Attorneys General's Corruption Control Units

November 1978

The National Association of Attorneys General
Committee on the Office of Attorney General

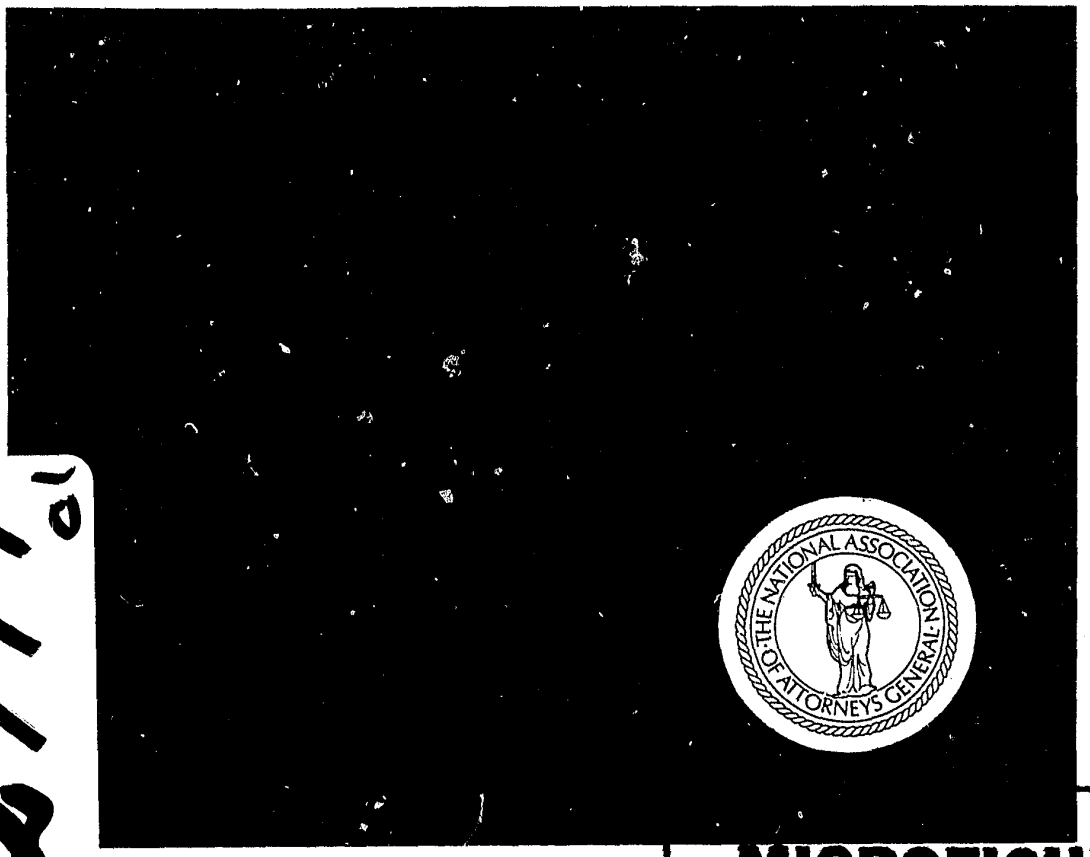

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TABLE OF CONTENTS

1. INTRODUCTION

Public official corruption is as ancient as the concept of government--Diogenes' lonely search for an honest man may have taken place in the Greek halls of government-- yet "post-Watergate" Americans could be forgiven for believing that it is a burgeoning phenomenon exclusive to the past few years. On almost any given day, newspaper front pages announce another investigation, indictment or conviction of a man or woman who has abused the public trust for his or her own benefit. Blakey and Goldstock noted in 1977:

> At the turn of the century, Lincoln Steffens, the muckraker, wrote his influential Shame of the Cities, in which he surveyed and attacked the municipal corruption of his time. Were Steffens to write today, the material available would be even more voluminous. In recent years, a President left office in disgrace; a Vice-President was convicted of abuse of position; and a Supreme Court Justice resigned under a cloud of suspicion. In turn, two Cabinet officers, two U.S. Senators, eight Congressmen, a federal judge, five governors and Lt. governors, several state judges (44) and various and assorted mayors (43), state legislators (60), and sheriffs and police officials (266) have been indicted or convicted of some form of official corruption. Were Steffens to write a new book today, he would have to entitle it the Shame of the Nation. [Citations omitted.][1]

Arguably, however, there is not necessarily a great deal more corruption now than in the past, but rather a great deal more investigation and prosecution of corruption and a great deal less public naivete and tolerance of it. New Jersey, for example, used to be taken as the quintessential haven for organized crime and corruption. A Life magazine editorial in the mid-sixties said that "the power of the fix in certain areas of New Jersey is just about total."[2] But the public outcry in New Jersey became so great by 1967 that state legislators could no longer ignore or suppress the problem, and in that year the Forsythe Commission was formed to study the state's criminal justice system. By 1970, innovative legislation was passed providing for court authorized electronic surveillance, statewide grand juries, a State Commission of Investigation, and a

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1. G. Robert Blakey and Ronald Goldstock, OFFICIAL CORRUPTION: BACKGROUND MATERIALS, Cornell Institute on Organized Crime, 2 (1977). The figures are derived from an unofficial listing maintained by the U.S. Department of Justice.

2. Deputy Attorney General Alfred J. Luciani, Chief, Antitrust-Civil Remedies Section, Divison of Criminal Justice, New Jersey Department of Law and Public Safety, in National Association of Attorneys General, Committee on the Office of Attorney General, COMBATTING ORGANIZED CRIME: SUMMARIES OF SPEECHES TO AN APRIL, 1978, SEMINAR, 3 (1978).

unified state law enforcement mechanism with the Attorney General as the state's chief law enforcement officer.

Although New Jersey would certainly not claim to have eradicated corruption or organized crime in the state, much has been accomplished in the last decade. In 1977, the Miami Herald said, "New Jersey has succeeded in making the law enforcement climate of that state so hostile to organized crime that scores of mobsters pulled up stakes to move elsewhere."[3] Since organized crime and corruption often exist in a symbiotic relationship, this can only be bad news for both groups. The point is that even in the most pervasively corrupt areas a war can be waged against corruption with many battles won, even if total victory remains elusive. The emphasis on corruption control that has emerged in the past few years has indeed produced significant victories.

Everyone can recognize corruption when they see it, yet few have ventured to define it. Black's Law Dictionary defines corruption as "the act of an official or fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the rights of others."[4] Expanding this slightly, corruption in government can be said to consist of, for the purposes of this report, improper or illegal practices by government officials or employees by which they use their position to obtain money, property, influence or power for themselves, or other persons or organizations not legally or ethically entitled to it, which would not accrue to their benefit but for the improper or illegal activity.

The dangers and costs of corruption are obvious. The monetary costs come to mind first: when a purchasing agent accepts a kickback to buy from his corrupter rather than a lower-priced party or bidder, the inflated cost is passed on to the taxpayer, and, since many corrupters also evade taxes, income goes untaxed, reducing government revenues and raising taxes for everyone else. Corrupt officials also tend to be inept or inefficient, reducing the quality of service we receive from our governmental units. Each time a new revelation about a corrupt official, practice or agency is made, citizens lose a little more faith in their government.

From the perspective of Attorneys General, perhaps the most important effect of corruption is that it fosters organized crime. It has been frequently observed that organized crime cannot exist without the aid of corruption. The President's Commission on Law Enforcement and Administration of Justice said in 1967:

> All available data indicate that organized crime flourishes only where it has corrupted officials. As the scope and variety of organized crime activities have expanded, its need to involve officials at every level of government has grown. And as goverment regulation expands into more and more areas of private and business activity, the power to corrupt likewise

3. Id. at 4.

4. BLACK"S LAW DICTIONARY, 414 (4th ed., rev. 1968).

affords the corrupter more control over matters affecting the everyday life of each citizen.[5]

Almost a decade later, the Task Force on Organized Crime of the National Advisory Committee on Criminal Justice Standards and Goals echoed this statement, and commented that:

> The primary goals of organized crime, whether through enterprises such as illegal gambling or legitimate businesses such as construction, are the making of money and the maximization of profit. In order to achieve the greatest possible return, organized crime has found it expedient to invest some of its capital in government; that is, to distribute varying sums of money to carefully chosen individuals serving in strategic government and law enforcement capacities who can provide organized crime with the services it requires.[6]

Corruption cases are among the most difficult that prosecutors face because, unlike street crime, the effects of corruption are not apparent, but insidious. Corrupt activities are often sophisticated, so law-enforcement agencies need to respond with sophisticated investigative and prosecutive techniques. Indeed, this is the very reason for having a state unit or agency leading the fight against corruption. Local prosecutors may lack the manpower, equipment, and investigative resources to mount any systematic opposition to corruption. Further, local prosecutors are susceptible to charges of favoritism, bias or political motivation when they choose to pursue or not to pursue a certain investigation. Finally, many corrupt activities are statewide or at least multi-county in scope, and statewide jurisdiction is needed to combat them effectively and avoid wasteful duplication of effort.

The National Advisory Commission on Criminal Justice Standards and Goals promulgated standards concerning statewide capability to prosecute corruption, summarized below.[7] The techniques suggested in this report are designed to help reach these standards.

The Commission said, first, that the state office charged with the responsibility of investigating and prosecuting corruption should have authority to perform the following functions: initiate investigations concerning the conduct of public officials and employees and the enforcement of state laws with particular reference to organized crime and racketeering; prosecute those cases that it can most effectively handle, referring all other evidence and cases to the appropriate enforcement authorities; provide management assistance to state and local government agencies to help

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5. President's Commission on Law Enforcement and Administration of Justice, TASK FORCE REPORT: ORGANIZED CRIME, 6 (1967).

6. National Advisory Commission on Criminal Jutice Standards and Goals, REPORT OF THE TASK FORCE ON ORGANIZED CRIME, 23 (1976).

7. National Advisory Commission on Criminal Justice Standards and Goals, REPORT ON COMMUNITY CRIME PREVENTION, 272 (1973).

eliminate conditions that invite corruption; develop a statewide intelligence network on the incidence, growth, sources, and patterns of corruption; and make recommendations to the Governor or legislature concerning removal of public officials and government reorganization to reduce corruption.

The office should have the following minimum characteristics and powers, according to the Commission: statewide jurisdiction; capability to obtain and preserve evidence prior to the filing of formal complaints; power to compel testimony, authority to subpoena witnesses, administer oaths, obtain grants of immunity, and have access to the sanction of contempt; ability to hold hearings; an adequate budget, protected from retaliative reduction; a specialized staff including investigators, accountants, and trial attorneys, with access to others as needed; consulting services available to all units of state and local government for counsel on means of maximizing the utilization of available staff and resources to meet workload demands; and disclosure of financial interests to the state ethics board by all persons performing regular duties in fulfillment of the above.

This report is not intended to be a comprehensive guide to what might be done to combat corruption. Rather, it is a guide to what has been done by states in this area. Both special corruption control units and operations of ongoing sections of Attorneys Generals' offices are studied. By chapter, the following topics will be discussed:

Chapter 2: Role of the Attorney General, including powers of prosecution and investigation, statutory authority in corruption cases, alternatives to criminal prosecution, and the relationship between Attorneys General and local prosecutors.

Chapter 3: Unit Structure, covering both integral and independent units, and examining personnel arrangements.

Chapter 4: Intelligence and Target Selection, including the different phases of the intelligence process, sources of cases, and the setting of priorities.

Chapter 5: Investigative Techniques, including the investigative grand jury and electronic surveillance.

Chapter 6: Case Preparation and Prosecution, including who prepares trials and appeals. Witness immunity and plea bargaining are also discussed.

Additionally, the following publications of the Committee on the Office of Attorney General should be consulted for in-depth treatment of the particular subjects addressed by them:

Organized Crime Control Legislation (159 pp. 1975)
Organized Crime Control Units (76 pp. 1977)
Statewide Grand Juries (48 pp. 1977)
Use of Civil Remedies in Organized Crime Control (50 pp. 1977)
Witness Immunity (58 pp. 1978)

The primary sources of information for this report have been the corruption control units themselves. The corruption control unit in each state was sent a questionnaire asking a comprehensive series of questions with regard to most of the topics covered by this report, and many units in return provided detailed responses. In many cases, the questionnaire answers were supplemented by personal or telephone interviews with personnel in the corruption control unit. Material has also been taken from the monthly Organized Crime Control Newsletter published by COAG. Most of the items in the Newsletter are based on materials submitted by Attorneys General's offices. Other sources have been utilized as cited.

2. THE ROLE OF THE ATTORNEY GENERAL

The role of the Attorney General in fighting official corruption in his state is dependent to a large extent on his powers with regard to criminal prosecutions and law enforcement, which, of course, vary greatly among the states.[1] This chapter will present an overview of the authority of Attorneys General in prosecutions and investigations, his special authority in corruption cases in a few states, and some examples of both criminal and civil actions to combat corruption.

Powers of Prosecution and Investigation

In prosecution, the Attorney General's role ranges from an absence of criminal authority in one state to responsibility for all prosecutions in others. Some Attorneys General have no direct role in crime control, while one is in charge of the State Police. This wide variety of powers makes it difficult to generalize about his authority.

Only five states-- Arkansas, Connecticut, Indiana, Tennessee and West Virginia-- prohibit the Attorney General from initiating criminal prosecutions under any circumstances. Elsewhere, his authority ranges from power concurrent with that of the local prosecutor, to power to initiate prosecutions only under certain circumstances, such as at the request of certain officials or in order to enforce specified statutes. In six jurisdictions the Attorney General has primary responsibility for local prosecutions, and in a number of others he has the authority to initiate prosecutions at his own discretion. In three states-- Alaska, Delaware and Rhode Island-- there are no local prosecutors, so the Attorney General has complete responsibility for prosecutions there.

In Florida, it is unusual for the Attorney General's office to become involved in the handling of criminal cases prior to the appeals stage but if it does, the office, by statute, plays no prosecutorial role. Occasionally, however, the Attorney General's office will assist in a prosecution conducted by a state's attorney, who is designated as the prosecutor in Florida's trial courts. There have also been a few instances in which the State Ethics Commission has found a criminal violation by a public official, in which case the Commission has asked the Attorney General's office to review the case. If the Attorney General finds that a prosecution is called for, the case will be forwarded to the appropriate state's attorney's office for such action. Recently the Attorney General was requested by the Florida Senate to handle the investigation and prosecution of a state Senator who was accused of misusing state funds, but this was an unusual situation atypical of the role of the Attorney General in Florida.

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1. See generally National Association of Attorneys General, Committee on the Office of Attorney General, POWERS, DUTIES AND OPERATIONS OF STATE ATTORNEYS GENERAL (1977).

Pennsylvania is another state in which the Attorney General's involvement in public official corruption cases is usually limited to the investigatory stage; prosecutions are generally handled by the local prosecutors. The Attorney General's office usually limits its inquiries to cases involving state money, state officials or employees, or those having a close nexus to state government. Local corruption cases are handled almost entirely by the district attorneys. The powers of the office will probably be expanded when an elective Attorney General takes office in 1980, as the result of a constitutional amendment changing it from an appointive office.

In Texas, the Attorney General can appear before any county grand jury in the state, but can prosecute cases only on request of a local prosecutor. Thus, he may investigate, but not prosecute, on his own initiative. Most of the corruption cases in which the Attorney General's office has been involved have been handled by the Organized Crime Division. The Division receives many citizen complaints and evaluates all of them, referring most of them to the appropriate local prosecutor.

In Wisconsin, the Attorney General may initiate criminal prosecutions at the request of the Governor or a local prosecutor, and also under certain statutes. Consequently, the Attorney General's role in that state in public official corruption cases is similar to that in many other states: although not strictly limited to rendering investigative assistance, the Attorney General is more often called upon to conduct or direct the investigation of cases than to actively prosecute.

The Washington Attorney General's office also provides investigatory assistance to state agencies, local prosecutors and other law enforcement bodies; the prosecution of cases which develop from their investigations is usually left to the local prosecutors. The Attorney General's authority to initiate prosecutions is limited to situations in which it is necessary in the execution of the duties of any state officer, or when there is a written request to do so by the Governor or a written request for assistance from a local prosecutor or sheriff.

The Attorney General's investigatory role is a valuable one. In any state, that office can often provide specialized and substantial resources that the local prosecutors do not possess or could not provide over the long period of time that it often takes to successfully investigate a corruption case. For example, the Organized Crime Division of the Texas Attorney General's office, together with the Texas Rangers, in 1975 undertook an investigation into corruption in Duval County. The Division staff consisted of fourteen agents (five attorneys and nine non-legal personnel); five agents were assigned to the Duval County investigation, which lasted into 1977. This represented a significant commitment of manpower to one investigation; however, the scope of the problem in Duval County illustrates why this kind of commitment in manpower was necessary.

A state district judge and his brother, a county commissioner, were convicted of income tax evasion, and impeachment proceedings against the judge were brought in the state legislature. A county attorney was convicted of perjury concerning kickbacks. A local attorney was sentenced to 9 years in the penitentiary for accepting money from the school district for work he did not do. A local justice of the peace was convicted of felony

theft. The county treasurer pleaded guilty to a charge of official misconduct and was removed from office. One hundred and six indictments were obtained against 37 defendants: 29 defendants were convicted, 2 were acquitted, an indictment against 1 defendant was dismissed, and several cases are still pending.

Fines, restitution and reparations in the amount of nearly $250,000 were assessed. Moreover, the governmental units in Duval County have filed several lawsuits totaling over a million dollars to recover illegally obtained funds. Without the assistance and expertise of the Attorney General's office, an investigation of these dimensions would have been considerably more difficult.[2]

Some Attorneys General provide assistance to local prosecutors through bureaus of investigation and identification, which now exist in virtually all jurisdictions. There may be identification units only, or statewide investigative agencies, or these functions may be combined. They may have power to initiate investigations, or be limited to assisting local authorities on request. They generally have laboratory facilities which are available to local authorities. Their investigators usually have the powers of a peace officer. Such bureaus are of fairly recent origin and represent a realistic response to the impact of technology and training on crime control. According to a 1976 COAG survey, state bureaus of investigation and identification were under the authority of the Attorney General in fourteen states.[3]

Statutory Authority in Corruption Cases

In some states, where the statutes give local prosecutors primary responsibility for initiating prosecutions, exceptions have been made to this general rule to allow the Attorney General's office to assume a greater role in combatting corruption. In Georgia, for example, the Attorney General may initiate prosecution in cases of alleged election fraud, labor union crimes, or misuse of state funds.

Two states have Special Prosecutor's offices created to handle corruption cases. The Maryland legislature created the Office of State Prosecutor as an independent unit within the Attorney General's office to be responsible for combatting public official corruption in the state. The first State Prosecutor was sworn in on December 1, 1977. The State Prosecutor has been given the power to initiate, at his discretion, or at the request of the Governor, the Attorney General, the General Assembly, or a state's attorney, investigations in the following areas: criminal offenses under the state election laws; criminal offenses under the state

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2. Texas Organized Crime Prevention Council, 1975 REPORT ON ORGANIZED CRIME IN TEXAS.

3. See POWERS, DUTIES AND OPERATIONS OF STATE ATTORNEYS GENERAL, supra note 1, at 122-4.

conflict of interest laws; violations of the state bribery laws "in which an official or employee of the State or of a political subdivision of the State was the offeror or offeree, or intended offeror or offeree, of a bribe;"[4] and offenses constituting criminal malfeasance, misfeasance or nonfeasance in office committed by an officer of the state or of a political subdivision of the state. The Office has multi-jurisdictional authority: at the request of the Governor, Attorney General, General Assembly or a state's attorney, the State Prosecutor may investigate criminal activity conducted or committed partly in the state and partly in another jurisdiction, or which is conducted or committed in more than one political subdivision of the state.[5]

In New York, the Office of the Special State Prosecutor was created in 1972 by Governor Nelson A. Rockefeller in response to the widespread New York City police corruption revealed by the Knapp Commission. The authorizing executive orders require the Special Prosecutor, who is a Deputy Attorney General, to investigate and prosecute unlawful activities by any person connected with the enforcement of law or the administration of criminal justice in the five boroughs of New York City. State involvement in criminal prosecutions in New York is restricted to such special situations where the Governor may direct the Attorney General to supersede a district attorney;[6] otherwise the district attorneys of New York's sixty-two counties have primary jurisdiction over criminal cases. Thus, the Special Prosecutor's office, first under Maurice Nadjari and then under John Keenan, was a "superseder" in the five counties of New York City.

In all states there is an array of criminal statutes to be applied in situations where a public official or employee is alleged to have committed a corrupt act or misused his position. There are bribery, graft, embezzlement and extortion statutes, misconduct in office (malfeasance, misfeasance and non-feasance) statutes, obstruction of justice statutes and others.[7] The most common types of corruption are extortion, bribery or graft, although within those broad categories there are as many different kinds of offenses as there are opportunities to commit them. Bribery and graft are usually differentiated in two ways. In some statutes, graft requires a benefit given in return for past official action, while bribery consists of a benefit given in return for future official action. Other statutes require

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4. MD. CODE ANN. art. 10, § 33B(3) (1956).

5. Id., art. 10, § 33B(5)(c) (1956).

6. In Mulroy v. Carey, 58 A.D. 2d 207, ___ N.Y.S. ___, (1977), the Appellate Division of the New York Supreme Court said that the exercise of the Governor's discretion to direct the Attorney General to supersede a local prosecutor is not subject to judicial review.

7. A full compilation of extortion, bribery and graft statutes in each state may be found in: G. Robert Blakey and Ronald Goldstock, OFFICIAL CORRUPTION: BACKGROUND MATERIALS, Cornell Institute on Organized Crime (1977).

proof of specific intent to improperly influence official conduct for bribery, but not for graft. In United States v. Arthur, the court said of bribery that a particular criminal intent must be present to make a gift to a public official bribery, and this intent must be more than "a generalized hope or expectation of ultimate benefit on the part of the donor. 'Bribery' imports the notion of some more or less specific quid pro quo for which the gift or contribution is offered or accepted."[8]

Additionally, a number of states have passed laws prohibiting any conflict of interest on the part of public officials and employees. For example, California makes it a felony for members of the legislature and state, county, district and city officers and employees to be financially interested in contracts made by them in their official capacity.[9] Contracts made in violation of this statute may be avoided, and it is unnecessary to prove the contract was unfair or tainted with fraud in order to do so.[10]

These statutes will not be covered in detail in this report, but it will be appropriate to describe some examples of different kinds of crimes that corrupt government officials have been prosecuted for in various states.

In New Jersey, a state grand jury charged four men with thirty-three counts of conspiracy, embracery, misconduct in office, solicitation of misconduct, obstruction of justice and perjury, all growing out of an attempt by a county Democratic chairman, two sheriff's officers, and two police officers to tamper with the jury that was hearing a bribery case against the chairman, and to impede two state grand jury investigations of the alleged jury tampering. Specifically, the indictment charged that the men attempted to interfere with the state grand jury investigation by causing witnesses to avoid and disobey subpoenas, withholding information, providing false alibis and testimony, and fabricating evidence.

In New Mexico, two former employees of the state Environmental Improvement Agency created a fictitious water and sewer sanitation district in the state and funneled approximately $400,000 in state funds into their own hands. Following the discovery of this operation 4 years later, the Corrupt Government Practices Unit, with investigative assistance from the New Mexico Organized Crime Prevention Commission, filed one felony count of conspiracy against both of the men, and charged one of them with one felony count of fraud; both were sentenced to prison. Approximately $240,000 was recovered from the two men, and the remainder from the bonding company involved.[11]

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8. 544 F.2d 730, 734 (4th Cir. 1976); (interpreting the federal bribery statute, 18 U.S.C. § 656.)

9. CALIF. GOVT. CODE § 1090 (West) (Supp. 1977).

10. People v. Vallegra, 67 C.A. 3d 847, 136 Cal. Rptr. 429 (1977).

11. Telephone interview with Assistant Attorney General Harvey Fruman, Director of Criminal and Special Prosecutions Division, Santa Fe, New Mexico, January 5, 1978.

In 1977, the Pennsylvania Bureau of Investigation, a division of the Department of Justice, filed charges against four persons, three of them officials of the Pennsylvania Department of Revenue, who diverted the services of four state employees to perform non-state related services for the McKean County Democratic Party and the Construction and General Laborers Union. One of the officials also submitted false travel expense vouchers, thereby fraudulently converting state funds to her own use. The four were charged with theft of services, conspiracy to commit theft of services, theft by deception, and tampering with public records.

In State v. Schonwald,[12] the defendant, a regional engineer for the New Jersey Department of Transportation, solicited bribes of between $100,000 and $140,000 from an engineering consultant in return for preferential treatment in the award of engineering contracts by the Department, and actually received bribes totalling $17,500. The defendant was charged with and convicted of one count of soliciting bribes and one count of misconduct, which charged him with actually receiving the money.

An interesting case in New York arose out of Project Scotch, an undercover operation begun in 1974 by the federal New York Strike Force and a city police detective unit to spy on organized crime, which inadvertently uncovered evidence of public corruption and which resulted in the indictment of a judge, a political party leader and others. Two agents fielded by Project Scotch negotiated for the purchase of a Bronx discotheque, described as a "watering hole for organized crime," which counted members of the Carlo Gambino and Carmine Tramunti families among its regular partrons. The two agents presented themselves as prison acquaintances with underworld backing, and the club's owners offered to sell the club to the agents for $75,000, only $20,000 of which would be reported to the State Liquor Authority, with the remainder "under the table." The owners also made it a condition of the sale that the buyers obtain a liquor license through the law firm of Kenneth Kase and Anthony J. Mercorella, a Bronx civil court judge.

The agents carried concealed tape recorders to meetings at the law firm's office. Concealment of part of the purchase price was agreed to in Kase's presence, and he mentioned that paperwork for the liquor license application could be expedited by his connection at the Alcohol Beverage Control Commission. He also boasted to the agents, in front of his partner Mercorella, that he had gotten charges against a client reduced through improper interference by a high law enforcement official, whom he described as a "close friend" of Mercorella. At another meeting Mercorella stated that a friend at the State Liquor Authority could smooth over a problem that might arise. One of the agents accompanied Kase to ABC Commission offices, where Kase met alone with the investigators, and then informed the agent that rushing the license through would cost $500. The agent made the payment in marked bills. Subsequent inquiries by ABC investigators were not very searching.

By the time the project was halted, the agents had also observed fraternization between police and organized crime figures and other signs

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12. State v. Schonwald, Docket No. A-4076-76, Superior Court of New Jersey, Appellate Division, September, 1978.

of systematic police corruption. After Project Scotch's termination, the evidence was turned over to the Special Prosecutor, and used to obtain court authorization for taps on Mercorella and Kase's telephones. These taps led to an investigation of Patrick J. Cunningham, State Democratic Chairman, and others on suspicion of having sold judgeships in the Bronx, where the Democratic judicial nomination is equivalent to election. Cunningham and Mercorella were indicted for bribery. The indictments charged that Cunningham illegally offered to "procure and cause the nomination" of Judge Mercorella "upon an understanding and promise" that he pay "a sum of money" to Cunningham and the Bronx Democratic Committee. Cunningham and two Bronx politicians were also indicted for threatening a Bronx newspaper with financial retribution-- loss of court advertisements-- if it did not discontinue its criticism of the politicians.

Additional indictments by the special grand jury charged that Carmine De Sapio, a former Democratic Party official, and Thomas I. Fitzgerald, former Manhattan public administrator, lied to the grand jury about how warrants for secret, court-ordered wiretaps were made known to the targets of the surveillance. Finally, an earlier indictment derived from Project Scotch charged that retired state Supreme Court Judge Joseph A. Brust committed perjury in denying to a grand jury that he had been influenced by Mercorella in several court decisions.[13]

The Public Integrity Section, Criminal Division of the United States Department of Justice has jurisdiction over all violations of federal law involving corruption of and misuse of office by public officials, and sometimes finds itself involved in the prosecution of corrupt state and local officials when state and local prosecutors lack sufficient time and resources and the necessary legal tools to effectively combat sophisticated corruption schemes. The Public Integrity Section deals mainly with six statutes in corruption cases: the Hobbs Act, dealing with official extortion (18 USC § 1951), the Travel Act, which prohibits interstate travel for committing certain crimes under state law, including bribery (§ 1952), RICO (§§ 1961 -64), the bribery of federal officials statute (§ 201), the mail fraud statute (§ 1341), and the wire fraud statute (§ 1343).

Alternatives to Criminal Prosecution

Sometimes criminal prosecution may not be appropriate or sufficient to remedy the wrong perpetrated by the corrupt official, to terminate the corrupt activities, or to take pecuniary gain out of the wrongdoing. The purpose of this chapter is to examine briefly some of the alternative means available to Attorneys General in combatting corruption through their common law powers and specific civil remedies. These approaches are also analyzed in the 1977 COAG publications, The Use of Civil Remedies in Organized Crime Control, and Common Law Powers of State Attorneys General.

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13. NEW YORK TIMES, May 23, 25 and 27, and June 8, 1976.

Common Law Powers

Courts have generally held that the Attorneys General are charged with all the common law powers and duties pertaining to the office, as well as those duties expressly conferred by statute. A majority of states have a constitutional or statutory provision confirming the force of common law; in some other states, the courts have confirmed the existence of common law powers. A recent study found that the Attorneys General of thirty-seven states have common law powers, those of eight do not, while the status of the other five is not decided.[14]

Among those common law powers of the Attorney General which have been upheld by the courts are the power to bring quo warranto actions to recover public offices from wrongful occupants. This action is civil in nature and is available to prevent a continued exercise of authority unlawfully asserted. The rationale for this was expressed in an early case which ruled that the Attorney General could bring an action to remove from office the mayor of a city for his alleged malfeasance in office in not reporting violations of the state liquor sales law. In speaking of the authority and duty of the state to enforce the laws designed for the public welfare, the court stated: "Essential to the complete performance of this duty is the unrestricted control and authority over all officers who are charged with the enforcement of the laws. This control necessarily includes power of removal for official misconduct ...."[15] The Attorney General was also allowed to sue for a penalty.

When it is apparent that negligence, as opposed to intentional misconduct, is at the center of governmental abuse, especially where no monetary loss to the state is provable, New Mexico issues letters of reprimand to the officials involved. These letters are backed up by the Attorney General's power to initiate removal, as well as by the possibility of prosecution for neglect of office as a criminal misdemeanor.[16]

In California, an available remedy is the use of the accusation. This is a procedure to remove certain public officials from office for willful or corrupt misconduct in office. There does not have to be an actual criminal offense committed before the accusation can be used. It can be used when there is a finding of willful or corrupt failure or refusal to carry out a duty prescribed by law or by the charter under which the official holds his position.[17]

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14. National Association of Attorneys General, Committee on the Office of Attorney General, COMMON LAW POWERS OF STATE ATTORNEYS GENERAL, 21 (May 1977).

15. State ex rel. Young v. Robinson, 101 Minn. 277. 112 NW 269, 271 (1907).

16. Gene S. Anderson, Office of the Attorney General of New Mexico, Evaluation Report: Corrupt Government Practices and White Collar Crime Project, 35 (August 1977).

17. CALIF. GOVT. CODE. §§ 3060, et seq. (Supp. 1977).

Attorneys General may also proceed through mandamus or injunction against public officers. The Supreme Judicial Court of Massachusetts held that:

> The Attorney General represents the public interest, and as an incident to his office he has the power to proceed against public officers to require them to perform the duties that they owe to the public in general, to have set aside such action as shall be determined to be in excess of their authority, and to have them compelled to execute their authority in accordance with law. A petition for mandamus is the remedy usually resorted to in such instances.[18]

The Mississippi Supreme Court held in a relatively recent case that the Attorney General was the proper officer to sue county officials for discrepancies in their financial records, as part of his common law duties.[19] A New York court held that the Attorney General had common law authority to seek to recover money that city officials had raised unlawfully and had converted to their own use.[20]

A Texas court restated the common law power of the Attorney General to bring mandamus proceedings in a case denying that right to a private citizen, saying that:

> ... under the ancient and modern rules of the common law, the State has the power and duty to supervise the conduct of municipalities.... Since the state can bring a mandamus suit similar in purpose to the one before us, it is elementary that the Attorney General has the power to institute such action.[21]

Some states, such as Louisiana and Texas, have statutory provisions for mandamus, but to date they have not been used in corruption cases.

Constructive Trust Doctrine

The Attorney General's common law powers include authority to prevent abuse by public officials of their trust powers and to bring actions to protect state revenues. Recent decisions in some jurisdictions have approved the imposition of a constructive trust for the benefit of the public on assets of public officials, obtained through abuse of office. For example, Cook v. Barrett was an action brought by Cook County, Illinois in which it alleged that the defendant as county clerk accepted bribes from companies seeking to sell voting machines to the county.[22] The clerk's

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18. Attorney General v. Trustees of Boston El. Ry. Co., 319 Mass. 642, 67 NE 2d 676, 685 (1946).

19. State ex rel. Patterson v. Warren, 180 So. 2d 298 (1965).

20. People v. Tweed, 13 Abb. Pr. N.S. 25 (1872).

21. Yett v. Cook 115 Tex. 205, 281 SW 837 (1926).

22. 36 Ill. App. 3d 623 344 NE 2d 540 (1975).

recommendations virtually determined the county's purchases of these items. The suit asked that a constructive trust be imposed for the benefit of the citizens of the county on the money which the defendant received from bribes.

The court saw no merit in the defendant's argument that the application of the constructive trust remedy to public officials taking bribes was unprecedented. Even in the absence of precedent, the court stated, it could see no reason why the remedy should not be applied to abuses by public officials in the same way as it is applied to abuses by private trustees. The court cited the use of the remedy in United States v. Carter, in which it was found that the defendant, who was in charge of a public works project, had exercised his discretion to create profits for certain contractors at the expense of the government and had received in return more than $500,000. The Supreme Court held that Carter had violated his fiduciary duty and subjected the secret payments received by him to a constructive trust for the government.[23]

In the states, civil cases such as the above are typically brought at the conclusion of the criminal case against the defendant. One significant case is Commonwealth v. Hilton.[24] The defendant, formerly the Secretary of Property and Supplies in Pennsylvania, was convicted of receiving kickbacks and bribes amounting to approximately $177,000 in connection with his official duty to procure insurance for the Commonwealth, and was jailed. The Attorney General of Pennsylvania brought a civil suit in Commonwealth Court alleging that the defendant was unjustly enriched as a result of actions in abuse of his public trust, and that his illegal actions caused the Commonwealth to expend money in investigating his activities and conducting litigation. The suit sought equitable relief in the form of restitution and the imposition of a constructive trust on the defendant's assets for the benefit of the people of Pennsylvania. The trial court overruled preliminary objections by the defendant, holding that the case was cognizable in equity, and presented a "classic" situation for the imposition of a constructive trust.

The Civil Remedies Section of the New Jersey Division of Criminal Justice has begun in recent years to institute civil suits against corrupt officials and employees, based on the constructive public trust theory. For example, in 1975 the Section brought a civil suit against a group of defendants, including a county municipal utilities authority and an engineering and architectural firm which contracted with the authority. The complaint alleged that the firm submitted fraudulent requests for payment for work done on a particular authority project when, in fact, the work was performed on totally unrelated projects and activities. Prior to institution of the civil suit, the engineering firm and one of its members had been indicted for conspiracy, obtaining money by false pretense, and altering corporate records.

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23. 217 U.S. 286 (1910).

24. 24 Pa. Commonw Ct. 255, 355 A. 2d 841 (1976).

The civil suit asked for the following relief against the engineering firm on account of its "fraudulent scheme, plan, and concert of action resulting in an unreasonable expenditure of public funds": an accounting by the county authority of all monies received; compensatory damages; punitive damages; restitution, plus interest; the impressment of a constructive trust on the assets of the firm and certain of its members "to the extent of unjust enrichment of each, for the use and benefit of ... [the] ..., Attorney General of New Jersey, as representative of the public;" rescission of the contract; and costs of the suit.[25]

The complaint alleged that members of the authority had breached their fiduciary obligation to serve the public, in that they "failed to exercise that degree of diligence required of persons holding a public trust and they failed to exercise their discretion in good faith and on fair and intelligent consideration free from influence." Authority members, according to the complaint, had, among other things, approved increases in the cost of the contract without ascertaining whether the increases were justified, had approved payment of fraudulent invoices, and had recommended that an audit of the engineering firm not be conducted. The complaint also alleged that the authority and its members had "generally authorized the extravagant, unnecessary or wrongful use of public funds." As against the defendant authority, the complaint asked for: rescission of the contract; an accounting by the authority of all funds received and expended since a certain date, including monies paid to the firm; the appointment of a receiver; and an injunction against the authority and its members from making any further payments to the engineering firm.

In April 1977, this suit was settled by the parties. It was stipulated that of the total billings made by the engineering firm to the municipal utilities authority in the amount of approximately $4 million, approximately $700,000 would be cancelled and that approximately $70,000 in restitution would be made.

Another New Jersey case illustrating use of the constructive trust doctrine is Hyland v. Simmons, where it was alleged that the defendant, a city councilman, had violated the public trust by accepting a bribe in return for favorable treatment of a zoning variance request.[26] A judgment against the defendant, establishing a constructive trust, was imposed for compensatory and punitive damages and interest thereon.

The New Mexico Special Prosecutions Section is currently in the process of charging a public official with "breach of trust," seeking recovery on a constructive trust theory. This is the first time that this approach has been taken in New Mexico. The Section is also going to take advantage of a statute passed in 1977, which provides for restitution under the

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25. Hyland v. Porter and Ripa Associates, Superior Court of New Jersey, Chancery Division, Camden County, April 28, 1977.

26. 152 N.J. Super. 569 (Ch. Div. 1977), aff'd. App. Div., October 27, 1978.

criminal law to a victim of a crime; the state qualifies under the statutory definition as a person who can file a civil complaint under the statute.[27]

"RICO" Statutes

One possible approach to corruption cases is the use by states of the federal Racketeer Influenced and Corrupt Organizations statute (RICO),[28] specifically Section 1964(c), which allows any person injured in his business or property by reason of a violation of Section 1962 of the statute to sue and recover treble damages and costs of the suit. "Person" is defined as including "any individual or entity capable of holding a legal or beneficial interest in property." A state would fit this definition, and if a state could bring suit for treble damages against persons involved in corrupt activities, this would enhance the states' powers to fight public corruption.

Three states have passed statutes which are closely modeled on the federal RICO statute: Pennsylvania,[29] Hawaii,[30] and Florida.[31] Apparently no civil actions have been brought under these statutes to date, but the potential for using these statutes in the manner described above is present.

The purpose of the RICO statute is "to outlaw the infiltration and illegal acquisition of legitimate economic enterprises and the use of legal and illegal enterprises to further criminal activities." The statute contains both civil and criminal remedies. The core of the RICO statute is Section 1962, which makes it unlawful to invest any income derived from a pattern of racketeering activity or collection of an unlawful debt in the acquisition of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce; or to acquire or maintain an interest in or control of any enterprise in interstate commerce through a pattern of racketeering activity or collection of any unlawful debt; or to conduct the affairs of an enterprise through a pattern of racketeering activity or collection of unlawful debt; or to conspire to violate any of these provisions.

To prove a violation of Section 1962, it must be established that the defendants were engaged in a "pattern of racketeering activity" or "collection of an unlawful debt." To prove a pattern of racketeering activity requires proof of at least two of the substantive crimes set forth in Section 1961 of the statute. The acts of racketeering set out in Section 1961

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27. N.M. STAT. ANN. § 40A-20-18.1 (1977).

28. 18 U.S.C. §§ 1961-1968.

29. PA. CONS. STAT. ANN., Tit. 18, § 911 (Purdon).

30. HAW. REV. STAT., ch. 842, §§ 1-12.

31. FLA. STAT. ANN. § 946.4 et seq. (West) (Supp. 1978).

include: state felonies; certain violations of Title 18 of the U.S. Code, including bribery, mail and wire fraud, illegal gambling, and sale of stolen goods; violations of Title 29, concerning labor union violations; bankruptcy and securities fraud; and federal narcotics violations. It is required that the "enterprise" engage in activities which affect interstate or foreign commerce, but the criminal acts themselves need not be interstate in nature. "Enterprise" is defined, in part, as "a group of individuals associated in fact," a definition which offers considerable latitude to prosecutors.

It will be of aid to corruption prosecutions that the Third and Fifth Circuits, at least, of the United States Court of Appeals have held that a city police department is an "enterprise" for the purposes of the Act,[32] as is a state agency.[33] The defendants argued that "enterprise" in Title IX should not be construed to include a government agency. To support their argument, they noted that there was no reference to governmental bodies in the legislative history of the 1970 Act. In addition, they relied on a district court decision in United States v. Mandel,[34] in which the court held that a state was not an "enterprise" within the meaning of the act. The court of appeals concluded otherwise, and held that a state agency can be an "enterprise" for the purposes of the RICO statute. Rejecting the idea that a narrow construction was called for, the court stated:

> Congress was concerned with the infiltration of organized crime into the American economy and to the devastating effects that racketeering activity had upon it. Yet we are asked to believe that Congress' approach to a monumental problem besetting the country was myopic and artificially contained.

The court upheld the defendants' convictions under RICO.

Recently the United States Supreme Court, by denying review to the case of Delph v. United States,[35] effectively affirmed the Fifth Circuit's decision that an informal criminal organization that engages in diversified kinds of criminal activity also fits within the definition of enterprise under RICO. The remedies provided in the RICO statute include a maximum of 20 years imprisonment and a $25,000 fine, as well as criminal forfeiture. In addition, Section 1964 authorizes the Attorney General to institute civil proceedings to: divest a person of any interest in an enterprise; restrain future activities or investments; and dissolve or reorganize any enterprise, subject to the rights of innocent persons.

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32. United States v. Brown, 555 F.2d 407 (5th Cir., 1977), cert. denied, 435 U.S. 904 (1978). The defendants were police officers in the Macon, Georgia Police Department, convicted of racketeering based on their receipt of bribes for the protection of vice-related activity.

33. United States v. Frumento, 563 F.2d 1083, (3d Cir., 1977).

34. 415 F. Supp. 997 (D. Md., 1976).

35. 571 F.2d 880 (5th Cir., 1977?), cert. denied, ___ U.S. ___, 47 LW 3311 (November 6, 1978.)

It is not necessary to institute a criminal action under the statute before bringing civil proceedings. If, however, the civil action is filed subsequent to a criminal conviction, Section 1964 (d) provides that the doctrine of collateral estoppel shall be available to the United States in the civil proceedings. It should be cautioned that the simultaneous filing of an indictment and a civil action might jeopardize the criminal case by making discovery available to the defendants.

Among the civil actions brought under the RICO statute have been some based on allegations of acceptance of bribes by public officials. Defendants in United States v. Merritts,[36] members and employees of a school board, had been convicted on mail fraud, Hobbs Act, and RICO charges for receiving bribes in connection with the award of contracts by the school board. The civil suit seeks a permanent injunction against their participation in school board affairs and a temporary restraining order to prevent the defendants from installing in their place individuals under their control.

Arizona recently enacted a new anti-racketeering law drafted by the Attorney General's office that, according to that office, is in many ways a significant expansion of the federal RICO statute. "Racketeering" is defined as "any act, committed for financial gain which is chargeable or indictable under the laws of this state and punishable by imprisonment for more than one year, regardless of whether such act is charged or indicted," involving any one of twenty enumerated crimes ranging from homicide to securities fraud.[37] The law establishes two new crimes. The first is "illegal control of an enterprise," which makes it a crime if a person, "through racketeering or its proceeds, acquires or maintains, by investment or otherwise, control of any enterprise." "Control" is defined as the possession of a sufficient interest in an enterprise to permit substantial direction of its affairs, and "enterprise" is defined as any corporation, association, labor union or other legal entity, or any group of individuals associated in fact, although not a legal entity. The second new crime is termed "illegal conducting of an enterprise," which makes it a crime if a person "is employed or associated with any enterprise and conducts or participates in the conduct of such enterprise's affairs through racketeering."[38]

The law also establishes a new civil cause of action. People whose persons, businesses, or property are injured by racketeering may file a civil suit for treble damages and costs, or the state may file an action on their behalf.[39]

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36. Civ. No. 753115 (E.D. Ill.).

37. ARIZ. REV. STAT. ANN. § 13-2301 (D)(4).

38. Id. § 13-2312.

39. Id. § 13-2314.

After conviction, or determination of liability in the case of a civil suit, the court may order: divestiture of a person's interest in an enterprise; reasonable restrictions on his future activities or investments, including prohibition from engaging in the same type of endeavor; dissolution or reorganization of an enterprise; treble damages to victims; payment of costs of prosecution and investigation; payment to the state or county general fund of any illegal interest or gain (probably the most significant provision for corruption cases); or any other appropriate order. Like the federal RICO statute, the Arizona law provides that a final judgment rendered in favor of the state in a criminal proceeding is res judicata as to the defendant in a subsequent civil proceeding.

Other Civil Remedies

In some states, quo warranto actions are available by statute. In New Mexico, for instance, the Attorney General has no common law powers, but the statutory equivalents of quo warranto are often found in the criminal statute under which the official is convicted. For example, the bribery statute provides for forfeiture of office upon conviction.[40] The Department of Finance and Administration has in its own provisions a procedure for removing from office any treasurer of a government subdivision found guilty of negligence or embezzlement. The statute dealing with conflict of interest of state officers and employees provides that violation of the statute means that the officer can be suspended, demoted or removed from office.[41] There is also a statute which provides for removing an Attorney General or a district attorney, upon the initiation of a grand jury, to be followed by a civil proceeding.[42]

In another pending New Jersey case, Hyland and Little Ferry v. Heinige, et al.,[43] it is alleged that ten public officials were involved in a decade of kickback activity with at least twenty-eight builders, developers and other defendants. The state seeks recovery of the kickback, profit and unjust enrichment, citing as a precedent Continental Management, Inc. v. United States.[44] In that case, the federal government filed a counterclaim, against plaintiff's claim against the United States, seeking to collect from Continental Management an amount equal to the sum of bribes paid by its former president to employees of the FHA and Veterans Administration. The United States Court of Claims held, among other things, that it is sufficient for the government to show the existence of the amount of the bribes, that no specific or direct injury to the United States had to be

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40. N.M. STAT. ANN. § 40A-24-2 (West) (1953).

41. N.M. STAT. ANN. § 5-12 et seq., (West) (1953).

42. N.M. STAT. ANN. § 17-1-93 (West) (1953).

43. Docket No. C-1127-77, Superior Court of New Jersey, Chancery Division, Bergen County.

44. 527 F.2d 613 (1975).

alleged or proved. The court also held that existence of extensive legislation governing bribery and fraud penalties did not rule out the government's maintenance of a civil action based on a common-law right.[45]

In Hyland and Little Ferry v. Heinige, the state is also seeking to recover kickback monies from the private individuals who paid the kickbacks based on a theory of unjust enrichment. The state contends that the bribers were unjustly enriched in the amount of the kickbacks that they paid, as they must have valued the service to them at least to that extent, and in the amount of their profits as a result of the transaction. This case is at an early stage of litigation.[46]

New Jersey has also introduced the use of antitrust statutes to fight corruption and organized crime. In the pending case of New Jersey v. Abbott Laboratories, et al.,[47] it is alleged that high-level purchasing agents for Hudson County and Jersey City were involved in kickback schemes with approximately 6,000 vendors to the county and city.[48] The antitrust theories asserted by the state are: (1) that the kickback scheme constituted a concerted refusal to deal, i.e., vendors could only receive contracts by making agreements to perform illegal acts, thus excluding from the market those vendors who would not engage in such activities; and (2) that the kickbacks constituted illegal brokerage payments under Section 2 (c) of the Robinson-Patman Act. Additionally, the state has charged the defendants under several other counts, including formation of contracts in contravention of public purchasing statutes. Such contracts have generally been held to be void ab initio in New Jersey, with full restitution to the state or other governmental unit and with no set-off to the vendor for quantum merit.[49]

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45. On this point, the court said specifically:
"In nearly unbroken succession, courts have declared that victimized principals may obtain non-statutory remedies against outsiders who have knowingly participated in or induced an agent's breach of duty." ... "Assuming (as we do) that the predicate for a non-statutory civil remedy is the probability that damage will flaw from the giving of the bribe, we think it clear from common experience that such probability ordinarily accompanies the subversion of public officials. In normal cases the briber deprives the Government of the loyalty of its employees, upon which the Gov't and the public must rely for the impartial, and rigorous enforcement of gov't programs." 527 F.2d at 616-618.

46. Telephone interview with Assistant Attorney General Robert Clark, Antitrust Section, Division of Criminal Justice, New Jersey, November 9, 1978.

47. No. 73-1769 (D. N.J., filed 1973).

48. Of the 6,000 vendors, 232 are defendants in the case. One of the purchasing agents is the state's chief witness.

49. Telephone interview with Deputy Attorney General Laurel Price, Antitrust Section, Division of Criminal Justice, New Jersey, October 17, 1978.

A few remaining administrative remedies are deserving of mention. State administrative agencies can initiate administrative proceedings to revoke the operating license of or close an establishment which has been involved in payoffs or other corrupt activities. Such proceedings could be taken by racing commissions, banking commissions, liquor control boards, and other state administrative agencies. Also, corruption officials who are attorneys are commonly disbarred in their states. Public contractors who engaged in bribery or other corrupt activities may be disqualified from doing business with the state.

Relationship Between Attorneys General and Local Prosecutors

The Attorney General's authority in proceedings initiated by the local prosecutor ranges from general authority to intervene or supersede on his own initiative to authority to intervene only when directed by another official. Many state statutes also provide for intervention or assistance by the Attorney General upon request of the local prosecutor. Because of these varying powers, the involvement of each of the Attorneys General in combatting official corruption in their states can differ markedly.

Attorneys Generals' staff who are assigned to corruption control emphasize the need to develop a positive relationship with local prosecutors, either as a liaison or by coooperating in prosecutions. New Jersey Deputy Attorney General Peter Richards described this effort with regard to organized crime control in the NAAG publication, Organized Crime Control Units; it is equally pertinent to corruption control. He said that the New Jersey Criminal Justice Division develops its own cases and does not take over cases developed by the district attorneys. When the Division obtains an indictment, it is careful not to suggest that the local prosecutor has been derelict in his duties, and it supports local prosecutors who receive press criticism for inactivity which, in reality, is the result of a lack of manpower. When investigations overlap, the Division accedes to the district attorney, unless a very sensitive informant is involved. The Division avoids referring to the local prosecutor cases it has investigated which have turned out to be insignificant, and when the appropriate unit in the Division is already busy, interesting and important cases may be referred to the prosecutor. The Attorney General also assists local prosecutors by offering training, lending equipment, and providing witnesses with protection.[50]

The Chief of New York's Organized Crime Task Force has described a parallel experience, noting that good relationships with local prosecutors are a practical necessity since the Task Force cannot engage in any grand jury or trial process without the consent of the particular district attorney. Except for one minor instance at the beginning of its operation, the Task Force has never been denied consent by a district attorney or by

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50. Letter from Deputy Attorney General Peter R. Richards, Assistant to the Director, New Jersey Division of Criminal Justice, to Calvin M. Morrow, May 9, 1977, in National Association of Attorneys General, Committee on the Office of Attorney General, ORGANIZED CRIME CONTROL UNITS, 46 (July 1977).

any of the three Governors under whom it has operated. The district attorneys are kept apprised of the conduct of the Task Force in their county. In many of the counties, the Task Force is considered to be a regular and continual adjunct of the district attorney's office.[51]

On the other hand, the Chief of the Organized Crime Division of the Michigan Department of the Attorney General feels that the emphasis on cooperation can become excessive, disagreeing with what he calls the "buddy-buddy" approach, because it erodes checks and balances between different levels of government. He advised Attorneys General that "you must see yourself as someone who has to step in and tell other agencies how to do their jobs when that's necessary. You can do it nicely but you must do it."[52]

Several Attorneys General's offices report that district attorneys are increasingly anxious and able to prosecute corruption cases, and most of the offices favor this trend. Some Attorneys General's office, like New Jersey, will occassionally make available to the prosecutor the services of an accountant or an investigator when a case has been referred to him. The Section does not lend personnel to the prosecutor on a long term basis, as this would handicap the Section's operations, but instead makes its manpower available for limited, specific purposes. New Mexico's Special Prosecution Division reports that, while the Division gets some cases from district attorneys, more and more district attorneys want to handle cases themselves. The Division will often work jointly with a district attorney, with one office handling part of an investigation or prosecution and the other office handling another part.

Although the California Attorney General has the power to initiate prosecutions and to supersede district attorneys, the policy has been that the district attorney handles the investigations and trial work, and the Attorney General handles appeals. The Criminal Division of the Los Angeles Attorney General's office and the Los Angeles District Attorney's Special Investigations Division have worked together on some corruption cases, but corruption prosecutions are usually handled entirely at the local level. Although the Los Angeles Criminal Division of the Attorney General's office develops about twenty corruption cases a year, most of these are handled by the Attorney General's office only through the investigative stage and then are turned over to the appropriate district attorney for prosecution. Also, occasionally a grand jury investigating official misconduct requests the Attorney General's office to come in and handle the investigation because the local prosecutor is felt to be too close to the people being investigated, or because there are allegations of misconduct within a district attorney's office.

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51. Deputy Attorney General Maxwell Spoont, Chief, Organized Crime Task Force, New York Department of Law, in National Association of Attorneys General, Committee on the office of Attorney General, COMBATTING ORGANIZED CRIME: SUMMARIES OF SPEECHES TO AN APRIL, 1978, SEMINAR, 9 (1978).

52. Chief Investigator Vincent W. Piersante, Organized Crime Division, Michigan Department of the Attorney General, Id. at 20.

In Washington, the Attorney General's office may initiate investigations; however, any subsequent prosecution is routinely handled by a local prosecutor, unless the latter neglects to act, in which case the Attorney General may initiate a prosecution to enforce the criminal law.[53] Because of this statutory scheme, the Attorney General's office refers citizen complaints of corrupt activities to the appropriate local prosecutor, who then determines the nature and extent of the Attorney General's involvement in investigating a particular case. County grand juries which may be investigating alleged corruption are generally assisted by the local prosecutor, although the Attorney General and his staff are statutorily authorized to attend and assist the grand jury when called upon by the prosecutor or when the Attorney General has invoked his authority to prosecute.[54]

The Texas Organized Crime Division, in addition to referring cases to local prosecutors, also receives many cases by referral from the local prosecutors, most often in the investigatory stage. There are also requests from local prosecutors for help by the Division staff in prosecuting cases, although often all that is asked is that the Division evaluate a case and give advice on how to proceed with it. The Division refers almost all arrests made by it to the district attorneys, although the district attorney will often then request help of some kind in the prosecution.

In Louisiana, when a case is handed over to a district attorney it usually is handled as a cooperative effort, in which case the Organized Crime and Racketeering Unit will probably assist the district attorney at trial. Sometimes, the district attorney will ask only for technical assistance from the Unit.

In sum, there appears to be no necessity for conflict between Attorneys General's offices and local prosecutors even where their powers and duties overlap. In New Jersey, Peter Richards has noted, many local prosecutors initially were strongly opposed to granting the Attorney General statewide prosecutorial authority, but in the past decade cooperation between the two has steadily increased so that now relations between the two levels of government are quite good.

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53. WASH. REV. CODE § 43.10.030 (1970).

54. Id. § 43.10.090 (1970).

3. UNIT STRUCTURE

States use at least three basic arrangements to organize corruption control investigations and prosecutions: first, conducting such activities within the organized crime or economic crime divisions of Attorneys General's offices; second, establishing specialized divisions devoted exclusively to the corruption problem; and third, creating an office of Special Prosecutor. After discussing the basic organization of each of these three types it will be appropriate to examine structural, personnel, and financial factors common to all three.

Integral Units

Many Attorneys General's offices have established special units to combat organized crime. These are referred to variously as organized crime, white collar crime or economic crime units. Units combining investigative and prosecutorial functions have been created in Attorneys General's offices in twenty-two states;[1] these units commonly handle official corruption cases. The approaches of some of these offices are described below. These examples are selected to show the various types of activities undertaken; this does not purport to be a description of all Attorney Generals' activities.

In Arizona, two developments in 1975-- one legislative and one structural-- led to an increased involvement by the Attorney General's office in combatting public corruption. First was the passage of legislation establishing a statewide grand jury.[2] The Attorney General (or his designee) is authorized to prosecute all indictments returned by a state grand jury, giving the Attorney General's office a new and major role in the investigation and prosecution of public official corruption. The second development was the creation, with federal and state funds, of a Financial Crime Bureau within the Attorney General's office. The primary impetus for establishing the Bureau was the existence of widespread fraudulent land sales practices in the state. Highly complex financial frauds using shell corporations, worthless securities and nonexistent land titles had resulted in the loss of millions of dollars by private citizens and large corporations. Because local law enforcement agencies were not equipped to detect, investigate or prosecute these financial frauds, which often operated on a multi-county level, the Attorney General's office established this unit and staffed it with experienced investigators, auditors and attorneys. It soon became apparent to the Bureau personnel that these financial crimes were exacerbated by and interrelated with public corruption, and in

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1. National Association of Attorneys General, Committee on the Office of Attorney General, ORGANIZED CRIME CONTROL UNITS, 5 (July 1977).

2. ARIZ. REV. STAT. ANN. § 21-421, et seq. (1975).

1976 the objectives of the unit were expanded to specifically include the detection, investigation and prosecution of public official corruption.[3]

The Colorado Attorney General can initiate criminal prosecutions only upon the request of the Governor,[4] but this apparent limitation does not mean that the Attorney General's office is not actively involved in prosecuting criminal cases. An Organized Crime Strike Force was set up within the Attorney General's office in 1974. Since then, it has assumed an increasingly important role in investigating and prosecuting the kinds of cases which come under the classification of organized crime, such as gambling, infiltration of legitimate businesses, automobile theft rings, narcotics and public official corruption. Because the Strike Force has developed a staff with expertise in handling such cases, it not only assists local law enforcement agencies with their cases, but develops and prosecutes cases on its own. At the same time, the Strike Force must necessarily limit its involvement due to resource limitations, so it refers as many corruption cases as possible to district attorneys. The Director of the Strike Force estimates that of the approximately two hundred complaints of public corruption received by the Strike Force each year, it will investigate and prosecute only about fifteen.

In South Dakota, most of the major corruption cases are handled by the Attorney General's office; if a case involves financial records, as is usually the case, it will be investigated and prosecuted by the Attorney General's Economic Crime Unit. The Unit staff currently consists of only one attorney, one investigator and one secretary, but agents of the Attorney General's Division of Criminal Investigation are available for assistance. Corruption cases in which the Unit has been involved include: the prosecution of a member of the state racing commission who was convicted of receiving stolen property; investigations of several chiefs of police resulting in guilty pleas to embezzlement, embezzlement of tax funds, and embezzlement of civil defense property; and a grand jury investigation of official corruption in one city.

The Oregon legislature, in 1977, created an Organized Crime Unit within the Department of Justice's Criminal Justice Division. The legislation appropriated $260,000 for the Unit for a 2-year period. The Unit is responsible for investigating allegations of corruption and malfeasance involving public officials, and coordinating and assisting in legal action against corrupt officials when such action is necessary. The Unit replaces the Governor's Commission on Organized Crime, which had been created in 1971 and was abolished in 1976. The Department of Justice had served as an investigative and prosecutorial body to the Commission but had not been directly involved in the efforts against organized crime.

The Wisconsin Department of Justice Public Corruption Control Unit was set up in 1975 as an investigative/prosecutorial unit, but the main

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3. Arizona State Justice Planning Agency, Final Evaluation (January 13, 1977).

4. COLO. REV. STAT. ANN. § 24-31-101-1A (1973).

emphasis of the Unit was on assisting local prosecutors in investigating corruption rather than in prosecuting such cases. The Unit was dissolved in February 1977, when its funding terminated, and statewide responsibility for the investigation of public corruption has mainly rested with the Department's White Collar Crimes Bureau; some cases are also handled by the General Crimes Unit. The White Collar Crimes Bureau continues, in lieu of the corruption unit, to provide investigative assistance to local and state law enforcement agencies which are faced with evidence of misconduct of public officials and employees.

The Louisiana Attorney General can initiate a criminal prosecution only upon a showing of cause and with the approval of the district court, and with the consent of the district attorney. When the Attorney General's Organized Crime and Racketeering Unit was created in 1973, its primary purpose was to assist local district attorneys in investigating and prosecuting matters relating to organized crime. One of the Unit's principal objectives was to use its resources to investigate and deter public corruption. After 3 years of operation, the Unit was devoting approximately 16 percent of its manpower to investigating official misconduct and corrupt activities. During that time, the legal staff of the Unit participated in grand jury investigations and trials dealing with public corruption on a major basis. A 1977 legislative cutback of funds for the Unit reduced its staff from nineteen to eight persons, but the Unit continues to render assistance to local law enforcement agencies.

The Washington Attorney General's Law Enforcement Assistance Section provides assistance when requested by local public officials; most requests from such officials involve assistance with investigations rather than prosecutions. At the close of the investigation the Section usually prepares and provides a report of its findings of fact for whatever subsequent action the requestor deems appropriate. Assistance requests have included allegations of police brutality, selective enforcement and prosecution, extortion, misappropriation and theft of public monies and property, and ineligibility of candidates to run for hold public offices.

For California, the Attorney General may institute criminal proceedings on his own initiative. He may also intervene or supersede on his own initiative in a proceeding brought by a local prosecutor. In spite of this broad authority, most cases dealing with official corruption and misconduct of state and local officials are tried by district attorneys. There are four branches of the California Attorney General's office, located in Los Angeles, Sacramento, San Diego and San Francisco. In the Criminal Division of the Los Angeles office, designated attorneys work on organized crime cases and corruption cases which may arise within the context of such cases. Except for those, however, the policy of that office is to have the appropriate district attorney try corruption cases as much as and whenever possible.[5]

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5. Interview with Assistant Attorney General S. Clark Moore, and Deputy Attorney General William R. Pounders, Office of the Attorney General of California, Los Angeles, November 15, 1977.

Specialized Units

New Jersey and Delaware are the only states which presently have a special unit devoted exclusively to investigating and prosecuting public corruption and misconduct. Other states have tried this approach with some success, only to find their funding discontinued, and still others are currently attempting to establish such a unit. The advantages and disadvantages of this approach are assessed below.

Whether an independent corruption control unit in a particular Attorney General's office can be a viable approach to dealing with the problem of public corruption depends upon a number of factors. Among these are the Attorney General's powers of prosecution, the office's relationship with the local prosecutors in the state, the investigative tools that are available to law enforcement officials in the state, the relationship of the Attorney General's office with other state agencies, the relationship of the special unit to other divisions of the office, and the attitude of the state legislature toward the work of the unit. Without the benefit of strong tools and relationships in these areas, a separate corruption control unit might find it difficult to justify its existence. A more basic question to be answered is whether a specialized unit should be established. Officials in the states that have used them, such as New Jersey, Delaware, New Mexico and Wisconsin, think that specialized units have attributes and advantages that regular components of the Attorney General's office, like economic/white collar/organized crime divisions, do not enjoy. While organized crime cases and corruption cases often are interrelated, and may share some of the same characteristics, they may not be compatible for purposes of investigation and prosecution. Organized crime cases tend to be of considerable duration, in terms of the investigation stage, but corruption cases are considered to be even more subtle and complex, requiring searches for and detailed examinations of documents, a "paper chase," as the Cornell Institute phrases it.[6]

In order for the attorneys, accountants and investigators to develop expertise at such techniques, they arguably should devote full time and energy to corruption control and not be interrupted with organized crime cases. Using New Jersey as an example, the Special Prosecutions Section of the Division of Criminal Justice had a mandate to fight organized crime, so corruption cases were of lower priority. This could lead to a negative public perception of the zeal of public officials to prosecute corrupt public officials, particularly if public complaints are given little attention. The former Director of the Illinois Governor's Office of Special Investigations advises:

> Start separate and stay that way. Don't make the unit a subdivision of some larger body with broader responsibilities such as, for example, the State Police. Make an independent, single purpose organization. Here are two reasons: (1) It pinpoints responsibility upon the Director in a visible, dramatic, effective way. This tends to push the Director into living

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6. G. Robert Blakey, Ronald Goldstock and Charles H. Rogovin, The Rackets Bureau Concept, Cornell Institute on Organized Crime, 29 (1977).

up to the professed ideals of the anticorruption unit. Any director, every director, is going to need all the pushing he can get. (2) It materially increases the probability that significant corruption or misconduct cases will get priority, because [the corruption unit] has only such cases to investigate. Therefore, the Director is not constantly involved in compromising the competing demands of, say narcotics investigations against the inevitably "hot," controversial, unpopular corruption cases. Because he need not hedge his commitment of resources, he cannot safely duck his duty.[7]

Political considerations are important, too. The Chief of New Jersey's Corruption Investigation Section has noted that as the corruption unit becomes larger and, hopefully, more successful, it may tend to anger those who provide the funds for its existence or those who hire its staff.[8] Thus, integrating the corruption unit with the organized crime unit could jeopardize the finances or integrity of the entire organized crime unit. This argument could be countered, however, by saying that it might be worth sacrificing some of the autonomy of the corruption unit by submerging it in the Attorney General's office, to make it less vulnerable and therefore subject to less political pressure.

State Examples

New Jersey's Corruption Investigation Section, formerly the Corruption Control Bureau, is generally acknowledged to be one of the most successful units in the country. Corruption cases were originally handled by the Special Prosecutions Section, which investigates and prosecutes cases involving traditional organized crime activities such as illegal gambling, loansharking, fencing and narcotics distribution. However, New Jersey enforcement officials began to feel, for the reasons mentioned above-- the length and complexity of corruption cases, and the necessity for skills to conduct the "paper chase"-- that an independent corruption control section was needed. Thus the Corruption Control Bureau was created in 1975. It was funded to conduct major investigations which it initiates, but also takes cases on referral from local prosecutors and will assist local prosecutors in investigations whenever this is required.

Other sections of the Division of Criminal Justice are vitally concerned with official corruption, and also investigate and prosecute cases.

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7. Donald Page Moore, Former Director, Illinois Office of Special Investigations, Office of the Governor, in Law Enforcement Assistance Administration, REPORT OF THE NATIONAL CONFERENCE ON ORGANIZED CRIME, 53 (1975).

8. Interview with Deputy Attorney General Charles D. Sapienza, Chief, Corruption Investigation Section, Division of Criminal Justice, Princeton, New Jersey, November 18, 1977. On a related matter, Sapienza is of the opinion that it is better to have a permanent unit rather than to use the strike force concept, in that conflicts and split allegiances can develop when personnel remain attached to their original agency.

Most notably, the Special Prosecutions Section (SPS), whose primary objective is to maintain pressure on organized criminal activity, continues to handle corruption cases that result from its organized crime investigations. For instance, if, during the course of a criminal investigation the investigators discover information which indicates that a police officer is corrupt, the Section would continue to handle the corruption case as an offshoot of the original criminal case.

The working relationship of SPS with the Corruption Investigations Section (CIS) varies with the individual case. Special Prosecutions might coordinate or consult with CIS, or it might handle the case alone. In all cases, however, SPS considers it imperative that CIS be kept closely informed of its activities. Special Prosecutions will also take charge of a corruption investigation that necessitates the use of non-consensual electronic surveillance, as it is the only office which is equipped to conduct such surveillance. Special Prosecutions usually handles cases requiring use of State Police units, because it maintains a close relationship with those units. For example, in a case where a political figure attempted to bribe a juror, SPS took over the investigation from the CIS because it entailed the use of both electronic surveillance and State Police.[9] The Civil Remedies Section and State Grand Jury Section are also very active in corruption control. The Civil Remedies Section was created to recover funds and property acquired by illegal conduct and breaches of public trust by public officials.

The Delaware Department of Justice initiated the operation of a Special Investigations Unit in May 1977 to investigate and prosecute public official corruption. In July 1977, an 18-month LEAA grant was obtained. It should be noted that there are no local prosecutors in Delaware, so the Attorney General has responsibility for handling all criminal cases. The Special Investigations Unit has no personnel of its own, but attorneys are assigned to it from the civil and criminal division of the Department of Justice, and investigators are assigned to the Unit on a loan basis from the Delaware State Police, the New Castle County Police Department, and the Wilmington Police Department. The most important case for the Special Prosecutions Unit so far has involved the investigation of a large wholesale supplier to the state and other governmental units whose practices included public official bribery in addition to bid-rigging, short-shipping and product substitution. The Unit has also investigated allegedly illegal union contributions to legislators, embezzlement of municipal funds in a small town, tax, welfare, and unemployment insurance fraud, and police misconduct.

In the New Mexico Attorney General's office, public official corruption cases are handled by the Criminal and Special Prosecutions Division, which was created in response to law enforcement reports indicating an increase in recent years of organized crime in the state. The Special Prosecutions Section of the Division is the unit which specializes in investigating and

9. Interviews with Deputy Attorney General William Palleria, Chief, Special Prosecutions Section, Division of Criminal Justice, Princeton, New Jersey, November 18, 1977 and September 22, 1978.

prosecuting corruption. (For identification purposes and to avoid confusion with New Jersey's Special Prosecutions Section, the New Mexico unit will be referred to by its former name, the Corrupt Government Practices Unit, or CGP.) Since the corruption cases were primarily criminal in nature, it was felt that it would be advantageous to operate this unit alongside the Criminal Division's staff. In practice, the ten other attorneys in the Criminal Division are called upon from time to time to assist with corruption cases developed by the CGP staff.

The New Mexico unit was established to develop a specialized staff of investigators, accountants, auditors and attorneys who could detect and prosecute official corruption and who could also assist other governmental agencies in doing the same. About 90 percent of corruption matters in New Mexico are handled by the Attorney General's investigators, with the remaining 10 percent being handled by other agencies assisting in investigations.

CGP has handled cases involving land fraud by a county commissioner, bribery of a witness by a county sheriff, embezzlement by an employee of the Department of Motor Vehicles, forgery and falsification of public documents, government employees causing public money to be paid for services not rendered, and solicitation by a private attorney of bribes to influence the outcome of judicial proceedings, among others. The unit also assists the Judicial Standards Commission. Unfortunately, federal funding for the corruption control unit is ending in late 1978, and state funding has not been forthcoming, with the result that there will no longer be a separate unit for corruption matters.

The lack of state support also led to the demise of the Public Corruption Unit in the Wisconsin Department of Justice. The unit had been funded from its inception in 1974 by LEAA grants. The unit was disbanded in 1977 when those expired. The LEAA grant enabled the Department to establish an investigatory unit with counsel supplied from the Criminal Prosecution Unit of the Department, and an Assistant Attorney General as Chief Counsel. Originally, the mission of the unit was stated to be to "operate within the Department of Justice as an investigative-prosecution strike-force which is charged with the singular responsibility of investigating and prosecuting public corruption...."[10] This was later revised to call for "particular emphasis and priority on well-organized, large-scale corruption activities."[11] The specific goals of the unit were described as being,

> To investigate government corruption . . . which is either state-wide in nature, influence or importance, or in which investigative assistance is requested by local authorities; to train local law enforcement agencies in the detection and investigation and prosecution of corruption cases; to

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10. Wisconsin Department of Justice, Evaluation: Public Corruption Unit, 2 (October 1975).

11. Wisconsin Department of Justice, Progress Report to Law Enforcement Assistance Administration, 2 (February 1976).

examine those areas of government in which a high potential for corruption exists; and, to maintain a liaison with local, state, and federal law enforcement agencies involved in corruption investigations.[12]

The Attorney General's White Collar Crimes Bureau is currently responsible for conducting investigations into misconduct in public office and bribery of public officials.

Personnel

Corrupt public officials and their partners in crime use sophisticated and covert techniques, and special skills are needed to trace their activities. Corruption cases are also usually highly sensitive; in order to maintain the credibility of the unit and avoid unfairly damaging reputations of public officials, care must be taken to prosecute cases only where a guilty verdict is very likely. During the investigatory stages, both the attorneys and investigators need to be highly aware of what constitutes evidence that will be admissible at trial. For these and other reasons, staff selection, organization and training should be conducted very carefully, yet there are few guidelines on how to accomplish any of these.

It is not possible to extrapolate from the number of persons in each type of position in the various corruption control units what the ideal number for a given size unit or state should be because each state has different funding resources, some units are integral with organized crime units, and some units have personnel supplied by other divisions of the Attorney General's office. Some observations, however, can be made based on the experience of established units.

Of the Attorney Generals' offices reporting the number of attorneys assigned to corruption control, a few states, such as South Dakota and Louisiana, had only one or two, while most units had four or five attorneys. A few units, such as Delaware's and New Mexico's, had variable numbers, as attorneys were "on loan" from other sections or divisions of the Attorney General's office, and their number could be increased or decreased as required by caseload.

The number of investigators varied more widely. New Jersey's Special Prosecutions Section and South Dakota's Economic Unit had only one investigator each, but other state agencies conduct the investigative work in those states. The Office of the Special Prosecutor in New York had by far the highest number of investigators, sixty-seven. The "normal" range appears to be seven to twenty investigators. The prevalent ratio appears to be one-and-one-half to two times as many investigators as attorneys. The number of clerical personnel generally ranged from half the number of attorneys to approximately a one-to-one ratio.

New Jersey's Corruption Investigation Section employs six financial analysts; otherwise, no corruption unit reported employing more than one or two accountants. This may be because the units "borrow" financial

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12. Id.

analysts from other divisions of the Attorney General's office. The position of accountant-- also termed investigative accountant, auditor, or financial analyst-- is an important one for many types of corruption cases. In their publication The Rackets Bureau Concept: General Standards for the Operation of Organized Crime Control Units, Blakey, Goldstock and Rogovin say that,

> today, it is often necessary to trace payoffs and other profit trails through a number of books and records to get back to their source or to follow them to their recipients. Only accountants experienced in criminal investigations can master the "paper chase." Such accountants are essential, too, in drafting comprehensive subpoenas and presenting complicated financial transactions to juries.[13]

Corruption control units in Delaware, Louisiana, New Jersey, New Mexico and Texas have reported using accountants.

All units report employing investigators and almost all units report employing attorneys, although a few "borrow" either attorneys or investigators from outside agencies. At least one Assistant Attorney General sees an advantage in having investigators provided by an outside agency in that those agents have access to information and intelligence gathered by that agency. Also, if a police department or other unit of local government is paying for the investigation, a substantial monetary and psychological commitment to their success has been made.[14] On the other hand, a division of loyalty could be a disadvantage.

The Team Approach

Most units use a one-on-one attorney/investigator team. An evaluation of the Texas Organized Crime Division stated, "The division was apparently created with a concept of integrating those skills obtained by an experienced trial lawyer with those skills obtained by an experienced investigative peace officer."[15] While the investigator may retain investigative authority and the attorney legal authority, it is important to have the two work closely together in order to build as tight a case is possible. The attorney should advise the investigator as to the admissibility of evidence material in each element of the alleged corrupt act. Conversely, the investigator should advise the attorney as to how easy or difficult it is to gather certain material.

There may be initial problems in implementing the team approach. When the New Jersey Corruption Investigation Section began its operations,

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13. Blakey, et al., supra note 6, at 29.

14. Interview with Rich Nathan, Director, Organized Crime Strike Force, Office of the Attorney General, Denver, Colorado, November 16, 1977.

15. Evaluation of the Texas Attorney General's Task Force for Organized Crime, 1 (November 30, 1977).

it was difficult to get the attorneys and investigators to work together. The investigators, recruited from the State Police, were used to working independently. As a result, they continued to conduct the investigations themselves without working along with the attorneys and accountants in the Bureau. The problem at CIS was overcome, in part, by the insistence of the Law Enforcement Assistance Administration on cooperation; if the unit was to be funded in the future, the police would have to operate within the unit. The new Director of Criminal Justice also stressed the importance of cooperation. Physical consolidation of the entire staff also facilitated cooperation. The Bureau Chief now feels that the investigators and attorneys work well together, and that the team approach to investigations is successful.[16]

The New Mexico Corrupt Government Practices Unit has been staffed by five attorneys, seven investigators and two accountant/auditors. Attorney/ investigator teams are assigned to a case early in the investigatory stage. They work in tandem, sometimes with an auditor, to develop the investigation. At the same time, the investigators were formed into a Criminal Investigation Unit within the Division, parallel to CGP. This Unit was under the direction of an Assistant Attorney General. The Director of the Criminal and Special Prosecutions Division stated that this was done because he felt he did not have enough time to adequately supervise the investigators, and because the investigators worked more efficiently when there was one attorney to report to.[17]

Prior Experience; Training

Corruption control units generally prefer experienced investigators. In Louisiana, at least 6 years police experience is required for investigators; Ohio is more typical in that investigators average 3 years' prior experience, usually with a metropolitan police department or a county sheriff. In New Mexico, all investigators have backgrounds with city police, a county sheriff's department, or the State Police, although this is not a requirement for employment. The New Jersey Corruption Investigation Section's investigative accounting staff consists largely of retired Internal Revenue Service agents. The Los Angeles District Attorney's Special Investigations Division reports that many of its investigators have retired from the city police department. In Texas, interestingly, there is a requirement that every agent in the Organized Crime Division be a former uniformed police officer in the state of Texas. The average number of years of experience in Texas is 10.

Some jurisdictions require that their attorneys must have a minimum number of years of experience before joining the special unit. The Colorado strike force requires 4 years, while the Los Angeles District Attorney's office requires 3 years experience in its office before an attorney

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16. Interview with Charles D. Sapienza, supra note 8.

17. Telephone interview with Assistant Attorney General Harvey Fruman, Director of Criminal and Special Prosecutions Division, New Mexico, January 5, 1978.

can join the Special Investigations Division. The most important requirement seems to be that the attorneys have significant trial experience. The Los Angeles District Attorney's 3-year requirement is really aimed at getting attorneys with highly developed courtroom skills acquired during a period of general felony trial work. A team which evaluated New Jersey's corruption control bureau stated,

> ...an attorney without appropriate trial experience is handicapped in being unable to see the picture as it is likely to emerge. He does not have a true feeling for the case and, particularly, the evidentiary requirements and what will be needed to go into the Grand Jury unless he has the experience which will enable him not only to see his own role but to give proper guidance and leadership to the other members of the team.[18]

Of course, heavy emphasis on trial experience makes it difficult to hire young, new attorneys. The Office of the Special Prosecutor in New York has established an innovative training program that may point the way to solving such a dilemma. The Special Prosecutor has said that corruption cases involve complex issues of fact and law and that for a lawyer's first prosecution to be the trial of a public official where the evidence is subject to a variety of interpretations is inappropriate. The Special Prosecutor's office has thus arranged for its younger attorneys to intern in county criminal courts, handling felony hearings and trying misdemeanor cases. In this way, their first exposure to the courtroom is on a more manageable scale. During their 4 to 7 week internship, these attorneys are trained by experienced assistant district attorneys to evaluate and try cases.[19] A second part of this training program consists of weekly in-house lectures, workshops and demonstrations presented by senior staff members, on such topics as the grand jury, electronic surveillance, trial practice, and pre-trial proceedings. Many of the new attorneys also attend training programs outside of the office. Specifically, the New York State Division of Criminal Justice Services offers a "Basic Course for Prosecutors" which includes lectures on pre-trial, trial and evidentiary subjects, and the New York County Bar Association offers a "Refresher Course on Evidence" preceeding an intensive review of basic evidentiary materials. In 1976-77 an in-house training program for investigators was instituted covering such topics as the use of force, service of the subpoena, the role of the auditor, trial preparation, narcotics investigation, search and seizure, the use of informants, electronic surveillance, and firearms training.[20]

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18. Criminal Courts Technical Assistance Project, The American University Law Institute, Evaluation and Technical Assistance Study of the Official Corruption Control Bureau of the Office of the Attorney General, State of New Jersey, 18 (July/August 1976).

19. Annual Progress Report to Governor Hugh L. Carey and Attorney General Louis J. Lefkowitz from John F. Keenan, Special State Prosecutor, 4 (July 7, 1977).

20. Id. at 40-44.

The large size of the Special Prosecutor's staff makes such endeavors more feasible, but even smaller units could offer some training. A 1976 evaluation of the New Mexico Corrupt Government Practices and White Collar Crimes Division (former parent to CGP) stated that the legal personnel should be better schooled in investigative techniques, surveillance and efficient use of manpower.[21] An evaluation in the same year of the New Jersey Corruption Investigation Section stated that more training was needed for all phases of the operation, particularly in the use of investigative accountants, who had insufficient expertise in identifying corruption targets and investigating bribery cases.[22]

Wisconsin's Corruption Control Unit offered its agents continuous in-service training relating to the investigation of financial fraud, especially with regard to business practices and procedures used by corporations and partnerships in their dealing with public contracts. Agents were also encouraged to broaden their own educational background in business administration and accounting.[23] Louisiana's organized crime unit has arranged for those of its attorneys who have had little experience to practice in local courts, in order to gain litigation experience.

Funding

The availability of federal funding to initiate corruption control units has been a major impetus to their creation. Corruption control units in Wisconsin, New Jersey and New Mexico have relied in large part on grants by the Law Enforcement Assistance Administration, through either block grants or discretionary grants. Listed below are yearly grant amounts for the units designated.

New Mexico Corrupt Government Practices and White Collar Crime Unit

November 1975-November 1976	$203,469
November 1976-March 1977	$ 34,000
March 1977-October 1978	$169,782

New Jersey Corruption Control Bureau (now Corruption Investigation Section)

January 1975-October 1976	$723,000
November 1976-July 1977	$200,000

Wisconsin Public Corruption Control Unit

February 1976-February 1977	$152,755

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21. Office of the Attorney General of New Mexico, Evaluation of the Corrupt Government Practices and White Collar Crime Division, 2 (Sept. 30, 1976).

22. Criminal Courts Technical Assistance Project, supra note 18, at 14.

23. Wisconsin Department of Justice, Evaluation: Public Corruption Unit, 1 (January 1976).

The table shows only the amount of the LEAA share, not the total cost of the program. For instance, in 1975-76, $80,000 in state match funds was provided to the New Jersey Corruption Control Bureau. Generally, the grantee must provide 10 percent of the total cost of the project to receive LEAA funds.

LEAA funding is not intended to be permanent, but to initiate programs that eventually will be absorbed into state budgets. Unfortunately, corruption control units have seldom been successful in obtaining continuation funding from the states. New Jersey is the exception here; CIS is supported in part, and SPS is supported entirely by state funds. Wisconsin's unit was denied state funds and was deactivated in 1977; New Mexico's Special Prosecutions Division is undergoing the same experience in 1978. The explanation for this reluctance on the part of legislatures to fund these operations appears to be political rather than fiscal. These units have recovered large sums of money for the state; for instance, the Wisconsin Corrupt Government Practices and White Collar Crime unit recovered $520,000 for the state in 1976, and almost $1,800,000 in 1975. Legislatures may be disinclined to appropriate funds to organizations which may investigate or prosecute a few of their members.

Similar experiences have been reported by organized crime control divisions which investigate and prosecute corrupt activities. After 3 years of federal funding, Louisiana's Organized Crime and Racketeering Unit's budget of $450,000 was assumed by the state legislature for a fourth year. The next year, the legislature severely cut appropriations for the Attorney General's Criminal Division in an amount closely matching that budgeted for corruption and organized crime control. The staff of the Organized Crime and Racketeering Unit was cut in half, and, as a result, more than 200 cases under investigation had to be closed. In Pennsylvania, the state legislature successfully cut off federal funds to the Philadelphia Special Prosecutor's office, which had been formed by the Attorney General, to investigate the city government. The investigation, funded by an LEAA grant, involved state legislators. In 1976, the General Assembly specifically prohibited the State Treasurer from issuing any warrant for requisitions of federal funds in the State Treasury unless such funds had been specifically appropriated by an act of the General Assembly. The legislature overrode the Governor's veto of the bill and declined to appropriate the funds for the Special Prosecutor's office. After extended litigation, the Commonwealth Court ruled that the legislature had the right to control such monies prospectively, although it ordered that 1975-76 funds be released to the Special Prosecutor.[24]

The Special Assistant Attorney General of Rhode Island in charge of that state's White Collar/Economic Crime Unit has several suggestions for

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24. The full story of this episode may be found in: Address of Deputy Attorney General Peter Foster, Pennsylvania Department of Justice, in National Association of Attorneys General, Committee on the Office of Attorney General, COMBATTING ORGANIZED CRIME: SUMMARIES OF SPEECHES TO AN APRIL, 1978, SEMINAR, 67 (1978).

units facing problems with the funding process, with regard to both state legislatures and LEAA.[25] First, the Attorney General and all members of the criminal division and the department must understand exactly what the unit can, should and does do under the terms of its grant and the rules adopted pursuant to that grant. Second, the unit should keep careful track of statistics to use as a selling point to the budget people. Third, the unit should use press or media to build public support so that the budget office and legislature will be hard pressed not to support the unit. Fourth, the unit should sell itself to the public and law enforcement and regulatory agencies so that they will support funding efforts. Fifth, the members of the unit should know and understand the state budget process. Finally, there should be close contact between the unit and the department's research and planning unit, and between the state planning agency and LEAA, to know about federal rules and regulations and new federal programs which may be a source of funds.

Evaluation Procedures

Evaluation is needed in order to plan the best use of scarce financial, manpower, and time resources, and it may be important to securing or continuing funding. But the questions of whether to have self-evaluation or outside evaluation, or whether to use objective or subjective data, and the like, remain unresolved. Some different evaluation methodologies are described here.

A proposed in-house evaluation design, which was part of a grant application for an independent corruption control unit in Colorado, contemplated the use of objective data to quantify certain achievements of the unit.[26] These were:

Objective 1: Development of intelligence sources

Measurements: (a) Number of sources of information regarding allegations of corrupt activity
(b) Number of investigations begun from information supplied by citizen sources
(c) Number of investigations begun from information supplied by government employees

Objective 2: Review of intelligence information and selection of target areas

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25. Special Assistant Attorney General Stephen P. Nugent, White Collar/Economic Crime Unit, Rhode Island Department of Attorney General, Id. at 73.

26. Colorado Department of Law, Grant Application to Law Enforcement Assistance Administration, Program Narrative, 13-15 (1975). The unit was never initiated due to legislative defeat.

Measurements: (a) Number of investigations begun by target area breakdown (b) Number of investigations completed by target area breakdown
(c) Number of investigations referred to other agencies
(d) Number of investigations referred by other agencies

Objective 3: Selection of investigative plan

Measurements: (a) Type of investigative tool(s) utilized per each investigation; e.g., grand jury, undercover activity, interviews, electronic surveillance, etc.
(b) Number of convictions per investigation
(c) Utilization of grand jury: total hours, number of witnesses, number of immunity grants

Objective 4: Filing of criminal charges; successful prosecutions

Measurements: (a) Number of prosecutions
(b) Number of defendants charged
(c) Number of convictions
(d) Range of sentences imposed upon conviction by target area breakdown

There are obvious drawbacks to any such quantitative evaluation, and even this proposal acknowledged the difficulty of quantifying the benefits of a corruption control program in terms of its deterrent effect.[27]

One quantitative measurement which has been used in several evaluations, particularly self-evaluations, is the amount of money or property recovered by the unit, especially as compared with the cost of the unit. This would seem to be a useful and perhaps even dramatic measurement, but again it is limited in that it cannot measure deterrent effect and would be low during periods of intensive investigation. An evaluation of the Louisiana Organized Crime and Racketeering Unit was conducted by an independent consulting firm under an LEAA grant. The consultants conducted on-site reviews of the operation, interviewing state officials and examining case files, financial records, investigative equipment and logs of its use. Staff training records were reviewed and an analysis of the use of the Unit's automobile fleet was made.[28]

The successful grant application for Arizona's Financial Crimes Bureau lists several standards against which the project will be evaluated at its conclusion. Although the application does not state in detail exactly how these standards will be measured, it is clear that they are a mixture of quantitative and qualitative:[29]

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27. Id. at 13.

28. Richard A. Nossen and Associates, Evaluation of the State of Louisiana Department of Justice-- Organized Crime and Racketeering Unit, LEAA, 4 (September 1976). Despite the evaluator's positive report, or perhaps because of it, the legislature cut the budget of the Attorney General's Criminal Division.

29. Office of the Attorney General of Arizona, Action Subgrant Application to Arizona State Justice Planning Agency (1977).

(1) the certainty of the results of the investigation;

(2) the detection, investigation, and prosecution of frauds which would not have been prosecuted but for the project;

(3) the amount of money involved in the frauds versus the cost of the project;

(4) the statistical success rate of the prosecutions;

(5) the decrease in the incidence of the target crimes;

(6) the willingness of the state to establish a permanent unit to prosecute such crimes;

(7) the development of investigators and prosecutors trained to prosecute these types of crimes; and

(8) the benefit of the new laws created at the behest of the unit

The Wisconsin Department of Justice, in contrast, used very discrete, specific objectives in evaluating its former public corruption unit, except for one objective which was denominated as "lowering public tolerance of illegal activities," which was rather nebulous. For example, one objective was "to support the adoption of a state gift and gratuity statute which would basically forbid public officials from receiving anything of value from individuals with whom they have had contact in their official capacity."[30]

The American University Criminal Courts Technical Assistance Project conducted an evaluation of the New Jersey Corruption Control Bureau.[31] Its first major step, following early discussions, was to prepare and circulate a background paper designed to, among other things, identify the dominant issues and principal problem areas which required examination. Then they conducted on-site visits to conduct interviews and examine documents. The approach taken by the Bureau in prosecuting actual cases was also examined, with special attention given to the way members of the Bureau went about their work and utilized the Bureau's resources. Interviews with outside officials, including the Governor and Attorney General, were conducted in order to help determine the effectiveness of the Bureau's activities.

The Organized Crime and Criminal Intelligence Branch of the California Department of Justice has developed a Handbook of Self-Evaluation Guidelines for Organized Crime Intelligence Units. The handbook is designed to assist self-evaluation in determining intelligence unit strengths and weaknesses, priorities, and the focus for future funding. It relates self-evaluation techniques to the interests and influence of four groups:

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30. Wisconsin Department of Justice, Final Report to LEAA on Public Corruption Control Unit, 4 (March 1976).

31. Criminal Courts Technical Assistance Project, supra note 18.

the unit itself, the intelligence community, funding sources, and the general public.

Formulating an intelligence process, in fact, is the next natural step in prosecuting official corruption after structuring an appropriate corruption control unit. Chapter 4 will discuss what states have done in the field of intelligence.

4. INTELLIGENCE AND TARGET SELECTION

"One of the most important things to remember in handling cases of this kind is that you simply cannot afford to be wrong; you have to be careful not to go after an innocent person and you also have to be sure that you have a solid case before you make any accusations. If you do not tread carefully in this area, your credibility and that of your unit may be ruined."[1]

--Alfred N. King, Special Attorney, Organized Crime and Racketeering Section U.S. Department of Justice, to Organized Crime Seminar, April 1, 1978

The first prerequisite to successfully prosecuting a corrupt public official is to make sure a solid case exists against him. This requires an effective intelligence capability. The term "intelligence" describes both the process of collecting, analyzing and disseminating this information and the end product of that process. Anyone working in law enforcement is familiar with the basic process of intelligence,[2] which is described as follows by a Delaware State Police procedures manual.[3]

Collection, including research, field investigation, collateral information, is followed by collation or comparison, and evaluation of both the reliability of the source and credibility of his information. These steps are followed by integration of the evaluated information into the larger body of information for correlation, which means putting newly evaluated information in the proper relationship and perspective with information already on hand. Although analysis appears to be a distinct step following correlation, some degree of analysis is conducted from the time the information is first received, and is a continuing process. All of this activity culminates in the production or compilation of the resulting intelligence, usually in the form of summaries, estimates and analyses. The final step in the cycle is the dissemination of finished intelligence to designated consumers.

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1. National Association of Attorneys General, Committee on the Office of Attorney General, COMBATTING ORGANIZED CRIME: SUMMARIES OF SPEECHES TO AN APRIL, 1978, SEMINAR, 29 (1978).

2. Two brief and informative sources that discuss the intelligence process and its use in the area of organized or economic crime are: E. Drexel Godrey, Jr. and Don R. Harris, BASIC ELEMENTS OF INTELLIGENCE, Law Enforcement Assistance Administration (November 1971); and, National Association of Attorneys General, Committee on the Office of Attorney General, ORGANIZED CRIME CONTROL UNITS, Chapter 6 (July 1977)

3. Delaware Department of Public Safety, Division of State Police, INTELLIGENCE CENTRAL - STANDARD OPERATING PROCEDURES, II-4.

In 1973, the National Advisory Commission on Criminal Justice Standards recommended that every police agency and every state establish the capability to gather, evaluate, and disseminate intelligence in a manner designed to curtail organized crime (which presumably includes official corruption) while protecting the individual's right to privacy. Several more specific guidelines are included within this standard. Among them, the Commission said that every state should establish a central gathering, analysis storage and dissemination system, and that every police agency in the state should participate in providing information and receiving intelligence from the system by designating a liaison officer to it. Further, the Commission stated that every police agency with more than seventy-five personnel should have a full-time intelligence capability and, that when the size of the intelligence operations permit, organized crime intelligence should be separate from civil disorder intelligence.[4]

Some of the established corruption control units conduct their own intelligence, while others work in cooperation with or receive their intelligence from other state agencies, but all of them utilize some type of centralized intelligence. The advantages of centralization of the intelligence process include: (1) avoiding duplication of effort; (2) permitting the combination of multiple leads and isolated facts; (3) bridging any non-communication gap among agents; and (4) capturing potentially useful information that might appear worthless when considered in isolation.[5]

Neither the New Mexico Special Prosecutions Division nor either of the New Jersey units, the Corruption Investigation Section or the Special Prosecutions Section, engages in extensive intelligence-gathering activities or employs specific intelligence analysts. Instead, they rely on the capabilities of their State Police intelligence divisions. New Jersey's State Police has a sophisticated intelligence operation, which an F.B.I. official characterized as "among the most honest and effective operations in the nation."[6] CIS and SPS work with several units of the State Police, including the Intelligence Bureau, the Major Crimes Unit and, especially, the Organized Crime Bureau. The State Police generate their own leads, and when the deputy in a State Police unit feels there is a case developing he will call in CIS or SPS. The Department of Law and Public Safety does maintain a central system for the filing and retrieval of intelligence. This central records system is scheduled to be computerized in late 1978, and will be connected with the State Police computer, although it is not clear as of this writing whether the State Police intelligence files will be computerized. CIS also maintains its own manual card file indexed by name, subject matter and geographical location.

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4. National Advisory Commission on Criminal Justice Standards and Goals, REPORT ON POLICE, 250 (1973).

5. Interview with Gerald Shur, Attorney-in-Charge, Intelligence and Special Services Unit, U.S. Department of Justice, Washington, D.C., December 27, 1973, in ORGANIZED CRIME CONTROL UNITS, supra note 2, at 54.

6. Howard Blum and Jeff Gerth, "The Mob Gambles on Atlantic City," New York Times Magazine, 48 (February 5, 1978).

In New Mexico, consideration was given to having the unit compile its own "raw data" intelligence, but an August 1977 evaluation of the unit questioned the desirability of such an arrangement:

> It may be debatable whether or not the unit should engage in compiling "raw data" intelligence within its own office if a suitable alternative agency can undertake this function, e.g., state police. It is debatable because within a politically elected office the collection of raw data can be misinterpreted and become a "bone of contention" especially with the post "Watergate" perspective on the protection of privacy and the massing of information not constituting criminal behavior in a political office.[7]

No decision was ever made to initiate such a process, but the same evaluation urged that the Division develop a more effective procedure for retrieving data from its cases: "statistical data, economic loss figures, and other relevant information is searched for periodically as opposed to being recorded in the regular course of business."[8] An earlier evaluation had stated, similarly, that with the large number of inquiries and requests for investigation flowing into SPD, an efficient system for information retrieval would have to be developed, so that the project director could get the "big picture" and "each investigator and an attorney will be able to retrieve information on a given person or method of operation without having to go back and find the agent or investigator who worked on a similar case...."[9]

Most state files are manual, although in some states, they are adaptable to or are designed for ultimate conversion to computers. States such as Ohio, Texas and Colorado, which do their own intelligence work, tend to have sophisticated storage, analysis and retrieval systems. The Colorado Organized Crime Strike Force, which investigates official corruption in that state, has its own intelligence unit which uses computerization extensively. The Strike Force receives daily intelligence input from local police departments.

Sources of Cases, Target Selection and Priorities

A productive intelligence process is a necessary but not sufficient condition for successful prosecutions. It is clear that not every instance of corruption, major or minor, can be prosecuted or even fully investigated, due to the realities of funding, time and manpower. Corruption control units must use their intelligence to select the "best" cases for investigation and prosecution. Sources of cases can be classified into five

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7. Gene S. Anderson, Office of the Attorney General of New Mexico, Evaluation Report: Corrupt Government Practices and White Collar Crime Project, 44 (August 1977).

8. Id. at 45.

9. Timothy James, Evaluation Report (accompanying Quarterly Progress Report to LEAA), 2 (September 30, 1976).

categories: citizen inquiries or complaints, referrals from other agencies, referrals from local prosecutors, tips by informants, and investigations initiated by the unit itself.

Citizen Complaints

The New Mexico Special Prosecutions Division receives numerous citizen complaints, and replies to these with a form letter which is designed to elicit more specific information about the activity, date, location, and persons involved. Frequently, the citizen does not reply to this letter and the unit simply never hears from him again. Citizen contacts are categorized into inquiries and complaints. An inquiry is defined as a request for information or a generalized grievance about potential or alleged corrupt practices. A complaint is a specific allegation that a particular corrupt act or practice has occurred or is suspected. The Director estimates that approximately 350 complaints were received by the Division in 1976-77.

In the first 9 months of the Division's operation, approximately 14 percent of the inquiries and complaints resulted in special investigations.[10] A complaint becomes a special investigation when it has reached the stage of evidence gathering and research with intent to prosecute. The Director of the Division estimates that about 75 percent of its intake is attributable to citizens. However "citizen" sources are characteristically informed individuals, often government officials or employees, who have access to matters not visible to the general public.

An evaluation of the Division cites these examples of sources of different subject matter: county commissioner-- private use of county equipment and employees; legislator--abuse of authority by state agency; media representative-- bill padding for consultant services; state employee--misuse of funds within his department; ex-city employee-- conversion of city property by its attorney; defendant in charged case-- information on accepting bribes by co-conspirator.[11] Some of these sources were risking loss of employment or public embarrassment themselves by alerting the Special Prosecutions Division to corrupt activities. The evaluation concluded that they furnished information because they believed that Special Prosecutions would act effectively on the information.[12] The Director has noted that public awareness of the unit developed soon after it was established when it began a county-wide grand jury investigation into corrupt practices of county officials and employees, which received a great deal of publicity.[13]

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10. Telephone interview with Assistant Attorney General Harvey Fruman, Director of Criminal and Special Prosecutions Division, New Mexico, January 5, 1978.

11. Anderson, supra note 7, at 26-27.

12. Id. at 27.

13. Telephone interview with Harvey Fruman, supra note 10.

In New Mexico, citizens may petition to convene a grand jury. A petition with the signatures of at least seventy-five residents is required. The Director relates that the allegations of wrongdoing in these petitions are usually very broad:

> ... if the petition calls for an investigation of members of the school board, the petition may say very broadly, "The school board is corrupt." It is then up to our office to look into this further and find out whether there is, in fact, wrongdoing ... [and] whether it constitutes criminal conduct ... These cases often turn up some kind of wrongdoing which does not involve a criminal case but which can result in the application of or neglect or misfeasance statutes which attach quite minimal penalties.[14]

In New Jersey, many citizen complaints are directed to the Governor and the Attorney General, as well as to the Corruption Investigations Section. The Section Chief has stated that it is important that other offices of state government be aware of the Sections's activities so they can direct inquiries to it. CIS routinely reviews all complaints received by it. There is an initial inquiry into the complaint, taking 2 weeks at the most. At the close of this inquiry a rating number of 1-5 is assigned to each complaint, which determines whether or not CIS will further investigate the complaint and, if so, what priority it will receive. Factors used in assigning a rating include the following:

- Who is involved or likely to be involved?
- Is a state or local official involved?
- What is the geographical area? Is that an area that CIS wants to get into? (CIS would consult the State Police to determine what information they have regarding criminal activities in the area.)
- What statewide impact would a prosecution have?
- If the case involves bribery, what is the amount of the bribe?
- Is a state or local agency involved?

This evaluation is conducted by the Chief of CIS, plus the chief accountant and the lieutenant who heads the investigation staff. After their decision is made, the Deputy Director of the Criminal Justice Division, and on occasion the Director, are consulted. If all agree to take the case, an initial investigation will begin.

In the office of New York's Special Prosecutor, telephone, mail and walk-in complaints are screened by investigative personnel. If there are questions of jurisdiction, the appropriate outside agency is consulted. The complaints are then reviewed by the Director and/or the Associate Director, and they make a final decision as to which areas merit investigation. They are then assigned to the Investigative Section which has geographical jurisdiction over the complaint.

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14. Assistant Attorney General Harvey Fruman, Director of Criminal and Special Prosecutions Division, New Mexico, in COMBATTING ORGANIZED CRIME, supra note 1, at 39.

Another form of citizen complaint is the tip by an informant. An Iowa Department of Justice official recommends caution when acting on the tip of an informant:

> A case of this kind usually starts with an informer who comes into your office and wants to give you some information about a person. First of all, you should go slow and you must remain as objective as possible. You have no idea at that point what that informer's real motivation is for coming to talk to you. Ask yourself these questions: Are there other possibilities for explaining the person's conduct? Is this a political accusation? Is there a political grudge? Is this information hearsay or is it based on this person's own experience? Are there any facts which back the accusation up? Very often you will find that there is really not much there. Is there corroboration for this person's story? This is very important because it is unlikely that you can make a case without some kind of corroboration. Is it worth it? The fact is that jurors are not willing to sit for weeks when the case is of minor consequence even though there is criminal conduct involved, and you must simply be realistic about it. Jurors will ignore an appeal to needed high standards in public service if they feel their time is being wasted. You should also ask your informer if he will take a polygraph test; this may help you to gauge his reliability and give you an indication of how and whether to proceed.[15]

The head of one corruption unit remarked that most of the citizen complaints that it receives are misdirected to the Attorney General's office and need to be referred to the appropriate district attorney. The Colorado Organized Crime Strike Force, similarly, receives as many as two hundred complaints per year but refers the vast majority to local prosecutors, saving only about fifteen or so for its own investigation and participation.

Referrals From Other Agencies

The referral process runs in two directions, and referrals from both prosecutors and outside agencies constitute a significant proportion of Attorneys General's caseload in several states. Arizona's Financial Crimes Bureau (FCB), which includes corruption matters in the cases it handles, obtained about half of its investigative leads and cases during its first 2 years in operation from outside law enforcement departments and state regulatory bodies. In such cases, an FCB attorney will research the pertinent law and, if necessary, recommend additional investigative procedures, which are conducted by the respective agencies.

In New Jersey, the local prosecutors pass along information and refer cases to CIS, the latter for the purpose of either getting the Section's assistance with a case or arranging for the Section to handle a case. The State Prosecutor's Association has developed guidelines for county prosecutors to help them determine when they should take complaints or information to the Section. Basically, the guidelines state that if a county prosecutor has significant leads in a corruption case, and if the case seems to

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15. COMBATTING ORGANIZED CRIME, supra note 1, at 41.

have statewide significance or impact, then he should refer it to the Section. But the Section Chief feels, on the other hand, that it is important that the prosecutors not feel that the Section is trying to take over "good" cases.[16]

The Texas Organized Crime Division receives many cases on referral from local prosecutors. Often these cases are in the investigatory stage, and will be prosecution requests, but sometimes all that is asked is that the Division evaluate the case and give advice on how to proceed with it.

State regulatory bodies and their employees can also be fertile sources of case referrals. In Ohio, in fact, citizen complaints are referred by the Attorney General's office to the agency with proper original jurisdiction. The agencies can then request the assistance of the Bureau of Criminal Investigation if they determine that the complaint warrants investigation.

Setting Priorities

When these external sources of cases are combined with investigations initiated by corruption control units themselves, it is not difficult to see that there is much more than enough work to keep everyone busy. Establishing priorities is one of the most important tasks of any corruption control unit, because each investigation will be costly in terms of the limited resources of time, manpower and money.

In New Mexico, factors considered in establishing priorities include the position of the allegedly corrupt official, the type of crime alleged, the quality of the information and the credibility of the informant. Defenses to the crime may also be considered; for example, falsification of a voucher by a subordinate may be overlooked by an official who does not have time to review everything in his office. The official's neglect might technically constitute a crime, but would probably not be worth the manpower commitment to pursue the case. Often such a lower priority case will be referred to the appropriate district attorney. Similarly, in the Los Angeles District Attorney's Special Investigations Division, allegations of official misconduct are carefully analyzed to take into consideration the level of office which the official or employee occupies, the relative seriousness of the conduct, the benefits reaped by the offender, if any, and the importance to the public of pursuing the investigation. For instance, in one case it was charged that an attorney in the Los Angeles City Attorney's office had used a city-owned helicopter on several occasions during his campaign for public office. Because the actual cost of the helicopter trips was not great, and because the use of the equipment was limited to only a few occasions, it was decided that the expense of prosecution would not be

16. Interview with Deputy Attorney General Charles D. Sapienza, Chief, Corruption Investigations Section, Division of Criminal Justice, Princeton, New Jersey, November 18, 1977.

warranted. Instead, the attorney agreed not to repeat the action and to repay the city for the cost of the transportation.[17]

Factors used by New Jersey's Corruption Investigations Division to determine priorities, in addition to those mentioned earlier, include: the urgency of the case, the availability of manpower, the strength of the evidence, the cost of obtaining additional evidence, the nature and availability of manpower resources required to handle the matter, a priori probability that an indictment will result, the reliability of the sources of evidence, the stature of the source, the position of the putative defendants, the reputation of the putative defendants, the extent of abuse of power alleged, the extent and nature of harm allegedly caused, the extent and nature of potential future harm, the potential impact of the case on similar acts of corruption, and whether the case requires the application of any specialized resources in the Division of Criminal Justice. Each case retained is assigned a priority and periodically reviewed to see if it still merits attention.

Three other factors have been mentioned by officials as being important ingredients in the decision to prosecute a public official: when there is no other way to remove an official from office; when there is a high likelihood that the case may appear to be "fixed" if prosecution does not follow the investigation; and when there is a high chance of success. "To lose the case creates a powerful enemy for the unit."[18]

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17. Interview with Deputy District Attorney Donald Eastman, Special Investigations Division, Los Angeles District Attorney's Office, Los Angeles, California, November 14, 1977.

18. ORGANIZED CRIME CONTROL UNITS, supra note 2, at 46.

5. THE INVESTIGATION PROCESS

Investigations into reports of public corruption are especially sensitive because of the evident dangers of going after an innocent party, with the possible consequences of destroying his or her career and jeopardizing the credibility and even the existence of the corruption control unit. Thus, discreet but effective investigative techniques are required. This chapter will discuss some of these techniques, concentrating on the use of the investigative grand jury and electronic surveillance, as these two methodologies are frequently mentioned by prosecutors as being the most helpful to their efforts.

Planning the Investigation

First, it is important, if obvious, to note that a corruption investigation should follow a carefully thought-out strategy. In New Jersey, the CIS Chief requires that the attorney in charge of a case develop a written plan early in the investigation. Such a plan should set forth what the complaint is, what people are involved, which criminal statutes are involved, the potential disposition of the case and how the attorney expects to reach that goal. The plan should also indicate, among other things, whether the attorney expects to subpoena documents, whether an informant will be used, and what witnesses will be interviewed. The CIS Chief stated that one of the most important parts of planning the investigation is to have the elements of the crime firmly in mind so that the team members know the kind of evidence they must obtain. The investigative plan must be realistic and must be adhered to, yet the team must be flexible enough to follow all investigative leads.

A few states have prepared an operational manual for attorneys and/or investigators. These may include guidelines and suggestions for substantive investigative techniques such as security or the use of equipment or they may cover the public corruption statutes in the state, describing the history of the statute, the elements of the offense and defenses to it, and providing a digest or listing of applicable case law. The Wisconsin Public Corruption Control Unit prepared such a manual, entitled Misconduct in Public Office Trial Manual, which examines the Wisconsin codification of misconduct in public office, Wis. Stat. 946.12. This manual was distributed to district attorneys as well as to members of the Attorney General's staff.

The Investigative Grand Jury

Although the grand jury system and abuses of it have come under attack periodically during the past half-century, in the past 15 years use of the grand jury as an investigative tool against organized crime has grown significantly. While the system may be open to criticism, its investigatory powers are probably best-suited to serious and sensitive matters

that will be the subject of widespread public concern. The National Advisory Commission on Criminal Justice Standards and Goals stated that,

> allegations of corruption by public figures, for example, should be investigated by someone outside of the administration to preserve the image of impartiality in the investigation and to avoid charges of cover-up or whitewash when no incriminating evidence surfaces.[1]

An increasing number of jurisdictions are enacting state grand jury legislation, which facilitates the investigation and prosecution of organized crime and corruption cases by circumventing the parochial interests of county grand juries, and by eliminating the need for duplicative grand jury indictments in multi-county cases. This is discussed in the 1977 COAG publication, Statewide Grand Juries. In states that have a statewide grand jury law, corruption control officials unhesitatingly praise it as one of the most effective tools in fighting public corruption. In states without statewide grand juries, however, county or other local grand juries are also used for their investigative powers in addition to their indictment powers.

Basically, the grand jury serves a dual function. First, field investigation of a case may be completed prior to its presentation to the grand jury. In that situation, when the attorney has organized the facts into a case format, witnesses are carefully prepared, summoned to appear before the grand jury, and the evidence is presented. Second, many situations are encountered where the grand jury's powers are required during the course of a developing investigation. It may be appropriate to issue subpoenas to witnesses who have refused to be interviewed by detectives or attorneys. It may also be necessary to obtain records, such as bank accounts or corporate books, by means of grand jury subpoena.

In New Jersey, the State Grand Jury Act went into effect late in 1968 and, after an initial period of organization, the first state grand jury was empaneled. By the middle of 1969, it began to return indictments in organized crime and official corruption cases. However, because of the legislation then in force regarding the Attorney General's prosecutorial powers, his office did not have the power to handle the trials of cases in which indictments were returned by the state grand jury. In 1970, legislation was passed which gave the Attorney General very broad prosecutorial powers which could be exercised from the beginning of a criminal case through to the appeals stage. Then in 1972, legislation was passed which made it mandatory for at least one state grand jury to be sitting at all times. This legislation amended the original statute under which a state grand jury was empaneled only upon petition of the Attorney General.

The New Jersey state grand jury can get venue anywhere in the state, at the request of the Attorney General, and can preempt local grand

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1. National Advisory Commission on Criminal Justice Standards & Goals, Courts 76, in ARIZ. ST. L.J. 841 (1975).

juries when it wishes to act.[2] The Attorney General's office feels that "it is important to get the official out of his sphere of influence so that we, as well as the defendant, can get a fair trial."[3] The state grand jury in New Jersey considers organized crime, public corruption, white collar crime and major fraud, and other suspected criminal activities of general statewide significance.

Numerous cases involving public corruption at all levels of government have been before the state grand jury; from 1969 through 1976 it returned 124 public corruption indictments. New Jersey officials include among the advantages of the statewide grand jury the reliability of having a single pre-selected group of people who are available once or twice a week consistently for a 5 to 6 month period, the usual tenure of a grand jury in New Jersey. They add that grand jurors, apprehensive at first, frequently become fascinated with a case and the grand jury process, and ask to sit for a longer period of time.[4] Another advantage, mentioned earlier, is the opportunity to escape local influence or prejudice and achieve objectivity through statewide balance. Furthermore, the grand jury may subpoena witnesses and documents, although the Attorney General possesses no general subpoena power. The subpoena power is often vital to the momentum of an investigation, particularly to elicit testimony from reluctant witnesses and to obtain documents and records.

Both the Special Prosecutions Section and the Corruption Investigation Section normally present cases to the state grand jury after a final determination has been made to initiate an investigation. This is especially true in corruption cases involving electronic surveillance authorized by the Attorney General and executed by the State Police. Attorneys from SPS and CIS present their own cases, but are supervised and coordinated by the Chief of the Grand Jury Section. When the state grand jury was first instituted, the Department of Law and Public Safety established a policy

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2. In Zicarelli v. Gray, 543 F.2d 466 (3d Cir. 1976), the plaintiff challenged the state grand jury action on the issue of venue. The Third Circuit concluded that the federal Constitution required a trial in the district where the crime occurred. The court, however, also held that since New Jersey constitutes a single federal district, the federal constitutional question was overcome. Another issue presented was whether or not the jury was drawn from a cross-section of the community in which the crime occurred. Holding the district to constitute the relevant community within the meaning of the federal Constitution, the court overcame this question.

3. Deputy Attorney General Alfred J. Luciani, Chief, Antitrust-Civil Remedies Section, New Jersey Department of Law and Public Safety, in National Association of Attorneys General, Committee on the Office of Attorney General, COMBATTING ORGANIZED CRIME: SUMMARIES OF SPEECHES TO AN APRIL, 1978, SEMINAR, 6 (1978).

4. Interview with Deputy Attorney General William Palleria, Chief, Special Prosecutions Section, New Jersey Department of Law and Public Safety, Princeton, New Jersey, November 18, 1977.

that only evidence which would meet or exceed standards of competence and admissibility in a trial courtroom would be introduced, and that an indictment would be returned only when, based on that admissible evidence, a prima facie case was established having a reasonable chance of success at trial. This concept is elaborated upon by the former chiefs of the Special Prosecutions Section:

> The theory of grand jury operation is that a trial attorney should be able to take the grand jury transcript, call the same witnesses at trial, ask the same questions that were asked in the grand jury, and have the case decided by a petit jury. In addition, potential defense witnesses should have been subpoenaed into the grand jury, locked into a story under oath, and, as far as possible, neutralized. Obviously, it is impossible for the Section to guarantee a trial lawyer that he will obtain a conviction. However, it is Section policy to at least guarantee the trial attorney that he will prevail in a motion at the end of the state's case and have the case submitted to a petit jury.
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> Experience has shown that the high standard of evidence required in the state grand jury has paid off in practical terms for a number of reasons. The state grand jury has not been the subject of public criticism because of questions raised about the quality of its cases. The conviction rate in state grand jury cases is high. Many cases result in guilty pleas after defendants and their attorneys review the full grand jury transcript, under New Jersey's open rules of discovery. The grand jury has established a reputation among members of the public and among the criminal element in New Jersey of making serious and solid cases. This reputation has assisted the Section in its efforts to develop witnesses and to expand its cases to more significant levels of organized crime and official corruption. There has been no suggestion of political interference with the operations of the state grand jury, because of the independence and completeness of the investigations conducted by this Section and presented to the grand jury.[5]

The Deputy Attorneys General assigned to the unit which is handling the particular case present all evidence to the state grand jury. Those attorneys also do all questioning of witnesses on the record, and the grand jurors themselves do not ask questions. That procedure is followed for a number of reasons. New Jersey court rules require that complete transcripts be made of all questioning of witnesses. During the pretrial discovery, the entire transcript becomes available to the defense. By confining questioning of witnesses to attorneys, the Division is able to maintain its previously discussed standards of eliciting only information which would be admissible in a trial court. Questions are not raised on the record by the asking of improper questions, calling for inadmissible evidence, by lay grand jurors.[6]

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5. Memorandum by Deputy Attorneys General Peter R. Richards and Edwin H. Steir, Organized Crime and Special Prosecutions Section, New Jersey Department of Law and Public Safety, December 29, 1973.

6. Id.

New Jersey officials offer certain recommendations concerning use of the state grand jury. Access to the grand jury may be a problem, because of demand from other sections of the Attorney General's office, but it is also important not to overuse the grand jury for routine matters so as to cheapen its impact or reduce its credibility. It is also wise to try to minimize publicity surrounding a grand jury investigation, as the grand jury's reputation will be tarnished if it is accused of leaks.[7] Recently, there was an investigation of alleged payoffs to members of a municipal police department. One of the payers agreed to cooperate with the investigation by recording his conversations with the police. Due to publicity, however, allegedly corrupt members of the police department declined to talk with anyone. In another case, a reporter learned about a race track investigation, but postponed reporting on it pending its outcome. Sometimes a newspaper will postpone reporting on certain investigations until after the delicate investigative period has passed.[8] Another recommendation is that the target be given the opportunity to testify before the grand jury, by subpoena if necessary, so that he will not be able to claim later that the investigation was biased.

Not all prosecutors are so enthusiastic about the use of the grand jury for investigations; Special Assistant Attorney General Garry Woodward of the Iowa Department of Justice cautions:

> ...in my opinion, you should not go to the grand jury immediately. The best thing to do is to thoroughly investigate the case through the agents you have available to you. Grand juries do not do a good job of collecting new facts; they can suggest areas to go into but they cannot expose people with unwilling witnesses before the grand jury. This is done on a one-to-one basis by the investigators who go out and talk with people and collect the facts. Complete the investigation before you call the grand jury.[9]

In Colorado, similarly, officials emphasize that the complexity of corruption matters means that cases require a grant deal of preparation before they can be presented to a grand jury.

New Mexico does not have a statewide grand jury, so it must use county ones. The Director states that grand jury reports have been used quite effectively in some counties, but, since such reports are not authorized by statute, their issuance depends upon the presiding judge in each

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7. Evan Jahos, Director of Criminal Justice, New Jersey Department of Law and Public Safety, in, National Association of Attorneys General, Committee on the Office of Attorney General, PROSECUTING ORGANIZED CRIME, 15 (1974).

8. Interview with Deputy Attorney General Michael Bozza, Grand Jury Section, and Deputy Attorney General William Palleria, Chief, Special Prosecutions Section, Division of Criminal Justice, New Jersey Department of Law and Public Safety, Princeton, New Jersey, September 22, 1978.

9. Special Assistant Attorney General Garry Woodward, Iowa Department of Justice, in COMBATTING ORGANIZED CRIME, supra note 3, at 41.

county. One county grand jury was impaneled in June of 1976 and was assisted by the Special Prosecutions Section for the 5 months of its life. It heard approximately forty witnesses, and also examined and discussed numerous files, reports, minutes, accounting records and other documents. Indictments were returned against various county officials, charging them with failure to comply with public purchasing laws and other laws and with neglect of their official duties. The grand jury also issued a report in which it stated that the allegations of official misconduct received by the grand jury included:

> favoritism, preferential treatment in the administration of justice, nepotism, conflict of interest, unconcern, harassment, solicitation and receipt of bribes, neglect, malfeasance, incompetency, misfeasance, receipt of payment for services not rendered, disrespect for the law, brutality, government by secrecy, theft of government property, and the rendering of services for the benefit of private parties rather than for the public at the public's expense.

The grand jury report was quite critical of the district attorney's assistance to it and of his representation of the county, and it requested that he address several areas of inquiry in a response to the Attorney General. The report asked the Attorney General to review the response and, if necessary, to initiate removal proceedings against the district attorney. After reviewing the district attorney's response, the Attorney General suggested that further investigation seemed to be called for, as the grand jury did not arrive at its criticism as a result of sworn testimony. Subsequently, a citizens' petition was filed with the district judge asking that a new grand jury be convened, to be assisted by CGP, in order to investigate the performance of the district attorney and, if warranted, to initiate removal proceedings against him. Other county grand juries in the state have utilized reports as a means of bringing attention to problems and abuses in various levels of government.

In California, the Attorney General has subpoena power by statute, and may conduct investigations and subpoena witnesses, records and the like without resorting to a grand jury. Grand juries investigating official misconduct have occasionally requested that the Attorney General handle an investigation where the local prosecutor was felt to be too close to the people being investigated.

Electronic Surveillance

An increasing number of states are authorizing electronic surveillance, although they still remain a minority. State electronic surveillance laws are patterned substantially after Title III of the Omnibus Crime and Safe Streets Act of 1968, the federal wiretap statute that sets minimum constitutional standards for the protection of individual rights during the use of electronic surveillance. The 1975 COAG publication, Organized Crime Control Legislation, includes a thorough examination of state and federal law in the area of electronic surveillance.

It should be noted that the terms "wiretapping" and "electronic surveillance" are often used interchangeably, although wiretap technically refers to telephone and telegraph interceptions only. Other surveillance

techniques include electronic listening devices, microphones, and aural and video tape recorders. A 1973 survey of the states conducted by the Administrative Office of the U.S. Courts showed that the vast majority of electronic interceptions were wiretaps: 731 interceptions in 1973 involved telephones, 48 involved microphones or similar devices, and 32 used both.[10]

In the area of corruption control, court-approved nonconsensual electronic surveillance and wiretapping is not frequently used, with some exceptions. Consensual surveillance, where one of the parties to a conversation is aware of the surveillance, is used much more frequently. The former Chief Counsel to the Knapp Commission has said, "You also need to be able to wire your informants in various cases. For example, bribery being the very private crime that it is, a body-mike may be a virtual necessity in order to develop adequate evidence."[11]

A striking example of the use of a "body-mike" in a bribery case occurred in the investigation leading up to the New Jersey case of State v. Schonwald.[12] As described in Chapter 2, a regional engineer for the state Department of Transportation solicited a bribe from an engineering consultant to the department, who reported the incident to the Division of Criminal Justice. During the course of investigation, the consultant had several conversations with the defendant wearing electronic recording devices so that State Police detectives could monitor their conversations. At the final meeting the consultant paid the defendant, who was later convicted of misconduct and soliciting, $14,000, which was recovered by State Police after they detained the defendant following the meeting.

New Jersey utilizes electronic surveillance extensively in organized crime cases, but only occasionally in corruption cases. The Corruption Investigation Section has never yet wiretapped without the consent of one of the parties. Both the Corruption Investigation Section and the Special Prosecutions Section rely heavily on consensual recordings, although its policy is to limit these as much as possible. Such use may decrease as a result of a new statute which requires that such a recording be authorized in advance by the Attorney General, even though one of the parties has already consented to being recorded.

When electronic surveillance is sought in New Jersey, the team in charge would draw up an application, detailing such matters as the persons to be recorded and why the conversations are needed as evidence.

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10. National Association of Attorneys General, Committee on the Office of Attorney General, ORGANIZED CRIME CONTROL LEGISLATION, 46 (January 1975).

11. Michael F. Armstrong, former Chief Counsel of the Knapp Commission and District Attorney for Queens County, New York, supra note 7, at 13.

12. State v. Schonwald, Docket No. A-4076-76, Superior Court of New Jersey, Appellate Division, September, 1978.

The application would be reviewed by the Chief of the Section, by the Deputy Director of the Division of Criminal Justice and then by the Director of the Division, who is the Attorney General's designee for authorization of wiretaps. Information obtained during the electronic surveillance is constantly analyzed in anticipation of preparing applications for extensions or additional electronic surveillance orders. While the length or type of surveillance may be extended, there remains the statutory obligation to "minimize or eliminate" the interception of non-incriminating communications. Thus, each attorney participating in an electronic surveillance investigation has a duty to review the investigation, with a view toward limiting the hours and days of monitoring.[13]

In Colorado, the Director of the Organized Crime Task Force is also the official designated to report on requests for wiretaps. He reports that there has been very little use of the state statute; in 1976 only three applications for a wiretap were made. On the other hand, he stated that they do rely heavily on consensual recordings in corruption cases.[14] In New Mexico, likewise, the legislature passed legislation permitting court-authorized electronic surveillance in 1973, but the law has seldom been used. Moreover, the Director of CGP reports that the office has only once used a body wire on a witness to obtain evidence. Instead, the office relies mostly upon public records, telephone records, and bank records to obtain evidence of corrupt activities.[15] In the state of Washington, similar legislation was enacted in 1967, but the Law Enforcement Assistance Section of the Attorney General's office does not utilize electronic surveillance and, should the need arise for it, would probably rely on local law enforcement agencies.[16]

Financial Analysis

Attorneys General report that relatively sophisticated techniques of financial analysis are being used with increasing frequency to investigate a variety of situations. Specialized auditing techniques are necessary in auditing public agencies, such as a utilities commission. The records of public agencies are kept in a different way than those of other businesses, and, therefore, it is best to have some accountants in the unit specialize in such audits. In other kinds of investigations that require knowledge of accounting, the investigator should understand what is said in interviews

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13. Memorandum by Peter R. Richards and Edwin H. Steir, supra note 5.

14. Interview with Rich Nathan, Director, Organized Crime Strike Force, Office of the Attorney General, Denver, Colorado, November 16, 1977.

15. Telephone interview with Assistant Attorney General Harvey Fruman, Director of Criminal and Special Prosecutions Division, New Mexico, January 5, 1978.

16. Letter from Assistant Attorney General Garry E. Wegner, Chief, Law Enforcement Assistance Section, Washington, to Miriam M. Nisbet, December 30, 1977.

and know what to look for in the records to which they gain access. For this reason, many New Jersey State Police detectives, for example, take accounting classes at night.

The Internal Revenue Service has long used certain methods of financial analysis in its tax investigations, especially where no books or records were available, and these are now beginning to find favor among organized crime and corruption investigators. The methods are known as the net worth method, the expenditures method and the bank deposits method.[17] All three are designed to determine the total accumulation of wealth and/or annual expenditures made by an individual as compared to his reported income. In the net worth method, any change in net worth is adjusted to allow for non-taxable receipts and for reported income, the balance being unreported income. The expenditures method is similar but differently expressed; funds are measured by their flow during the year, rather than by observing changes in net worth from the beginning to the end of the year. Finally, the bank deposits method measures income at the time of receipt rather than at the point of its outflow: three dispositions of receipts for the year are determined; how much was deposited into banks; how much was spent without going through banks (cash expenditures); and how much was stored in other places (increases in cash on hand).

An example of effective financial analysis comes from Wisconsin's corruption control unit. A request was received from University of Wisconsin representatives for assistance in investigating the possible embezzlement of state funds by a state university employee. The employee in question was in charge of receiving money from students for the copying of documents. The employee collected excess of $100,000 a year. Corruption unit investigators made an in-depth investigation into the employee's spending habits over the past several years and concluded that she was spending far in excess of her earnings. When confronted with the facts, the employee confessed to a systematic embezzlement scheme that had been taking place over the past 4 years. The embezzlement in question netted the employee between $40,000 and $50,000 over that period of time. A report was given to university administrators showing how poor accounting control and auditing practices allowed this series of thefts to take place without detection over a long period of time.[18]

Another example concerns an investigation of a county sheriff in Ohio. An Internal Revenue Service investigation resulted in conviction of the sheriff for evading taxes on unreported income of $48,000. The Bureau of Criminal Identification and Investigation conducted an investigation independent of IRS to ascertain the source of this income. Agents reviewed and analyzed all financial records pertaining to the operation of the

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17. More detailed discussions of the techniques and formulas may be found in: PROSECUTING ORGANIZED CRIME, supra note 7, at 54-58; and Richard A. Nossen, THE SEVENTH BASIC INVESTIGATIVE TECHNIQUE, Law Enforcement Assistance Administration (1976).

18. Wisconsin Department of Justice, Public Corruption Control Unit, Quarterly Report to LEAA (January 23, 1976).

sheriff's department including travel and expense accounts, equipment vouchers and jail commissary records, and interviewed persons connected with those records. As a result, the sheriff was indicted on thirteen state charges, including theft in office, bribery, unlawful interest in contracts, and tampering with evidence.[19]

Where an investigation is centered on the paying of bribes the records of the payer may be the most valuable jumping off point. Accountants should examine the books and records to locate a method of generating cash to pay the bribes. This may be a petty cash account for day-to-day expenditures, or an account of a fictitious company, or the company may overpay some of its employees or ostensible "consultants" or sales representatives, who are then required to kickback the overpayment.

Other Investigative Techniques

Other methods of surveillance are, of course, used extensively. Personal observation, on foot and by automobile, is the most time-honored technique, and is still used by most every office. In Colorado the anti-trust section of the Attorney General's office used a van to follow a participant in a rebate scheme conspiracy with great success. Through their observations they noticed that a particular briefcase was carried everywhere. The briefcase was subpoenaed and found to contain incriminating records. On the other hand, it would probably not be wise to follow the example of one unit which purchased a new Corvette for its undercover operations but wrecked it a few days later. It is also important that investigators working with corruption cases understand something about the workings of politics. If they are investigating local public officials, they need to know something about the local political structure and how it operates.

One corruption control investigator feels that it is also good to have at least one person in the unit who knows how to work a polygraph. He estimated that his unit averages two polygraph tests a month, and it is an advantage to have a staff member conduct the test, rather than calling someone in from another agency.[20]

Investigative commissions or organized crime commissions are also useful in conducting investigations. The New Mexico Special Prosecutions Division reported that when it first initiated operations, information and intelligence it received from the Governor's Organized Crime Commission was useful in choosing areas for further investigation and developing cases for prosecution. Corruption commissions will find that there are both

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19. Letter from Patrick T. Luzio, Investigative Division Chief, Bureau of Criminal Identification and Investigation, Office of the Attorney General of Ohio, to Miriam M. Nisbet, October 28, 1977.

20. Interview with Deputy Attorney General Charles D. Sapienza, Chief, Corruption Investigations Section, Division of Criminal Justice, Princeton, New Jersey, November 18, 1977.

advantages and disadvantages in their role. New York's Knapp Commission to Investigate Alleged Police Corruption conducted field investigations, document analyses, interviews of supervisors, held executive hearings and sought police witnesses. It could not use electronic listening devices because in New York only regular law-enforcement personnel may do so after obtaining a warrant. Since the Commission had no prosecutive authority, it also lacked the power to compel testimony by granting immunity from prosecution. In addition, the temporary status of the Commission was a handicap because potential witnesses realized that the police officers against whom they were being asked to testify would probably still be police officers long after the tenure of the Commission had expired. These disadvantages were partially offset, however, by some advantages Commission investigators possessed as compared with traditional law enforcement officers. They were not primarily engaged in building criminal cases, so they were not obligated to spend time developing evidence against specific individuals. Also, some witnesses felt freer to talk to investigators who could give assurances, where necessary, that the information would not be used in a criminal prosecution.[21]

The powers and authority of such commissions vary from state. In New Jersey, for example, the State Commission of Investigation may authorize interception of a wire or oral communication, although by recent amendment such authorization must be approved by the Attorney General in most instances. While it is true that most law enforcement agencies that do not have the benefit of a statewide grand jury or of electronic surveillance very much desire these tools, it also appears that anti-corruption efforts have been waged by states without them, using more traditional, less "easy" investigative tools.

21. THE KNAPP COMMISSION REPORT ON POLICE CORRUPTION, 42-47 (1973).

6. CASE PREPARATION/PROSECUTIONS

Unit personnel and evaluators in several states have alluded to the difficulty in determining at the outset of an investigation whether it will warrant bringing criminal charges against the offender. Cases should be continuously analyzed in order to minimize this difficulty; this is largely a matter of target selection and choosing priorities, as discussed in Chapter 4. When extensive manhours are put into an investigation but no conduct of a criminal nature is found, it will often be possible to bring to the attention of the proper authorities the existence of mismanagement in the particular office.

Defining Charges to Be Brought

The next step in prosecuting a corrupt government official is to decide what charges will be brought against him. Sometimes this decision is made by the section chief or the Attorney General, but usually the attorney in charge of a case has the primary responsibility for deciding what charges to bring against an allegedly corrupt public official, often in consultation with his superiors. In Colorado's Organized Crime Strike Force, decisions on what charges to bring against a defendant are made jointly by the Director and the attorney in charge of the case, and they will usually consult with other strike force attorneys before making a decision as to what charges to bring. In the Los Angeles District Attorney's office the decision is made by the attorney in charge, although he may discuss the proposed charges informally with his superiors. The decision as to what charges the New Jersey Corruption Investigation Section will bring against a defendant is made by the attorney in charge of the case and the Section Chief. They will then review the indictment with the Assistant to the Director of the Division of Criminal Justice, who is in charge of the statewide grand juries. It is finally sent for review by the Director of the Division. The way in which a defendant is charged may involve some policy decisions, and a careful review is necessary before the case goes before the grand jury.

Trials and Appeals

Another determination to be made is which lawyers will try cases and argue appeals. In New Mexico, the attorneys in charge (there are usually two) try the case unless it is turned over to a local prosecutor, in which case the CGP will not assist in the trial unless a staff member has previously been investigating the case with the district attorney. If the case is appealed, it may be handled by the attorneys in charge or by an attorney from the appellate section of the criminal division, depending on workload, experience and other logistical factors. At the Colorado Organized Crime Strike Force, the attorney in charge will try the case and may also assist if the case has been turned over to a local prosecutor. However, appeals are handled by the Appellate Section of the Attorney General's office.

Similarly, in the Los Angeles District Attorney's office, trials and appeals are conducted by different sections.

New Jersey's Corruption Investigation Section uses a somewhat different approach because there are only four attorneys in the Section. A corruption trial is generally lengthy and complicated, and CIS cannot spare an attorney for a substantial length of time, so an attorney from the Trial Section will take the case to trial. However, the CIS attorney helps prepare the case. Appeals are handled by a separate section.

In Louisiana the Attorney General's Appellate Section handles the appeals for all prosecutions in the state, but the Unit attorney usually assists the Appellate Section attorney in court. In South Dakota and Texas, the same attorney will take the case both to trial and appeal. In Texas, moreover, the Organized Crime Division will always offer assistance to the district attorney if the case is handed over to him, and will assist the district attorney at trial.

In one way, it may be advantageous to have young Assistant Attorneys General, rather than more experienced lawyers, try cases. A United States attorney has recommended, interestingly, that corruption cases be tried by young lawyers. He said that "their sense of indignation is conveyed to juries. Older lawyers are practically bored with tales of corruption, but the younger ones are genuinely shocked by it all."[1]

The supervision of witnesses in a corruption case is very important. Corruption cases are sensitive and sometimes involve individuals who are well known and in powerful positions. The process of choosing witnesses is a delicate one and it is necessary to be particularly careful in deciding who to call to testify, how to handle the witness and which questions to ask. In New Jersey, team members join in discussing which witnesses will be called before the grand jury, but the final decision rests with the attorney in charge and the Chief of the Corruption Investigation Section. In New Mexico, on the other hand, the attorney in charge of the case will usually have complete discretion in this regard, although the Director may informally go over the list of prospective witnesses. The attorney is expected to list his witnesses and what he anticipates their testimony to be. The Attorney General is not involved in decisions in this area. In the Los Angeles District Attorney's office, the decision is also made by the attorney in charge, although again he may discuss strategies with others in the Special Investigations Division.

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1. James Thompson, former United States Attorney, Northern District of Illinois, in National Association of Attorneys General, Committee on the Office of Attorney General, PROSECUTING ORGANIZED CRIME, 25 (1974).

Witness Immunity and Plea Bargaining[2]

The granting of immunity is frequently the only way to obtain evidence or testimony which would otherwise be unavailable. Immunity statutes are particularly useful in prosecuting conspiratorial crimes such as many organized crime and official corruption cases because, as noted by a former Attorney General of Oregon, " ... the victim is as guilty as the perpetrator. Unless the state can immunize one, it is very difficult to prosecute the other."[3]

In an extortion situation, the victim may invoke the Fifth Amendment before a grand jury or at trial because he fears reprisals by politicians or governmental bodies. In these and other situations where the details of a conspiracy can only be supplied by one of the conspirators, a grant of immunity may be necessary to make the case. However, most law enforcement personnel agree that immunity should only be granted when absolutely necessary. The decision to grant immunity should take into consideration several factors, including the degree of accountability of the witness and whether he betrayed the public trust, and whether immunity can be withheld until after the witness has been convicted himself. Immunity is both an investigatory tool and a trial tool; it has been placed at this part of this report because of the high visibility of immunized witnesses at trial and the sensitivity of their use.

Plea bargaining shares some characteristics with the use of immunity. They are both methods of getting reluctant witnesses or defendants to provide information in order to further justice in the long run, but they are both subject to public criticism and misunderstanding, and both should be used only when necessary. The National District Attorneys Association recommends that plea negotiations never be used to reduce case backlogs or reallocate manpower.[4]

Many authorities consider immunity to be an important weapon in prosecution, but corruption control officials in several states seem reluctant to use their immunity statutes with any frequency. This may be partially explained by the fact that some of these statutes provide for "transactional" immunity rather than "use" immunity. Transactional immunity statutes compel the witness to testify, but immunize him against prosecution for any crime about which he testifies. Use immunity only protects the witness from having the testimony that he has given, or evidence derived from it ("fruits"), used against him in a subsequent prosecution. One prosecutor

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2. A comprehensive treatment of witness immunity is offered in: National Association of Attorneys General, Committee on the Office of Attorney General, WITNESS IMMUNITY (1978).

3. Lee Johnson, Oregon's Witness Immunity Law, 59 OREGON L. REV. 573, 577, Id. at 2.

4. National District Attorneys Association, NATIONAL PROSECUTION STANDARDS, First Edition, 215 (1977).

insists, however, that in practice use immunity turns out as transactional immunity anyway, because the immunized witness takes advantage of the immunity to discuss every aspect of the crime.[5]

The Louisiana statutes on witness immunity grant immunity and compel testimony in return. The Unit's policy on witness immunity agrees with the rule given by the prosecutor quoted above, "trade only the smaller fish to get bigger fish." A corollary is not to give immunity to a lot of people to get a few, unless the few overwhelm the others in importance.[6] The unit limits the use of immunity as much as possible. There are usually other charges pending against a witness and the office will press these charges, or a perjury charge, even though granting immunity for some charges. The policy also includes always knowing in advance what testimony you will get from the immunized witness, before granting him immunity. In this regard, however, the Chief Counsel for Investigations in the Maryland Attorney General's office told an organized crime control seminar:

> Many prosecutors say that they are not willing to grant anyone immunity unless they know what the witness will say and whether that testimony will be helpful and useful. Sometimes you simply cannot know before-hand what the witness will say. Conspiracy crimes, particularly white collar crimes, normally involve a number of people, a lot of whom are not really criminals; they are bookkeepers, secretaries, hangers-on, people who are on the fringes of the activity. These are people who probably have valuable information, and you are reasonably sure that they will not subject themselves to a perjury prosecution to protect somebody else. At the same time, they do not want to see their employers, relatives, and friends prosecuted, and they may not be too cooperative. Thus you don't know ahead of time exactly what they are going to say and you have to make the decision whether to immunize them based upon your best judgment that they will probably answer truthfully once they are required to answer.[7]

Before granting immunity to a witness, the Louisiana unit, like most other units studied, always confers with officials of other governmental units, such as the district attorney or the U.S. Attorney, in order to avoid interference with another case involving the same individual. These offices are always consulted when there is a joint investigation underway, so that there can be agreement on the best way to handle a particular witness. Such cooperation is particularly important when both state and federal officials are involved, because a federal grant of immunity is binding on the state.

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5. James Thompson, supra note 1, at 25.

6. Id.

7. Assistant Attorney General Robert C. Ozer, Chief Counsel for Investigations, Office of the Attorney General of Maryland, in National Association of Attorneys General, Committee on the Office of Attorney General, COMBATTING ORGANIZED CRIME: SUMMARIES OF SPEECHES TO AN APRIL, 1978, SEMINAR, 57 (1978).

New Jersey has a "use plus fruits" immunity statute. New Jersey officials prefer this limited grant of immunity in corruption cases for two reasons. The total immunity "bath" of a public official who has been guilty of misconduct or corrupt activities engenders a great deal of public criticism, and it may be difficult for a jury to accept the testimony of an immunized witness.[8] New Jersey also has a statute which provides for compelling the testimony of a public employee or official when matters related to his office or employment are before a court, grand jury or the State Commission of Investigations. Under this statute, if the employee or official (of the state, county, municipality or any branch or agency of public service) refuses to testify, then he is subject to removal from employment or office. If the public employee claims the privilege against self-incrimination and testifies, then the testimony and evidence derived therefrom cannot be used against him in a subsequent criminal proceeding brought against him; if he admits to a misdemeanor or high misdemeanor, however, he may be subject to losing his job. Both the latter statute and the general witness immunity statute specifically provide that the witness may be subject to prosecution for perjury.

The Special Prosecutions Section's policy is to use immunity as little as possible, and to get as much testimony as possible from any persons who may be partially immunized. With regard to plea bargaining, the policy is that there are no deals, and that if a defendant pleads guilty to a charge he must do so without any sentencing recommendations from the Attorney General's office.[9]

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8. On this same point, Assistant Attorney General Ozer observed:

> "There was a fairly minor corruption prosecution in a county in Maryland. After the jury was selected, the prosecutor quite understandably wanted to explain to the jurors that they would be hearing the testimony of an immunized witness. After the opening statement, on of the jurors sent the judge a note saying that he could not consider fairly and impartially the testimony of people who had been immunized. So far as I am concerned, the only thing that makes that occurrence in any way unusual is that you had a juror who articulated his feeling. ...When a juror sees someone up on the witness stand and the find that he has been granted immunity and that, no matter what he says, he cannot and will not be prosecuted, you can sometimes see a curtain come down behind that juror's eyes and he will not listen to the testimony. I think that perhaps for every successful prosecution based in whole or in part on the testimony of an immunized witness, there are probably nearly half a dozen very good cases in which the defendant is found not guilty for no reason other than that the jurors refused to even consider the testimony of immunized witnesses." Id. at 58.

9. Interviews with Deputy Attorney General William Palleria, Chief, Special Prosecutions Section, Division of Criminal Justice, Princeton, New Jersey, November 18, 1977 and September 22, 1978.

At the Colorado Organized Crime Strike Force, the policy on plea bargaining is "don't do it." A lesser charge may be dropped in exchange for pleading guilty to the major charge, but the defendant will have to plead guilty to the major charge brought against him. Specific decisions regarding pleas are made by the Director. The office's policy is that white collar criminals, including officials charged with bribery and kickbacks, can make restitution, but will not be allowed to plead guilty to a lesser charge; there will be no "deals" for white collar criminals, and no one will be allowed to plead nolo contendere. The policy concerning immunity is to use it as little as possible and to always exclude prosecution for perjury from the grant.[10]

New Mexico does not have a general immunity statute, but the Attorney General's office may grant transactional immunity to a witness under a Supreme Court rule. As of January 1978, the Special Prosecutions Division had only once immunized a witness. Instead, the Division induces witnesses to testify by plea bargaining, by agreements to combine charges or charge in the alternative, or by sentencing recommendations. The unit's philosophy is to plea bargain where practical, in order to "build volume, gain a quick precedent, or bring about the removal of the public official charged." Whether or not these goals are attained depends on how long the case remains in the system. Like Louisiana, New Mexico will bargain for information only when the charged defendant is in a position to implicate someone senior in rank to himself.[11]

Pennsylvania's witness immunity statute has recently been amended to provide for use immunity. Immunity is available only in an actual court proceeding, and may be petitioned for by either the Attorney General or a district attorney. Generally, this immunity is available only in statutorily defined organized crime and racketeering cases, with an additional requirement that conspiratorial elements be present. However, if a grand jury has as its purpose the investigation of one or more of the enumerated crimes, immunity may be obtained on an indictment handed down by that grand jury even if the crime is not one of the enumerated ones.[12]

In Texas, the Attorney General makes decisions about immunity, and his policy is to use it sparingly. As of late 1977 the Organized Crime Division had not ever immunized a witness. As an incentive to testify, it will promise to recommend probation if the witness is convicted.[13]

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10. Interview with Rich Nathan, Director, Organized Crime Strike Force, Office of the Attorney General, Denver, Colorado, November 16, 1977.

11. Gene S. Anderson, Office of the Attorney General of New Mexico, Evaluation Report: Corrupt Government Practices and White Collar Crime Project, 34 (August 1977).

12. Interview with Deputy Attorney General J. Andrew Smyser, Director, Office of Criminal Law, Pennsylvania Department of Justice, Harrisburg, Pennsylvania, September 21, 1978.

13. Telephone interview with Assistant Attorney General Timothy James, Organized Crime Division, Texas, December 19, 1977.

The use of an immunity grant occasionally can and does backfire. For example, the Mayor of Honolulu was indicted in 1977 for obtaining through his campaign manager a promise from a developer to pay the mayor $500, 000 in return for selection of the developer's company to develop a $50 million urban renewal project. The developer received a grant of immunity for his testimony before the grand jury which indicted the mayor and for his anticipated testimony at trial. However, the developer refused to testify at trial. He was imprisoned for 2 weeks under a civil contempt order, after which time he was released because the court felt further incarceration would have no coercive effect. The case was dismissed, and the Attorney General's office is now prosecuting the developer for criminal contempt of court.[14]

Target Reaction

An area which Attorneys General might be tempted to overlook is the reaction of the target. An Iowa Assistant Attorney General has said:

> This is a target that fights back; they frequently believe that the best offense is a good offense, and this is sometimes successful. If they can, they will cry "politics." The press, because it is more sensational, will seem to start out on your side, but the press' interest is in a good story. The press tends to give wide coverage to such cases and after it announces that you are investigating a particular official, the press is going to go to that person to ask why you are picking on him because you must have some political motive. You cannot let yourself become embroiled in a contest of this kind, with accusations on each side; you must know and accept that your opponent is going to attempt to make press against you.
>
> You must also be prepared for an investigation of yourself, particularly if you go after someone like a sheriff who will turn the tables and have an investigator investigating you. People in political office have powerful friends who can exert a lot of pressure. You must have a tough skin because these people will attack you publicly and privately.[15]

Probably the most extreme reaction to a state investigation occurred in Montana in 1974-75. The Attorney General was investigating alleged widespread corruption in the state Workmen's Compensation Division, and was having difficulty getting Montana attorneys to aid in the investigation, finally finding it necessary to call on out-of-state attorneys. In August 1975, the gravity of the investigation became dramatically clear when two attorneys already convicted on fraud charges as a result of the investigation were charged with conspiring to assassinate the Attorney General and his chief special prosecutor.

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14. Letter from Assistant Attorney General Larry L. Zenker, Department of the Attorney General of Hawaii, to Jeffrey M. Trepel, October 17, 1978.

15. Special Assistant Attorney General Garry Woodward, Iowa Department of Justice, in COMBATTING ORGANIZED CRIME, supra note 7, at 41.

We should not lose sight of the fact that if the first two steps in prosecution-- determining whether criminal charges should be brought against the offender at all, and defining exactly what those charges will be-- are carried out precisely the way they should be, then there is a good chance the defendant will enter a plea of guilty, and the rest of the steps discussed in this chapter become superfluous. In fact, the likelihood is that only a small percentage of investigations initiated by a corruption unit will reach the trial stage. Yet the ones that do are most important cases, for a unit cannot afford to gain a reputation of being unable to back up its indictments with solid proof. If it does, it will find that the number of guilty pleas, public support and legislative support will all drop off precipitously.

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It has been demonstrated that Attorneys General have substantial statutory and common law power to deal with official corruption. There are a variety of criminal statutes. Many states have also, by statute or case law, given the Attorney General authority to intervene in proceedings initiated by a local prosecutor, or in certain instances, to supersede the local prosecutor. This report has described a variety of civil approaches to fighting official corruption and examples of successful civil actions. Thus, Attorneys General have available a variety of approaches to combatting corruption.

Intelligence and target selection are vitally important to the operation of a corruption control unit, because as has been stressed, favorable pleas and verdicts are essential not only to the continued existence of the unit, but to ensure that no innocent persons are targeted. Sophisticated investigative techniques, such as the statewide grand jury and, in some cases, electronic surveillance, can supplement more traditional techniques and are appropriate in fighting the subtle and complex activities of corrupt officials. Normal investigative techniques may not always be sufficient because the corrupt practices of government officials are commonly observed only by participants in the unlawful conduct. A grand jury with statewide jurisdiction is an appropriate response to criminal activity carried on without regard to county boundaries. The consensual nature of corrupt operations also make witness immunity statutes a valuable weapon.

It is true, as we have seen, that several states conduct relatively sophisticated corruption control investigations and prosecutions within the organized crime or similar units of their Attorney General's office, but the independent units that have existed in New Mexico, New Jersey, Wisconsin and elsewhere have been especially successful in focusing attention on the problem of corruption and in bringing corrupt officials to justice. Public awareness of official corruption and support for efforts to fight it can affect the inclination of state legislatures to provide the necessary resources. Certainly, such an arrangement is not suitable for every state, and various other structural approaches have met with success.

END