated in his dissent in McNally (and with which the majority did not disagree):

> When a person is being paid a salary for his loyal services, any breach of that loyalty would

> appear to carry with it some loss of money to the employer--who is not getting what he paid for.

McNally v. United States, supra at 2890 n.10 (Stevens, J., dissenting).

Control over Property

Another governmental property right recognized in McNally and related cases is the right to control one's property. This means that a person, or a government, or its citizens, has the right to be protected from a fraud which induces them to part with their property, even when they are paid a fair price.

In noting what types of instructions were not given to the jury, the McNally Court recited several types of governmental property interests, any of which apparently would have been sufficient to sustain the conviction. The last was control over how the government's money was spent. Id. at 2882. The concept has been recognized in cases both before and after McNally. The "intangible nature [of this right] does not make it any less 'property' protected by the mail and wire fraud statutes. McNally did not limit the scope of Section 1341 to tangible as distinguished from intangible property rights." Carpenter v. United States, _____ U.S. ____, 108 S.Ct. 316, 320 (1987). Furthermore, a scheme to defraud need not involve a monetary loss. Id. at 321.

United States v. Fagan, 821 F.2d 1002 (5th Cir. 1987), involved a corporate employee who accepted kickbacks from a person who was renting boats to the company. Id. at 1005. The defendant contended that his rental price for the boats was competitive. Id. at 1009. The court nonetheless found the scheme to defraud to be one involving property rights because the company was induced to part with its rental payments (even though it was a fair price) based on a false premise (i.e., that its employee was not taking kickbacks). Id. at 1009-10. This was held to be so even in light of McNally. United States v. Fagan, supra at 1010 n.6. 1/

A quote in Fagan from a pre-McNally case is instructive in this regard:

---

1/ In footnote 6, the Fagan court lists three separate and independent property rights that it finds to be in accord with McNally. Control of property is one of them which can stand without the other two.

> A man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value.

Id. at 1010 (quoting United States v. George, 477 F.2d 508, 513 (7th Cir.), cert. denied, 414 U.S. 827 (1973), which was in turn quoting United States v. Rowe, 56 F.2d 747, 749 (2d Cir.), cert. denied, 286 U.S. 554 (1932)) (emphasis added). Accord United States v. Fischl, 797 F.2d 306, 312 (6th Cir. 1986).

The control-over-property concept is bolstered by other language in McNally. In commenting on Justice Stevens' dissent, the majority notes that the case does not involve any state laws that prohibit a public official from having a financial interest in companies doing business with the state official's agency or which require the official to disclose such interests. McNally v. United States, supra at 2882 n.9. The Court elaborates:

> But, if state law expressly permitted or did not forbid a state officer, such as Gray, to have an ownership interest in an insurance agency handling the State's insurance, it would take a much clearer indication than the mail fraud statute evidences to convince us that having and concealing such an interest defrauds the State and is forbidden under federal law.

Id.

The converse of this principle is that where a state does have laws concerning a public official's financial interest in entities doing business with his state agency and laws concerning disclosure of those interest by the public official, the mail fraud statute can and does reach frauds that are designed to defeat that statutory scheme. This is clear because such statutory schemes are necessarily designed to preserve the state's control over its property rights. Ingber v. Enzor, 664 F. Supp. 814, 822 (S.D.N.Y. 1987). Many state codes contain a statutory scheme which can be used in this context.

Constructive Trust

A third governmental property right that survives McNally is the constructive trust. This is suggested in Justice Stevens' dissent:

> Additionally, "[i]f an agent receives anything as a result of his violation of a duty of loyalty to the principal, he is subject to a liability to

deliver it, its value, or its proceeds, to the principal." Restatement (Second) of Agency §403 (1958). This duty may fulfill the Court's "money or property" requirement in most kickback schemes.

McNally v. United States, supra at 2890, n.10 (Stevens, J., dissenting). This theory would cover situations where a public official receives a bribe or kickback for his official duties.

Since McNally this theory has been accepted by the Fifth and Sixth Circuits. In United States v. Fagan, supra, the Fifth Circuit stated that a property right would be found in an employer's right to receive the kickbacks or bribes that were given to its employees. Id. at 1011, n.6. In United States v. Runnels, 833 F.2d 1183 (6th Cir. 1987), the Sixth Circuit held the constructive trust theory to be a property right capable of supporting a mail fraud conviction post-McNally. Id. at 1187-88.

## Conclusion

While McNally has worked a change in the nature of mail and wire fraud prosecutions, it has not foreclosed the use of the statutes in the public corruption field. With some careful drafting and specific definition of the nature of the property right being defrauded, most state and local corruption can still be prosecuted Federally.

Attached are sample conspiracy and substantive mail fraud counts from an indictment that was brought before the McNally decision. By supplementing the language describing the deprivation of honest and faithful services of the public official and the deprivation of material information which is necessary for governmental decision with additional language explaining the "deprivation of salary" and "deprivation of control of government property" theories, the indictment should withstand a post-McNally attack.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA



INDICTMENT FOR CONSPIRACY AND MAIL FRAUD

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | : | |
| | : | |
| VERSUS | : | CRIMINAL NO. 86-92-A |
| | : | |
| | : | VIOLATIONS: 18 USC 371 |
| WILLIAM C. HULS | : | 18 USC 1341 |
| MARSDEN W. MILLER, JR. | : | 18 USC 2 |

The Grand Jury Charges:

COUNT 1

At times relevant to this Indictment:

1. The Louisiana Department of Natural Resources (DNR) was a department established under the laws of the State of Louisiana (State), whose function, among other things, was to administer the laws and regulations of the State concerning the drilling for and production of oil and gas on lands owned by the State. DNR was headed by a Secretary appointed by the Governor of the State.

2. The Louisiana State Mineral Board (Mineral Board) was a body established under the laws of the State as a part of DNR whose function, among other things, was to receive bids for mineral leases on State lands, to consider, review, and deliberate concerning such bids, and award or reject such bids. Its members were appointed by the Governor of the State and included the Secretary of DNR.

3. The Louisiana Commission on Ethics for Public Employees (Ethics Commission) was a body established under the laws of the State with the responsibility, among other things, to administer and enforce the State Ethics Code and render advisory opinions to public officials concerning their conduct in public office.

4. The Secretary of DNR served as the executive and chief administrative officer of DNR and his compensation, office, and expenses were paid for by the taxpayers of the State. The Secretary of DNR also served as a member of the Mineral Board. The Secretary of DNR had the duty, among other things, to represent the public interest in matters relating to his office.

5. From in or about March of 1984, through in or about November 1984, the defendant, WILLIAM C. HULS, was the Secretary of DNR.

6. The Texas International Petroleum Company (TIPCO) was a corporation engaged in oil and gas exploration with its principal offices located in Oklahoma City, Oklahoma.

7. From in or about March of 1980, to in or about March of 1984, the defendant WILLIAM C. HULS was a consultant for TIPCO at a monthly salary of approximately $20,000.

8. The Exploration Company of Louisiana (XCL) was a corporation engaged in the exploration of oil and gas with its principal offices located in Lafayette, Louisiana.

9. The defendants, WILLIAM C. HULS and MARSDEN W. MILLER, JR. (MARSDEN W. MILLER) were founders and stockholders of XCL.

10. The Chief Executive Officer of XCL was MARSDEN W. MILLER. In addition, MARSDEN W. MILLER was the sole owner and Chief Executive Officer of Village Green, Inc., Miller Investments, Inc., and Southern Operators, Inc.

11. An "overriding royalty interest" was an interest in the production of an oil or gas well whereby the owner of the interest received a share of all revenues from the well and did not pay any of the costs of production.

12. A "working interest" was an interest in an oil or gas lease or well whereby the owner of the interest was required to contribute a share of the costs of production and then received a share of the revenue from the well.

13. In order to obtain a mineral lease on State lands, the lands had to first be nominated for bid prior to the lease sale day which was the second Wednesday of each month.

14. On the lease sale day any interested party could submit a sealed bid to the Mineral Board containing, among other things, an offered bonus price to be paid per acre of land to be awarded under the lease or leases bid upon.

15. The Mineral Board, in closed session, decided whether to award or reject the bids that were submitted.

16. If the Mineral Board awarded a lease or leases, the lessee paid the bonus price to the State and had the exclusive right to drill for oil or gas on that land for at least one year.

## Conspiracy

17. From in or about November 1983, through in or about June 1985, the exact time being unknown to the Grand Jury, in the Middle District of Louisiana and elsewhere, the defendants, WILLIAM C. HULS and MARSDEN W. MILLER, did knowingly, willfully, and unlawfully combine, conspire, and agree together and with others known and unknown to the Grand Jury, to commit offenses against the United States, that is, to violate Title 18, United States Code, Section 1341, by using and causing the use of the mails in furtherance and in execution of a scheme and artifice to defraud the citizens of the State of Louisiana of their right to the honest, faithful, and impartial services of WILLIAM C. HULS, and of the right to have the functions of DNR, the Mineral Board, and the Ethics Commission administered honestly, fairly, impartially, free from abuse, free from corruption, free from self-dealing, and with all information which is material to their business.

## Objects

18. The objects of the conspiracy were:

(a) To allow WILLIAM C. HULS to maintain his substantial economic and financial interests in XCL without there appearing to be self-dealing and a conflict of interest with his official duties as Secretary of DNR.

(b) To conceal from and fail to disclose to the Ethics Commission WILLIAM C. HULS' substantial economic and financial interests in XCL.

(c) To conceal from and fail to disclose to the Mineral Board WILLIAM C. HULS' substantial economic and financial interests in XCL.

(d) To allow WILLIAM C. HULS to serve on the Mineral Board and perform official acts in transactions which were beneficial to XCL and TIPCO despite his having substantial economic and financial interests in XCL at the time.

Manner and Means

19. The conspiracy was accomplished through the following manner and means:

(a) WILLIAM C. HULS and his family would and did own stock in XCL.

(b) WILLIAM C. HULS would and did own overriding royalty interests in approximately 60 oil or gas wells. XCL was the operator on approximately 54 of the wells and was a working interest participant in approximately 6 of the wells.

(c) XCL would and did issue checks to WILLIAM C. HULS throughout 1984 which represented his share of the revenues from his overriding royalty interests.

(d) WILLIAM C. HULS would and did own a working interest with XCL in at least one oil or gas well.

(e) XCL would and did issue checks to WILLIAM C. HULS throughout 1984 which represented his share of the profits from his working interest.

(f) WILLIAM C. HULS would and did represent to the Ethics Commission and to the citizens of the State of Louisiana that he had divested himself of all of his stock in XCL and was no longer involved in the business of XCL so that it would appear that WILLIAM C. HULS, as a member of the Mineral Board and the Secretary of DNR, would not be self-dealing and would not have a conflict of interest when he took part in official action which would affect XCL.

(g) WILLIAM C. HULS and MARSDEN W. MILLER would and did enter into an agreement purporting to be a sale of WILLIAM C. HULS' and his family's XCL stock to MARSDEN W. MILLER, whereas, in fact, this was not a genuine sale but a sham sale of the stock.

(h) WILLIAM C. HULS would and did, with MARSDEN W. MILLER, continue to be involved in the business of XCL while WILLIAM C. HULS was Secretary of DNR.

(i) In or about April 1984, while WILLIAM C. HULS was Secretary of DNR, XCL, at the direction of MARSDEN W. MILLER, would and did purchase for WILLIAM C. HULS a new 1984 Mercedes Benz automobile; model 300D-T, at a cost of $29,721.

(j) WILLIAM C. HULS would and did receive and use the 1984 Mercedes Benz automobile while he was Secretary of DNR.

(k) During the time that WILLIAM C. HULS was Secretary of DNR, XCL, at the direction of MARSDEN W. MILLER, would and did

pay for health insurance coverage for WILLIAM C. HULS.

(l) During the time that WILLIAM C. HULS was Secretary of DNR, XCL, at the direction of MARSDEN W. MILLER, would and did pay for the use of private chartered aircraft for WILLIAM C. HULS.

(m) WILLIAM C. HULS would and did conceal from and fail to disclose to the Ethics Commission his true economic and financial interests in XCL as described above.

(n) XCL, with the knowledge of WILLIAM C. HULS and MARSDEN W. MILLER, would and did become a joint and equal partner with TIPCO in the bidding on leases for 19,000 acres of State lands known as the Terrebonne Trough.

(o) TIPCO and XCL would and did submit a bid to the Mineral Board on these lands only in the name of TIPCO.

(p) WILLIAM C. HULS would and did, as Secretary of Department of Natural Resources and as a member of the Mineral Board, participate in the awarding by the Mineral Board of the leases to TIPCO and XCL.

(q) WILLIAM C. HULS would and did, as Secretary of Department of Natural Resources and as a member of the Mineral Board, participate in the release by the Mineral Board of TIPCO and XCL from a requirement of providing the Mineral Board with a $5,000,000 letter of credit as a condition of being awarded the leases.

(r) WILLIAM C. HULS would and did conceal from and fail to disclose to the Mineral Board his substantial economic and financial interests in XCL, and XCL's substantial economic and financial interest in the Terrebonne Trough leases.

(s) WILLIAM C. HULS and MARSDEN W. MILLER would and did mail items and cause items to be mailed via the United States Postal Service in furtherance of the scheme and artifice to defraud.

## OVERT ACTS

20. In furtherance of the conspiracy and in order to accomplish the objects thereof, the defendants WILLIAM C. HULS and MARSDEN W. MILLER performed, in the Middle District of Louisiana and elsewhere, the following overt acts:

(a) Subparagraphs 19, (b) through (r) are realleged and incorporated herein by reference as overt acts.

(b) On or about March 9, 1984, WILLIAM C. HULS pledged his overriding royalty interest as collateral for all indebtedness due to Republic Bank Dallas for loans and advances made to XCL as evidenced by a promissory note executed by XCL in the principal sum of $10,000,000 payable to Republic Bank Dallas.

(c) On or about June 20, 1984, HULS endorsed a $20,000 check issued at the direction of MILLER and had it deposited into HULS' personal bank account.

(d) On or about July 19, 1984, HULS endorsed a $55,000 check issued at the direction of MILLER and had it deposited into HULS' personal bank account.

(e) On or about October 1, 1984, HULS endorsed a $20,000 check issued at the direction of MILLER and had it deposited into HULS' personal bank account.

(f) On or about November 23, 1984, HULS endorsed a $20,000 check issued at the direction of MILLER and had it deposited into HULS' personal bank account.

(g) On or about January 7, 1985, HULS endorsed a $20,000 check issued at the direction of MILLER and had it deposited into HULS' personal bank account.

(h) On or about January 21, 1985, HULS endorsed a $20,000 check issued at the direction of MILLER and had it deposited into HULS' personal bank account.

(i) On or about February 22, 1985, HULS endorsed a $20,000 check issued at the direction of MILLER and had it deposited into HULS' personal bank account.

(j) On or about August 3, 1984, MILLER signed a consulting agreement with TIPCO which was dated March 1, 1984.

(k) On or about July 11, 1984, HULS participated in the Mineral Board's awarding of 19,000 acres of State mineral leases to TIPCO and XCL in the name of TIPCO.

(l) On or about August 7, 1984, HULS participated in the Mineral Board's release of TIPCO and XCL from having to provide

the Mineral Board with a $5,000,000 letter of credit as a condition of being granted the aforesaid leases.

The above is a violation of Title 18, United States Code, Section 371.

COUNT 2

21. The Grand Jury realleges the allegations contained in Count 1 of this Indictment, excepting paragraphs 17 and 20(a) thereof, as constituting a part of the scheme and artifice to defraud.

22. For the purpose of executing and in order to effect the scheme and artifice to defraud the citizens of the State of Louisiana of their right to the honest, faithful, and impartial services of WILLIAM C. HULS, and of the right to have the functions of DNR, the Mineral Board, and the Ethics Commission administered honestly, fairly, impartially, free from abuse, free from corruption, free from self-dealing, and with all the information which is material to their business, the defendants, WILLIAM C. HULS and MARSDEN W. MILLER, aided and abetted by each other, on or about the date set forth below, knowingly caused the item listed below to be sent, delivered, and moved through the Middle District of Louisiana and elsewhere, via the United States Postal Service:

| Date | Item |
|---|---|
| January 24, 1984 | Letter from William D. Brown to R. Gray Sexton of the Ethics Commission. |

The above is a violation of Title 18, United States Code, Sections 1341 and 2.

COUNT 3

23. The Grand Jury realleges the allegations contained in Count 1 of this Indictment, excepting paragraphs 17 and 20(a) thereof, as constituting a part of the scheme and artifice to defraud.

24. For the purpose of executing and in order to effect the scheme and artifice to defraud the citizens of the State of Louisiana of their right to the honest, faithful, and impartial services of WILLIAM C. HULS, and of the right to have the functions of DNR, the Mineral Board, and the Ethics Commission administered honestly, fairly, impartially, free from abuse, free from corruption, free from self-dealing, and with all the information which is material to their business, the defendants, WILLIAM C. HULS and MARSDEN W. MILLER, aided and abetted by each other, on or about the date set forth below, knowingly caused the item listed below to be sent, delivered, and moved through the Middle District of Louisiana and elsewhere, via the United States Postal Service:

| Date | Item |
|---|---|
| June 15, 1984 | $20,000 check payable to WILLIAM C. HULS written on the account of Village Green, Inc. |

The above is a violation of Title 18, United States Code, Sections 1341 and 2.

APPENDIX I

# CONSPIRACY TO DEFRAUD THE UNITED STATES

BY

JAMES M. COLE*

Trial Attorney
Public Integrity Section
Criminal Division

* James Cole has been a prosecutor with the Public Integrity Section for seven years.

## CONSPIRACY TO DEFRAUD THE UNITED STATES

The general Federal conspiracy statute, 18 U.S.C. § 371, covers more than just conspiracies among two or more people to commit some other crime covered by another Federal criminal statute. It also covers conspiracies to "defraud the United States." This means that any conspiracy to impair, obstruct, or defeat a lawful function of any part of the Federal government can be prosecuted under section 371 even though the activity is not in violation of any specific statute or regulation and does not involve any intended financial loss to the Government. Haas v. Henkel, 216 U.S. 462, 479 (1910).

In order to make a case under this prosecutive theory, it is not enough to show that the defendants conspired to simply thwart a governmental function. The statute prohibits conspiracies to defraud the United States and, therefore, requires proof that the conspiratorial ends were to be carried out through deceit, craft, or trickery. Hammerschmidt v. United States, 265 U.S. 182, 188-89 (1924).

For example, a conspiracy to gain advance information about the contents of crop reports by bribing a public official would involve frustration of a lawful governmental function (secrecy of crop reports) through a fraudulent means (the use of the bribe) and would fall within the statute. Haas v. Henkel, supra. However, while openly advocating, counseling, and promoting resistance to the selective service laws would frustrate the lawful governmental function of raising an army, it would not fall within the statute because by being done openly there is no deceit, craft, or trickery involved. Hammerschmidt v. United States, supra.

Most of the time activity that amounts to a conspiracy to defraud will violate other more specific laws. For example, bribery of a Federal official to induce an unlawful act is covered by 18 U.S.C. § 201 and would also be covered by section 371 conspiracy to defraud the United States. Section 371 can nonetheless be a useful tool with which to bring a conspiracy count when the specific statutory violation will not permit it. As an example, in a bribery case where there are only two participants, a bribe-giver and a bribe-taker, you cannot bring a charge of conspiracy to commit bribery because of the Wharton Rule (if a crime requires two participants, a conspiracy count cannot be brought if only two participants are involved). You can, however, charge a section 371 conspiracy to defraud the United States because it does not require two people to frustrate a lawful Government function. Glasser v. United States, 315 U.S. 60, 66-67 (1942).

Section 371 can also be used to prosecute diversions of Federal funds for political purposes. Langer v. United States, 78 F.2d 817 (8th Cir. 1935) involved a prosecution of a state Governor for requiring his employees, who were paid with Federal funds, to kick back a small percentage of their pay to his reelection campaign. While the workers still performed the job for which the Federal funds were paid, those funds were nevertheless diverted from their intended purpose. Accord, United States v. Pintar, 630 F.2d 1270 (8th Cir. 1980).

Section 371 may not be the most frequently used statute in a prosecutor's arsenal, but it is one worth considering in the appropriate case. It is capable of covering a great deal of corrupt activity that may not be covered by any other specific statutes. In cases involving the Federal government, it can be used to reach most of the areas known as "intangible rights to good government" which McNally v. United States, 107 S.Ct. 2875 (1987), has now cut out in the state and local fields.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | INDICTMENT |
| | ) | (18 U.S.C. S371; - conspiracy |
| MICHAEL A. PINTAR | ) | 18 U.S.C. S1341; - mail fraud |
| BARBARA PINTAR | ) | 18 U.S.C. S600; - |
| | ) | 42 U.S.C. S3220) |
| Defendants. | ) | |
| | ) | |

The Grand Jury Charges:

COUNT I

At all times material to this Indictment:

1. The Upper Great Lakes Regional Commission (hereafter referred to as the Commission) was a federal agency authorized to award grants for the purpose of encouraging regional economic development in designated areas in the States of Michigan, Minnesota and Wisconsin.

2. Funds for the Upper Great Lakes Regional Commission were provided in whole or in part by periodic appropriation of the United States Congress.

3. The Commission was composed of a Federal Cochairman and the Governors of the States of Michigan, Minnesota and Wisconsin. The Governor of the State of Minnesota employed an alternate and a staff representative to assist in carrying out his duties as a member of the Commission.

4. MICHAEL A. PINTAR was employed as the staff representative to the Commission on behalf of the Governor of Minnesota. In this capacity he had responsibility for recommending and overseeing particular grants made by the Commission. The salary of MICHAEL A. PINTAR was paid out of federal grant money to the State of Minnesota.

5. BARBARA PINTAR was employed by the Commission as a secretary. The salary of BARBARA PINTAR was paid, in part, by federal grant money.

6. DONALD C. BOYD operated organizations which received money from the Commission. These organizations included the

Northern Minnesota Small Business Development Center and the Duluth Area Economic Development Office. Said money was entrusted to Donald C. Boyd for his use in the faithful and honest administration of grant programs approved by the Commission.

7. The Minnesota Department of Economic Development was an agency of the State of Minnesota established for the purpose of encouraging economic development in the State of Minnesota. In furtherance of this function, from time to time, this agency submitted applications for grants to the Commission and received funds pursuant thereto.

OBJECT OF CONSPIRACY

From in or about May, 1972 to in or about July, 1977, in the District of Minnesota and elsewhere, the defendants, MICHAEL A. PINTAR and BARBARA PINTAR, did knowingly and willfully combine, conspire, confederate and agree together and with each other and with others to the grand jury known and unknown to defraud the United States of its right to have programs of an agency financed in whole or in part with money provided by the United States Government, namely, the Upper Great Lakes Regional Commission, administered honestly, fairly, without corruption or deceit, and free from the use of federal funds to accomplish political objectives, for personal uses, or for other purposes unrelated to legitimate Commission business.

MANNER AND MEANS

1. It was a part of the conspiracy that MICHAEL A. PINTAR would travel or claim to travel to Miami, Florida, Omaha, Nebraska, and elsewhere, at the expense of the Commission, for purposes unrelated to the legitimate business of the Commission.

It was a further part of the conspiracy that MICHAEL A. PINTAR would recommend that grant money from the Commission be made available to the Northern Minnesota Small Business Development Center and the Duluth Area Economic Development Office.

3. It was a further part of the conspiracy that the Northern Minnesota Small Business Development Center and the Duluth Area Economic Development Office would receive funds either directly from the Commission or indirectly from the Commission through the Minnesota Department of Economic Development.

4. It was a further part of the conspiracy that MICHAEL A. PINTAR and BARBARA PINTAR would hire and cause to be hired Shirley Baker as an employee of the Northern Minnesota Small Business Development Center.

5. It was a further part of the conspiracy that MICHAEL A. PINTAR and BARBARA PINTAR would hire and cause to be hired Sharon Backstrom as an employee of the Northern Minnesota Small Business Development Center.

6. It was a further part of the conspiracy that MICHAEL A. PINTAR would hire and cause to be hired Ann Zweber as an employee of the Duluth Area Economic Development Office.

7. It was a further part of the conspiracy that MICHAEL A. PINTAR and BARBARA PINTAR would direct and authorize and cause to be directed Shirley Baker, Sharon Backstrom and Ann Zweber to perform political functions unrelated to legitimate purposes of Commission grants.

8. It was a further part of the conspiracy that MICHAEL A. PINTAR and BARBARA PINTAR, during the time they were employees of the Commission and during business hours, would engage in political activities unrelated to the legitimate business or purposes of the Commission.

9. It was a further part of the conspiracy that MICHAEL A. PINTAR and BARBARA PINTAR would conceal and attempt to conceal the aforementioned facts relating to political activities.

OVERT ACTS

The Grand Jury charges that in furtherance of the aforesaid conspiracy and to accomplish the objects thereof, the conspirators, in the District of Minnesota and elsewhere, did commit the following overt acts:

1. In or about May, 1972, MICHAEL A. PINTAR traveled from Duluth, Minnesota to Omaha, Nebraska.

2. In or about July, 1972, MICHAEL A. PINTAR traveled from Duluth, Minnesota to Miami, Florida.

3. In or about June, 1973, BARBARA PINTAR interviewed Shirley Baker.

4. In or about June, 1973, MICHAEL A. PINTAR offered Shirley Baker employment.

5. In or about the summer of 1973, MICHAEL A. PINTAR and BARBARA PINTAR instructed Shirley Baker to distribute raffle tickets.

6. From in or about April, 1973 to in or about April, 1974, MICHAEL A. PINTAR and BARBARA PINTAR instructed Shirley Baker to type Democratic Farmer Labor Party precinct caucus lists.

7. In or about June, 1974, BARBARA PINTAR instructed Shirley Baker to work on the Octoberfest for Congressional candidate James Oberstar.

8. In or about July, 1974, MICHAEL A. PINTAR and BARBARA PINTAR instructed Shirley Baker to collect political contributions for the Senatorial campaign of Wendell Anderson.

9. In or about January, 1975, MICHAEL A. PINTAR and BARBARA PINTAR instructed Shirley Baker to prepare invitations to a ceremony on behalf of Duluth Mayor Robert Beaudin.

10. In or about July, 1975, BARBARA PINTAR offered Sharon Backstrom employment.

11. In or about August, 1976, BARBARA PINTAR instructed Sharon Backstrom to address and stuff envelopes for the legislative campaign of Thomas Berkleman.

12. In or about November, 1976, BARBARA PINTAR instructed Sharon Backstrom to obtain lists of names from the county welfare office.

In violation of Title 18, United States Code, Sections 371 and 2.

APPENDIX J

TAX CHARGES

BY

JOSEPH A. GROFF*

Assistant United States Attorney
District of Maine

* Joseph Groff has been an Assistant United States Attorney in the District of Maine for the past six years. Before that, he was a trial attorney with the Tax Division, Criminal Section, Department of Justice.

# UTILIZATION OF CRIMINAL TAX LAWS AND TAX INFORMATION IN POLITICAL CORRUPTION CASES

I. How to make the IRS part of the investigation.

A. Request that the Chief of the District IRS Criminal Division assign an agent to analyze the material available and/or draft a letter to the District Director via the Chief of the Criminal Investigation Division.

B. If IRS assistance is not sought, consider obtaining tax information pursuant to 26 U.S.C. § 6103(i) (see attached Department of Justice forms).

C. IRS involvement must be approved by the IRS Regional Counsel and the Regional Commissioner.

D. Obtain Tax Division Department of Justice authorization to conduct a Title 26 investigation.

E. At the conclusion of the investigation have a Special Agent's report prepared and obtain Tax Division approval of the proposed charges.

F. In the event of a plea to a tax charge, be aware of the necessity to have enough public information as factual basis for the plea to avoid Rule 6(e) problems concerning grand jury disclosure prior to a contested civil assessment.

II. Commonly utilized statutes to prosecute tax violations related to political corruption.

A. Title 26 offenses.

1. Section 7201(1) - tax evasion (felony).

2. Section 7206(1) - subscribing under penalties of perjury to a false tax return (felony).

3. Section 7206(2) - aiding and abetting subscribing under penalties of perjury to a false tax return (felony).

4. Section 7203 - failure to file (misdemeanor).

5. Section 7207 - submission of false document (misdemeanor).

B. Title 18 offenses

1. Section 371 - conspiracy to commit offense or defraud the United States.

(a) conspiracy to violate substantive criminal tax statutes.

(b) conspiracy to defraud the United States by impeding and impairing the lawful function of the IRS.

2. Section 1001 - false statements.

NOTE: In all cases, Tax Division approval must be obtained. For detailed discussion of the law applicable to each statute, methods of proof and proposed indictment forms, utilize the 3-volume Criminal Tax Manual prepared and disseminated by the Criminal Section, Tax Division.

III. Examples of tax prosecution in political corruption cases.

A. Failure to report income (I.R.C. Section 61 includes in gross income "all income from whatever source derived").

1. Bribery: United States v. Isaacs, 493 F.2d 1124, 1161, cert. denied, 417 U.S. 876 (1974) (race track stock purchased by Government official for a fraction of actual value).

2. Gratuities received by Government employees: United States v. St. Pierre, 377 F.Supp. 1063 (S.D. Fla. 1974), aff'd, 510 F.2d 383 (5th Cir. 1975).

3. Loans with no intent to repay: United States v. Pomponio, 429 U.S. 10 (1976).

4. Campaign contributions, when used for personal purposes. United States v. Scott, 660 F.2d 1145, 455 U.S. 907 (1982).

5. Extortion proceeds: Rutkin v. United States, 343 U.S. 130, 131 (1952).

6. Diversion of corporate funds is an understatement of the corporate income and income to the recipient: United States v. Thetford, 676 F.2d 170 (5th Cir. 1982), cert. denied, 459 U.S. 1148.

B. False entry on tax return (not gross income).

1. False source but correct figures: In United States v. DiVarco, 484 F.2d 670 (7th Cir. 1973), the Government merely proved that the source stated on the return was false; but did not prove an understatement of income or a tax deficiency. The conviction was upheld: "a misstatement as to the source of income is a material matter."

C. Aiding and abetting others in filing a false return (Section 7206(2)).

1. Although the statute has long been directed at fraudulent return preparers, it can be used against anyone who caused a false return to be filed and the defendant need not have actually prepared the return.

2. In political corruption cases, this statute is uniquely suited to deal with the middlemen who facilitate the payment of the bribe or campaign contributions.

3. Examples:

(a) United States v. McCrane, 527 F.2d 906 (3d Cir. 1975), vacated and remanded on another issue, 427 U.S. 909 (1976), reaff'd as to § 7206(2) count, other counts vacated and remanded, 547 F.2d 204 (3d Cir. 1976). The defendant solicited political contributions as finance chairman for a gubernatorial candidate. Fictitious invoices for advertising services were issued in some instances to disguise the payments as business expenses, which were then used as deductions on the contributor's income tax returns. The arrangement was carried out by a small public relations firm engaged by the defendant.

(b) United States v. Kopituk, 690 F.2d 1289 (11th Cir. 1982), cert. denied, 463 U.S. 1209 (1983). Defendants made payoffs to union officials but falsely reflected the payments in corporate records as being for "commissions", "repairs", and other items. Pointing out that even if it is true that the defendant never examined the returns which were prepared by their accountant, the court went on to say:

> Since the tax returns were prepared in reliance upon the information supplied by appellants, they were chargeable with

knowledge of the content of those returns regardless of the fact that they did not actually fill out the tax forms. See United States v. Cramer, 447 F.2d 210 (2d Cir. 1971), cert. denied, 404 U.S. 1024 (1972).

D. Conspiracy to defraud the United States by impeding and impairing the lawful function of the Internal Revenue Service.

1. United States v. Klein, 247 F.2d 908 (2d Cir. 1947), cert. denied, 355 U.S. 924 (1958) is still the leading case.

2. If a tax evasion motive plays any part in a scheme the offense (conspiracy to impede and impair) can be made out even though the scheme may have other purposes such as the concealment of other crimes. United States v. Shermetaro, 625 F.2d 104, 109 (6th Cir. 1980).

Sample application to be used when requesting both (i)(1) information only or joint (i)(1) and (i)(2) disclosures

IN THE UNITED STATES DISTRICT COURT

FOR THE _____ DISTRICT OF _____

UNITED STATES OF AMERICA, )
)
v. )
)
)
_____

APPLICATION FOR EX PARTE ORDER TO DISCLOSE RETURNS AND RETURN INFORMATION

Comes now the United States Attorney for the _____ _____,/(Attorney-in-Charge of the _____ Strike Force), pursuant to 26 U.S.C. §6103(i)(1), and makes application to the Court for an ex parte order directing the Internal Revenue Service (IRS) to disclose to applicant (and others hereinafter named) returns and return information of

Name:

Address:

Social Security Number or Employer Identification Number:

which returns and return information are described as those returns and return information for the taxable period(s). (State year(s) for which disclosure is sought.)

In support of its application applicant alleges and states the following:

(1) There is reasonable cause to believe based upon information believed to be reliable, that a violation of _____U.S.C. _____ has been committed. (State facts sufficient to allow the court to so find, and, where necessary, the basis for a belief that the information related is reliable.)

(2) There is reasonable cause to believe that the above-described returns and return information are or may be relevant to a matter relating to the commission of such act. (State the connection between the material requested to be disclosed and the matter in issue related to the commission of the crime and facts sufficient for the court to find that such connection exists.)

(3) The returns and return information are sought exclusively for use in a federal criminal investigation or proceeding concerning such act.

(4) The information sought to be disclosed cannot reasonably be obtained, under the circumstances, from another source.

Applicant further alleges and states that in addition to himself

Name:

Title:

(It is only necessary to include the names of the attorneys involved in the investigation and/or prosecution.)

are personally and directly engaged in investigating the above-mentioned violations of _____ U.S.C. _____ and preparing the matter for trial. The information sought herein is solely for our use for that purpose. No disclosure will be made to any other person except in accordance with the provisions of 26 U.S.C. §6103 and 26 C.F.R. §301.6103(i)-1.

This application is authorized by (name and title of authorizing official).

Therefore, applicant prays that this Court enter an order, ex parte, on this application granting disclosure by the Internal Revenue Service of the returns and return information specified in this application.

Respectfully submitted,

_____

## Verification

I, _____, being first duly sworn, depose and say that I am the United States Attorney for the _____ District of _____,/(Attorney-in-Charge of the _____ Strike Force) and that the foregoing application is made on the basis of information officially furnished and upon the basis of such information is true as I verily believe.

_____

Subscribed and sworn to before me

this _____ day of _____, _____.

_____

Notary Public

Sample application to be used when requesting both (i)(1) information only or joint (i)(1) and (i)(2) disclosures

IN THE UNITED STATES DISTRICT COURT

FOR THE _____ DISTRICT OF _____

UNITED STATES OF AMERICA, )
)
v. )
)
)
_____

APPLICATION FOR EX PARTE ORDER TO DISCLOSE RETURNS AND RETURN INFORMATION

Comes now the United States Attorney for the _____ District of _____,/(Attorney-in-Charge of the _____ Strike Force), pursuant to 26 U.S.C. §6103(i)(1), and makes application to the Court for an ex parte order directing the Internal Revenue Service (IRS) to disclose to applicant (and others hereinafter named) returns and return information of

Name:

Address:

Social Security Number or Employer Identification Number:

which returns and return information are described as those returns and return information for the taxable period(s). (State year(s) for which disclosure is sought.)

Sample order to be used when requesting both
(i)(1) information only or joint (i)(1) and (i)(2) disclosures

IN THE UNITED STATES DISTRICT COURT

FOR THE _____ DISTRICT OF _____

UNITED STATES OF AMERICA, )
)
v. )
)
)
_____

ORDER FOR DISCLOSURE
OF RETURNS AND
RETURN INFORMATION

On this _____ day of _____, 198__, comes for the attention of the Court the application of the United States Attorney for the _____ District of _____,/(Attorney-in-Charge of the _____ Strike Force) for an ex parte order, pursuant to 26 U.S.C. §6103(i)(1), directing the Internal Revenue Service to disclose returns and return information of

Name:

Address:

Social Security Number or Employer Identification Number:

for the taxable period(s). (State year(s) for which disclosure is sought.)

After examining the application the Court finds:

(1) There is reasonable cause to believe, based upon information believed to be reliable, that a violation of a federal criminal statute, namely _____U.S.C. _____, has been committed.

(2) There is reasonable cause to believe that the returns and return information are or may be relevant to a matter related to the commission of such act.

(3) The returns and return information are sought exclusively for use in a federal criminal investigation or proceeding concerning such act.

(4) The information sought to be obtained cannot reasonably be obtained, under the circumstances, from another source.

The Court further finds that applicant and

Name:

Title:

(It is only necessary to include the names and titles of attorneys involved in the investigation and/or prosecution.)

are employees of the United States Department of Justice and are primarily and directly engaged in, and the information sought is solely for their use in, investigating the above-mentioned violation of _____ U.S.C. _____, and preparing the matter for trial; and that the application is authorized by (name of authorizing official).

It is therefore ordered that the Internal Revenue Service (1) disclose such returns and return information of

Name:

Address:

Social Security Number or Employer Identification Number:

for the taxable period(s) _____. [state year(s)]

as have been filed and are on file with the Internal Revenue Service; (2) certify where returns and return information described above have not been filed or are not on file with the Internal Revenue Service that no such returns and return information have been filed or are on file; (3) disclose such returns and return information described above as come into the possession of the Internal Revenue Service subsequent to the date of this order, but for not longer than 90 days thereafter; (4) disclose such returns and return information and make such certification only to applicant and

Name:

Title:

(State names of any attorneys involved in the investigation and prosecution.)

and to no other person; (5) disclose no returns or return information not described above.

It is further ordered that applicant and

Name:

Title:

and any officer or employee of any federal agency who may be subsequently assigned in this matter shall use the returns and return information disclosed solely in investigating the above-mentioned violation of _____ U.S.C. _____, and such other violations of any federal criminal statutes, although presently unknown, as are discovered in the course of this investigation of _____ U.S.C. _____, and preparing the matter for trial, and that no disclosure be made to any other person except in accordance with the provisions of 26 U.S.C. §6103 and 26 C.F.R. §301.6103(i)-1.

_____

Judge

Sample letter to be used when
requesting (i)(2) information only

Mr./Ms._____
District Director
Internal Revenue Service
Street Address
City, State—Zip Code

Attention: Disclosure Officer

Re: Tax Disclosure Pursuant to
26 U.S.C. §6103(i)(2)
(State name of Case)
Our Ref:_____
Tax Disclosure Information Act

Dear Mr./Ms.:_____

Pursuant to 26 U.S.C. §6103(i)(2), the Department of Justice requests the Internal Revenue Service to furnish return information, other than taxpayer return information, for the taxable period(s) (state years for which disclosure is sought) regarding (state names, addresses, and Social Security numbers for individual taxpayers; names, addresses, and Employer identification numbers for corporations).

The subject(s) of this request is/are the subject(s) of an investigation/indictment regarding possible violations of _____U.S.C. _____.

Involved in this investigation/prosecution (state facts).

Disclosure of the requested return information is or may be relevant to the investigation/indictment in establishing (state reasons for relevancy).

Access to the information will be limited to: (state names, titles, and addresses of attorneys working on the investigation or prosecution), or such other officers and employees of a federal agency as shall be specifically assigned to participate in the investigation, preparation for trial, or trial, of this matter. No disclosure will be made to any other person except in accordance with the provisions of 26 U.S.C. §6103 and 26 C.F.R. §301.6103(i)-1.

At this time it is anticipated that the disclosed material will be used (State the intended use, i.e., whether the material is sought solely for investigative purposes at the time of the request or whether the requester currently anticipates using the information in a judicial proceeding and an estimated time table.) Therefore, disclosure is required on or before (date).

At this time it is further anticipated that returns and taxpayer return information will not be sought pursuant to 26 U.S.C. §6103(i)(1).

Sincerely,

Name
Title

DOJ-1982-11



*U.S.GOVERNMENT PRINTING OFFICE:1988-202-046:82048