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Federal Prosecution of State and Local Public Officials: The Obstacles to Punishing Breaches of the Public Trust and a Proposal for Reform, Part Two

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FEDERAL PROSECUTION OF STATE AND LOCAL PUBLIC OFFICIALS: THE OBSTACLES TO PUNISHING BREACHES OF THE PUBLIC TRUST AND A PROPOSAL FOR REFORM, PART TWO*  

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I. REFORM OF PUBLIC CORRUPTION PROSECUTION LAWS  

As previously discussed in Part One of this article, a multitude of procedural and practical limitations greatly hinder the ability of state investigative and prosecutive authorities in West Virginia to combat public corruption. On the national level, the increased role of the federal government in the prosecution of public corruption establishes that similar restrictions exist in other states as well. When public corruption persists unchecked, it erodes the public’s confidence in those charged to govern them. The tools employed and the penalties imposed by the federal government to prosecute these cases, however,  

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vary in application and interpretation. The hodgepodge of statutes and their divergent application lead to uncertainty for federal prosecutors and the public. The authors believe that the solution lies in the passage of one federal public corruption statute which would be utilized in most cases. Further, state reform would allow state authorities to shoulder part of the responsibility for addressing the problem of public corruption.

A. Federal Statutory Reform

Federal reform should be undertaken to define, in one statute, corrupt behavior by public officials. The fundamental deficit in the federal prosecution of corrupt state and local officials is the necessary reliance by federal prosecutors on a collection of statutes that are not sufficiently comprehensive and, in many areas, unclear. This problem is exacerbated by the important but competing policy concerns presented when courts attempt to construe the statutes. In each case the court must attempt to balance anew the Congressional goal of eliminating state and local public corruption with the need to construe such statutes narrowly due to federalism concerns. This conflict was present when the Supreme Court decided McNally v. United States\(^1\) and McCormick v. United States,\(^2\) with federalism concerns prevailing. The dilemma was again present last term in the Supreme Court in Evans v. United States.\(^3\)

In addition to the federalism concern, the Court in Evans addressed issues of statutory construction (i.e., criminal statutes must be construed narrowly under the rule of lenity) and the role of precedent (long held majority opinions of the circuit courts deserve deference). The dissent also raised a more general public policy question: the need to control public corruption versus the need to prevent prosecutorial abuse.\(^4\) While the opinions in Evans address each of these

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4. In McNally, Justice Stevens raised the policy issue in his dissent that the class of defendants — white collar public officials — that benefits from the McNally opinion includes those least in need of help. Justice Thomas, dissenting from Justice Stevens' majority opinion in Evans, presumably was responding in kind when he raised the issue of the need to avoid "discrimination" in the prosecution of public corruption cases.
concerns, the holding does not, and probably could not, completely resolve the underlying problem presented by these tensions. Rather, at best, the case resolves the split in the circuit courts relating to whether there is an "inducement" requirement under the Hobbs Act.\textsuperscript{5} The Court concludes that, as applied to public officials, there is no such requirement in the statute.\textsuperscript{6}

Evans was a DeKalb County Commissioner who took an $8,000 "campaign contribution" offered to him by an undercover agent purportedly seeking a favorable zoning decision. The Court held that "inducement" (some action or demand by Evans) was not an element of the offense.\textsuperscript{7} Rather, a public official who simply accepts a "bribe" is guilty under the Hobbs Act.\textsuperscript{8} On the other hand, not every payment to a public official would violate the Hobbs Act.\textsuperscript{9} The payment must be "under color of official right."\textsuperscript{10} Presumably this means that payments made for a purely private reason with no corrupt motive, such as birthday presents between family members, would not be a violation of the law. Evans, therefore, settled the two extremes — bribes and purely private transactions — but did not seek to address some potentially difficult questions that remain.

The clearest remaining issue is the status of those payments typically called "gratuities" — a gift that, while only given because the person is a public official, is in fact simply a gift. In this circumstance, no specific benefit or public action is necessarily expected when a gratuity is given. One example might be the unanticipated payment by a business to a public official after he acts in the business' favor. The criminality of other goodwill-type payments under the Hobbs Act is also not made clear by Evans.

Prior to Evans, the language of the circuit courts' decisions purportedly affirmed in Evans would include "gratuities" as Hobbs Act violations.\textsuperscript{11} In fact, \textit{any} payment motivated by the defendant's public responsibilities is a violation of the Hobbs Act.

\textsuperscript{5} 18 U.S.C § 1951 (1988).
\textsuperscript{6} Evans, 112 S. Ct. at 1883.
\textsuperscript{7} Id.
\textsuperscript{8} Id. at 1885.
\textsuperscript{9} Id. at 1884.
\textsuperscript{10} Id. at 1883.
\textsuperscript{11} Id. at 1884 n. 2.
office is prosecutable under these cases.\textsuperscript{12} However, the literal terms of the \textit{Evans} opinion are far less clear. Under \textit{Evans}, a payment motivated by the public office is prosecutable "when the public official receives a payment in return for his agreement to perform specific official acts."\textsuperscript{13} While it would be reasonable to conclude that \textit{Evans} did not result in a wholesale reversal of the circuit court cases it purported to follow, some ambiguity was raised by the Court in its choice of the phrase "specific action" rather than the more general term — "public position" or "recipient’s office."

While \textit{Evans} may have injected some ambiguity in one area, it also clarified \textit{McCormick}. In \textit{McCormick}, the Court held that the United States must show an "explicit promise or undertaking" for a Hobbs Act conviction for extortion of campaign contributions.\textsuperscript{14} It was unclear whether "explicit" modified only "promise" or also "undertaking." If the requirement was that everything be explicit between the individual paying a bribe in the form of a campaign contribution and the public official who received it, creative wrongdoers could have a field day avoiding the statute.\textsuperscript{15} \textit{Evans}, which was also a campaign contribution case, does not apply the "explicit promise or undertaking" test, but instead talks in terms of \textit{quid pro quo}. In addition, the jury instructions affirmed in \textit{Evans} contained no requirement of an "explicit undertaking," but instead permitted conviction when there is an agreement, explicit or otherwise, to perform specific official acts for payment.\textsuperscript{16} Consequently, \textit{Evans} clarified that a literal interpretation of the "explicit undertaking" requirement in \textit{McCormick} was not intended.

It is apparent that a slow evolution and, perhaps, clarification of federal corruption statutes is underway. For example, over the last five years the "intangible request to good government" theory was

\begin{footnotesize}
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\item \textsuperscript{12} See, e.g., \textit{United States v. Price}, 617 F.2d 455, 457 (7th Cir. 1979) ("So long as the motivation for the payment focuses on the recipient’s office, the conduct falls within the ambit of 18 U.S.C \textsection 1951.") (citing \textit{United States v. Brasch}, 505 F.2d 139, 151 (7th Cir. 1974), \textit{cert. denied}, 421 U.S. 910 (1975)).
\item \textsuperscript{13} \textit{Evans}, 112 S. Ct. at 1889.
\item \textsuperscript{14} \textit{McCormick v. United States}, 111 S. Ct. 1801, 1816 (1991).
\item \textsuperscript{15} \textit{Evans}, 112 S. Ct. at 1892 (Kennedy, J., concurring).
\item \textsuperscript{16} Id. at 1889.
\end{itemize}
\end{footnotesize}
rejected in *McNally* and replaced by an "intangible right to honest services" theory by Congress in 18 U.S.C. § 1346. Thereafter, the "explicit promise or undertaking" requirement imposed in *McCormick* was later replaced with a *quid pro quo* requirement in *Evans*. Also in *Evans* inducement was found unnecessary; but the scope and applicability of the *quid pro quo* requirement was left unclear. Consequently, there remains a need for a clear, comprehensive federal statute criminalizing state and local public corruption.

The proposed federal corruption statute should not be written so broadly as to criminalize all suspect behavior but rather should employ language developed through case law for existing statutes. Thus, the chance deficiencies resulting from employing statutes originally enacted to address problems other than public corruption could be eliminated. Similarly, adoption of current language will serve to place public officials on notice that certain conduct will or will not constitute a criminal offense. Finally, the statute should be jurisdictionally based on the Commerce Clause, Mail Power and the receipt of federal monies. Consequently, the statute’s jurisdictional basis would be time tested.

As one single statute becomes the primary statute relied upon by federal prosecutors to prosecute public corruption, a body of law will quickly develop upon which future conduct can more accurately be predicated. Further, the passage of a single statute will lend stability to what is now an ever evolving state of the law. Moreover, should Congress decide that such a statute is not being interpreted as intended, then only one statute, rather than a multitude, would need to be amended.

To this end, the United States Senate passed in 1989, 1990 and 1991, an anti-corruption statute designed to clearly delineate criminal conduct under one umbrella statute. The 1991 version reads as follows:

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17. 135 Cong. Rec. 12430 (1989); 136 Cong. Rec. 6639 (1990); 137 Cong. Rec. 9382 (1991). In each of these years the House of Representatives did not pass the Senate version or any similar proposal. In 1992, the "Anti-Corruption Act of 1992" was offered as an amendment to bill S. 250, but it did not pass. 138 Cong. Rec. 6911 (1992).
TITLE XLVIII PUBLIC CORRUPTION

Sec. 4801. Short Title

This title may be cited as the “Anti-Corruption Act of 1991.”

Sec. 4802. Offense

Chapter 11 of title 18, United States Code, is amended by adding at the end thereof the following new section:

§ 226. Public corruption

(a) Whoever, in a circumstance described in subsection (d), deprives or defrauds, or endeavors to deprive or to defraud, by any scheme or artifice, the inhabitants of a State or political subdivision of a State of the honest services of an official or employee of such State, or political subdivision of a State, shall be fined under this title, or imprisoned for not more than 10 years, or both.

(b) Whoever, in a circumstance described in subsection (d), deprives or defrauds, or endeavors to deprive or to defraud, by any scheme or artifice, the inhabitants of a State or political subdivision of a State of a fair and impartially conducted election process in any primary, run-off, special or general election —

(1) through the procurement, casting, or tabulation of ballots that are materially false, fictitious, or fraudulent or that are invalid, under the laws of the State in which the election is held;

(2) through paying or offering to pay any person for voting;

(3) through the procurement or submission of voter registrations that contain false material information, or omit material information; or

(4) through the filing of any report required to be filed under State law regarding an election campaign that contains false material information or omits material information shall be fined under this title or imprisoned for not more than ten years, or both.

(c) Whoever, being a public official or an official or employee of a State, or political subdivision of a State, in a circumstance described in subsection (d), deprives or defrauds or endeavors to deprive or to defraud, by any scheme or artifice, the inhabitants of a State or political subdivision of a State of the right to have the affairs of the State or political subdivision conducted on the basis of complete, true, and accurate material information, shall be fined under this title or imprisoned for not more than 10 years, or both.

(d) The circumstances referred to in subsections (a), (b), and (c) are that

(1) for the purpose of executing or concealing such scheme or artifice or attempting to do so, the person so doing

(A) places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing;

(B) transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce any writings, signs, signals, pictures, or sounds;

(C) transports or causes to be transported any person or thing, or induces any person to travel in or to be transported in, interstate or foreign commerce; or

(D) uses or causes to use of any facility of interstate or foreign commerce;

(2) the scheme or artifice affects or constitutes an attempt to affect in any
manner or degree, or would if executed or concealed so affect, interstate or foreign commerce; or

(3) as applied to an offense under subsection (b), an objective of the scheme or artifice is to secure the election of an official who, if elected, would have some authority over the administration of funds derived from an Act of Congress totaling $10,000 or more during the 12-month period immediately preceding or following the election or date of the offense.

(e) Whoever deprives or defrauds, or endeavors to deprive or to defraud, by any scheme or artifice, the inhabitants of the United States of the honest services of a public official or person who has been selected to be a public official shall be fined under this title or imprisoned for not more than 10 years, or both.

(f) Whoever being an official, or public official, or person who has been selected to be a public official, directly or indirectly, discharges, demotes, suspends, threatens, harasses, or, in any manner, discriminates against any employee or official of the United States or any State or political subdivision of such State, or endeavors to do so, in order to carry out or to conceal any scheme or artifice described in this section, shall be fined under this title or subject to imprisonment of up to 5 years, or both.

(g)(1) Any employee or official of the United States or any State or political subdivision of such State who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against because of lawful acts done by the employee as a result of a violation of subsection (e) or because of actions by the employee on behalf of himself or others in furtherance of a prosecution under this section (including investigation for, initiation of, testimony for, or assistance in such a prosecution) may in a civil action, obtain all relief necessary to make such individual whole. Such relief shall include reinstatement with the same seniority status such individual would have had but for the discrimination, 3 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including reasonable litigation costs and reasonable attorneys' fees.

(2) An individual is not eligible for such relief if that individual participated in the violation of this section with respect to which such relief would be awarded.

(3) A civil action or proceeding authorized by this subsection shall be stayed by a court upon the certification of an attorney for the Government, stating that such action or proceeding may adversely affect the interests of the Government in an ongoing criminal investigation or proceeding. The attorney for the Government shall promptly notify the court when the stay may be lifted with such adverse affects.

(h) For purposes of this section

(1) the term "State" means a State of the United States, the District of Columbia, Puerto Rico, and any other commonwealth, territory, or possession of the United States;

(2) the terms "public official" and "person who has been selected to be a public official" have the meaning set forth in section 201 of this title; the terms "public official" and "person who has been selected to be a public official" shall also include any person acting or pretending to act under color of official authority.

(3) the term "official" includes

(A) any person employed by, exercising any authority derived from, or holding any position in the government of a State or any subdivision of the executive,
legislative, judicial, or other branch of government thereof, including a department, independent establishment, commission, administration, authority board, and bureau, and a corporation or other legal entity established and subject to control by a government or governments for the execution of a governmental or intergovernmental program;

(B) any person acting or pretending to act under color of official authority; and

(C) includes any person who has been nominated, appointed or selected to be an official or who has been officially informed that he or she will be so nominated, appointed or selected.

(4) the term "under color of official authority" includes any person who represents that he or she controls, is an agent of, or otherwise acts on behalf of an official, public official, and person who has been selected to be a public official; and

(5) the term "uses any facility of interstate or foreign commerce" includes the intrastate use of any facility that may also be used in interstate or foreign commerce.

Sec. 4803. TECHNICAL AND CONFORMING AMENDMENTS.

(a) Table of Sections. The table of sections for chapter 11 of title 18, United States Code, is amended by adding at the end thereof the following item.
226. Public Corruption.

(b) RICO Section 1961(1) of title 18, United States Code, is amended by inserting "section 226 (relating to public corruption)" after "section 224 (relating to sports bribery)."

(c) Interruption of Communications. Section 2516(1)(c) of title 18, United States Code, is amended by inserting "section 226 (relating to public corruption)" after "section 224 (bribery in sporting contests)."

Sec. 4804. INTERSTATE COMMERCE.

(a) In General Section 1343 of title 18, United States Code, is amended by

(1) striking "transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds" and inserting "uses or causes to be used any facility of interstate or foreign commerce"; and

(2) inserting "or attempting to do so" after "for the purpose of executing such scheme or artifice."

(b) Conforming Amendments (1) The heading of section 1343 of title 18, United States Code, is amended by striking "fraud by wire, radio, or telephone" and inserting "Fraud by use of facility of interstate commerce."

(2) The chapter analysis for chapter 63 of title 18, United States Code, is amended by striking the analysis for section 1343 and inserting the following:
"1343. Fraud by use of facility of interstate commerce."

Foremost, this statute would expand the mail and wire fraud statutes to include any use of any facility involved in interstate commerce and, perhaps more importantly, any scheme simply affecting interstate commerce. Consequently, the statute would eliminate prosecution depending on the fortuity of the use of the mails or interstate wire transactions. Schemes employing the use of Federal Express or having
a *de minimis* effect on interstate commerce would be prosecutable alongside those cases previously limited to use of the mails or interstate wire transactions. Thus, the more savvy public officials, who intentionally hand deliver documents in furtherance of their schemes to avoid federal prosecution, would be prosecuted alongside the less informed criminal who chooses to place a 29 cent stamp on them and drop them in the mail. In the broad scheme of things, the person who knows how to evade federal prosecution is probably a greater threat to society and consequently more worthy of prosecution than his less sophisticated counterpart.

Moreover, the proposed statute would embody the case law developed under 18 U.S.C §§ 1341 & 1343 (1988) and thus place public officials on notice that it is Congress' intent to criminalize conduct that the courts have already determined to be violations of the mail and wire fraud statutes in all cases where an effect on interstate commerce occurs.

Significantly, the proposed bill incorporates the more expansive language contained in the *McNally* fix, criminalizing schemes which defraud the citizenry of honest services and not just property. Consequently, all of the pre-*McNally* case law defining this clause would be viable under this statute.

Furthermore, the definition of "official" includes not only those holding office, but also those recently elected to office, those seeking office, those nominated or appointed to office, those claiming to speak for public officials, and those pretending to exercise the power of public officials. In this way, not only would prosecution of the public official himself be possible but those holding themselves out as public officials would be prosecutable as well. Thus, power brokers, political bosses, sycophants, and charlatans would be subject to prosecution just as the public official who abuses the public's trust is prosecuted.

The more definitive change of the proposed statute is found in § 226(b), however, which would clearly delineate the role of the federal government in the prosecution of election offenses. Under current law, prosecution of election crimes depends on a variety of arcane and seemingly obscure limitations. Foremost is the requirement lim-
iting jurisdiction to those elections where a federal candidate is on the ballot although the criminal activity need not have any relation to the federal candidate. Yet there is no greater threat to the constitutional guarantee to a republican form of government than election crimes which subvert the electoral process. In contrast, § 226(b) would permit federal prosecution of persons who use any interstate facility or affect interstate commerce by engaging in conduct that violates states law through buying votes, submitting false voter registrations, filing false campaign reports, and the like. Section 226(d)(3) also provides for prosecution of such schemes whose object is to elect a person to an office which has “some authority” over at least $10,000 in federal funds in the twelve month period before or after the election. In addition to clarifying the role of the federal government in election offenses in general, § 226(b) would eliminate any lingering debate that the McNally fix did not restore the power of the federal government to prosecute those who submit false campaign reports. Prior to McNally such prosecutions were permissible under the Curry line of cases. False campaign prosecutions have been brought under the theory that the public official sought to defraud the citizens of their right to pay salaries to honestly elected officials. Although some might argue that such prosecutions are impermissible under McNally, § 226(b) would eliminate this debate.

Another significant change contained in the proposed statute is found in § 226(h)(5) which defines “uses any facility of interstate or foreign commerce” to include the “intrastate use of any facility that may also be used in interstate or foreign commerce.” Under current law, jurisdiction under the mail fraud statute can be based on an intrastate mailing but the wire fraud statute requires an interstate mailing. Thus, not only would the proposed statute expand jurisdiction to any use of an interstate facility but further to any intrastate use of that facility.

Clearly, the proposed statute would go far in delineating the federal role in corruption and election offenses. Moreover, it would eliminate many of the chance deficiencies existing in the various statutes

currently employed by federal prosecutors to combat public corruption. Finally, the proposed statute would stabilize this very important area of the law. In addition to efforts on the federal level, individual states need to introduce reforms to facilitate prosecution of public corruption.

B. Possible State Responses

There are several steps the State of West Virginia should take to better enable county prosecutors to effectively pursue public corruption investigations. As outlined in Part One of this Article, county prosecutors are hampered by several seemingly unjustifiable anomalies in the State criminal law. Each of these impediments could be corrected legislatively. Two of these problems have to do with the grand jury system. Corruption investigations differ from most investigations conducted by agencies of the State in that they often require an aggressive use of the grand jury. In a typical street crime investigation, witnesses are usually interviewed by the investigating officer who then submits a completed investigative report to the prosecutor. Corruption investigations, on the other hand, truly develop before the grand jury. Often, key witnesses in corruption investigations are wedged between what they perceive to be two sovereigns: the prosecuting attorney and the office-holder targeted by the investigation. Many such witnesses will align with the power whom they believe is most potent or most real. The decision a witness in such an unenviable position makes may be quite cynical: do I have more to fear in telling the truth and implicating my boss or in lying to the grand jury? Thus, the grand jury must be employed as, and be perceived by the witness as, an entity with both authority and power. Frequently federal investigators advise a witness suspected of having loyalty to the target that she faces felony prosecution if she fails to be truthful to the grand jury. The State prosecutor does not have that leverage: the statute outlawing lying to a grand jury is only a misdemeanor. Misdemeanor convictions rarely result in jail sentences, they do not carry the stigma of a felony, they do not result in the permanent loss of any civil right; and a one-year statute of limitations applies. They resemble

a traffic offense more than a crime involving scienter. Thus, the cyn-
ic's decision in a State grand jury situation is often far too easy. The
power his boss wields over him is quite real: his job most probably
will hang in the balance, his boss may threaten to expose the skeletons
in the witness's closet, and there may be a quite reasonable fear of
more violent retaliation. The potential of a misdemeanor conviction—
and it is only a potential, somebody else must talk before the pros-
ecution can raise even a misdemeanor case—looks like a stroll in the
park compared to the horrors the target of the grand jury may work
on the witness.

Throughout our experience we have been impressed with the
heightened seriousness with which federal courts take crimes that have
as their victim the system of justice: obstruction of justice, perjury,
and jury tampering. Judges typically address such crimes with a dis-
dain and, indeed, alarm that reveals an acute awareness of the vul-
nerability of the justice system and its dependence on a respect for
its institutions and workings. These crimes strike at the very heart
of the justice system — they threaten our ability to effectively govern
ourselves. Such schemes, if successful, not only untrack the particular
case at which they were aimed, but also undermine general public
trust in the administration of justice and foster cynicism about gov-
ernment.

How then can a mere misdemeanor penalty for lying to a grand
jury, the public's main tool for penetrating government corruption,
be justified? Although one might fear a vindictive and reckless pros-
ceutor, not even such a prosecutor can obtain a conviction without
convincing twelve of the defendant's peers of the righteousness of his
case. Furthermore, the trial court inevitably provides some check
against a careless or baseless criminal charge.

Defining perjury before a grand jury as a mere misdemeanor in-
vites a cavalier attitude toward its proceedings. The state in effect,
joins the chorus saying that while federal grand jury proceedings must
be taken seriously, state grand juries are second-class citizens and are
not to be taken as seriously.

The State could express how seriously it regards perjury before
a grand jury by simply increasing the statutory maximum jail term
and the applicable statute-of-limitations to a several-year period. Inasmuch as this penalty could be announced to grand jury witnesses after they are given the oath, the legislature's message would be heard loud and clear by those who need to hear it. We believe that the state grand jury process would thereby be greatly strengthened. This strengthening would in turn empower county prosecutors to use the grand jury as a tool for advancing corruption investigations.

Secondly, a substantial question exists as to whether West Virginia law prohibits prosecutors from using a defendant's grand jury testimony against him, regardless of whether or not the defendant requested immunity. Typically, early in an investigation a public official appears before a grand jury to explain away some circumstances which appear sinister; the official, then aware of the information before the grand jury, gives a glib but plausible explanation; the prosecutor then begins to investigate the version offered by the public official; evidence is then uncovered which renders the official's grand jury testimony implausible; the official is indicted; at trial the prosecution adduces the evidence discovered after the official's grand jury testimony; the official takes the stand and gives a glib but plausible explanation for the seemingly sinister conduct, this explanation being totally at odds with the version given by the defendant during his grand jury appearance. Here the defendant's grand jury testimony should be admitted against him. Excluding such evidence effectively blinds the fact-finder to the reality of the situation, that is: the witness is unworthy of belief and will shape his alibi to whatever facts he is aware the prosecution knows about at the time he is called upon to testify.

Under West Virginia law, however, this prior grand jury testimony of the defendant may not be admissible. The prosecutor may, of course, use the grand jury testimony and the trial testimony in a subsequent perjury trial, but what are the chances of this? If the

22. Compare State v. Cook, 72 S.E. 1025 (1911) (holding that the prosecution may impeach a defendant through the use of testimony given by the defendant in an earlier trial in the same matter) with State v. Price, 167 S.E. 862 (W. Va. 1933) (holding that a defendant's testimony before a justice of the peace may not be used to impeach his trial testimony, even if the two are inconsistent).
prosecutor has won the case, the point is almost moot. The falsity of the defendant’s story is manifest to the public and the defendant will be sentenced by the court who will also be aware of the defendant’s contemptuous testimony. Further prosecution is overkill. If the prosecutor loses her case, there are several extra-legal, but quite real reasons why a perjury prosecution based on the conflict between the official’s grand jury testimony and his trial testimony will not be pursued. There is a tide in the affairs of men. The prosecutor has taken a big political risk in indicting this powerful person in the first place, she has invested untold effort and emotion into the case; whatever support she may have had for the case has probably waned. Even if the prosecutor has the emotional mettle to try it again, she must ask herself how her chances of winning a second prosecution have been affected by the loss of the first. Will the court see the effort as vindictive, desperate, overzealous? What about the jury? The public?

Admittedly, there is some superficial appeal to this doctrine. There we have echoes of the Fifth Amendment’s proscription against compulsory self-incrimination. However, the law could protect this right just as completely and effectively without issuing such a blank check to everyone who takes the witness stand. Any concerns about a possible chilling effect on Fifth Amendment rights could be satisfied by requiring the prosecutor to inform the grand jury witness of those rights, on the record, before substantive questioning begins like police officers are required to give Miranda-type warnings. Thus, the witness would be told that she could refuse to answer any self-incriminating question and that she has the right to retain an attorney with whom she could consult regarding her appearance and the questions being asked of her. Any such witness would thereby be given fair warning. Those who felt at risk could simply refuse to answer; they would be protected as the Constitution contemplates.

Others, knowing themselves to have criminal exposure, will nevertheless dive blithely into the question and answer session with the prosecutor. These witnesses believe they can lie their way out of their criminal liability. This class of people (and experienced corruption prosecutors will invariably testify that this is a very large class of people) should be afforded no protection against their own testimony.
While state law allows false grand jury testimony to be used against the witness in a prosecution for perjury or false swearing\textsuperscript{25}, testimony of this kind is most often revealed to be false during the trial of the witness for the substantive offense about which he testified.

The ability of the county prosecutor to properly employ a grand jury in a search for truth, and thus to conduct effective corruption investigations, would be enhanced by allowing her to use a defendant's false grand jury testimony against him at trial. A witness's Fifth Amendment privilege against compulsory self-incrimination can be adequately protected through the system of warnings outlined above.

West Virginia law also allows a defendant in a criminal case a severance from other defendants as a matter of right.\textsuperscript{26} This provision not only strains the already limited resources of the county prosecutor (where there are three defendants charged in a single criminal scheme, there must be three trials the prosecutor must spend three weeks, not one, in her trial mode, interviewing and preparing witnesses to all hours of the night, the judge will have to hear the same evidence three times, the frightened witnesses will have to face those whom they accuse, often reluctantly, three times), it also may prevent the prosecutor from getting her whole case before the jury in each of the trials.

Federal standards for severance allow joint trials of several defendants charged in the same scheme. If joinder is otherwise legally proper,\textsuperscript{27} a defendant is only granted severance from other defendants where he can show that he would suffer undue prejudice in a joint trial.\textsuperscript{28} The federal rule requires the trial court to weigh the interests of the government in economy of resources against the defendant's interest in a separate trial. These various procedural reforms would make the state system more responsive to its purpose — the interests of justice in ways that have already been determined to be consistent

\textsuperscript{26} W. Va. R. Crim. P. 14.
\textsuperscript{27} Fed. R. Crim. P. 8(b).
\textsuperscript{28} Fed. R. Crim. P. 14.
with the rights of defendants; each proposed reform has long been a basic part of the federal criminal justice system for years.

The State might also consider the creation of some statewide prosecuting authority. In many states such authority is vested in the Attorney General. There is no apparent constitutional impediment to so empowering the Attorney General. A look to other state codes would provide models for empowering legislation; a study of the experience of those states should provide some insight into the wisdom of the approach they have taken.

On the other hand, the state could create a new office with statewide prosecutorial authority. The challenge would be to create an office which is independent enough of the political system to be effective, yet responsible to the body politic. A prosecutor, particularly a prosecutor whose primary function is to investigate and prosecute public corruption-type offenses, cannot be effective if she must always be watching her back. If her tenure in office is at the will and pleasure of some elected official, she will be impotent to reach the misdeeds of that particular person and his allies. Likewise, if her budget — her staff and resources — are controlled directly by those whom she may prosecute, she faces an insurmountable task.\(^\text{29}\)

Yet she cannot be completely autonomous. She, like every other officer in the republic, must be subject to some check and balance within government and ultimately responsible to the body politic.

Such a prosecutor could be appointed to serve a term which would be staggered with the governor. For example, a 10-year term would not coincide with any governor’s or other public official’s term and would be long enough to allow for independence and experience. Moreover, assuming a multiple-attorney staff, the staff attorneys would be treated like civil service employees and would not be subject to removal upon a change in administration.

Any such statewide prosecutor should be given the authority to investigate and prosecute offenses carried out in multiple counties.

\(^{29}\) Reminiscent of Archibald Cox’s prosecution of executive branch officials involved in the Watergate break-in.
She should be given authority to investigate and indict public officials and their agents in grand juries convened in counties other than those where the target is an official.

Finally, such an office should be funded in a way to attract experienced and qualified people. Perhaps salary ranges could be tied to those paid to similar office-holders in the federal system.

In sum, reform could be made in the authority given to special prosecutors and in the method by which they are chosen. The autonomy necessary for prosecutorial effectiveness versus the need for institutional checks on all governmental power and a final responsibility to the electorate comprise the competing interests.

Any such empowering legislation should include standards insuring that an appointee is experienced, qualified, and without bias. Thought should be given to employing several branches of government in the selection process. Perhaps a disinterested trial judge or members of the ethics commission could play a role in the selection process. The goal, of course, is to eliminate pressure on the prosecutor from individual politicians, parties, or factions.

There are those who would criticize these various reforms as an undue expansion of government. In particular, to the extent these reforms result in more convictions and more aggressive prosecution, some elements of the defense bar may object. The criminal defense bar unquestionably plays a crucial role in the protection of individual rights and liberties not only on a case-by-case basis but also in the formulation of law and policy. This effort is quite legitimate and should be applauded. However there are other societal interests such as order, public decency, safety, and fairness in commerce which are not the first concern of the criminal defense bar and which should not be underrepresented. The vindication of the rights of the weak and oppressed is not always accomplished by extending procedural protections to criminal defendants or by insuring the limitation of prosecutorial power. This is especially true in the area of public corruption, where the class of defendants who benefit from ineffective prosecution or irrational procedural hurdles are the most powerful members of society. As sadly demonstrated by the West Virginia and nationwide experience, the victims of public prosecutorial ineffec-
tiveness consist of ordinary folk denied fair elections, fair competition in the marketplace, fair taxation, fair distribution of public resources, and fair administration of justice by public office holders.

II. Conclusion

The corruption of public officials is a serious problem in our state. The fact that non-federal prosecutions of office holders are so rare indicates a need for reform in the State criminal justice system. Any such reform, to be meaningful, will carry a price tag. However, failure to act out of a sense of hopelessness or bankruptcy is an abdication of responsibility and a cynical expression of disbelief in the State's ability to govern itself. There is work to be done here, and responsible government—government that seeks protection for the weak and the oppressed—will do it. Whether the state or the federal government accomplish this task depends on the state's willingness to respond effectively to the obvious need.

An organized response to the problem of corruption is a refinement of—or move toward—democracy. The idea is to restore or maintain some measure of trust in the integrity of government institutions, to ensure that what is done in secret will be brought to light, and to guarantee that decisions affecting the public will not be tainted by self-interest. These goals are not high-minded rhetoric; vigorous pursuit of them is absolutely necessary to the life of a functioning democracy. In the final analysis, those who value liberty ignore these goals at their peril. Justice may be expensive, but its value far outweighs its cost.