

PROSECUTING PUBLIC OFFICIALS/FIGURES FOR CORRUPTION: THE APPROACH IN THE UNITED STATES

I. INTRODUCTION

A. Overview

- 1) Public corruption in any form is the misuse of a public or government office for private gain. Its existence is an indication that something has gone wrong in the management of the government office, whether it be federal, state, or local. In that regard, it is a basic tenet that government is not to be used for personal enrichment and the extending of benefits to the corrupt.
- 2) The prevention of corruption is essential not only to make government work for its intended purpose, *e.g.*, ensure that public officials are using their office to further the public interest and not to enrich themselves or others, but also to preserve public confidence in the democratic process. As to the latter, the United States Supreme Court has observed: “[A] democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.” (*United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 562 [1961]).

B. The Anti-Corruption Legacy of the United States Constitution

- 1) The United States Constitution reflects its framers’ intent to deal with corruption which led to the adoption of a number of provisions in the Constitution itself limiting the opportunities for self-enrichment. As one commentator has observed: “The Constitution reflects a significant concern with preventing corruption in all levels of the government.” (Henning, 92 Kentucky L.J. 75, 84 [2003]).
- 2) Thus, the Constitution permits impeachment of any officer of the United States, including the President and Vice President, for “Treason, Bribery, or other high

crimes and Misdemeanors.” (U.S. Const., art. II, §4). It also prohibits anyone holding “any Office of Profit or Trust . . . without the consent of the Congress, [from accepting] any present, Emolument Office, or Title of any kind whatever, from any King, Prince, or foreign State.” (U.S. Const., art. I, §9, cl. 8). Members of Congress are prohibited from taking any public office created during their tenure or any public office whose compensation has been increased during their tenure. (U.S. Const., art. I, §6, cl. 2). The Constitution’s Appropriations Clause requires authorization from Congress before any funds could be spent by a federal officer. (U.S. Const., art. I, §9, cl. 7).

- 3) With respect to the possibility of corruption in the states, no specific provisions were included. However, certain structural protections were enacted, such as trial by jury to protect against corrupt judges, and the ability of state legislatures to enact legislation to combat corruption.

II. PROSECUTING FEDERAL CORRUPTION

A. Introduction

- 1) The United States Constitution through its grant of enumerated powers to Congress, including the postal power, the commerce clause power, the necessary and proper clause, and the spending power, provides the sources for Congress to enact specific legislation designed to combat corruption at the federal level. Notably, the anti-corruption legacy did not lead to a specific grant of power in the Constitution to Congress to enact anti-corruption legislation to cover areas beyond those specified in the Constitution.
- 2) As derived from these enumerated powers, the three basic approaches for combating corruption at the federal level are: criminal statutes, impeachment, and ethical proscriptions.

B. Criminal Statutes

1) Bribery of Public Officials - 18 USC §201

- (a) This provision criminalizes both the offer and receipt of bribes and illegal gratuities by federal officials. It applies to every federal employee

irrespective of whether they occupy a supervisory position or exercise discretionary authority.

- (b) This provision at its basic core recognizes that a bribe is any inducement intending to improperly influence the performance of a public function meant to be gratuitously exercised. It prohibits the giving of a “thing of value”, the definition of which is very broad, encompassing anything that has subjective value to the recipient.
- (c) The crime of bribery is completed when there is shown that something of value was promised or offered, not that a bribe actually be paid.
- (d) Significantly, where the prosecution has difficulty proving an express bribery, *i.e.*, specific intent to give or receive something of value in return for an official act, the prosecution may then merely charge a gratuities violation, *i.e.*, receipt of anything of value.

2) Other Statutes

- (a) 18 USC §666 outlaws theft, fraud or bribery concerning programs receiving federal funds. (*See generally, Sabri v. United States*, 124 S. Ct. 1941 [2004]).
- (b) There are numerous statutes which condemn specific conduct in specific areas, *e.g.*, bankruptcy, procurement, taxation.

C. Impeachment

- 1) Although it is not entirely clear, it would appear that the impeachment clause of the United States Constitution covers misuse of office that constitutes a “political crime,” even if it does not constitute a violation of any specific criminal statute.

D. Ethical Proscriptions

- 1) There is an extensive amount of regulations which governs the behavior of federal officials. (*See, United States v. Sun-Diamond Growers*, 304 U.S. 255 [1992]). These regulations state ethical proscriptions, and are not necessarily criminal in nature. However, their violation can lead to removal from office.

III. PROSECUTING STATE AND LOCAL CORRUPTION

A. Introduction

- 1) All of the states and most local governments have criminal statutes or codes which criminalize various aspects of corruption.
- 2) While there is no federal statute which is aimed specifically at state and local corruption, there are three statutes which have been generally utilized by federal prosecutors to prosecute state and local officials for acts of corruption. They are the mail and wire fraud statute, the Hobbs Act, and the Racketeer Influenced and Corrupt Organizations Act (“RICO”).

B. Hobbs Act – 18 USC §1951

- 1) The Hobbs Act by its express language makes it a crime to obstruct, delay, or affect commerce by robbery or extortion.
- 2) However, the statute by a series of judicial decisions, including a United States Supreme Court decision (*See, United States v. Evans*, 504 U.S. 255 [1992]), has been extended to cover practices best characterized as bribery. In that regard, all that has to be shown is that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts. This results in making the Hobbs Act similar to 18 USC §201 insofar as it covers bribery of a federal official. However, the statute would not cover mere receipt of gratuities, as under 18 USC §201, which is covered by the mail and wire fraud statutes.
- 3) While the Hobbs Act is limited to conduct that “obstructs, delays or affects interstate commerce [commerce between two or more states],” this requirement is hardly any requirement at all since all that is needed is a small or practically negligible effect.
- 4) A Hobbs Act violation may serve as the foundation for RICO offenses.

C. Mail and Wire Fraud – 18 USC §§1341 (Mail), 1343 (Wire)

- 1) The mail and wire fraud statutes were enacted as anti-fraud statutes, designed to combat as criminal the common law crime of larceny by trick. Even though the

statutes' terms do not specifically embrace corruption, they are extensively used to prosecute acts of public corruption.

- 2) For mail fraud, the prosecutor must prove only (a) a scheme to defraud, and (b) the mailing of a letter for the purpose of executing the scheme; and for wire fraud, the prosecutor must prove only (a) a scheme to defraud, and (b) the use of interstate wire communications in furtherance of the scheme. For purposes of the statute, the requisite mailing can be done through the postal service or a private carrier, and the requisite wire communications include radio transmissions, telephone calls and e-mails. Significantly, the requisite mailing or wiring need not itself contain any fraudulent information and may be entirely innocent. However, they must be shown to be at least a "step" in the scheme. (*Schmuck v. United States*, 489 U.S. 705, 712 [1989]).
- 3) With respect to the statutes' use in public corruption cases, a fraudulent scheme includes "a scheme . . . to deprive another of the intangible right of honest services." (18 USC §1346). It is this definition which makes the statutes a flexible tool for prosecutors to prosecute public corruption at the state or local level.
- 4) A typical "honest services" corruption case arises in two situations. First, "bribery" where the public official was paid for a particular decision or action, which includes a pattern of gratuities over a period of time to obtain favorable action. Secondly, "failure to disclose" a conflict of interest, resulting in personal enrichment, which encompasses circumstances where the official has an express or implied duty to inform others of the official's personal relationship to the matter at hand even though no public harm occurred or there was no misuse of office. As to the "conflict of interest" situation, the basis for its condemnation is that "[w]hen an official fails to disclose a personal interest in a matter over which he has decision-making power, the public is deprived of its right either to disinterested decision making itself or, as the case may be, to full disclosure as to the official's potential motivation behind an official act." (*United States v. Sawyer*, 85 F3d 713, 724 [1st Cir. 1966]). Notably, a person who holds no public office but participates substantially in the operation of government, *e.g.*, a political party leader, may be subject to prosecution under an "honest services" theory. (See, *United States v. Margiotta*, 688 F.2d 108 [2d Cir. 1982]).

- 5) While there is the need to show in a bribery case an intent to give or receive something of value in return for an official act, in a failure to disclose case, the failure is itself sufficient to show the requisite intent. Moreover, there is no need to show the scheme came to fruition or caused harm.
- 6) A public official may be charged with a separate count for each mailing or wiring in furtherance of the charged scheme.
- 7) In 2002, Congress amended the statutes to allow for a maximum sentence of up to 20 years imprisonment for each violation of the statutes.
- 8) A violation of the statute serves as the foundation for RICO offenses.

**D. Racketeer Influenced And Corrupt Organizations Act
("RICO") – 18 USC §1962**

- 1) In 1970, Congress passed the RICO statute as part of the Organized Crime Control Act. It was designed "to seek the eradication of organized crime by . . . establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." (*United States v. Turkette*, 452 U.S. 576, 589 [1981]).
- 2) §1962 has four subdivisions. Subdivisions (a) and (b) have been invoked to combat the infiltration of legitimate business by organized crime, and subdivisions (c) and (d), also designed for that organized crime purpose, have been used as a tool against corrupt public officials.
- 3) §1962(c) makes it unlawful for any person, which includes a public official, "employed by or associated with any enterprise engaged in, or the activities of which affect interstate or foreign commerce, to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity"; and §1962(d) makes it unlawful for a person to conspire to violate subdivision (c) as well as subdivisions (a) and (b).
- 4) The elements of a RICO violation as charged against a public official are that the official:
 - (a) through the commission of two or more chargeable or indictable or punishable predicate offenses,
 - (i) The requisite offenses include mail or wire fraud and Hobbs Acts offenses;

- (b) constituting a “pattern of racketeering”,
 - (i) The statute requires that a pattern include at least two acts of racketeering activity, one of which occurred after the effective date of the statute (October 15, 1970), and the last of which occurred within ten years of a prior act of racketeering activity. The Supreme Court has held that a pattern “requires the showing of a relationship between the predicates, . . . and of the threat of, continuing activity . . .” “Criminal conduct,” the Court explained, “forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.” (*H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239-240 [1989]).
 - (ii) “Racketeering activity” includes conduct that is “indictable,” “chargeable” or “punishable” under various state and federal criminal laws. The acts of racketeering activity are also referred to as predicate offenses, and the list incorporated into the statute covers a wide array of illegal activity, including mail and wire fraud, and Hobbs Act offenses.
 - (c) directly or indirectly invests in, maintains an interest in, participates in, conducts the affairs of, or acquires income used to acquire an interest in,
 - (d) an enterprise,
 - (i) An enterprise includes any individual partnership, corporation, other legal entities or group of individuals or entities associated in fact, which encompasses a government office through which the official(s) conducted the racketeering activities.
 - (e) The activities of which affect interstate or foreign commerce,
 - (i) This provision has been liberally construed so that nearly any interstate involvement would satisfy the statute.
 - (ii) It is difficult to conceive of a government office in the United States whose activities would not be construed as affecting interstate commerce.
- 5) When RICO is charged together with the crimes alleged to be the “racketeering activity” upon which the RICO charge is predicated, such as mail and wire fraud and Hobbs Act offenses, the public official faces much higher statutory penalties and the possibility of consecutive sentences.

- 6) RICO also provides for criminal forfeiture of any interest acquired or maintained in violation of §1962, any interest in any enterprise operated in violation of §1962, and any property constituting, or derived from, the proceeds of racketeering activity in violation of §1962. The prosecutor may also secure pre-trial orders barring the public official from using available assets to obtain legal representation.
- 7) It must also be noted that it is well recognized that charging a public official with a RICO violation carries with it an adverse stigma that casts the official in a worse light than being a mere corrupt official, *i.e.*, the official is involved in organized crime.

IV. CONCLUSION

Federal prosecutors are given broad weapons to prosecute public corruption, especially with respect to state and local corruption, where the pertinent statutes empowers them to challenge almost any unlawful, questionable or unethical conduct of a public official, subject to the prosecutor's exercise of sound discretion. RICO prosecutions give prosecutors even more discretionary prosecution power.

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