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

Michael W. Carey  
*Southern District of West Virginia*

Larry R. Ellis  
*Southern District of West Virginia*

Joseph F. Savage Jr.  
*Southern District of West Virginia*

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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 ONE

MICHAEL W. CAREY*
LARRY R. ELLIS**
JOSEPH F. SAVAGE, JR.***

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* B.A., Virginia Polytechnic Institute, 1976 (with distinction); J.D., West Virginia University College of Law, 1979; Principal Associate Deputy Attorney General and United States Attorney for the Southern District of West Virginia.

** B.S., West Virginia University, 1974; J.D., West Virginia University College of Law, 1977; Assistant United States Attorney for the Southern District of West Virginia.

*** B.A., Harvard, 1978 (Magna Cum Laude); J.D., University of Virginia School of Law, 1981; Assistant United States Attorney and Senior Litigation Counsel for the District of Massachusetts; Special Assistant United States Attorney for the Southern District of West Virginia.

The views expressed in this piece are solely those of the authors and do not necessarily represent the views of the U.S. Department of Justice.

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I. Introduction

In the Southern District of West Virginia, over seventy-five public officials have been convicted of corruption offenses in the last six years. During that period, six sheriffs, eleven deputy sheriffs, three county commissioners, eight police officers, three mayors, two members of county school boards, two county prosecuting attorneys, four members of the West Virginia Legislature (including two senate presidents), four lobbyists, three housing officials, a former gov-

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1. See supra Appendix A; see also Mingo Corruption Cases to be Heard By Supreme Court, UPI, Oct. 3, available in LEXIS, Nexis Library, UPI File.
ernor of the state, and a multitude of other public officials and related persons have been convicted for abusing the trust of their office. The West Virginia cases have involved a variety of crimes including extortion, fraud, arson, drugs, tax evasion, and others. Specific examples of these crimes include the following:

- Money was paid in the form of a "public relations contract" to the President of the West Virginia Senate by persons interested in casino gambling legislation.

- $10,000 was paid to another member of the Senate by a lobbyist and part owner of a dog racing track who was interested in the passage of legislation favorable to his track.

- The president of a county school board was paid money to guarantee that a jury considering the drug case of the payor’s daughter would not convict. He did so by telling the foreman of the jury that his daughter would not obtain the job she applied for with the school board unless he voted not guilty.

- A fire chief set fires for insurance frauds as often as he put them out.

- A sheriff took marijuana out of the evidence locker to give to his good friend, the superintendent of the county school system, and then lied to a federal grand jury about it.

- Two deputy sheriffs sent in vouchers seeking reimbursement for overtime they allegedly worked when, in fact, they simply sat in their office and wrote out bogus tickets.

- A sheriff and his chief field deputy extorted protection money from local gambling establishments.

- A police chief allowed his family to run an illegal drug distribution operation out of an abandoned house not more than ninety feet from the police station.

- A secretary in a prosecutor’s office tipped off drug dealers about a search warrant.

- The manager of federal Housing and Urban Development Program in West Virginia demanded payments totalling over $50,000 to ensure a contractor received a housing construction contract.
While these federal prosecutions revealed endemic and systematic public corruption, there were few similar prosecutions on the state level. Where attempts were made, the results were mixed.\textsuperscript{2} It is telling that the only reported appellate decision relating to a prosecution based on West Virginia’s Bribery and Corrupt Practices Act\textsuperscript{3} (the state’s primary anticorruption statute) is a \textit{federal} court decision interpreting the statute in a federal RICO prosecution.\textsuperscript{4} The fact that the cases described above were prosecuted by the federal government rather than the state speaks volumes for the necessity of federal involvement in the prosecution of state and local corruption. Thus, it is worth exploring the West Virginia experience for two reasons: (1) to determine why this prosecutorial task has fallen to the federal government, and (2) to put in context the competing views about the propriety of \textit{federal} prosecution of state and local officials.

\textbf{A. Limitations on State Prosecution of Public Corruption in West Virginia}

One of the most significant factors impeding effective state prosecution of corruption is that West Virginia prosecutors and the state attorney general lack any statewide prosecuting authority.\textsuperscript{5} The primary function of the Attorney General is to render opinions, provide advice, and represent the state in all criminal appeals and civil suits.\textsuperscript{6} Thus, criminal prosecutions are left to the fifty-five county prosecutors\textsuperscript{7} who are elected in county elections to four-year terms.\textsuperscript{8} Despite the gravity and pervasiveness of public-corruption crimes, there are several legitimate law enforcement reasons why these offenses are not actively pursued by county prosecutors. Foremost among these reasons is that prosecutors are responsible for the prosecution of all crimes committed within the boundaries of their coun-

\begin{itemize}
  \item \textsuperscript{2} \textit{Editorial: Mingo Mess, Charleston Daily Mail}, Oct. 3, 1988, at 6A.
  \item \textsuperscript{3} \textsc{W. Va. Code} §§ 61-5A-1 to -11 (1989).
  \item \textsuperscript{4} \textit{United States v. Arthur}, 544 F.2d 730 (4th Cir. 1976).
  \item \textsuperscript{5} The powers enumerated by statute for the Attorney General do not include any independent investigative and prosecutive authority. See \textsc{W. Va. Code} §§ 5-3-1 to -5 (1990).
  \item \textsuperscript{6} \textsc{W. Va. Code} § 5-3-1 to -2 (1990).
  \item \textsuperscript{7} \textsc{W. Va. Code} § 7-4-1 (1990).
  \item \textsuperscript{8} \textsc{W. Va. Const. art. IX, § 1}.
\end{itemize}
ties; each prosecutor is thus already burdened by a full panoply of crimes including murder, rape, robbery, assault, and drunk driving. The public is entitled to protection from these offenses, and state investigative and prosecutive authorities must give priority to them in allocating limited resources.

County prosecutors are also called upon to represent each of the elected county officials in their official capacities, the county board of education, and the State of West Virginia, when requested by the Attorney General. Often underpaid, the majority of the prosecutors are allowed, and indeed compelled, to supplement their incomes by maintaining a private civil practice on the side. Most county prosecutors, therefore, cannot devote their full time to their criminal duties. Under this system, there are currently only seven full-time prosecutors in the twenty-three counties throughout the Southern District of West Virginia. Most county prosecutors simply do not have the time to devote to extremely time-consuming public-corruption investigations.

Consequently, many prosecutors simply never develop the expertise in corruption investigations which require the talents of several different investigative agencies to follow financial and paper trails, to conduct undercover investigations, to analyze volumes of records, and the like. The range of investigative agencies, like the Federal Bureau of Investigation, the Criminal Investigation Division of the Internal Revenue Service, and the Postal Inspection Service do not exist at the state level in West Virginia. Only segments of the West Virginia State Police and the Commission on Special

10. Id.
11. The salary of the prosecuting attorney is determined by the classification the county falls into based on assessed property values. Salaries range from $41,500 for Class I counties to $17,000 for Class VI counties. W. Va. Code § 7-7-4 (1990). Although the law permits the prosecuting attorney to hire assistants, their salaries are fixed by the prosecuting attorney based on the amount designated for expenditure by the county commission. W. Va. Code § 7-7-7 (1990).
12. The law only requires that Class I and Class II county prosecutors devote full time to their duties. W. Va. Code § 7-7-4 (1990).
13. The United States Attorney's Office for the Southern District of West Virginia has worked very closely with the Bureau of Criminal Investigation of the West Virginia State Police (formerly the Criminal Investigation Section) on several cases involving public corruption. Most notable were the contributions made by the State Police in the investigation of corruption in Mingo County and the Arch Moore Investigation.
Investigations are consistently adept at conducting corruption investigations. Also, county prosecutors cannot freely call upon the federal investigative agencies to assist in their investigative efforts, unlike federal prosecutors who often involve the state agencies in federal investigations. Thus, even if they have the inclination to prosecute corruption offenses, county prosecutors often do not have either the experience or the resources to perform the task.

There are also several procedural limitations which make state corruption prosecutions difficult. Many such crimes are simultaneously committed in several different counties. Nonetheless, a county prosecutor’s jurisdiction is limited to the boundaries of his county. Thus, a prosecutor is without jurisdiction to prosecute a corruption offense which occurred in another county. Further, a legitimate question may then be raised as to which of the county prosecutors has jurisdiction where the perpetrator is a statewide official.

In addition, county grand juries are not true investigative grand juries like their counterparts in the federal system. Generally, they do not take testimony from witnesses, subpoena documents, or actually participate in the course of an investigation. Rather, county grand juries typically only hear the summary testimony of a law enforcement officer who conducted the investigation. This often occurs because under state law, unlike federal law, anyone who appears

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14. The Commission on Special Investigations was established by the West Virginia Legislature to, inter alia, investigate the purchasing practices and procedures of the state and any matter involving a conflict of interest by, or a bribery of, state officials. W. Va. Code § 4-5-2 (1990). Membership on the Commission is determined by the President of the Senate and Speaker of the House. Id. § 4-5-1. Most importantly, the Commission is empowered to hire investigators and other personnel to carry out their duties. Id. § 4-5-2. The United States Attorney's Office for the Southern District of West Virginia has worked very closely with the Commission's investigators on several cases. Most notable was the investigation conducted by the Commission of the Office of the Treasurer, which resulted in the conviction of Assistant Treasurer Arnold Margolin for securities violations.

15. It has been the experience of the authors that one prosecutor cannot adequately handle a corruption investigation and prosecution. This is so for a variety of reasons, not the least of which is that subjects of corruption prosecutions often have the very best legal counsel. Also, because corruption investigations are of tremendous public interest, they are subject to a great deal of scrutiny which can be demanding and stressful. Accordingly, it is the policy of the United States Attorney's Office for the Southern District of West Virginia to involve at least two prosecutors, and often more, very early in a corruption investigation. In terms of manpower, these investigations place a great burden on an office of limited size.

before a county grand jury is granted some form of use immunity for their testimony and perhaps even "complete legal" immunity.\textsuperscript{17} Thus, prosecutors may not subpoena certain individuals with evidence or testimony important in establishing the crime out of fear of immunizing someone who may be involved in the offense. Also, county grand juries may have a more difficult time ascertaining the truth; lying to a county grand jury is intended to come within West Virginia's statutory definition of false swearing,\textsuperscript{18} which only constitutes a misdemeanor subject to a one-year statute of limitations.\textsuperscript{19} Accordingly, the incentive to tell the truth in the county grand jury is less than in the federal system where the penalty for lying is five years in prison and a $250,000 fine\textsuperscript{20} using a five-year statute of limitations.\textsuperscript{21} Another limitation on county grand juries is that their subpoena power extends only to the state unless exceptional judicial procedures are invoked. Federal grand juries have nationwide subpoena power.\textsuperscript{22}

There may be another reason, albeit not quantifiable, that county grand juries cannot be as effective as their federal counterparts. Federal grand juries conduct investigations of crimes committed anywhere in the district.\textsuperscript{23} Anytime a sensitive investigation arises, the investigation can be conducted in a location removed from the area where the crime has been committed. In this way, the grand juries are able to conduct their investigations without interference from the press or others interested in their proceedings. County grand

\begin{itemize}
  \item 17. In West Virginia, any person who is "compelled" to testify in any legal proceeding is granted complete legal immunity. W. VA. Code § 57-5-2 (1966). It would appear that such a statute would only grant immunity when the witness is compelled by the court to testify, similar to the provisions contained in 18 U.S.C. § 6001-05 (1988). However, West Virginia further provides: "In a criminal prosecution other than for perjury or false swearing, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination." W. VA. Code § 57-2-3 (1966).
  \item 22. Fed. R. Crim. P. 17(e)(1).
\end{itemize}
juries, however, are limited to the geographical boundaries of the county and usually convene in the courthouse located in the county seat. Thus, any investigation of a county official is literally conducted down the hall from his office. This may be a real psychological impediment to any effective investigation. Any witness subpoenaed to testify against a local official may be reluctant to appear knowing that people loyal to or employed by the target will see him walk into the grand jury room. Imagine the fears that may arise when someone is subpoenaed to testify against the local sheriff or other official who is in a position to cause harm to the witness.

There is also the possibility that county grand jurors may be familiar with (if not friends with) the subject of the investigation. Although everyone would hope that the integrity of the grand jury process would be maintained, the possibility of leaks is greater in a closed community. As a result, at least in some of the more isolated counties, there may be greater confidence in the secrecy of federal grand juries than county grand juries.

There are also procedural limitations at the state trial level which make prosecutions against a public official difficult. First, under state law a defendant is entitled as a matter of right to a severance from all other defendants. Thus, where an indictment is returned against multiple defendants, the prosecution can be forced to conduct separate trials for each. As a result, a prosecutor’s resources will be greatly strained to bring the entire case to a conclusion. A county prosecutor, then, may be reluctant to charge multiple de-

24. In West Virginia, "[t]he grand jury shall inquire of and present all felonies, misdemeanors and violations of penal laws committed in the jurisdiction of the court wherein they are sworn . . . ." W. VA. CODE § 52-2-7 (1981).
25. As an example, during the course of an investigation of various persons in Mingo County, West Virginia, certain witnesses expressed fear about testifying against the drug trafficking of Wilburn Preece, who was the fire chief of Kermit. They had great concern that Preece might burn their house down in retaliation or simply fail to respond if their house legitimately caught on fire. One defendant had her bail revoked for threatening witnesses in the hallway of the courthouse.
27. By their very nature, corruption offenses involve multiple offenders. The classic example is where a lobbyist pays a bribe to a public official through an intermediary, also referred to as a "bag man." If the public official and bag man are not tried together as co-conspirators, the prosecution may not be able to prove the full relationship between the two, and the public official may be able to fashion a defense which inaccurately portrays the bag man as the sole perpetrator of the crime.
fendants with conspiracy. The full picture of the public official’s conduct may never be revealed. Further, unlike the federal system where cases are brought to trial fairly quickly pursuant to the Speedy Trial Act, state law only requires that a case be tried within three regular terms of court following the term at which an indictment was returned, and even this temporal limitation does not prevent further delay on a defendant’s motion.

Perhaps the greatest hindrance to effective involvement by county prosecutors lies in the statutory and practical relationships between county prosecutors and other county officials. Prosecutors are elected in county-wide elections and are called upon to represent the other elected officials in their official capacities. Therefore, any investigation of a sitting public official is fraught with the conflicts of interest of a prosecutor investigating a person he is statutorily required to represent. The problem is not diminished if the subject is a former official who will likely be someone who either helped the prosecutor obtain office or who opposed their election. If the investigation reveals there is no merit to the allegations, the prosecutors may be accused of favoritism. If charges are brought against the person who opposed his election, they will likely be accused of vindictive prosecution. Public corruption prosecutions are highly charged emotional events which are very difficult to conduct under the best of circumstances. When they are burdened by allegations of misconduct, favoritism, vindictiveness, and the like, they are virtually impossible to bring to a successful conclusion.

United States Attorneys, however, are somewhat detached from the county or local political process. The United States Attorney for each judicial district is appointed by the President of the United States and confirmed by the Senate. These appointments are usually made upon the recommendation of the state Congressional representatives or state party officials who are of the same political party as the President. The candidates are then evaluated by the

30. Id.
Department of Justice and undergo a full-field background investigation by the Federal Bureau of Investigation before nomination. Thus, while United States Attorneys are not completely detached from the political process, they are screened and are not directly elected. They serve four-year terms at the will and pleasure of the President.\textsuperscript{32} As a consequence, they can typically pursue investigations without running the risk of becoming tangled in conflicts of interest. On the occasions where a conflict does arise, there is a mechanism to call in an experienced prosecutor, usually from the Public Integrity Section of the Criminal Division of the Department of Justice, to handle the investigation. Moreover, many concerns associated with the federal government conducting investigations of local officials are obviated to some degree by the statutory requirement that, in most cases, the United States Attorney and all of his assistants reside in the district in which they serve.\textsuperscript{33} Thus, it is rare indeed that the United States Attorney is not a long-time resident, if not native, of the state.\textsuperscript{34}

If a county prosecutor in West Virginia receives allegations of wrongdoing which he believes he cannot pursue because of a conflict of interest, the system of appointing a special prosecutor to conduct the investigation is inadequate. The law provides that where the prosecutor or his assistants are unable to act, the circuit court shall appoint some competent practicing attorney.\textsuperscript{35} There is no requirement that the appointee have any training or experience as a prosecutor in general or in prosecuting corruption cases in particular. As such, the system has the potential for placing someone in the position of special prosecutor who is inexperienced in prosecuting public corruption cases.\textsuperscript{36} Moreover, payment of the special pros-

\textsuperscript{32} Id. § 541(b).
\textsuperscript{33} Id. § 545(a). There are exceptions for the District of Columbia, the Southern District of New York, and the Eastern District of New York where the attorneys must reside within 20 miles of the district. Id. In addition, if the United States Attorney or his or her assistants appointed for the Northern Mariana Islands also serve in the same capacity in another district, the residence provision is inapplicable. Id.
\textsuperscript{34} It must also be remembered that even though it is the "federal" government which is pursuing the prosecution, it is a jury of twelve of the defendant's peers from the district which will decide the case.
\textsuperscript{35} W. VA. CODE § 7-7-8 (1990).
\textsuperscript{36} An Editorial: Another Bumbling Embarrassment on Record, WILLIAMSON DAILY NEWS, July 13, 1989, at 4.
OBSTACLES TO PROSECUTION

ecutor must be taken from the general funds of the county treasury.37 If the subject of the investigation has ties to the county commission, there may be an inherent conflict concerning the decision to adequately fund the special prosecutor. Even if the county commission has a great interest in providing funds, an adequate amount may not be available.

Thus, there are a variety of structural impediments in West Virginia that presently prevent effective prosecution of public corruption cases. Some reform efforts have been undertaken, and they are reviewed in the next section.

B. The Response of the State Government in West Virginia to the Problem of Public Corruption

It is perhaps instructive to take a look at what the recent state response has been to ameliorate political corruption. In 1988, the legislature considered ethics legislation setting limitations on the conduct of state officials and establishing mechanisms for providing advisory opinions defining permissible conduct.38 West Virginia was one of the few states to have no such legislation.39 At that point, the federal investigations of state officials were in their infancy. The legislature failed to pass the proposed legislation.40

Thereafter, Robert L. McCormick, a member of the West Virginia House of Delegates from Logan County, was indicted by a federal grand jury for extorting money from a group of foreign-trained doctors interested in obtaining legislation granting them permanent licenses to practice even though they had not passed the medical licensing exam.41 McCormick was convicted after trial on December 7, 1988. Within a month thereafter, in his State of the

State address, newly elected Governor Gaston Caperton called a special session of the West Virginia Legislature to consider ethics legislation.\(^42\) The West Virginia Governmental Ethics Act\(^43\) was passed by an overwhelming margin.\(^44\) Based on this experience, it appears that where a state may be unable to adequately police itself due to entrenched corrupt politicians or procedural limitations, federal prosecution can break that hold and restore vitality to the local government. State responses are then possible.

Despite the encouraging beginning, subsequent amendments have critically impaired the Act. The most significant harm occurred in 1990 when the legislature removed the authority of the Commission to initiate its own investigations of violations of the Act.\(^45\) Now the Commission can only institute investigations upon a verified complaint, and if the allegations of the complaint are found not to be true, sanctions may be imposed.\(^46\) Although the apparent goal of this provision was to prevent vindictive complaints, it probably deters legitimate complaints as well. Nonetheless, the Act sets out ethical standards for public employees, and the Ethics Commission still serves the valuable function of rendering advisory opinions to persons who are interested in determining whether certain conduct or relationships would violate the Act.\(^47\) Moreover, if two-thirds of the Ethics Commission determines that probable cause exists to believe a criminal violation has occurred, it may refer the matter to the appropriate prosecuting attorney.\(^48\)

This example of the state's mixed response to the federal prosecutions may raise arguments sometimes made to limit federal in-


\(^44\) See, e.g., 1989 J. House of Delegates 3169 (reporting passage of the Act by a margin of 95-0).

\(^45\) In the Act as originally passed, the Ethics Commission was permitted to institute an investigation upon the affirmative vote of seven of its members. W. Va. Code § 6B-2-4(b) (1990). In the 1990 session of the legislature that provision was removed. See 1990 W. Va. Acts 710.

\(^46\) If the Ethics Commission finds that the complaint was made in bad faith, it will order the complainant to reimburse the subject of the complaint all costs, including attorney fees, incurred by him. W. Va. Code § 6B-2-4(t) (Supp. 1991).


volvement in this area. If we draw from the legislature’s enactment and then curtailment of the power of the Ethics Commission the conclusion that the citizens of West Virginia first preferred strong enforcement and later wanted a weaker enforcement mechanism for the Ethics Act, federal intervention through corruption statutes which punish behavior that the citizens do not want punished would raise serious federalism concerns. On the other hand, federal intervention into state and local corruption seems consistent with the general notion of “checks and balances” found throughout the Constitution. Moreover, such federal participation serves to preserve a republican form of government guaranteed by Article IV, Section 4 of the Constitution, which is a distinctly federal interest.49 Madison noted the incompatibility of corruption and republican government in 1792 when he stated that “the springs which operate government are either permanent military force, corruption, or the reasoned will of the society. In the last class, are the republican governments which it is the glory of America to have oriented, and her unrivaled happiness to possess.”50 A federal interest is also present when local conduct involves national concerns such as federal funds, interstate commerce, or the postal service.

It is the premise of this Article that federal involvement is necessary to vindicate the right of citizens to honest government. But this view has been subject to attack for several reasons, including the applicability of the particular statutes commonly used by federal prosecutors in state corruption cases and the wisdom of federal involvement generally.51 These differences of opinion must be evaluated in light of the inherent differences between public corruption cases and other criminal prosecutions. Corruption has an impact beyond the amount of money that may have been stolen or the decisions influenced by bribery. The real cost comes in the form of


50. 3 IRVING BRANT, JAMES MADISON (1950), quoted in Kurland, supra note 49, at 427.

51. The attack on this view is based not only on federalism but also “comity,” tradition, and a notion of “balance” between the state and federal role. See Kurland, supra note 49, at 374 n.23 (collecting treatises).
a breakdown in societal morality caused by prominent examples of corrupt behavior. Democracy, which is perhaps the most fundamental of all federal concerns, rests on an attitude of mind: the peoples' belief that they can govern themselves through their freely chosen representatives. When the repositories of the peoples' trust prove unworthy, their actions undermine the peoples' belief, thus striking at the most fundamental tenet of our community life. This justifies both a federal response and effective state action. This is illustrated clearly in the next section, which examines the scope of the corruption problems from a national perspective.

C. Public Corruption Prosecutions From a National Perspective

Federal prosecution of state and local corruption has by no means been limited to West Virginia. Nationally, public corruption cases are being handled in increasing numbers and with increasing success by the federal government. In 1986, 320 state and local officials were indicted by the federal government for corruption-related offenses.52 In 1988, 342 state and local officials were indicted and 298 were convicted of corruption-related offenses.53 Perhaps one of the most celebrated federal investigations into local corruption was Operation Greylord, a seven-year probe which resulted in the conviction of some sixty-five persons associated with the Cook County Illinois Circuit Court system, including ten former and sitting judges.54 Operation Pretense, conducted during 1987 and 1988 in the Southern District of Mississippi, resulted in the conviction of numerous county supervisors and private contractors in county-contract-kickback schemes.55 Probes into bribery and extortion in state legislatures have yielded recent convictions of elected officials and lobbyists not only in West Virginia, but also in California56 and South Carolina.57

52. See Public Integrity Section, U.S. Dep't of Justice, Report to Congress on the Activities and Operations of the Public Integrity Section for 1986 at 43, 44 (1987).
53. See Public Integrity Section, U.S. Dep't of Justice, Report to Congress on the Activities and Operations of the Public Integrity Section for 1988, at 29 (1989).
55. At the conclusion of Operation Pretense, 39 supervisors and 10 vendors had been convicted.
56. United States v. Montoya, 945 F.2d 1068 (9th Cir. 1991) (California state senator).
57. Operation Lost Trust has resulted in convictions of 15 House of Representative members, 1 Senator, 6 lobbyists, and 1 circuit judge, as well as other public officials.
The real momentum for federal prosecution of public corruption has occurred in the last twenty years. It has involved, in many instances, prosecutors developing approaches under old statutes that had not previously been used for that purpose. Until recently, the federal courts generally supported these efforts. Paralleling this development in the court system has been a fairly direct expression by Congress of the priority it places on preserving a federal role in the prosecution of state and local politicians. These developments, along with the creation in 1976 of the Public Integrity Section of the Department of Justice, have reflected an increasing national willingness to address, through federal intervention, the corruption problem found at the state and local level.

However, the substantial development of a federal role in public corruption cases from 1970-84 has raised several important issues that are likely to be fiercely debated into the next decade. First, the expansion of the federal role has been subject to attack on federalist grounds. In recent years, courts at all levels have become increasingly reluctant to expand the reach of federal corruption statutes. Thus, in the federal courts, the pendulum may be swinging away from broadening prosecutive options.

The federalism question has also led to considerable debate and controversy concerning whether the Congress can or should impose restrictions on the operation of state and local government through statutes permitting or expanding prosecutions against local public officials. The usual argument is that it is unwise or unconstitutional for Congress to regulate the prosecution of local officials, because

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58. See, e.g., infra notes 67-71 and accompanying text.

59. However, it is important to remember that the Congressional response in this area has been mixed. For instance, while 18 U.S.C. § 666 constitutes a direct expression of congressional interest in the prosecution of local public corruption, it does so in a narrow context directly involving state agencies receiving more than $10,000 in federal money, and even then in only decisions involving amounts of $5,000 or more. 18 U.S.C. §§ 666(a)(1)(B), (b) (1988). It is clear that while Congress wanted these sorts of cases prosecuted, it was unwilling to give a blanket approval for federal prosecutors to pursue modest bribery.

60. See McNally v. United States, 483 U.S. 350, 360 (1987); see supra notes 49-50 and accompanying text.

it is inconsistent with the primary role assigned to the states: to police their own public officials either through corruption laws or the ballot box.

It is beyond the scope of this Article to resolve the federalism debate or to argue for any particular alternative basis for federal jurisdiction that satisfies all federalism concerns. Rather, it is the position of the authors that prosecution, both state and federal, is necessary to combat public corruption. Where the states fail to act or are limited in their ability to act, a strong federal response is necessary. However, the haphazard evolution of the federal statutes now used in corruption cases presents significant problems. There are inherent limitations in these corruption statutes, given the particular substantive and jurisdictional elements which must be proven. Many particular elements are unrelated to the goal of the statutes in a corruption-prosecution context. Thus, the authors of this Article contend that a single, proposed federal statute designed to prosecute local public corruption, premised upon the jurisdictional grounds already employed, should be enacted. Adopting such a single statute with a broad jurisdictional base would go far in eliminating many of the limitations presently found in the existing federal statutes taken individually.

Moreover, the authors do not believe that the continued intervention of the federal government into the arena will have the effect of preempting a primarily state function. As a practical matter, much of the federalism concern is academic. In fact, in Massachusetts, Tennessee, and in the West Virginia experience discussed above, intensive federal investigations of corrupt local officials did not lead to state abdication but rather to renewed effort. In each case, the states enacted new corruption statutes and implemented enforcement mechanisms that they had not previously employed.

62. See Kurland, supra note 49. This article argued for a proposed federal statute to prosecute local public corruption premised upon the guarantee clause of the Constitution, which provides all citizens with the right to a “republican form of government.” U.S. Const. art. IV, § 4. Adopting a statute with that broad a jurisdictional base would, of course, go far in eliminating many of the limitations presently found in the existing federal statutes that rely on commerce clause, postal power, or use of federal funds as the jurisdictional “hooks” for prosecuting misconduct.

63. See, e.g., supra notes 42-45 and accompanying text.
quence, then, of federal intervention was greater state responsiveness to public corruption.

If federal participation in the struggle against public corruption has produced beneficial results, it must be acknowledged that the victories have been won with weapons not always well-suited to the task. A variety of statutes have been used by federal prosecutors in an ad hoc patchwork approach to law enforcement that has not always proved satisfactory. Part II of this Article examines the development of a federal role in prosecuting corruption. Part III examines the specific statutes and their evolution. Part IV is focused on judicial development of certain important aspects of the laws against public corruption.

II. A History of the Development of Federal Involvement in Addressing the State and Local Corruption Problem

While the variety of federal statutes discussed herein have provided a cumbersome but workable approach to the prosecution of corrupt state and local officials, a historical perspective on the use of those statutes reveals in part why they are vulnerable to certain conceptual attacks and, perhaps, why the Supreme Court is now showing relatively little flexibility in the analysis of these statutes.

It is clear that the statutes on which many corruption prosecutions are based are not comprehensive or focused on the problems they have been used to combat. Federal prosecution of state and local corruption has been largely the product of the actions of the executive and judicial branches of government. Generations of federal prosecutors have responded to the perceived need for federal intervention in the area of state and local corruption by articulating theories extending the mail fraud and Hobbs Act statutes. Federal courts responded to these efforts by developing a jurisprudence which allowed the federal prosecutor greater latitude in combatting state and local abuses. However, since the intent of the various statutes was not clearly focused on their present use, the language of the statutes does not directly address the objectives of the federal prosecutors.
The oldest statute used to address public corruption is the mail fraud statute, enacted in 1872. Some scholars trace the original use of the mail fraud statute in combatting state and local corruption to the early 1940s when prosecutions were brought against public officials in Louisiana. Those cases were novel in using the "intangible right to honest government" theory but none relied solely on that theory. The theory was, essentially, that citizens have a right to honest government. A public official who acted dishonestly and used the mails in furtherance of his conduct committed a fraud on the public and was therefore punishable under the mail fraud statute. It was much later, in 1973, in United States v. States, that the "intangible rights" theory was employed as the sole basis for a prosecution. States, which is the quintessential application of the theory, involved a candidate mailing fraudulent absentee ballots. There was no money or property alleged to be involved. The court concluded that the public had nonetheless been defrauded. After

64. 18 U.S.C. § 1341 (1988). The statute provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, 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, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Id.


66. See, e.g., Shushan v. United States, 117 F.2d 110, 115 (5th Cir.), cert. denied, 313 U.S. 574 (1941); Kurland, supra note 49, at 395, 446-49.


68. Id.; Kurland, supra note 49, at 397 n.105.

69. States, 488 F.2d at 765.

70. Id. at 764-65. After the McNally decision, which rejected the intangible right to good government theory, a number of alternate theories (based primarily upon Justice Stevens' dissent) were proposed to construe the public official's fraud as involving money or property, such as a theory that the official attempted to fraudulently obtain salary or to deprive the state of the "control" over its funds. Those sorts of theories, some of which are collected in United States Department of Justice Prosecution of Public Corruption Cases, may also have been viable in States, but were not asserted as the basis for that prosecution at the time.
States, the "honest services" approach became a common vehicle for prosecution of virtually any kind of state and local corruption. 71

After the intangible right to honest government theory became universally accepted, the Hobbs Act 72 underwent a similar evolution. The statute was enacted in 1934 and amended in 1946. However, the theory of prosecution based upon the "under color of official right" wording of the statute against state and local officials did not bloom until the early 1970s with United States v. Kenny. 73

Prior to Kenny, prosecutions of state and local officials for public corruption offenses under the Hobbs Act were pursued using the alternate theories of obtaining money or property by force, violence, or fear as outlined in the Act. 74 The broadest extension of those


(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
(b) As used in this section —
(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

Id. See Lee Radek, Hobbs Act, in Prosecution of Public Corruption Cases 417 (U.S. Dep't of Justice ed. 1988).

73. 462 F.2d 1205 (3rd Cir.), cert. denied, 409 U.S. 914 (1972); Kurland, supra note 49, at 367, 383-84.

74. Radek, supra note 72, at 418-19.
particular theories was found in the "fear of economic loss" cases, particularly those cases which focused on the future ability of a company to continue to do business as it had prior to the extortion.\textsuperscript{75} The most glaring limitation of this "fear of economic loss" theory was that the government had to show "loss;" thus, any demand for payment in exchange merely for a "benefit" was not covered under the Hobbs Act.\textsuperscript{76} With the advent of the "under color of official right theory" in \textit{Kenny}, the use of the Hobbs Act expanded considerably by allowing prosecution of public officials for wrongly accepting payments motivated by their official position.\textsuperscript{77}

The Travel Act\textsuperscript{78} was enacted in 1961, prior to the flowering of either the mail fraud statute or the Hobbs Act. The Travel Act deals directly with public corruption by incorporating within itself state bribery statutes and federal extortion statutes, making them \textit{predicate} offenses to be proven as part of the Travel Act violation.\textsuperscript{79} This statute provided a vehicle for some prosecution, but had obvious limitations in the prosecution of primarily local officials be-

\begin{itemize}
\item \textsuperscript{75} \textit{Id.}
\item \textsuperscript{76} \textit{Id.}
\item \textsuperscript{77} McCormick v. United States, 111 S. Ct. 1807, 1819 (1991) (collecting cases) (Scalia, J., concurring). Justice Scalia suggests in his concurrence in \textit{McCormick} that courts initially resisted the "under color of official right" theory. As he notes, however, such resistance was short lived. \textit{Id.}
\item \textsuperscript{78} 18 U.S.C. § 1952 (1988). The Travel Act provides:
\begin{enumerate}
\item Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to —
\begin{enumerate}
\item distribute the proceeds of any unlawful activity; or
\item commit any crime of violence to further any unlawful activity; or
\item otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
\end{enumerate}
\item As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act [21 U.S.C § 802(6) (1990)]), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or (3) any act which is indictable under subchapter II of chapter 53 of title 31, United States Code [31 U.S.C §§ 5311 et seq.], or under section 1956 or 1957 of this title.
\item Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.
\end{enumerate}
\item \textsuperscript{79} \textit{Id.} § 1952(b)(2).
\end{itemize}
cause their crimes tended to be just that — local — and the statute requires direct use of interstate facilities. While the definition of what constitutes a “bribery” or “extortion” offense under state law has been construed very broadly by the federal courts, the prosecution nevertheless must still meet those particular elements.

Between the expansion of the mail fraud statute and the Hobbs Act as corruption fighting tools and the enactment of the Travel Act came the passage of the Racketeering in Corrupt Organizations Act (RICO) in 1970. RICO operates much like the Travel Act in federalizing state offenses under certain circumstances. In particular, it lists state bribery and extortion statutes as predicates as well as the Hobbs Act and the mail fraud statute. While it requires less direct impact on interstate travel than the Travel Act, it does impose the “pattern” and “enterprise” requirements that are unique to RICO.

80. While one case, United States v. Riccardelli, 794 F.2d 829 (2d Cir. 1986), concluded that a purely intrastate use of the U.S. Postal Service would satisfy the jurisdictional component of the Travel Act, the theory has been subject to some criticism. Kurland, supra note 49, at 387 n.62. This theory was rejected by another circuit court. See United States v. Barry, 888 F.2d 1092 (6th Cir. 1989). In any event, the vast majority of cases involve showing actual movement between two states.

81. See Perrin v. United States, 444 U.S. 37, 42-49 (1979); United States v. Nardello, 393 U.S. 286, 296 (1969). The title of the state statute is not determinative; the Travel Act looks to the substance of the particular state law to determine if it is, in fact, a bribery or extortion statute. Id. at 293-94.

82. At about the time Congress passed the Travel Act, it also undertook a complete revision of the federal code relating to bribery and conflict of interest by federal officials. See 18 U.S.C. § 201 (1988). While enacting the Travel Act and the bribery statute relating to federal officials, there is no mention of the Hobbs Act in the sections of the legislative history that purport to be thorough reviews of the various applicable corruption statutes. See, e.g., S. REP. No. 2213, 87th Cong., 2d Sess. (1962); H.R. REP. No. 748, 87th Cong., 1st Sess. (1961); Ethical Conduct in Government: Message From The President, H.R. Doc. No. 145, 87th Cong., 1st Sess. (1961), reprinted in 1961 U.S.C.C.A.N. 1141; Federal Conflict of Interest Legislation, Hearings before the Antitrust Subcomm. of the House Comm. on the Judiciary, 87th Cong., 1st Sess. 30-63 (1961) (Justice Department testimony). At that time, the development of the “intangible rights” theory for mail fraud and the “under color of official right” theory for the Hobbs Act had not yet occurred, and the gaps in the statutes were obviously large.

83. 18 U.S.C. § 1962(c) (1988). The RICO statute provides in relevant part:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Id.

84. Id. § 1961(1)(A), (B).

85. Id. § 1962(c).
One of the obvious benefits, and perhaps the unique appeal of RICO in the corruption context, is its forfeiture provisions. But these provisions may present substantial federalism questions that go beyond the general issue of the propriety of federal involvement in combatting local corruption.

In 1984, Congress, for the first time, directly federalized the crime of bribery of or by local officials in 18 U.S.C. § 666. This provision criminalizes receipt or payment of benefits to influence or reward local agents of government organizations which receive in

86. 18 U.S.C. § 1963(a), (b) (1988). RICO forfeiture under § 1963 includes, in relevant part, as follows:

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both,[1], and shall forfeit to the United States, irrespective of any provision of State law —

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any —

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a course of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes —

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims and securities.

Id.

87. For example, it is considered inappropriate by the Department of Justice to forfeit the right to hold a particular political office, particularly when there is a state mechanism to remove a convicted official. Paul Coffey, RICO and the Travel Act, in Prosecution of Public Corruption Cases 435-36 (U.S. Dep’t of Justice ed., 1988). While the Department has adopted this stance as a matter of policy, some commentators are more vigorous in their position that it is not legally permissible. Kurland, supra note 49, at 390-91 & n.77. A somewhat less obvious, but still problematic, issue would be that of forfeiture of salary or pension benefits from those public officials convicted under RICO. The forfeiture of pension benefits becomes particularly problematic in states like West Virginia where a statute exists stripping the convicted public official of the pension. W. Va. Code §§ 5-10A-1 to -10 (1990). RICO forfeiture could arguably require payment of the pension—but to the United States.
excess of $10,000 in federal funds in decisions involving $5,000 or more. Subsequent judicial construction broadly defined the individuals subject to prosecution.

88. 18 U.S.C. § 666(a), (b) (1988); U.S. v. Little, 687 F. Supp. 1042 (N.D. Miss. 1988). This section provides:

(a) Whoever, if the circumstance described in subsection (b) of this section exists —

(i) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof —

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that —

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section —

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, 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;

(3) the term "local" means of or pertaining to a political subdivision within a State; and

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

Id. § 666.

The most recently enacted statute dealing with the prosecution of state and local corruption was 18 U.S.C. § 1346, known as the "McNally fix," enacted in 1988 and signed by President Reagan on November 18, 1988.\textsuperscript{90} It was passed in an effort to reverse the Supreme Court decision in \textit{United States v. McNally},\textsuperscript{91} and was included as an amendment to a crime bill dealing primarily with drugs.\textsuperscript{92} Essentially, it once again included within the mail and wire fraud statutes conduct designed to defraud the public of its right to honest government, which the Supreme Court had found to be outside the scope of the mail and wire fraud statutes in 1987 in \textit{McNally}.\textsuperscript{93} A number of other proposals concerning public corruption statutes are also pending or have been introduced in the last few years.\textsuperscript{94}

It is clear from the development of these various statutes that the prosecution theories have sometimes evolved well after the particular statute was enacted. Some have argued that this evolution in itself presents a problem, since the scope of a statute may be unclear or the theories supporting prosecution debatable. The next section discusses some of the obvious deficiencies in the existing statutory framework.

III. AN OVERVIEW OF FEDERAL CORRUPTION STATUTES

The six statutes used most often for federal prosecution of public corruption offenses\textsuperscript{95} are the Hobbs Act, the Travel Act, RICO, 18 U.S.C. § 666, and the mail and wire fraud statutes. Only 18 U.S.C.

\begin{footnotesize}
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  \item 90. 18 U.S.C. § 1346 (1988).
  \item 91. 483 U.S. 350 (1987).
  \item 93. McNally, 483 U.S. at 356.
  \item 94. A discussion of these further proposals will appear in the second part of the authors' article to appear in volume ninety-four, issue four, of the \textit{West Virginia Law Review}.
  \item 95. This Article does not purport to cover the many statutes that may be invoked in prosecuting public-corruption cases that prohibit conduct that has no necessary relationship to the public position. For example, any given corrupt activity by a public official might involve (or be in service of) other criminal schemes, such as drug dealing or arson. There are a number of federal statutes dealing with that conduct. This Article also does not address the many statutes that are invoked in corruption cases to address parts of the criminal activity that are secondary consequences of the primary corruption or the result of the investigation into corruption. These sorts of offenses include tax crimes found in Title 26 of the \textit{United States Code} (failure to pay tax on bribes or setting up schemes to hide transactions) and obstruction offenses, found in Title 18 of the \textit{United States Code} (obstruction of justice, perjury, and false statements to federal agents).
\end{itemize}
\end{footnotesize}
§ 666 was designed solely, or even primarily, for the prosecution of public officials. Each statute also has its own separate jurisdictional basis. The disparate original purposes and various jurisdictional requirements of these statutes combine to create gaps where acknowledged corrupt conduct sometimes cannot be prosecuted under any federal statute due to the lack of a comprehensive approach directed to this problem.96

A. The Hobbs Act

The Hobbs Act is the major tool used by federal prosecutors in attacking local corruption.97 It proscribes "extortion" that obstructs, delays, or affects interstate commerce.98 It includes provisions that criminalize attempts and conspiracies as well.99

An initial limitation of the Hobbs Act is the jurisdictional requirement of an effect on interstate commerce.100 Consequently, virtually every Hobbs Act prosecution will involve a business in interstate commerce whose funds are used to make payments to corrupt public officials. Individual personal payments generally would not have the requisite effect on commerce. Also, the interstate jurisdictional requirements basically preclude prosecution of certain cases that are purely local in nature, such as individuals fixing cases in the local courts or seeking a pardon from the governor.101

The definition of "extortion" also limits the reach of this statute. Extortion is defined as: (a) obtaining money or property from another; (b) with their consent; (c) induced by the wrongful use of

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96. For an excellent brief summary of some of the problems encountered in applying federal statutes to corruption cases, and the increasing judicial suspicion about some of these approaches, see Gerard E. Lynch, RICO: The Crime of Being A Criminal, (pts. 1 & 2), 87 COLUM. L. REV. 661, 742 (1987).
97. Radek, supra note 72, at 415.
99. Id.
100. Id. § 1951(b)(3).
101. Radek, supra note 72, at 417.
actual or threatened force, violence, fear or under color of official right.\footnote{102}

Thus, the statute requires as a threshold matter that the items obtained be “money or property,” which is considerably narrower than the definition for bribery found elsewhere in the federal code that refers to “anything of value.”\footnote{103} The items must also be “obtain[ed].” There must be both gain and loss in the transaction and not merely, for example, destruction of property. Finally, the element of “induced . . . under color of official right”\footnote{104} contains further limitations, the full scope of which are not yet clear, because the extent of the “induce[ment]” required varies in the different circuit courts of appeal\footnote{105} and remains unresolved by the Supreme Court.\footnote{106} To the extent an inducement standard requiring affirmative “inducing” activity by the public official is imposed, then certain circumstances of passive receipt by an official for doing his job would no longer be covered. More importantly, if the “logic” of the inducement requirement is taken to an extreme conclusion, the inducement requirement could be read in a way that makes bribery and extortion mutually exclusive, with participants in the former not subject to prosecution. This would result in an enormous gap in the federal framework for approaching corruption cases, both in terms of letting public officials accept bribes with impunity and by also not leaving any mechanism under this statute to prosecute the bribe payor.

B. The Mail Fraud and Wire Fraud Statutes

The mail and wire fraud statutes provide for prosecution for using the United States mails or interstate wire facilities as part of schemes and artifices to defraud or to obtain money or property by false and fraudulent pretenses, including schemes to defraud any-

\footnotesize{\textsuperscript{102} 18 U.S.C. § 1951(b)(2) (1988).}
\footnotesize{\textsuperscript{104} 18 U.S.C. § 1951(b)(2) (1988).}
\footnotesize{\textsuperscript{105} Compare United States v. O'Grady, 742 F.2d 682 (2d Cir. 1984) with United States v. Spitler, 800 F.2d 1267 (4th Cir. 1986).}
\footnotesize{\textsuperscript{106} The question is presented in United States v. Evans, 910 F.2d 790 (11th Cir. 1990), cert. granted, 111 S. Ct. 2256 (1991). The case was argued before the Court in early December 1991.}
one of the right to honest services. The statutes have several limitations, the first of which is the jurisdictional element. There must be a mailing or use of an interstate wire facility in furtherance of the scheme. Consequently, with hand deliveries, and the rise in the use of private parcel services, the requisite mailings may not be present. Again, as with the Hobbs Act, there are many state and local corruption schemes that are intensely local and not readily reached with statutes that require an interstate nexus.

A second, substantive limitation on the mail fraud statute is the scope of the provision, codified at § 1346, which criminalizes schemes to deprive others of honest services. It is not yet completely clear that the particular language chosen by Congress accomplished the purpose articulated in the legislative history: to restore the law to its state prior to the decision in United States v. McNally and, therefore, to permit prosecution of deprivations of intangible rights to "good government." "Honest service" may not be equivalent to "good government" in all cases and, to the extent it is not, schemes such as those by individuals not yet holding government positions, such as candidates, may be beyond the reach of the mail and wire fraud statutes.

C. The Travel Act

The Travel Act prescribes certain conduct that also violates a state or federal law whenever there is interstate travel or use of an interstate facility, such as the mails, to promote the illegal activity. Specifically, the Travel Act prohibits the use of the interstate facilities to promote or further bribery or extortion in violation of state or federal laws.

The most obvious limitation of the Travel Act is, again, the jurisdictional base. Generally, there must be some activity that touches on two states. This requirement bars federal prosecution

109. United States v. Curry, 681 F.2d 406 (5th Cir. 1982).
110. 18 U.S.C. § 1952 (1988); see supra note 78.
111. See supra note 80.
in many cases, since not all corrupt schemes involve interstate contact. Moreover, in those cases where some interstate nexus is provable, courts have differed in their determinations as to whether the travel must have been necessary to the scheme\textsuperscript{112} or merely incidental.\textsuperscript{113} There is also an issue relating to who must travel. If the defendant or one of his co-conspirators personally travel to further the scheme, then the interstate nexus is satisfied. When the travel is by a nonconspirator, some courts require a close and direct connection between the scheme and the travel to permit the prosecution.\textsuperscript{114} The more exacting the interstate nexus requirement becomes, the fewer corrupt schemes are prosecutable. Finally, the Travel Act is further limited by the requirement that there be some overt act after the travel to accomplish the underlying offense.\textsuperscript{115}

Beyond the jurisdictional difficulties, the statute carries with it the inherent limitations of the underlying substantive statutes which are incorporated into it and which must be proven as if alleged separately.

\section*{D. RICO}

RICO defines a crime which includes a pattern of engaging in criminal conduct involving an enterprise and, like the Travel Act, relies on other statutes to define the underlying criminal conduct. Title Eighteen U.S.C. § 1962(c), makes it illegal for a person employed or associated with an enterprise to participate or conduct the affairs of that enterprise through a pattern of racketeering activity.\textsuperscript{116}

The underlying predicate acts most applicable in corruption prosecutions under RICO are state or federal felonies involving bribery, extortion, and mail or wire fraud. As with the Travel Act, the substantive limitations of the underlying statutes are incorporated di-

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\item\textsuperscript{112} United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1974) (more than incidental contact required).
\item\textsuperscript{113} United States v. Garrett, 716 F.2d 257 (5th Cir. 1983) (casual contact sufficient).
\item\textsuperscript{114} Compare United States v. Barbieri, 614 F.2d 715, 720 (10th Cir. 1980) with United States v. Altobella, 442 F.2d 310 (7th Cir. 1971).
\item\textsuperscript{115} See United States v. Peskin, 527 F.2d 71 (7th Cir. 1975) (overt act of reimbursing bribe payor was sufficient even though bribery was complete).
\item\textsuperscript{116} See supra note 83.
\end{enumerate}
\end{footnotesize}
rectly into the RICO prosecution. Unlike the Travel Act, however, predicate offenses under RICO must be felonies. The scope of the RICO statute is also limited by the requirement that the predicate or underlying felonies be related. That is, the prosecution must not only establish the elements of the underlying offenses, but must also prove that these offenses are part of a pattern. Neither unrelated bribes nor one isolated bribe would meet the RICO "pattern" requirement.117 RICO also requires that the United States must allege and prove the association between the pattern of predicate acts and an "enterprise."118 The case must involve some entity or group of associated people,119 and the facilities and services of the enterprise must have been used in some way to advance the racketeering activity. Finally, there is the jurisdictional limitation that the enterprise must be engaged in or affecting interstate commerce.

E. Section 666

Federal prosecutors may also get jurisdiction over bribery, extortion, theft, and embezzlement by agents of state and local governments if the governmental entity affected has received over $10,000 in federal funds during the year in which the wrong was committed.120 Title 18 U.S.C. § 666 was enacted for the express purpose of "augment[ing] the ability of the United States to vindicate significant acts of theft, fraud and bribery involving Federal monies" disbursed to private organizations, state, or local governments pursuant to a federal program.121 However, the criminal act need not be traced or connected to the federal money received by the entity.

Thus, once a governmental unit has accepted over $10,000 in federal funding in a particular year, it is "federalized" for the purposes of the statute. Thereafter, (1) bribery or extortion in connection with any business of that entity involving "anything of value of $5,000 or more," or (2) embezzlement or theft by agents of that

119. Id. §§ 1961(4), 1962(c).
120. 18 U.S.C. § 666 (1988); see supra note 88.
governmental entity of money or property of a value greater than $5,000 owned, controlled by, or in the care of that entity, may be prosecuted federally.

It is not necessary that the "business of the entity" to which the bribery or extortion relates have any connection to the federal funds which the entity has received. Likewise, it is not necessary to show any relationship between the property embezzled or stolen and the federal funding.

This statute is newer than most of the federal corruption statutes and, as detailed below, is not as awkward as the older ones. However, it is still half a loaf given the requirement that the bribe relate to a decision involving at least $5,000 or more. Also, the "influence or reward" language in the statute is problematic. For instance, one intention of the statute is to punish kickbacks, and this language invites a facetious defense in every kickback prosecution—what payor or receiver of a kickback will admit that the money or thing changed hands because they intended to influence or be influenced?

While flawed, this relatively new statute has been important to federal prosecutors in districts where state and local corruption had gone practically unchecked. In the Southern District of Mississippi alone, forty-nine persons involved in the corrosion of county and local business activities have been convicted and sentenced under this statute in the past five years. It is a good tool because it is straightforward; it does not require prosecutors to stretch for jurisdiction. There is no need to find a mailing, an interstate wire transfer, interstate travel, or the perennial "effect on interstate commerce" and the accompanying resolution of whether these jurisdiction-giving events are sufficiently related to the crime. Moreover, it does not require the task (rendered impractical by the accounting practices of many state and local governments) of tracing which funds are federal in character and which are not.

The passage of this statute indicates an appreciation of the simple wisdom behind the efforts of the generations of federal prosecutors

and federal courts responsible for the pre-McNally, pre-McCormick jurisprudence which evolved over a twenty-year period, almost without dissent, to give the federal prosecutor authority to prosecute state and local corruption schemes: 1) there is a federal interest in maintaining the integrity of state and local governments; 2) that interest is not based primarily on the federal nature of the transactions in question, but rather on: A) the reality that, in today's world, state and local governments operate in substantial part on federal funding and thus are in some measure creatures of the federal government, and B) the reality that state and local entities, for a multitude of reasons, are ill-equipped to police themselves, particularly when it comes to the corrupt acts of those who control the jobs and other resources at the local level.

F. Election Laws

Perhaps the area where the laws are least effectively drafted or suited for corruption-offense use is in the area of prosecuting state and local officials for violations relating to elections. Again, this stems in part from the emphasis on regulating only elections having a direct federal effect. However, depriving United States citizens of a fair electoral process, even when it involves state and local elections only, arguably creates a federal interest.123

The basic premise of election crime prosecution is to stop ballot fraud, which takes many forms, including multiple voting, vote buying, alteration of ballots, stolen or tampered ballots, and the like. The United States Code provisions governing state and local elections are found in Titles Eighteen and Forty-Two, while the provisions of the Federal Election Commission Act are found in Title Two.124

123. As a consequence, as noted elsewhere in this Article, the mail fraud statute is used to address election violations that are often not covered by other federal statutes. The particular theory under the mail fraud statute, which focuses on deprivation of intangible rights to honest conduct, is an unsettled area in light of recent Supreme Court decisions and perhaps a less than fully effective Congressional response.

124. 2 U.S.C. §§ 431-56 (1988). This section of the Code enacts the Federal Election Commission Act (FECA). FECA covers only federal candidates and is beyond the scope of this Article.
1. Title Eighteen Election Offenses

The primary statutes that can be invoked to address local ballot fraud are those prohibiting deprivation of civil rights or conspiracies to do so, and expenditures to influence voting. There are a variety of other statutes in Title Eighteen that tangentially relate to voting irregularities that might be involved in a particular and narrow context, but the vote buying and civil rights statutes are the primary Title Eighteen tools. Other avenues for prosecution of these offenses also exist. For instance, RICO, the Travel Act, and the mail fraud statute are available when there are mailings relating to elections—such as fraudulent absentee ballot schemes—or bribery of voters, and the vast majority of the states consider vote buying to be a bribery offense.

The Title Eighteen approach to vote-fraud prosecutions has substantial deficiencies. Election fraud prosecutable under the civil rights statutes, sections 241 and 242, must have a relatively direct federal effect; schemes must either have as their object influencing the outcome of a federal election or, in fact, have an actual, even if indirect, effect on the outcome of a federal election. The United States Supreme Court, in a ballot-box-stuffing case from Logan County West Virginia, refused to decide whether the statutes are any broader than that. The civil rights statutes reach nonfederal elections only when it can be shown that the particular ballot fraud involved the participation of state officials, demonstrating "state action" for the purposes of the equal protection clause of the Fourteenth Amendment. The most substantial gap, however, in the Title Eighteen

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131. This was made clear in the Fourth Circuit opinion in Anderson, (although the Supreme Court did not address it) and it was also adopted by the Fourth Circuit in another West Virginia ballot-box stuffing case, United States v. Stollings, 501 F.2d 954 (4th Cir. 1974).
2. Title Forty-Two Election Offenses

There are two primary statutes found in Title Forty-Two that relate to prosecution of state and local election offenses: (1) 42 U.S.C. § 1973(c) which prohibits vote buying, "illegal voting," and providing false information at the polls, and (2) § 1973(e) which prohibits multiple voting.

Again, the jurisdictional basis for this statute imposes the most substantial limitation. Title Forty-Two offenses rely on the "necessary and proper" clause to protect federal elections from contamination by misconduct that might be occurring as to other, nonfederal, candidates on the ballot. As a consequence, Title Forty-Two's proscriptions against ballot fraud are limited to only those elections where there is a federal candidate on the ballot. While the fraud does not have to involve the federal candidate as it does under Title Eighteen, a number of state and local elections are wholly beyond the reach of any federal statute. Although it is evident that the elements of the various federal corruption statutes have gaps, their construction by the Supreme Court has further exacerbated that problem.

IV. THE JUDICIAL RESPONSE TO APPLICATION OF THE FEDERAL CORRUPTION STATUTES

Recently the Supreme Court has begun to review statutes used for public corruption prosecutions. In addition, the circuit courts

132. United States v. Bathgate, 246 U.S. 220 (1918); United States v. McLean, 808 F.2d 1044 (4th Cir. 1987). While 18 U.S.C. § 597 ostensibly would close the gap by proscribing vote buying, there is also a strong argument that it does not. Prior to the enactment of FECA in 1971, 18 U.S.C. § 597 was only applicable to payments intended to influence a federal election that in fact did have some influence. FECA repealed the applicable limitations found in § 591 that imposed this restriction on § 597. Thus, there are no express limits in § 597. However, there does not appear to be any intent by Congress to expand the previously explicit federal limitation on the scope of § 597. The Department of Justice has, to date, followed this view. Downsanto, supra note 128, at 21–22. The statute, therefore, is of no value in the usual state and local context.


134. Id. § 1973(e).

of appeal have also begun to review these statutes and, additionally, have developed a trend of construing the statutes more restrictively than had been the practice in the mid to late 1970s. The consequence of these various decisions, the major ones of which are discussed below, is to broaden the gaps in the present federal statutory framework by restricting the scope of the existing statutes.

A. Mail Fraud

1. McNally: Restricting the Scope of the Mail Fraud Statute

The Supreme Court's initial encounter with public corruption statutes used against state and local corruption was with the mail fraud statute and its "intangible right to honest government" theory. In the case of public officials taking bribes or acting with conflicts of interest, the mail fraud statute became a tool to prosecute them for defrauding the public of its right to honest services based upon the argument that public officials, or those closely associated with them (such that they have de facto power over public decisions), owe a fiduciary duty to the public, a breach of which constitutes fraud.

However, in 1987 the Supreme Court considered a case from Kentucky, McNally v. United States, and concluded that the mail fraud statute protected only "property" interests and, therefore, it was not a federal crime under the mail fraud statute for a public official to deprive the citizens of their right to good government.

McNally was basically a conflict of interest case. The Chairman of the Kentucky Democratic Party was given de facto authority to determine what insurance companies received state contracts. In exchange for permitting a particular company to obtain a contract, the company was required to "kick back" a portion of the com-

136. While the McNally decision addressed the mail fraud statute, 18 U.S.C. § 1341, the wire fraud statute, 18 U.S.C. § 1343, contains the identical language regarding schemes to defraud. The analysis of McNally is, thus, fully applicable to wire fraud prosecutions.
137. See supra notes 64-66.
139. Id. at 360.
140. Id. at 352-56.
141. Id. at 352.
mission, which was then funnelled to various individuals associated with the Chairman of the Democratic Party, including the petitioner, McNally. McNally was charged with aiding and abetting the scheme to funnel commission payments to public and party officials while the public official involved, Gray, was charged essentially with failing to disclose to the state his ownership interest in the various companies that were receiving the commission payments. The United States contended that this behavior violated the mail fraud statute by depriving the citizens of Kentucky of their right to honest government.

The Court in McNally began by considering "the sparse legislative history" of the mail fraud statute and concluded that the fraud prohibited by the mail fraud statute must involve a lost property interest. The Court reached the conclusion, based in part on the meaning of "defraud" at common law, in part on the statements in the legislative history and in part on the principle of statutory construction which construes criminal statutes in the most lenient manner when they are ambiguous. This latter concern also had federalism overtones when the Court noted:

Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the federal government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights.

Since the jury instructions did not require the jury to reach a conclusion on whether property was obtained, the conviction was reversed.

142. *Id.* at 353.
143. *Id.* at 355.
144. *Id.* at 356. This particular strength of the mail fraud statute, its evolutionary ability if you will, has been subject to significant criticism. *Id.* at 360.
145. *Id.* at 358.
146. *Id.* at 358-60.
147. *Id.* at 360 (emphasis added).
148. *Id.* at 360-61. Justice Stevens, in a dissent joined by Justice O'Connor, disagreed with the construction of the statute adopted in the opinion and the interpretation of the legislative history. *Id.* at 366 (Stevens, J., dissenting). In particular it seems significant to the dissent that this was an entirely settled area of the law and, at least for Justice Stevens, the class of defendants who benefit by the Court's decision are the most privileged encountered by the court system. *Id.* at 375 n.9.
The Court also noted, although only in a footnote, that the scheme alleged in *McNally* was apparently not against state law. The majority characterized the allegation against McNally and Gray as follows: "The violation asserted is the failure to disclose their financial interest, even if state law did not require it, to other persons in state government whose actions could have been affected by the disclosure."\(^{149}\) *McNally* established a key principle for future consideration of public corruption statutes: criminal statutes will be interpreted by looking to express Congressional intent, and a broader intent will not be implied.

The immediate result of *McNally* was to create a gap in the prosecution of public officials, especially in the area of election crimes and conflicts of interest. A wide range of conduct that had previously been viewed as "fraudulent" was no longer illegal. Additionally, the constriction of the mail fraud statute to the protection of a narrow property interest presumably inhibits the potential for the statute to be applied against new schemes which had not been previously encountered, but nonetheless would fall within the general notions of fraudulent behavior.\(^{150}\)

The gap created by *McNally* was addressed promptly by Congress.

2. Title Eighteen U.S.C. § 1346: The *McNally* Fix

The Congressional response to *McNally*, although swift, was possibly of limited help. Eighteen U.S.C. §1346 was enacted and provides: "For the purposes of this chapter, the term 'scheme or artifice

\(^{149}\) Id. at 361 n.9.

\(^{150}\) Kurland, *supra* note 49, at 367, 399 n.114. Also, it initially appeared that the opinion prohibited any attempts to prosecute for deprivation of "intangible," as opposed to "tangible" rights. The Court clarified and somewhat softened the most extreme import of the *McNally* decision in Carpenter v. United States, 484 U.S. 19 (1987), by concluding that property includes "intangible" property rights. At stake in Carpenter was the *Wall Street Journal's* confidential business information which a reporter was sharing with brokers prior to its publication to permit advance trading. Id. at 24-25. The Court made it explicit that *McNally's* distinction was not between tangible and intangible property but between property and other interests of a nonproprietary nature. The Court concluded that the *Journal's* property interest had been damaged because it was "deprived of its right to exclusive use of the information." *Id.* at 26.

What is also suggested by the decision in Carpenter is that the issue of interference by the federal government in state and local affairs was the primary, motivating force behind the *McNally* decision.
to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."

The legislative history plainly indicates that the statute was intended to reverse McNally, and in the context of prosecution of public officials for conflicts of interest and the like, the provision clearly did so. There is, however, a lingering issue concerning whether the reference to "honest services" has left open the possibility that some conduct, by individuals other than those who actually have the public positions, such as informal power brokers or candidates, might remain outside the scope of the mail fraud statute. Likewise, campaign activity, even by those holding a public position, may be beyond the scope of the compromised correction of McNally.

Employing a strict statutory construction focusing literally on the phrase "honest services" supports an argument that Congress did not reinstate prosecutive power to its full pre-McNally scope, but only addressed the prosecution of public officials and not candidates. If so, a gap in the prosecutive framework would remain which did not exist prior to McNally. Thus, some of the gap opened by the McNally decision has surely been closed by Congress, but uncertainty remains.

B. The Hobbs Act

1. McCormick: Interpreting the Hobbs Act

In the wake of McNally, the Court next considered the case of United States v. McCormick. This was the first case in which the

153. Also, even incumbent public officials who committed offenses during the campaign could argue they owed no "honest service" to anyone during a campaign.
154. Closing the gap opened by McNally also, as a practical matter, will serve to minimize the problem posed by the potentially adverse impending decision(s) by the Supreme Court concerning the Hobbs Act's various requirements. The mail fraud theory of prosecution when citizens are deprived of their intangible rights to honest services is now viable for all such fraudulent conduct after 1988. Obviously, the resurrection of the mail fraud statute as a corruption fighting tool on the state and local level causes a parallel increase in the viability of RICO prosecutions in such cases, since mail fraud is a predicate act.
Supreme Court considered the Hobbs Act in the context of a public corruption prosecution. McCormick was prosecuted under a theory of the Hobbs Act that was first applied in 1972 in the case of United States v. Kenny. The prosecution employed a clause of the statute defining as extortionate payments those received “under color of official right.” There was no allegation of fear, coercion, or violence.

McCormick, a delegate from Logan County, West Virginia, assisted foreign doctors in obtaining licenses to practice medicine. A temporary permit system allowed the doctors to practice pending their completion of the formal requirements for a full license to practice, which included passing a particular test. McCormick assisted the doctors in 1984 in extending the program by sponsoring the bill to do so; he also agreed with the doctors to sponsor such a bill in the 1985 legislative session. During his 1984 re-election campaign, Delegate McCormick told a lobbyist that he had not heard from the doctors. Thereafter, they provided him with several cash payments, which were nowhere recorded as campaign contributions as required by law. McCormick’s sponsorship of the 1985 legislation followed thereafter. After the bill passed, McCormick received another cash payment from the doctors. In all, he received five cash payments from the doctors.

The Supreme Court purportedly took the McCormick case “because of disagreement in the Courts of Appeals regarding the meaning of the phrase ‘under color of official right’ as it is used in the Hobbs Act . . . .” However, the Court’s decision did little to resolve this issue. In fact, the Court specifically declined to address

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156. 462 F.2d 1205 (3d Cir. 1972), cert. denied, 409 U.S. 914 (1972).
157. Id. at 1229.
158. See McCormick, 111 S. Ct. at 1809-10; see also supra note 41 and accompanying text.
159. McCormick, 111 S. Ct. at 1809-10.
160. Id. at 1810.
161. Id.
162. Id.
163. Id.
164. Id.
165. Id.
166. Id. at 1813.
the one area of disagreement which had been identified—the nature and extent of the “inducement” for the payment, if any, required by the public official under the Act.\textsuperscript{167} Rather, the Court limited its inquiry to the applicability of the Hobbs Act’s “color of official right” requirement to an elected official receiving campaign contributions.\textsuperscript{168} Areas other than campaign contributions, such as those involving nonelected public officials, were explicitly beyond the Court’s conclusions.\textsuperscript{169}

The Court found that the factors enumerated by the court of appeals, all of which suggested that the payments were not intended as legitimate campaign contributions, were insufficient to constitute extortion under “color of official right” without a more explicit statement of Congressional intent:\textsuperscript{170}

\begin{quote}
[w]hatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, ‘under color of official right.’ To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the nation. It would require statutory language more explicit than the Hobbs Act contains to justify a contrary conclusion.\textsuperscript{171}
\end{quote}

While these particular concerns are distinct from those expressed in \textit{McNally}, they lead to the same conclusion regarding the Court’s approach to these public corruption statutes: a strict construction of the statutory language will be applied.

The Court articulated the standard for prosecution of elected officials for extorting campaign contributions as follows: “The receipt of such contributions is . . . vulnerable under the Act as having been taken under color of official right, but only if the payments

\begin{footnotes}
\footnotetext[167]{Id. at 1813 n.5.}
\footnotetext[168]{See id. at 1814.}
\footnotetext[169]{Id.}
\footnotetext[170]{Id. at 1816.}
\footnotetext[171]{Id. (citations omitted).}
\end{footnotes}
are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act.” The Supreme Court thus concluded that a *quid pro quo* is necessary. The Court again indicated that it was not considering whether its reasoning applied beyond the context of campaign contributions to other things of value, nor did it resolve the inducement conflict pointed out in footnote five of the case.

While the policy of the Department of Justice has always been that prosecutions for receiving campaign contributions will only be brought where there is a direct and demonstrable connection between the contribution and specific official action or inaction, several issues are raised by the *McCormick* opinion. First, at least one class of cases has been eliminated as a Hobbs Act target; it appears that it is no longer possible to prosecute that class of campaign gratuities which, while directly tied to and motivated by the official conduct of the recipient, were not discussed or otherwise contemplated *prior to* the official action. That is, if McCormick had advanced the particular interest of the doctors, and they then rewarded him for that conduct with subsequent campaign contributions, no Hobbs Act prosecution would lie. Interestingly, other federal statutes, such as 18 U.S.C. § 666, make it an offense to “reward” public officials with payments, so the gap created by *McCormick* is not derived from a policy decision that the conduct is acceptable.

Second, what the Court means by requiring “the promise or understanding” to be “explicit” is unclear. It would appear in this context that the Court is using the term “explicit” in the sense of a “direct relationship” between the payment and the official action.

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172. *Id.*
173. *Id.* at 1817 n.10.
174. *Id.* at 1813 n.5. This issue will presumably be decided when the Court considers the case of United States v. Evans, 910 F.2d 790 (11th Cir. 1990), *cert. granted*, 111 S. Ct. 2256 (1991). In that case the district judge gave the instruction, essentially, which the Supreme Court would ultimately require in *McCormick*. The court did not, however, go further and say that the public official had to be the initiating force or otherwise induce the payment.
175. *McCormick*, 111 S. Ct. at 1816-17. *McCormick* was such a case. The payments were not campaign contributions at all, which the United States contended throughout. Therefore, a factually similar case would be brought again if presented today.
This view is consistent with the portions of the *United States Attorney Manual* the Court cites,\textsuperscript{177} the prior practice of the Department of Justice, and the discussion in the opinion of *quid pro quo*, and if correct, will not result in any fewer prosecutions. At most, it will lead to a modification in the jury instructions.

In discussing "explicit," the Court was careful to refer not only to "promises" but also to "undertakings."\textsuperscript{178} This latter concept suggests that the reference to "explicit" does not mean a written or spoken promise or agreement necessarily, but rather, perhaps, a form of implicit understanding or undertaking in which the parties are aware of the direct connection between the payment and the anticipated future official action or inaction.

The rationale offered by the Court for requiring an "explicit" promise further suggests an interpretation that focuses on connectedness. The factor that makes a payment one "under color of official right" is the willingness of the public official to make it clear that his future conduct will be controlled by the payment or promises accompanying the payment.\textsuperscript{179} Justice Scalia, in his concurrence, reframed the majority opinion by stating that the distinction being drawn by the Court was between a campaign contribution given with the "anticipation" of favorable future action, as opposed to the contribution given in exchange for an "explicit promise of favorable future action." Viewed through this prism, it is again clear that the real issue in campaign-contribution cases is the issue of "connectedness" between the payment and the action.

While the result in *McCormick*, of course, presents some incentive for the crafty bribe taker to structure such payments as "campaign contributions" in the future, the case itself does not go to the core of most Hobbs Act prosecutions, which involve payments to public officials outside the context of the campaign arena. How-

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179. *Id.* at 1816. This approach to "explicit" as relating to "connectedness" is similar to the analysis used in the Second Circuit. United States v. Biaggi, 909 F.2d 662 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1102 (1991). In *Biaggi*, the Court considered a Hobbs Act conviction which the defendant asserted on appeal was based upon extorted campaign contributions. *Id.* at 695.
ever, the opinion did raise several issues that go to the core uses of the Hobbs Act, which will be the focus of the Court's analysis of the statute in this term.

First, the McCormick Court's footnote five traced the development of the Hobbs Act "under color of official right" provision, both briefly outlining that it had not been used at all until 1972, and that from 1972 until 1984 "the 'color of official right' element required no more than proof of the payee's acceptance knowing that the payment was made for the purpose of influencing his official actions." 180 In 1984, the Second Circuit imposed a requirement that there be "some affirmative act of inducement" and the Ninth Circuit joined that position in 1988. 181 The McCormick majority noted that the other Circuits held a contrary view and cited specifically United States v. Evans 182 and the Fourth Circuit opinions in United States v. Spittler 183 and United States v. Paschall. 184

Second, the majority noted that McCormick did not preserve for appeal the arguments that the Hobbs Act was (1) never intended for the prosecution of local public officials at all, and (2) that the "color of official right" language carries with it a requirement that the public official actually make a false official claim of legal right to the money. 185 The Court declined to address the merits of these claims beyond noting that they did not constitute plain error in light of the repeated application of the Hobbs Act to local corruption and the previous construction of the statute by every other court.

Justice Scalia, in his concurrence, identified a problem with the heart of the Court's analysis—there is nothing in the language of the Hobbs Act or the legislative history about campaign contributions or a quid pro quo. Scalia noted the development of the "under color of official right" theory through the case law and the fact that it has been subject to some debate. 186 He then undertook a brief

180. McCormick, 111 S. Ct. at 1813 n.5.
181. United States v. Agoun, 851 F.2d 1158 (9th Cir. 1988).
182. 910 F.2d 790 (11th Cir. 1990), cert. granted, 111 S. Ct. 2256 (1991).
183. 800 F.2d 1267 (4th Cir. 1986).
184. 772 F.2d 68 (4th Cir. 1985).
185. McCormick, 111 S. Ct. at 1814 n.6.
186. Id. at 1818 (Scalia, J., concurring).
review of the legislative history and an analysis of common law and concluded that perhaps it was the Congressional intent to only punish the public official who was falsely claiming a right to the money.187 He bolstered this possible conclusion with a reference to the United States Code as criminalizing this conduct as “bribery,” which he asserted is a crime in which both parties are prosecutable while, to the contrary, the “extortion” statutes do not permit the prosecution of the individual paying the bribe.188

While Scalia did not resolve these questions, the tenor of his observations is plain. He concludes that:

[B]efore we are asked to go further down the road of making reasonable but textually unapparent distinctions in a federal ‘payment for official action’ statute — as we unquestionably will be asked [he then refers to footnote five of the opinion which mentions Evans] — I think it well to bear in mind that the statute [as applied] may not exist.189

McCormick sets the stage for the resolution of the issue presented in United States v. Evans and several Fourth Circuit cases cited by the Court in footnote five of the McCormick opinion: what, if anything, is required for inducement by the public official to constitute a violation of the Hobbs Act? The imposition of a requirement by the Supreme Court that the United States prove inducement through certain particular activities could create another gap in the statutory framework depending upon the nature of the requirement, if any, that is ultimately imposed; such a requirement could range from the office itself providing inducement to a requirement of actual coercion by the public official.

One area that would seem to be most vulnerable is the prosecution of bribe payors as aiders and abettors under the Hobbs Act. The Fourth Circuit has explicitly accepted this theory.190 Its viability is likely to be in issue as the Court determines what sort of conduct by the public official is necessary to constitute inducement. Some

187. Id. at 1819-20.
188. Id. at 1820.
189. Id.
historical perspective on the judicial development of an inducement requirement is provided below.

2. Development of the Inducement Requirement

a. United States v. O'Grady: Defining the Inducement Requirement

As the Supreme Court noted in McCormick, for more than a decade after acceptance of the theory of prosecution of public officials for extortion "under color of official right" became widespread, no court required substantially more than the mere passive receipt of money by a public official relating to his job. The first court to reject that notion and adopt an alternate view was the Second Circuit Court of Appeals in United States v. O'Grady. There, a quality control officer for the New York City Transit Authority received $34,000 in travel and entertainment from companies providing subway cars to the city. There was apparently little evidence that these benefits influenced his job performance but no question that the payments were motivated by his public position. The district court instructed that he could be convicted if the jury was convinced that the payments were motivated by his public position and he knew it. Passive receipt of the payments was sufficient. The en banc Court of Appeals reversed, raising the issue of "inducement" sua sponte.

The en banc court required an instruction that there be "proof that the public official did something, under color of his public office, to cause the giving of the benefits." However, the court noted that the inducement could be found when there is subtle solicitation such as "a finding of repeated acceptances over a period

191. McCormick, 111 S. Ct. at 1813 n.5.
192. 742 F.2d 682 (2d Cir. 1984).
193. Id. at 683-85.
194. Id. at 692.
195. Id. at 686.
196. Id. at 683.
197. Id. at 687.
of time of substantial benefits.\textsuperscript{198} Creating an impression that gifts were expected was sufficient inducement under the statute.

The O'Grady court's reasoning in many ways parallels Justice Scalia's later observations in his McCormick concurrence. Specifically, the court found that the language of the statute suggested the need for inducement. The court also relied on the enactment of the federal bribery statute (which forbids the receipt of gratuities) as evidence that Congress did not think this conduct was prohibited by the Hobbs Act. Finally, the court expressed policy concerns about the ambiguity of the statute and the prospect of federal prosecution for conduct long considered permissible, such as receipt of \textit{de minimis} benefits.

The United States did not petition for \textit{certiorari}. The effect of the court's conclusion, while apparently at odds with the language of almost every other circuit court,\textsuperscript{199} is unclear. If the mere repeated receipt of payment constitutes inducement, the Second Circuit's departure from the majority view is minimal. Further, the payments in O'Grady were much less connected to official action than is usually the case. They were more like gifts than bribes or extorted payments. Therefore, as with McCormick, the O'Grady prosecution was not at the core of the usual prosecutions under the Hobbs Act.

In fact, as at least one court noted,\textsuperscript{200} almost every Hobbs Act case decided to date would meet the definitions of inducement actually adopted by the Second Circuit. Most of the cases involve coercive demands by public officials for payments in exchange for official action. Thus, from that perspective, this particular inducement requirement may prove to be an academic rather than a practical problem, which the later case law suggests.

b. Subsequent Case Development in the Second Circuit of the Inducement Requirement

Immediately after O'Grady, the Second Circuit reversed a conviction where the district court instructed that no inducement was

\begin{itemize}
  \item \textsuperscript{198} \textit{Id.} at 694 (Pierce, J., concurring).
  \item \textsuperscript{199} See, e.g., United States v. Paschall, 772 F.2d 68, 71 (4th Cir. 1985).
\end{itemize}
necessary, but reaffirmed the O'Grady conclusions that inducement may be "subtle" and proven by showing that the public official repeatedly took substantial benefits over a long period of time.

Likewise, in United States v. Tillem, the court, with citation to O'Grady, observed that "[w]e acknowledged that this inducement could take many forms including subtle requests, demands, or solicitations that may be established through circumstantial evidence." The evidence in that case "established that there was a pervasive atmosphere of fear in the restaurant industry," which provided the inducement for payments to the defendant health inspectors.

Tillem also addressed the issue found in the Fourth Circuit case of United States v. Spitler concerning the prosecution of the bribe payors. On this point, the court reversed the Hobbs Act conviction of defendant Campbell, an independent consultant hired by restaurants to assist them in passing inspections. In that role, Campbell made payments to the inspectors, a practice he had begun prior to becoming an independent consultant when he worked directly for a group of restaurants. The court concluded that there was no evidence that he extorted his restaurant clients, therefore, "he may at most be found guilty of bribery."

The court considered the aiding and abetting theory, beginning with the recognition that "[f]inding culpability when a 'victim' goes beyond passive compliance and becomes an active participant in a conspiracy has been a principle of our common law from the turn-of-the-century." However, the court refused to find Campbell was an aider and abettor because, although he acted as a conduit passing money from the restaurants to the inspectors, "a reasonable jury

201. United States v. Campo, 744 F.2d 944 (2d Cir. 1984).
202. Id. at 946.
203. 906 F.2d 814 (2d Cir. 1990).
204. Id. at 821.
205. Id.
206. 800 F.2d 1267 (4th Cir. 1986).
207. Tillem, 906 F.2d at 819-22.
208. Id. at 822.
209. Id.
OBSTACLES TO PROSECUTION

could not find that Campbell himself promoted the conspiracy and had a stake in its outcome.”210 In short, it could not be shown that Campbell was more than a bribe payor.211 In this regard, the court found it significant that Campbell never “told the victims of the scheme that he had authority from the City Health Department to collect payments from his clients on behalf of the Department.”212

The court distinguished Spitler by noting that “Campbell did not initiate a ‘symbiotic relationship’ between the victims — his client restaurants — and the corrupt government officials.”213 Instead, Campbell himself had been a previous extortion victim of a plan initiated by the Department of Health. The court found no proof that the Department ever referred a restaurant to Campbell to facilitate the payments.214

Thus, while the Second Circuit was the first to impose and articulate the “inducement” requirement, the court did not adopt a position that since extortion requires inducement, the payor is precluded from conviction by definition. In fact, the court, by reaffirming the principles of accessorial liability in the abstract, did just the opposite.215

It is apparent from the case development in the Second Circuit that the inducement requirement developed there need not be a significant barrier to prosecution.

C. United States v. Aguon: Inducement in the Ninth Circuit

Aguon was the Director of the Department of Education (DOE) in Guam and received cash and merchandise from a supplier and

210. Id. at 823.
211. Id.
212. Id.
213. Id.
214. Id. at 824.
215. Perhaps the point that liability exists for aiders and abettors is so obvious that the Court did not cite its own precedent. United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983). Margiotta allowed for the conviction of an individual who was not a public official for violating the Hobbs Act as an aider and abettor. In Margiotta, unlike Spitler, the aider and abettor was a third party assisting the recipients, not the party making the payments. It seems, at least as a theoretical matter in the Second Circuit, the inducement requirement can co-exist with the aiding and abetting prosecution of payors.
contractor hired by her Department,\textsuperscript{216} due to the desire of the payors to maintain their business relationships with the DOE.\textsuperscript{217} The Ninth Circuit, sitting \textit{en banc}, reversed the conviction for violation of the Hobbs Act. The court's decision was split in a six to five decision on the proper approach to the inducement issue, with the majority requiring an instruction to the jury that there must be inducement.\textsuperscript{218}

The majority's conclusion that inducement is required stemmed first from the language of the statute, which has a series of clauses, each of which being modified by the word "induced," including the clause "under color of official right."\textsuperscript{219} The court reasoned that inducement must mean something more than passive receipt of money.\textsuperscript{220} To "induce," the public official had to have "done something to activate the payor."\textsuperscript{221} The majority then concluded the following: (1) common-law extortion required "[h]owever subtly . . . communicated, a demand . . ."; and (2) that the New York Penal Code, upon which the Hobbs Act was based, also required "inducement as an element" of extortion, which distinguished it from the crime of bribery.\textsuperscript{222} Finally, the majority found it persuasive that without inducement, the Hobbs Act would punish the same offense as the federal "anti-gratuities statute," although the latter has far lighter penalties.\textsuperscript{223} The court felt Congress would not duplicate the law against receiving payments that are not induced.\textsuperscript{224}

The Court in \textit{Aguon} found inducement is required and established a test similar, if not identical, to the Second Circuit’s test. The Court stated:

\textsuperscript{216} 851 F.2d 1158, 1160-61 (9th Cir. 1988).
\textsuperscript{217}  \textit{Id.} at 1161.
\textsuperscript{218}  \textit{Id.} at 1167.
\textsuperscript{219}  \textit{Id.} at 1162.
\textsuperscript{220}  \textit{Id.} at 1163.
\textsuperscript{221}  \textit{Id.}
\textsuperscript{222}  \textit{Id.} at 1163-64.
\textsuperscript{223}  \textit{Id.} at 1165.
\textsuperscript{224}  \textit{Id.} The antigratuitities statute was passed in 1962, and the Court took that to be evidence that Congress did not feel that the Hobbs Act covered that conduct. Of course, it could also be argued that Congress simply did not feel that the Hobbs Act was being used to address this conduct and, therefore, provided another tool for doing so. The \textit{Kenny} interpretation of the Hobbs Act to permit these prosecutions was not advanced until 1972 and, therefore, the Hobbs Act was not being used yet for that purpose. In other words, the "under color of official right" theory was not being used at all.
We hold that proof that the defendant "induced" the improper payment is an essential element in the crime of extortion and that "inducement" can be in the overt form of a "demand," or in a more subtle form such as "custom" or "expectation" such as might have been communicated by the nature of defendant's prior conduct of his office. Reliance on a system of expecting payments in exchange for public favors can itself be the necessary act of inducement if the public official previously establishes or acquiesces in the system and if the donor is sufficiently aware of the expectation created by prior acts of extortion. Accordingly, the jury instructions must incorporate inducement, which may be explicit or implicit, as a required element of the crime of extortion under the Hobbs Act.225

Significantly, this language does not prohibit, nor does the rest of the opinion, the instruction by the district court that no specific acts need be performed by the public official to have inducement.

The Aguon dissent objected to the inducement language on the following grounds: First, requiring inducement overruled prior Ninth Circuit doctrine; second, it was inconsistent with all circuits but the Second; third, the plain meaning of the statute did not necessitate an inducement requirement; fourth, common law did not require inducement; fifth, New York law did not require inducement for public-official extortion; and sixth, there is nothing in the legislative history of the Hobbs Act that prohibits this reasonable reading (i.e., the lack of an inducement requirement) of the statute.226

The dissent also addressed and rejected the other arguments of the majority, including the import of the antigratuitities provisions of section 201. As the dissent noted correctly, section 201 will overlap with the Hobbs Act, with or without an inducement requirement, because it covers the public official who "demands" payment.227

Thus, only the extent of the overlap is at issue. Finally, the dissent concluded that there is no way to rationalize the varying penalties provided under varying bribery statutes by Congress.228

1. The Evans Case: The Supreme Court Considers The Inducement Question

With O'Grady and Aguon on the one hand and Spitler and the other circuit to the contrary, the Supreme Court will probably apply

225. Id. at 1166.
226. Id. at 1176-90 (Wallace, J., dissenting).
227. Id. at 1185.
228. Id. at 1186-89.
the analytical structure it established in *McCormick* and *McNally* when it considers this issue in the pending *Evans* case. That approach is likely to begin by establishing ambiguity in the statute and then invoking either the "rule of lenity" or, as phrased in *McCormick*, some sort of "reasonableness" test to narrowly construe the statutory language.

Based on the analysis in *McCormick* and *McNally*, it is likely that the Court will find that the Act requires some form of inducement. The important inquiry for law enforcement purposes is, then, what "inducement" means. Resolution of the issue raised by Justice Scalia will be important: is the Hobbs Act a statute focused on extortionate behavior, with its common meaning relating to threats and violence, or is it a "payment for official action" statute? The more one views that statute as focused on "payment for official action," the less stringent will be the appropriate inducement requirement. The question is thus posed, what is Congress really trying to address?

*Evans* was a member of the Board of Commissioners of DeKalb County, Georgia, who was approached by an undercover FBI agent with an offer of money in exchange for help with a zoning decision.229 For about a year, *Evans* and the undercover agent met and discussed zoning.230 They also discussed *Evans'* campaign expenses, and the agent agreed to provide $7,000 in cash and a $1,000 campaign check.231 *Evans* accepted the money, although he indicated that he would help because he had promised to help — not just because he was being paid.232

*Evans* challenged the jury instructions for failing to require that the jury be told the public official must take some action to "induce" the payment.233 The court rejected the challenge, first noting that to the extent inducement is required it is "automatically satisfied

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230. *Id.* at 792.
231. *Id.* at 794.
232. *Id.*
233. *Id.* at 796.
by the power connected with the public office," 234 and, thus, the only real requirement is that the public official accept the money in exchange for the performance of his job. 235 The Evans court also concluded that any time there is a *quid pro quo*, there is inducement. 236

Evans does not raise any attack of the sort mentioned by Scalia on the validity of the application of the "under color of official right" language in this context to local public officials. It would seem that if the Supreme Court decides this case, it would be hard pressed someday to revisit this fundamental issue and conclude that there is no such crime as Scalia suggests may be the case.

As the Supreme Court examines the inducement issue, the principles outlined above will, no doubt, be applied again, probably to impose an inducement requirement. Obviously, the most minimal "requirement" would be that the office itself provides the inducement which would not impinge upon present prosecutions and would overrule the more restrictive interpretations found in the Second and Ninth Circuits. This interpretation is probably least likely, since it is equivalent to requiring no inducement at all. An intermediate definition would be akin to that adopted by the Second and Ninth Circuits which requires inducement, but also considers patterns of behavior, subtle understandings, and other circumstantial evidence to be sufficient. The intermediate position would be unlike the requirements for "explicitness" and "directness" developed by the Court for the campaign contribution context in *McCormick*. The most extreme form of an inducement requirement would be a requirement of active and direct "coercion" by the public official against the bribe payor. Under this definition a substantial gap would be opened in the statute. Such a holding would preclude prosecution of most, if not all, bribe payors and many bribe recipients who rely on custom and practice in their particular areas to provide the in-
ducement. That result would be at odds with the settled law in the Fourth Circuit, and elsewhere, and would leave an important class of crimes beyond the statute. The discussion below deals, in a related vein, with the need to have the ability to prosecute the bribe payor and how the inducement requirement may affect such prosecutions.

D. The Spitler Problem: Role of An Inducement Requirement in the Prosecution of the Bribe Payor

The prosecution in United States v. Spitler\(^{237}\) involved defendants Carpenter, a public official who was chief of the metals unit of the Maryland State Highway Department, and Spitler, the Vice President of a company that provided inspection services for the Metals Unit.\(^{238}\) Carpenter "demanded and received" a variety of items from the inspection company at Spitler's authorization. In exchange, the company was allowed to submit falsely inflated bills to the State of Maryland, which Carpenter approved.\(^{239}\)

The court of appeals first rejected the argument that O'Grady required "coercion."\(^{240}\) The court concluded again that the Hobbs Act covers conduct considered to be bribery and mere retention of benefits by the public official was sufficient.\(^{241}\) The court also held that Spitler was properly prosecuted as an aider and abettor, but rejected the Government's claim that since the "corporation" was the victim that any corporate officer could be prosecuted for authorizing corporate payments.\(^{242}\) That conclusion, the court believed, was "beyond the legislative intent of the Hobbs Act."\(^{243}\) Nonetheless the court concluded Spitler was not a mere victim in this case.\(^{244}\)

The Court stated that the statute was not meant to punish victims but that "[w]hen an individual protected by such legislation exhibits

\(^{237}\) 800 F.2d 1267 (4th Cir. 1986).  
\(^{238}\) Id. at 1269.  
\(^{239}\) Id. at 1270.  
\(^{240}\) Id. at 1274.  
\(^{241}\) Id. at 1274-75. Thereafter, the court rendered the issue academic by concluding that Carpenter had in fact "coercively demanded the items." Id. at 1275.  
\(^{242}\) Id.  
\(^{243}\) Id.  
\(^{244}\) Id.
conduct more active than mere acquiescence, however, he or she may depart the realm of a victim and may unquestionably be subject to conviction for aiding and abetting and conspiracy.” 245

This leaves the following central question: When does a participant cease to be a victim and become an accomplice? The Spitler court found “[i]n resolving the instant case, we need not paint with a broad brush and declare a bright line at which a payor's conduct constitutes sufficient activity beyond the mere acquiescence of a victim so as to subject him to prosecution as an aider and abettor or a conspirator.” 246 Instead, the court concluded, “To declare a rule of general applicability might criminalize under the Hobbs Act conduct which, for example, may constitute ‘active solicitation and procurement’ . . . but may nevertheless be conduct of a victim succumbing to a climate of unstated prerequisites to doing business with particular public officials or departments.” 247

The Second Circuit was able to use this language, in Tillem, to restrict Spitler to its facts. Underlying Spitler and Tillem, and perhaps the decision that the Supreme Court may reach in Evans, is a philosophical issue concerning the definition of one central problem presented by public corruption. In its starkest terms, applied to this state, do we view West Virginia as a place whose politicians are so corrupt that the system “victimizes” honest businessmen by requiring payments from them, or is it a place where corrupt businesses have initiated a corrupt system of forcing vulnerable politicians into accepting bribes? It may be that both descriptions have some validity. However, bribe payors have been traditionally viewed as “victims” not subject to prosecution in the context of the Hobbs Act. 248 Yet, 18 U.S.C. § 666 punishes the bribe payor. Thus, if the Court were to impose a stringent inducement requirement under the Hobbs Act, prosecution of some conduct that violates the Act may be precluded while it might still be prosecuted under § 666 or also as mail fraud. If the conduct of the bribe payor can be prosecuted

245. Id. at 1276.
246. Id. at 1278.
247. Id. at 1278 n.6 (citations omitted).
248. Radek, supra note 72, at 420.
under some federal law, one must consider whether it makes any analytical sense to continue to view that conduct as the acts of innocent victims under the Hobbs Act. Does it not lead to a more rational approach to construe the Hobbs Act in conjunction with the provisions precluding aiding and abetting and allowing the Act to cover conduct of those who cease to be mere victims? This is an issue that the Supreme Court may resolve, even if only implicitly, in *Evans*.

V. Conclusion

If the activity of federal prosecutors over the past ten years proves anything, it proves that many state and local officials routinely operate in corrupt ways to the detriment of the citizenry. While the several legal theories employed by federal prosecutors have been subject to some responsible legal criticism, and to some recent erosion in the courts, there is no doubt that the behavior the federal prosecutors have reached under these theories is corrupt and has a negative impact on matters of substantial federal concern. This leads to the conclusion that the federal government has a proper role to play in the prosecution of state and local political corruption. Yet Congress has not developed a set of proactive tools consistent with that role.

The federal government is commanded by the Constitution to protect interstate commerce, the United States mails, federal funds, elections, and the citizenry's right to a republican form of government. Thus, it follows that Congress should respond to the need for federal enforcement tools through legislation directly criminalizing corrupt behavior by state and local officials. The comprehensive anticorruption bill pending before the U.S. Congress creates an enforcement scheme that is clear, straightforward, and constitutionally sound. It will be one purpose of the second part of this article249 to examine and explain this proposed law.

Federal corruption prosecutions also demonstrate the need for state and local responses to the corruption problem. There are areas

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249. The second part of the authors' Article will appear in volume ninety-four, issue four of the *West Virginia Law Review*. 
which should be left to the states to control. Part II of this Article will also discuss statutory and governmental responses at the state and local level that will complement federal efforts and deter criminal behavior by public officials.
## APPENDIX A

### PUBLIC CORRUPTION CONVICTIONS

**SOUTHERN DISTRICT OF WEST VIRGINIA**

**SELECTED FEDERAL PUBLIC OFFICIAL PROSECUTIONS—FISCAL YEARS 1984 THRU 1991**

LRE/JFS (ljw)/August 16, 1991

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<th>OFFENSE</th>
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<td>Former Director West Virginia Tax Division</td>
<td>18:1623</td>
<td>JFS</td>
<td>JTC</td>
<td>IRS</td>
<td>07/02/90</td>
<td>09/07/90</td>
<td>1 yr. probation; 6 mos. work release</td>
<td>Perjury</td>
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<td>Former Campaign Director for former three-term Governor of State of W.V.</td>
<td>26:7206(1)</td>
<td>LRE</td>
<td>JTC</td>
<td>IRS</td>
<td>09/21/90</td>
<td>12/06/90</td>
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<td>Filing false income tax returns</td>
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<td>Margolin, Arnold T.</td>
<td>Former Assistant Treasurer; State of W.V.</td>
<td>15:78(b)</td>
<td>CTM</td>
<td>JTC</td>
<td>CSI</td>
<td>09/06/90</td>
<td>12/07/90</td>
<td>1 yr. prison; $10,000 fine</td>
<td>False statements in connection with securities transactions</td>
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<td>Moore, Arch A., Jr.</td>
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<td>18:1341</td>
<td>LRE/JFS/ Hoffman</td>
<td>JMC/</td>
<td>IRS/FBI/</td>
<td>05/08/90</td>
<td>07/10/90</td>
<td>5 yrs.; 10 mos. prison; $170,000 fine</td>
<td>Extortion under color of official right; filing false personal income tax returns; mail fraud; obstruction of justice</td>
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URL: [West Virginia Law Review, Vol. 94, Iss. 2 (1992), Art. 3](https://researchrepository.wvu.edu/wvlr/vol94/iss2/3)
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<td>7 yrs. prison; $50,000 fine</td>
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<td>09/11/89</td>
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<td>6 mos. prison; 5 yrs. probation; $20,000 fine; 250 days public service</td>
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**FRAUD AGAINST FEDERAL OR STATE GOVERNMENT BY PUBLIC OFFICIALS**

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Hobbs Act conspiracy. Payments to County Commissioner to maintain landfill contract.
False ambulance service billings to State Medicaid/Mail Fraud.
Defrauding program of funds.
Four counts of willful failure to file tax returns.
Five counts of accepting cash for and because of any official act performed.
Submitting false claims to Job Corps.
Violation of probation; possession of firearm.
Fraudulent expense accounts.
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**OTHER PUBLIC CORRUPTION CRIMES**

**BOONE COUNTY**

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<td>Six counts of possession of cocaine while Kanawha County Prosecuting Atty. and Mayor. Had to resign.</td>
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Carey et al.: Federal Prosecution of State and Local Public Officials: The Obst

1991-92

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<td>03/10/87</td>
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- 14 yrs. prison; $10,000 fine: Hobbs conspiracy; tax evasion
- 6 mos. prison; 18 mos. probation: Marihuana distribution
- 11 yrs. prison: Drug conspiracy (pharmaceutical drugs and marihuana); tax evasion
- 15 yrs. prison; $10,000 fine: Drug conspiracy (pharmaceutical drugs and marihuana); tax evasion
- 10 yrs. prison; $5,000 fine: Drug conspiracy (pharmaceutical drugs and marihuana); tax evasion
- 15 yrs. prison; $115,000 fine; $1,150 special assessment: Marihuana conspiracy; tax evasion
- 10 years prison; $105,000 fine; $1,150 special assessment: Marihuana conspiracy; tax evasion
- 14 yrs. prison; $10,000 fine: Tax evasion
- 2 yrs. prison: Marihuana conspiracy
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<td>Jones, Grover</td>
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**NOTES:**

1. All convictions are by guilty pleas unless otherwise noted:
   a. "Trial" for guilty verdicts by jury.
   b. "Trial plea" for guilty pleas during a jury trial.

2. Convictions are for felonies unless designated as misdemeanors.

3. Legend:
   - **AUSA** - Assistant United States Attorney/United States Attorney who worked on the case
   - **CPD** - Charleston (W. Va.) Police Department
   - **DOL** - U.S. Department of Labor Investigators
   - **OCDET** - Organized Crime Drug Enforcement Task Force of federal, state, county and local law enforcement officers
   - **WVCSI** - West Virginia Commission on Special Investigations (old PPPC)
   - **WVDEQ** - West Virginia Department of Public Safety (State Police)
   - **WVMFCU** - West Virginia Medical Fraud Claims Unit
   - **USPO** - U.S. Probation Department

**SUMMARY TOTAL:**

Convictions: 78 (72 felonies and 6 misdemeanors)