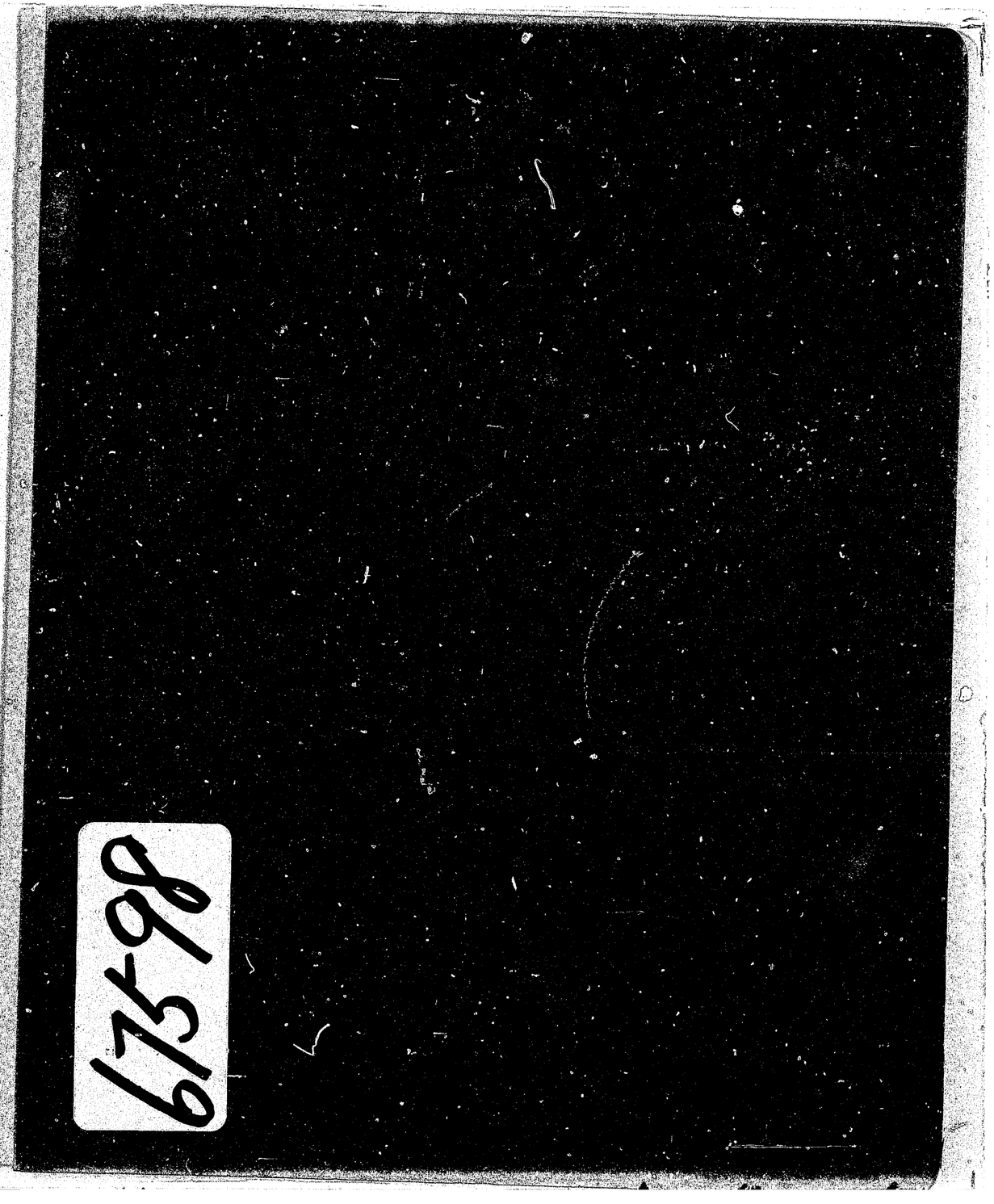

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Department of Justice

SUPPLEMENTAL STATEMENT

OF

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ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
DEPARTMENT OF JUSTICE

BEFORE

THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

APRIL 23, 1980

Mr. Chairman, I would like to enter for the record my main statement on the Criminal Division's mission. Let me take a few more minutes, however, to discuss how we have performed one essential part of our mission -- the investigation, evaluation, and, where appropriate, prosecution of public corruption cases.

First, I'll review the rather dramatic record of the last few years, and give some reasons the number and quality of public corruption prosecutions has increased. Second, I'll discuss how it is that out of any 100 initial allegations, most will not and should not lead to a prosecution -- that is, why declinations occur. Third, I'll talk about some possible causes of misunderstanding about the nature of declination decisions. Finally, I'll talk about why the courage to close cases -- and it does take courage -- is as important as the courage to bring cases. Occasionally, I will touch on recent criticisms -- in my view, unfounded criticisms -- of several of our declination decisions in the last few years.

I. The Growth in Public Integrity Cases

A. Some Statistics

Over the last few years there has been a remarkable burst of activity in tackling public integrity cases on the part of the federal law enforcement system. To the best of

our knowledge, 43 federal officials were convicted for corrupt activities in 1975. In 1979, that number more than doubled to 102. In 1975, state and local officials convicted for misuse of office numbered 112. For 1979, the number was 182, a 63 percent increase. To keep government honest, you also have to police the private individuals who seek to corrupt public officials. There too, the growth has been striking: in 1975, 24 private individuals were convicted in cases involving public officials; in 1979, the number was ten times greater. To show what is in the pipeline, let me cite an FBI statistic. In February 1978, the Bureau had underway 574 public corruption investigations, involving everything from crooked cops on the beat, to school board members taking kickbacks, to persons at high levels of state and federal government. In December 1979, the public corruption investigations underway numbered 1,192.

B. Causes of the Growth

To account for this increase is not hard. I don't think it means that public officials are more or less honest than they ever were. Instead, it is a satisfying result of a deliberate change of focus in law enforcement policy.

The centerpiece in the growth was Attorney General Bell's decision in early 1977 to place public integrity cases among the Department's top four criminal enforcement priorities, and Attorney General Civiletti's continuation of that priority. The creation of a priority area has meant

that more agent hours and attorney hours are devoted to the cases, and that more sophisticated analysis is done to develop an effective enforcement strategy.

A second cause of growth has been the creation of new operating units. The FBI created a Public Corruption Sub-unit within its White Collar Crime Unit. In 1976, Attorney General Levi created a Public Integrity Section in the Criminal Division -- drawing together for the first time an enforcement program that had been scattered among the Fraud, Labor, General Crimes, and Organized Crime Sections. Our Public Integrity Section has grown from an initial staff of 9 attorneys to a current complement of 28. With these new units at the FBI and the Department, it has been possible to develop collective experience in running investigations and in using statutory tools of enforcement such as relatively new prosecutive theories under the Hobbs Act, the RICO statutes, and the wire fraud statute. The FBI has developed a team approach to its investigations, consulting with the U.S. Attorney early on so as to develop cases most effectively. Our Public Integrity Section has exercised leadership among the U.S. Attorney's offices through training programs, consultation, and joint prosecutions.

A third source of the growth is the plain enthusiasm of FBI agents, newspaper reporters, government program agencies, and prosecutors, for developing public corruption cases. In the decade after Watergate, these cases are perceived as

important and urgent, contributing directly to the public welfare. As in the competitive world of journalists, so in the competitive world of law enforcement agencies, detecting and proving a case of major public corruption is a highly valued achievement.

The fourth cause of growth -- and the greatest catalyst for continued growth -- is the iron-clad policy of independence adopted under the last two Attorneys General. This policy has insulated the Department of Justice from influences that should not affect decisions in any criminal case. Under a rule announced by Attorney General Bell in September 1978 and re-promulgated by Attorney General Civiletti last year, the prosecuting attorneys in the Department -- whether at the Assistant Attorney General, Section Chief, or staff lawyer level -- are forbidden to have any contact or communication with the White House or the Congress concerning open cases. Another part of the policy says that prosecution decisions will be made at the Assistant Attorney General level or a level below that. If the Deputy Attorney General or Attorney General wishes to overrule a particular decision, the overruling must be committed to writing, including a statement of reasons. This puts the matter clearly on the record for future examination. The reasons for the overruling are to be publicly disclosed if law enforcement considerations and the rights of persons or organizations under investigation permit. Once a case is closed, it is also our policy to

make the case files available on request to Congressional committees charged with oversight where law enforcement considerations permit. Thus, whenever we make a case decision, it is our working assumption that the matter is likely to be scrutinized after the fact.

This policy of delegating decisions to the career prosecutors, of insulating them from any possible outside pressure, of making decisions on the record, and of welcoming later Congressional oversight, insures that case decisions will be made carefully and completely on the merits. The iron-clad policy of independence is extremely healthy, both symbolically and operationally, and reinforces the nonpolitical character of a nonpolitical Department.

C. The Quality and Types of Cases

Statistics can be misleading, and an observer should rightly ask what kinds of cases we have brought -- whether our focus has only been minor government employees, or whether we have addressed corruption and misconduct at higher levels of government. The record here is quite impressive.

In the last three years, the Department has obtained indictment and conviction of five Congressmen for corrupt acts connected to office -- Richard Tonry, for agreeing to accept improper campaign contributions and promising federal benefits in exchange for contributions; Richard Hanna, for

conspiracy to accept bribes and defrauding the United States; Charles Diggs, who was chairman of the House Committee on the District of Columbia, for mail fraud and false statements in connection with a salary kickback scheme; Joshua Eilberg, who was chairman of the House Judiciary Subcommittee on Immigration, for violating a criminal conflict of interest statute; and Daniel Flood, who was chairman of the House Labor-HEW Appropriations Subcommittee, for a six-year-long conspiracy to elicit contributions from persons seeking to do business with the federal government. We also sought and obtained indictments against three other Congressmen, although we did not succeed in obtaining convictions. There were the Passman, Galifianakis, and Leach cases. We are currently proceeding with the Abscam investigation.

The investigation of persons close to the White House has been extensive and painstaking, so much so that the Washington Post last Saturday ran a news story speculating whether the potential costs of legal defense would not discourage some people from public service. We have just finished the Lance trial. We appointed a Special Counsel to investigate the finances of the Carter Warehouse. We conducted an 18 month long grand jury investigation to follow every strand of an allegation concerning Robert Vesco's fugitive status and a White House official. We requested appointment of a Special Prosecutor by the U.S. Court of Appeals to investigate alleged cocaine use by the White House chief of staff. The Post story mentions other similar investigations,

each conducted without regard to administration membership or political party.

The Public Integrity Section had full or shared operational responsibility for many of these cases. There are also lesser known cases of federal officials in which the Section has had an operational role. These include the conviction of a representative to the Great Lakes Regional Commission for using Commission funds to aid Democratic Farmer Labor candidates; of a federal co-chairman of the Coastal Plains Regional Commission for official acts affecting a personal financial interest; of a former American Ambassador to the Dominican Republic for using government personnel and materials to build a private home; and of a former Assistant Director of the Bureau of Engraving and Printing for criminal conflict of interest. We are proceeding to trial in the next few weeks against the former chief of the Federal Highway Safety Commission.

At the state and local level, the Public Integrity Section has also been active. Over the last three years we have participated in the indictment and conviction of a Mississippi State Senator who was one of the most powerful members of that body, for conspiracy to defraud the United States; of a prominent Pennsylvania State Representative for election law violations; and of the Sheriff of Madison County, Illinois for fraud and false statements in connection with a wide-ranging shakedown scheme. Add to that the conviction of the

Sheriff and First Deputy Sheriff of Randolph County, Alabama, for vote-buying and the Sheriff of Perry County, Mississippi, for RICO violations. And the conviction of the East Chicago, Indiana Building Commissioner and Sanitary District Commissioner; the former police chief of Houston, Texas; the Insurance Commissioner of Florida; a county judge in St. Francis County, Arkansas; the chairman of the State Liquor Control Commission in Iowa; the chairman of the Board of County Commissioners in Knox County, Tennessee; the police chief in Gary, Indiana; and the former Mississippi Director of Highway Safety. We recently indicted two prominent members of the Washington State legislature for allegedly accepting corrupt pay-offs from undercover agents who posed as persons pressing for legalization of gambling in the state.

The list could go on. If I were to include cases handled solely by U.S. Attorneys around the country, the list would be far too long to read to you. But the point is clear. Our activity as prosecutors has been far-reaching, productive, and wholly impartial in ferreting out public corruption. If an observer took the trouble to check the party affiliation of the defendants in all these cases, the nonpolitical independent character of our activity would be immediately apparent. The record is one I'm proud of. The FBI and the attorneys in the Criminal Division are proud of it. It is a record that has been developed in large part under the leadership of Tom Henderson as chief of Public Integrity.

II. Declinations and the Prosecutor's Task

A. Why Declinations Occur

Winning convictions is only half of a prosecutor's job. Equally vital is to sort out which cases to prosecute and which to decline.

Declinations are the rule, not the exception. Of 171,000 criminal matters referred to federal prosecutors in Fiscal Year 1976, 108,000 were declined -- a declination rate of 63 percent. Many other uncounted declinations are made by the investigative agencies, in accord with guidelines agreed on with federal prosecutors.

Cases are declined for a variety of reasons. The first is scarcity of resources; the federal system cannot handle every allegation of a federal criminal violation generated in a country of 200 million people. We try to make our resources have the most effect by selecting areas where deterrence is especially important, where the federal interest is the greatest, cases of the greatest culpability and cases where we have a good chance of winning. To conserve resources, we will often defer to state and local prosecution, or in appropriate cases of lesser culpability, to administrative discipline by a suspect's employer or professional association.

The more important reason for declining is lack of merit in the prosecution. Often, upon investigation, we discover that there simply is no evidence supporting the initial allegation. In other cases the available evidence

turns out to be weak; there is a vast difference between making an allegation and mustering sufficient proof to convince twelve jurors beyond a reasonable doubt. Declining a weak case is part of the prosecutor's duty of fairness, for the burdens of indictment and trial were never intended to be a form of curbstone punishment to be used without a reasonable chance of securing a conviction. Declining weak cases is also important because too many losses at trial would seriously weaken the credibility of the Department's future prosecutions.

Attorney General Bell suggested that we should seek an indictment only where the available evidence would be at least likely to produce a conviction. I have found that to be an extremely sensible standard.

Judging what is a weak case is partly a technical evaluation of the evidence -- what witnesses are likely to be available, what they will testify to and with what credibility. It is also a matter of gauging whether the jury is likely to be impressed by the wrongfulness of the defendant's conduct. The phenomenon of jury nullification is not unknown in the federal system and elements of a crime such as "corrupt intent" provide another way for jurors to act on their assessment of the wrongfulness of conduct.

Many declination decisions are clear calls. If a government employee cheats on his sick leave, almost all prosecutors would decline prosecution in favor of administrative

discipline. In the case of a major embezzlement from a federal program, the opposite call is equally clear.

But if we are doing our job right, there will always be tough calls, close cases, where the decision on how to proceed could go either way. Every prosecutor faces numerous such close decisions, which depend on his evaluation of the adequacy of the evidence, the jury appeal of the case, the federal interest in the case, the need for deterrence, the availability of alternative sanctions. Out of the 100 or more criminal matters reviewed yearly by a typical federal prosecutor, there will be a sizeable number on which reasonable prosecutors could differ. It is a prosecutor's obligation to call those cases on the merits, in good faith judgment, based on his own evaluation of the case.

It is important to have public support and understanding of this part of the job of prosecutors and investigators. If prosecutors are afraid to call cases on the merits and to decline prosecution when appropriate, the criminal process will be susceptible to serious abuse. Yet at the moment, in the post-Watergate era, all the outside pressures that operate on law enforcement push in one direction only -- in favor of <u>not</u> declining cases, at least in the area of public corruption. Declining, even on a case where there is no evidence, is likely to lead to charges, by somebody, somewhere, of cover-up. And there will always be close cases on which reasonable prosecutors could differ; in such close cases, where a political figure

is involved, declining will permit a suggestive charge that politics was the deciding factor. A law enforcement person belongs to a profession that powerfully demands adherence to the law and impartial pursuit of violators, and for him such a charge is anathema. Without public understanding of the declination function, the temptation always will be to prolong investigations that deserve to be closed, to reveal information that should be kept a confidential part of the investigative process, even to charge and prosecute where no indictment deserves to be brought.

B. Recent Debate

One example of misunderstanding of the declination function is the recent mild flurry of assertions about the prosecutorial record of a man whose rectitude is beyond question. The chief of our Public Integrity Section, Tom Henderson, has been a stalwart and steadfast chief since the creation of the section. He has led the Public Integrity Section for four years in creating the impressive string of prosecutions and convictions I described. He has a reputation for complete independence, for bending to no political wind, for having the guts to call cases both ways, completely on their merits. He has shown tough-mindedness and independence of judgment in every matter we have handled together, and has never once changed his view to suit the front office.

The questions that are asked about a few recent cases may be legitimate; but the answers that some have given to the questions are out of touch with a very simple mathematical reality. Out of the hundreds of matters the Public Integrity Section considers each year -- and it does consider hundreds -- any observer could find a dozen or so on which reasonable prosecutors could differ. Every case the Public Integrity Section deals with involves governmental or political figures. There has to be a class of cases, for any prosecutor, in which a call could go both ways. The Public Integrity Section thus must decline prosecution of political figures in at least some close or debatable cases. To conclude from the legitimately debatable nature of a handful of declination decisions, and from the fact that they involved governmental or political figures, that the declinations are a sign of nonindependence or political pliability, would be foolish.

The particulars in the assertions about Tom Henderson's prosecutorial record more than bear out my point. The observers who have put forward a list of a supposed "debatable dozen" -- declinations another prosecutor might have called a different way -- face several awkward facts in citing the declinations as examples of anything besides independent judgment. (1) Most of the cases are, upon scrutiny of the full facts, declinations with which no prosecutor would disagree, because the evidence in each was extremely weak or nonexistent. The "debatable dozen" shrinks to the

"debatable few." (2) Many of the declined cases concerned transactions by public employees occurring before this Administration, as to which there could be no conceivable motive to go easy in even the most venal world. (3) Most of the declined cases concern people who have no prominence or political power. You and I have never heard of most of them, making it more than a little unlikely that the declination could have been biased to please someone in a position of power.

III. Why the Declination Function Can Be Confusing

The recent characterizations of the significance of a dozen cases -- plucked from among hundreds of cases handled each year by the Public Integrity Section -- have been troubling to lawyers in the Criminal Division and many FBI agents. The fact that Bud Mullen, head of the FBI's Criminal Investigative Division, and Jack Keeney, my senior career Deputy, are sitting here with me today, is some indication how seriously we take this kind of allegation. When assertions are made about Tom Henderson, the bell tolls for every lawyer and agent who has to decide close cases involving political figures and who deeply values his reputation for integrity.

In a sympathetic light, however, there are a number of common reasons why the declination function may have been misunderstood.

First, that declinations are so common an occurrence in law enforcement is a fact frankly unfamiliar to many citizens, legislators and writers. For instance, when GAO published a study two years ago describing the 63 percent declination rate common to federal prosecutors, several Committees in the House and Senate issued a request for a study of "recommendations for improving the percentage of such [criminal] complaints which are prosecuted by the Department."

Second, it can be hard to keep in clear view the difference between scandalous behavior and criminal behavior, and the difference between suspecting criminal behavior and proving it -- particularly when a matter is being discussed in the non-technical confines of a journal or newspaper. When we pursue an investigation, often we find that the suspect behaved badly, may even have acted like a scoundrel, and yet has not committed a federal criminal violation. When a legislative subcommittee omits to put a witness under oath, for instance, we can hardly bring a perjury prosecution against the witness even though he tells untruths. Sometimes we end up at the conclusion of an investigation strongly suspecting that a person <u>is</u> guilty of a criminal offense,

but unable to assemble adequate admissible evidence. Keeping these distinctions in mind is essential in understanding that a declination does not amount to approval or condoning of the examined behavior.

Another cause of potential misunderstanding is that we can't talk very much about our declinations. Investigative information is generally to be presented in court or not at all. By law we can't make grand jury information public, and by ethical practice, to protect privacy, we generally refrain from disclosing other investigative information except in the confines of an indictment and trial or in response to oversight requests from the Congress on closed cases. Certainly, as an agency following the rule of law, we have no business broadcasting our "suspicions" or "hunches" about guilt. So the public is often not given any detailed information on the reason for a declination; they simply learn that an investigation of an obvious scoundrel has been closed. This may contribute to suspicion that the real reason for the declination is political.

Another potential cause of misunderstanding is that allegations of criminal conduct often surface in highly charged settings, where people have properly strong feelings about matters of moral conduct or public policy to which criminal law does not give full expression. If a lobbyist gets advance access to inside information from a government department, that cozy situation is a troubling one fully

warranting Congressional inquiry and reform. But if we are determining whether the lobbyist committed perjury in testifying about the cozy practice, there is no way around the criminal law's requirement of literal falsity and the two-witness rule. If the Civil Service Commission is discovered to be giving weight to political recommendations in hiring, that is a scandal and heads should roll. But if we are looking at whether a criminal obstruction of justice occurred in the course of the Commission's response to a Congressional investigation of the matter, we have to measure our evidence against the stringent "intent" requirement of the obstruction statute. That we end up declining prosecution doesn't mean we condone the hiring abuse or the inadequate response to a Congressional request. Yet the distinctions between criminal behavior and immoral behavior, and the frequent difficulty in meeting the "reasonable doubt" standard of the criminal law, can be hard to keep in clear focus -- especially when as a society we often have to grope for a suitable sanction against immoral but noncriminal behavior.

A fifth reason for misunderstanding declinations is that the law enforcement business is very competitive, with jousting and bruising between agencies. Each one hopes to make the big case. There will not always be complete unanimity among all the prosecution lawyers, all the grand jurors, all the investigative agents, on what tactics to use in an investigation or whether a case should be declined. There

is of course a fair process of review for resolving any serious disagreement; an investigative agency that believes a declination decision in the Criminal Division is in error can appeal the matter to the Assistant Attorney General or even higher. But if an observer is looking for internal dissent on a decision, he often can find it, sometimes even expressed in strong and harsh language. The vocal dissent is part of the roughhouse world of law enforcement. The difference between two reasonable judgments which leads to that dissent should not be hastily converted into a suspicion of partisan cover-up.

The typically slow course of criminal investigations can be a sixth factor in causing misunderstanding of the prosecution function. A criminal investigation often requires sifting through massive financial records, or painstakingly compiling the testimony of witnesses with hazy memories. It can require time-consuming procedures to get tax return information under the Tax Reform Act of 1976 or bank records under the Right to Financial Privacy Act. It may require waiting for the trial of a lesser individual in the hope that he can be "turned" or "flipped" -- that is, induced to cooperate in supplying information on higher-ups. Sometimes the delay comes because we are waiting for the completion of investigative work by another agency, so that we do not stumble over each other's feet. Yet when a reporter inquires about the Congressman XYZ investigation and is told six

months later that it is still under investigation, the first impulse may be to think it is a stall or a cover-up. With grand jury secrecy requirements and our confidentiality rules, there will not be much information we can give out to explain the status of the investigation. If the reporter writes an article about the so-called stall, it will likely color the public's perception of any later decision that prosecution is not warranted.

A seventh factor in causing misunderstandings may be simple unfamiliarity with standard methods of investigation, rules of procedure, or the technical definition of particular substantive offenses. For instance, if we receive a referral concerning possible perjury by a government official testifying before a Congressional committee, and after examining the transcript we conclude the testimony was so couched as not to be literally false, then it makes no sense to suggest that we should interview the official or question the Congressional staff who heard the testimony. Under Bronston v. United States, 409 U.S. 352 (1973), a perjury charge requires a showing of literal falsity, and all the interviews in the world cannot fill the gap if the transcript shows that no false statements were made; evasiveness and unresponsiveness are not, Bronston teaches, federal crimes.

Similarly, if a citizen is doing first-time service on a federal grand jury, he may be unfamiliar with the traditional role of the prosecutor in relation to the grand jury in

deciding on an order for the presentation of evidence and in formulating questions to ask of the witnesses. Parts of standard operating procedure in many U.S. Attorney's offices -- for example, not supplying transcripts of each previous day's testimony to the grand jurors, or storing the written notes taken by grand jurors in a secure place at the close of each day, both used as standard practice in order to protect grand jury secrecy -- may be unfamiliar to a citizen and seem, on first blush, suspicious to him.

IV. Public Scrutiny and the Courage to Close Cases

I do not make light of the public's responsibility for scrutinizing the actions of law enforcement and prosecutorial agencies. That is a very strong long-term safeguard against abuse. But at the same time, we must avoid creating a system in which the only incentive is to prosecute, no matter how weak or nonexistent the case. Members of Congress know better than anyone that in running for office or in holding office, it is possible to be the target of allegations from people of varying degrees of credibility. A system in which momentum builds unceasingly from public allegation to a paper-thin indictment, without the chance for an independent hard-nosed assessment by a prosecutor of the merits of the case, would hardly be a good system.

Part of the fault may belong to the law enforcement community for not educating the public about the necessity of declinations in a system of justice. But a well-functioning

system will also require a certain degree of restraint and hard thought on the part of the public -- to not jump to hasty conclusions about a declination, to realize that a declination does not amount to approval of behavior, and to read with a certain amount of critical analysis publicly available accounts of an investigation.

Soon after his appointment, Attorney General Civiletti reminded all Department lawyers that there is an ethical obligation to handle government cases with reasonable speed. We should have the courage to close unworthy cases that are going nowhere, rather than endlessly postponing decision, lest investigation become itself a new form of punishment. If declination decisions in public corruption cases are automatically made the basis for charges of cover-up, then our system of justice will be in trouble. For then investigations which should be closed, instead will be indefinitely prolonged, with unjustifiable damage to the lives of people who are guilty of no criminal offense, and pressure will grow for indictment no matter how thin the proof.

In light of the record of prosecutions and aggressive investigations established by the FBI, by the U.S. Attorney's offices, and, under Henderson's able leadership, by the Public Integrity Section, a declination decision in the public integrity area is surely by now entitled to a presumption of regularity. When we decline to prosecute unmeritorious cases, it is as much a part of a system of justice as when we prosecute the guilty.

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