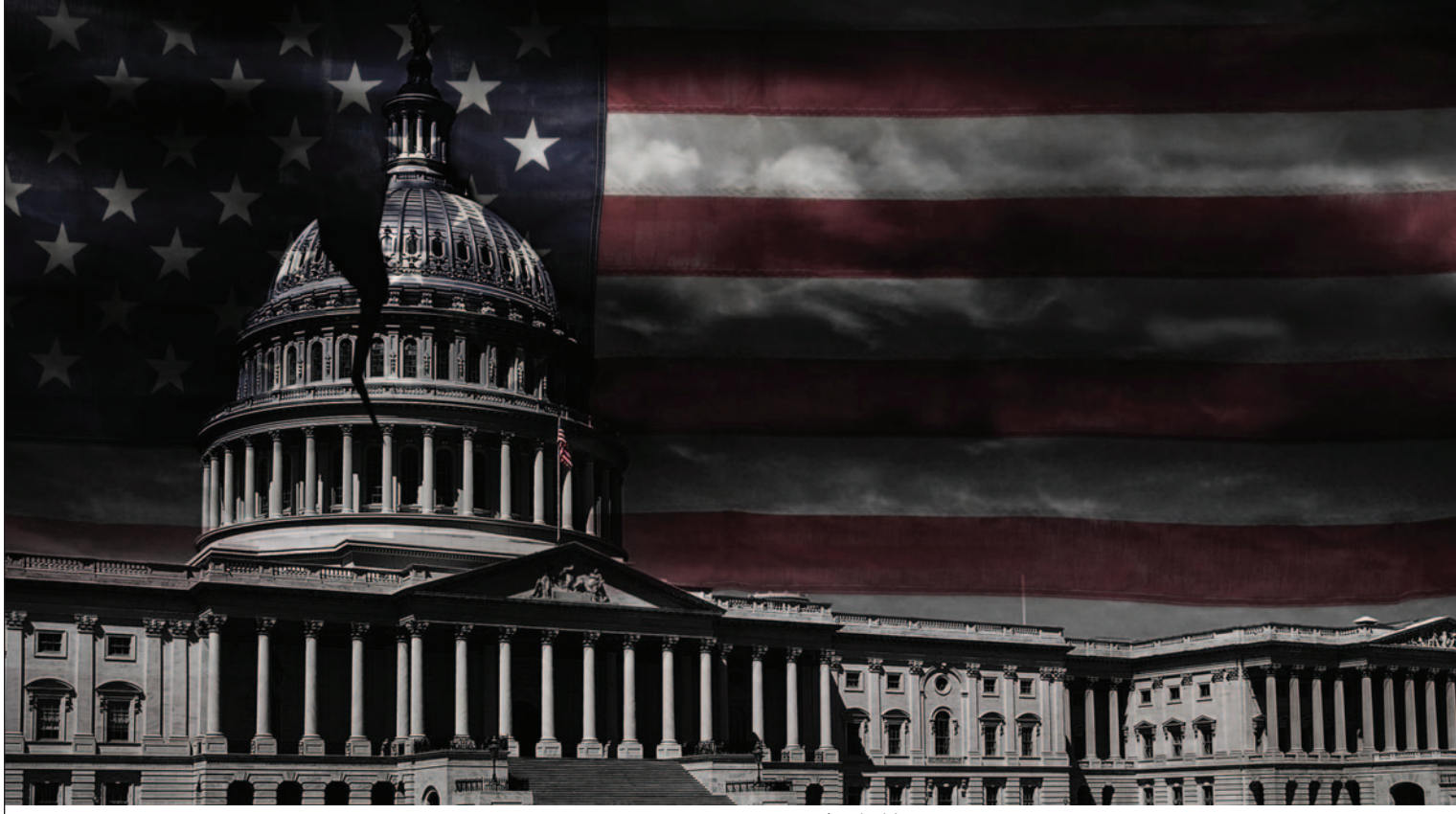

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# The Public Corruption Trial: A Checklist

For the white collar criminal defense lawyer, few trials pose a challenge greater than the public corruption prosecution. Popular in the lay imagination, the public corruption trial is at the intersection of law, politics, and the media, a place where power, money, and ethics are put on display in a manner peculiar in the American judicial system. This article will help the practitioner whose client faces a public corruption prosecution and trial. Each case is different, and there is no magic here. On the other hand, the careful, persistent, and creative use of a handful of tools will increase the likelihood of success and will help defense counsel practice at the highest level in one of 21st century American law's most trying crucibles.

## A Defense in Search of a Theory

In any criminal case, the defense needs a theory before setting out on the pretrial and trial trail, but theory — both that of the defense and the government — is particularly important and challenging in a public corruption case. Why is this so?

### Cultural Distrust

First, the defense lawyer faces distrust in the culture arising from assumptions about the use and misuse of power. Lord Acton (1834-1902), the English historian, famously said that "power tends to corrupt, and absolute power corrupts absolutely." The ancients were equally suspicious: as Augustine noted, "[j]ustice being taken away, then, what are kingdoms but great robberies? For what are robberies themselves, but little kingdoms."[1] The academic inventor of the concept of "white collar crime" based his definition on the use of power through position: to him, "white collar crime" was committed by a group "composed of respectable or at least respected business and professional men."[2] For many contemporary jurors, Professor

Sutherland's observations from 80 years ago would sound prescient: the wrongdoing of "present-day white collar criminals" shows up in "investigations of land offices, railways, insurance, munitions, banking, public utilities, stock exchanges, the oil industry, real estate, reorganization committees, receiverships, bankruptcies, and politics."[3]

### The Cost-Benefit Assumption

Second, many if not most jurors believe that any white collar defendant — including a defendant in a public corruption trial — is in the dock because he or she has made a cost-benefit analysis with regard to the supposedly wrongful transactions. As Eugene Soltes of Harvard Business School has argued, however, this common way of thinking about white collar crime is often wrong.[4] Only rarely, if ever, do white collar defendants engage in a dry cost-benefit analysis before

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acting. Rather, multiple factors conspire to lead one to potentially offend. Where the matter involves public policy, governmental decisions, tax dollars, and elected officials, that matrix of potential sources for intent and causation is even more complex.

### Unethical or Criminal?

Third, the definitional line between ethical transgressions and criminal acts has become blurred over time for many reasons, including Congress's habit of criminalizing unpopular behavior; prosecutors' creativity; and instantaneous access to fragmented information through the internet generally and social media in particular. In a public corruption trial, the defense lawyer faces a significant hurdle: even if a judge gives appropriate jury instructions (discussed below), the likelihood remains that jurors will assume that what might qualify as a state law ethics violation could also easily meet the requirements for the federal public corruption statutes. If the government can prove the factual conduct it alleges in the indictment, and if that conduct is in some way "corrupt" in the layperson's sense of the term, then the jury tends to convict — whether or not the elements of the criminal offense have been satisfied. Two recent examples of this are the *McDonnell* and *Kelly* cases discussed below.

### Public Power and Discernment of Intent

Fourth, the problem of power exacerbates the fault lines — already existing in a business crime case — between "blue collar" and "white collar" offenses. Defense counsel needs to be sensitive to those fault lines. In a jury research project the authors conducted, a very nice older lady at one point threw up her hands and said: "I just want to know if he did it." This is a reasonable question but, in a white collar prosecution, the wrong one. In white collar cases, there are few important disputed facts: the contract was awarded, the legislative vote was cast, the commission payment was made, the city council meeting was prematurely adjourned. In a "blue collar" prosecution, there may be defenses such as misidentification, alibi, or shoddy forensics, but there is usually not a dispute that a crime has occurred: the bank was robbed, child pornography was created, the meth lab was operated. In a white collar prosecution, a threshold dispute exists as to whether a crime occurred at all. This is so because in such prosecutions guilt or innocence turns almost exclusively on intent. When faced with a defendant operating in the political sphere either as a private person or an elected official, jurors may be unusually tempted to give up on discerning intent, jumping ahead to something like "she did it."

### Race and the Misuse of Public Power

Fifth, assumptions or beliefs about misuse of power with regard to race — for example, regarding police brutality — may be consistent with jurors' assumptions or beliefs about the misuse of power generally. If defense counsel lacks affirmative evidence to negate this point — because in reality the defendant bears the burden of persuasion in this regard at least — then the defendant in the public corruption trial starts at an additional disadvantage. Acknowledgment in the opening and elsewhere of the issues of race and power may go some ways toward blunting their effect, but those issues will inform the landscape in the jury room as pro-government jurors fight it out with pro-defense jurors. At a minimum, defense counsel in the public corruption prosecution must give "his" jurors enough confidence to swim the tide.

## Quartet: *McNally, Skilling, McDonnell*, and *Kelly*

The federal wire fraud statute[5] prohibits the use of the interstate "wires" to further a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." Before 1987, courts regularly held that the statute criminalized schemes to deprive individuals not merely of "money or property" but also of intangible rights, including the right to the "honest services" of one's fiduciaries. In *McNally*

*v. United States*,[6] the Supreme Court held that the companion mail fraud statute applied only to schemes to defraud others of money or property, *not* honest services. The following year, Congress passed 18 U.S.C. § 1346, which expressly defined the term "scheme or artifice to defraud to include "a scheme or artifice to deprive another of the intangible right of honest services" — in other words, reinstating honest services doctrine to its landscape before *McNally*.In *Skilling*, the Supreme Court held that Section 1346 criminalizes only schemes to defraud involving bribery or kickbacks.[7] The government had argued that Section 1346 should criminalize schemes involving fiduciaries' undisclosed conflicts of interest, defined as "the taking of official action by [a public official or private] employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a financial duty."[8] Concerned about due process, the Supreme Court rejected such an expansive reading, noting the "principle that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."[9]

In *McDonnell v. United States*,[10] which involved the prosecution of former Virginia Gov. Robert McDonnell, the Supreme Court discussed what "official action" means and does not mean for purposes of the federal bribery statute. The parties stipulated at trial to the statutory definition of "official act": a "decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity."[11] The government argued at the Supreme Court that a "question, matter, cause, suit, proceeding or controversy" encompasses "nearly any activity by a public official," including "the typical call, meeting, or event."[12] The Court disagreed, noting that the words in the statute "connote a formal exercise of governmental power, such as a lawsuit, hearing, or administrative determination."[13] Thus, because "a typical meeting, call, or event arranged by a public official is not of the same stripe" as formal governmental actions, such would be a "question" or "matter" under Section 201.[14]

The Court also declined to accept the government's argument that an official takes "action on" a matter merely by "meeting with other officials" or "speaking with interested parties" to express a particular view.[15] The Court observed that "[s]imply expressing support" for a governmental act or arranging a "meeting, event, or call" to discuss a matter is not acting "on" a matter.[16] Indeed, a government official takes official action only if he "us[es] his official position to exert pressure" on the responsible official, or "us[es] his official position to provide advice to another official, knowing or intending that such advice will form the basis for an 'official act.'"[17] This definition has constitutional underpinnings. Had the Court accepted the government's reading, prosecutors could "cast a pall of potential prosecution" over a wide range of legitimate political activity, such as "arrang[ing] meetings for constituents" and "contact[ing] other officials on their behalf."[18] Criminal prosecution could arise

from "prosaic interactions" involving campaign donations or gifts by constituents, thus threatening "democratic discourse."[19] Consistent with the observation in the earlier part of this article about the contemporary fuzziness between ethics complaints — which are usually handled at the state or municipal level — and federal criminal charges, the Court invoked principles of federalism when it noted that federal public corruption statutes are not codes of "good government for local and state officials."[20] Famously, the Court concluded that a statute "'that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter.'"[21] Finally, and most recently, in *Kelly v. United States*,[22] the Supreme Court (in a unanimous decision) held that there could be no Section 666 prosecution where the scheme, although politically abusive, did not aim to obtain money or property: "The realignment of the toll lanes was an exercise of regulatory power — something this Court has already held fails to meet the statutes' property requirement. And the employees' labor was just the incidental cost of that regulation, rather than itself an object of the officials' scheme."[23]

The facts will be familiar to many readers. Staffers and officials supporting Chris Christie, who at the time was the governor of New Jersey, changed the traffic lanes — for no reason related to traffic control — on the George Washington Bridge so as to politically punish the mayor of Fort Lee, New Jersey, because the mayor did not support Gov. Christie's re-election campaign. The traffic lane alteration caused days of gridlock on feeder streets until the scheme was discovered. The government charged two persons with wire fraud and with defrauding federally funded programs (the Section 666 offense), arguing among other things that the scheme had the object of obtaining the Port Authority's money or property. The two officials were convicted.

The Court overturned the convictions, pointing out that "federal fraud law leaves much public corruption to the States (or their electorates) to rectify. Save for bribes or kickbacks (not at issue here), a state or local official's fraudulent schemes violate that law only when, again, they are "for obtaining money or property."[24] In an echo of the cautionary language from *McDonnell*, the Court in *Kelly* rejected the government's effort to "use the criminal law to enforce (its view of) integrity in broad swaths of state and local policymaking."[25] In a passage that should be in the notebook of every defense lawyer at a public prosecution trial, the Court pointed out that "not every corrupt act by state or local officials is a federal crime."[26]

## Pretrial

### Write an Initial Letter to the Government: Setting the Stage

In a public corruption prosecution, a great prosecutorial temptation is to overreach. Early on, defense counsel must get a grip on (1) the nature of the government's theory and (2) what information has been withheld. As soon as possible after the client's indictment, it is a good idea to send a detailed letter — the "Initial Letter" — to the government in order to set the stage for what is to come after. The Initial Letter must be conformed to the facts and circumstances of the particular prosecution and upcoming trial, but a number of topics should be included or at least considered:

1. **Initial Government Disclosure**
   If the government's initial disclosures have not been provided, request them.

2. **Preservation of Documents**
   Ask for confirmation that the government has preserved relevant documents and put in place at the outset a document "hold," with appropriate follow-up.

3. Production of Electronic Surveillance Information Wires are popular in public corruption investigations. Ask for all intercepts of the defendant's telephone, text messages, or other electronic communications under Title III, as he or she is an "aggrieved person" pursuant to 18 U.S.C. § 2510(11). In addition, ask for consensual recordings (and transcripts thereof). Cooperators are critical to public corruption investigations, so be sure to also specify cooperators' recordings.

4. ***Brady* Material and Rule 16 Disclosures**
   The reminder should be unnecessary, but the government has an obligation to disclose "evidence favorable to an accused … where the evidence is material to either guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[27] The "materiality" of such evidence, however, is "an inevitably imprecise standard."[28] Consequently, "and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure."[29] Specifically request the defendant's oral statements (Rule 16(a)(l)(A)); his or her written or recorded statements (Rule 16(a) (l )(B)), including grand jury testimony; any prior record (Rule 16(a)(l )(D)); any documents and objects as described in (Rule 16(a)(l)(E)); reports of examinations or tests (Rule 16(a)(l )(F)); and the expert information set out in (Rule 16(a)(l)(G)).

   The Initial Letter should also remind the government that *Brady* encompasses *potentially* discoverable evidence, that *Brady* trumps Jencks,[30] and that *Brady* may be found in agents' text messages.

5. ***Giglio* Material**
   Ask the government to confirm that it has produced all *Giglio* material. As with the request for *Brady* material, this request should extend also to information *not* memorialized in any document. Federal, state, and local agencies often involved as witnesses or even victims in public corruption investigations. Remind the government that *Giglio* extends to those agencies (and their employees) as well.

6. **Early Production of Jencks Material**
   Many public corruption prosecutions are document-heavy or complicated, and almost none involve a real threat to the safety of witnesses. Ask for early production of Jencks Act material.

7. **Grand Jury Testimony, Proffers, 302s and Statements**
   With regard to any cooperating witness and any federal or state agent, ask for grand jury testimony (if any), all proffers, all FBI 302s, and agents' rough notes (if any such statements are not fully contained in 302s). Public corruption investigations are sometimes the product of joint federal/state efforts.

8. **Cooperation**
   Ask for any offers of favorable treatment, expressed or implied, made directly or indirectly to potential witnesses, including favorable treat-

ment at any sentencing; any understanding not to prosecute; or any "charge" or "count" plea bargaining.

**9. Federal Rule of Evidence 404(b)**

Ask for a prompt and fulsome 404(b) notice. Public corruption investigations are rarely quick. By the day of indictment, the government should have a good idea of its 404(b) evidence. In addition, with regard to any government witnesses who have pleaded guilty, ask for any evidence in the government's possession concerning or alleging acts or transactions similar to those as to which they pleaded guilty.[31]

**10. Documents from Federal and State Agencies**

As noted above, critical evidence in a public corruption investigation may come from federal or state agencies that otherwise have nothing to do with the prosecution. Ask for all such documents or confirmation that the government has none.

**11. Names of Unindicted Co-Conspirators**

At trial, prosecutors may try to paint the defendant as benefitting from the political "swamp." To render this effect, the government may discuss or call all manner of unappetizing public servants, staff members, or government relations experts — without actually charging anyone or even saying they did anything wrong. For that reason, the Initial Letter should expressly ask for the names of all unindicted co-conspirators or, if there are none, confirmation of that fact.

**12. *Bruton* Disclosure**

Ask whether the government plans to attempt to introduce at trial any co-defendant's statement, and ask for production of any such statement.

## Move to Dismiss the Indictment

In most federal public corruption cases, the indictment will be reasonably well-pled and many judges will be reluctant to dismiss in whole or in part. Especially if defense counsel is on a budget, why make the effort? And why risk doing anything that shows the defense's hand?

**An attack on the government in the opening statement must be tied to a specific pivot point. Simple "overreaching" or "unfairness" will never do.**

The answer, as with many things in life, is education.

Education of the judge is important; early education is critical. Do not forget that the judge, however disciplined she or he may be, is as potentially susceptible to false assumptions about ethics, crime, race, and public power as any member of the venire. Further, because the judge is an officer to whom great power is entrusted, he or she may be doubly sensitive to allegations of misuse of public power by others. For that reason, it is important to relay in plain English the defense theory of the case. If the defense vocabulary begins to guide the courtroom narrative about

power early, it can have beneficial effects on everything from jury selection to jury instructions. As science fiction novelist Philip K. Dick noted: "If you can control the meaning of words, you can control the people who must use the words."[32]

## Find the Jury's Commonweal: The Value of Jury Research

In any kind of trial, lawyers will have widely divergent views of the value of jury research. In addition, financial constraints may not allow extensive research. In public corruption cases, however, a basic amount of jury research — even a focus group — can be helpful. Most prosecutions are binary: there are two poles, the prosecution and the defense, and the jury must consider one or the other. There may be additional role-players such as victims, witnesses, or experts, but such persons are usually instruments of one side or the other rather than independent values.

A public corruption trial, in contrast, contains *three* poles: prosecution, defense, and the public. Few contemporary jurors would use the word, but the third pole that drives their discussion is the *commonweal*, the question of what is the public good. The concept will not be in a list of the elements of an offense or in the jury instructions, but jurors will consider it. For that reason, it is useful to understand how potential jurors work through concepts such as the public good — both in general and with regard to the client the defense attorney represents. A person's hidden and unarticulated conception of the commonweal cuts across partisan, regional, income, and racial lines. Indeed, for that reason, in public corruption cases it is often possible to figure out what kind of juror one does *not* want but nearly impossible to discern who is desirable.

## Swing for the Fences on the Jury Questionnaire

A well-drafted juror questionnaire serves the same "commonweal" function externally that jury research serves internally. Different court systems and different judges have different approaches to juror questionnaires, so first confirm local practice. If allowed, many questions can be crafted to get at conceptions of the public good. In one matter, for example, where the government claimed that the scheme touched a wide variety of public officials, defense counsel created a chart to gauge potential jurors' reactions. The chart posed a question ("What are your general feelings about each of the following?"); gave an instruction ("Mark the box that applies."); set out a range of options (from "Very Unfavorable" to "Very Favorable"); and listed institutions and officials by individual name and by status (State House of Representatives, State Politicians, Local Politicians, State Government, Federal Government, current and former Presidential Administrations, current and former United States Senators). Such answers provide context and background otherwise unavailable.

## Select Pretrial Motions with a Purpose

White collar defense lawyers sometimes make one of two errors with regard to pretrial motions: they either file too few (or none), out of fear of showing their cards or giving the government new ideas, or they have a pet list of motions that get filed in every case. Both approaches are a mistake in a public corruption case. Defense counsel should take a judicious approach, conforming motion practice to the general theory of the case that has, one hopes, already been established. Even in light of that specificity, however, there are three motions in particular that we have found useful.

### Motion to Compel Rough Notes

Under certain circumstances, and particularly when the defendant identifies the discrete portions that may be relevant, a court can compel production of rough notes of a government agent.[33] The *Rudolph* court noted:

> Federal criminal defendants have a due process right to disclosure of evidence that is favorable to the accused on issues of guilt and punishment, or evidence that would impeach the government's witnesses, including inconsistent statements by the witness, or plea and immunity agreements. These rights are independent of the Federal Rules of Criminal Procedure and the Jencks Act. …[34]

*In camera* review of potentially exculpatory evidence is not a novel procedure and has been blessed by the Supreme Court.[35] This process is appropriate where discrete undisclosed information may lead to other undisclosed exculpatory or impeaching evidence in the government's possession.[36]

Why is the production of rough notes more urgent than in a run-of-the-mill white collar case? In public corruption cases, agents and prosecutors often

have a long road to bring the public official to a point of cooperation. Politicians and elected office holders often believe that they can talk to their way out of anything. For that reason, there may be multiple iterations of a concept in the government's interviews with the public figure who ultimately cooperates. If so, some of those iterations may be inconsistent with statements in other 302s; with the allegations in the indictment; and, perhaps most importantly, with statements or observations in other handwritten rough notes, an inconsistency that can be exploited when the interviewing agent is on the stand.

#### In Limine Motion About Ethics Laws

The more that the government at trial can substitute the concept of *ethics* for the concept of *crime*, the more it can convince the jury that the defendant has acted contrary to the public good — and has so convinced them using a lower standard with looser language. Although few federal indictments will expressly incorporate state or municipal ethics regulations, prosecutors will often seek to backdoor such evidence: for example, by offering in evidence officeholders' disclosure forms for purportedly another purpose; or by claiming that a lawyer-defendant should have registered as a state lobbyist, even though she does no real lobbying; or by calling to the stand legislative committee chairmen or state agency directors and asking what is permissible practice before their respective bodies. It is important to convince the judge that such evidence is not proper.

#### In Limine Motion to Exclude Underlying Policy Evidence

In a trial involving alleged bribes or kickbacks (perhaps supposedly disguised as consulting agreements or commission payments), there will be an underlying policy landscape that the parties — perhaps legitimately — wished to influence on behalf of themselves, their industry, or their clients. Relying upon their First Amendment rights, they may have sought to petition federal or state agencies to change a position. The underlying policy fray may, however, be noxious, ready to inflame the power-assumptions discussed above. As of this writing, two such explosive landscapes are the opioid crisis and the concept of environmental justice (that is, the argument that minority communities have historically borne the brunt of pollution and thus have suffered racially driven negative health outcomes). It is difficult enough to defend a person charged with paying a bribe or accepting a kickback. It is impossible to do so successfully while also managing the opioid crisis or cleaning up historically disadvantaged neighborhoods. The government realizes the explosive nature of such evidence and will use it without remorse. Try to keep it out.

### Take Up *Touhy* Early

Defense counsel in a public corruption investigation may need to call officers or employees of federal agencies. An elaborate regulatory structure governs such witnesses and counsel is well advised to invoke the *Touhy* process early and often. A summary of the legal framework is set out below.

The federal "Housekeeping Act," codified at 5 U.S.C. § 301, permits the head of a federal department or agency to "prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property." The Supreme Court in *United States ex rel. Touhy v. Ragen*[37] upheld the validity of regulations promulgated pursuant to the Housekeeping Act, and held that a court could not enforce a subpoena *duces tecum* against an agency employee where that employee had been directed by his superiors not to comply, pursuant to those regulations.[38] Executive agencies may also promulgate regulations regarding the testimony of their employees.[39] These agency regulations are now commonly described as "*Touhy* regulations." The Court in *Touhy* specifically reserved the question of "the effect of a refusal to produce in a prosecution by the United States."[40]

In the years that immediately followed the *Touhy* decision, its rationale was undermined to some degree by the Supreme Court's decision in *United States v. Reynolds*.[41] *Reynolds* related to the government's claim of privilege over documents sought by the plaintiffs in the underlying Tort Claims Act, which was based upon the relevant agency's *Touhy* regulations.[42] The Court, though affirming the privilege on different grounds, noted that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."[43]

Further corrective reaction to the *Touhy* decision came from Congress in 1958 with an amendment to the Housekeeping Act to add the following concluding language: "This section does not authorize withholding information from the public or limiting the availability of records to the public."[44]

Most federal agencies' *Touhy* regulations provide that the agency general counsel may request the assistance of the Department of Justice to represent the interests of the agency and the employee-witness. This request is common in a federal criminal matter.[45]

## Trial

### Client Testimony: Client as Public Official or Private Person

In any criminal prosecution, the question of whether the client testifies is important. In a public corruption prosecution, the question of client testimony will come to the fore early and will take on a disproportionate importance. This is so for several reasons. First, even more so than in other white collar trials, the jury may demand an explanation from the defendant. In particular, jurors leaning towards the defendant will be hungry for arguments that they can use in the jury room. A public corruption charge is very personal, much like a libel on one's character or morals. Many jurors will find it probative one way or the other if the defendant takes the stand or does not.

Second, defendants may be officeholders, lobbyists, lawyers, or other professionals who are articulate and who depend upon the words from their mouths for their daily bread. In addition, they may have an outsize ego and may believe that, if they can just get a chance to talk with the jury, everything will be set to right.

Third, jurors may unfairly hold a public official to a higher standard than a private person and may want to hear more urgently and definitively from the officeholder.

There are no hard and fast rules about whether the client testifies, but it is a question that needs to be addressed early and the ramifications discussed in detail.

### Opening: Can You Really Put the Government on Trial in a Public Corruption Case?

Yes, the defense can put the government on trial, but defense counsel must give the jury a reason.

The "presumption of innocence" has been translated into a presumption of guilt. Most citizens, most of the time, believe that when individuals or companies are charged with a criminal offense, they are guilty (or guilty of something pretty close to the charged offense). They do not believe all the machinery of court — a judge, federal agents, prosecutors, courtroom staff, and they themselves, the jurors — would be put in motion if there were not a pretty good reason. That "pret-

ty good reason" standard, combined with the power–assumptions discussed throughout this article, means that an attack on the government in opening must be tied to a specific pivot point. Simple "overreaching" or "unfairness" will never do. In the current environment, an attack on the government based upon political or even racial selectivity or persecution may have more legs than in earlier days, but a specific factual counterpoint will be best. In one case, for example, the defendant had been successful in beating back a federal government regulatory initiative, much to the frustration of agency officials and political groups. Part of the narrative in opening was that the prosecution had little to do with the public good, and nothing with corruption, but was rather government payback because the defendants had taken an unpopular position but had won fair and square in the regulatory arena.

### The Peculiar Problem of Identical Evidence

What is the best strategy in a public corruption trial when the government and the defense rely on the same documentary evidence? In a case involving lobbyists and lawyers, there was a great amount of documentary evidence that established what happened and when: detailed lawyer time narratives, draft and final bills created from those narratives, redline drafts of letters, talking points, proposed legislation, and recorded appearances before federal and state officials. The government offered this evidence as contemporaneous, real-time admissions of conspiracy. The defense offered this evidence as contemporaneous, real-time proof of lack of criminal intent. After all, the defense argued, how many criminals document their wrongdoing in detailed six-minute increments subsequently sent to a corporate accounting department for review? Or how many consultants or lawyers report on their income tax returns the very bribe that the government charges — and, report it with a 1099 tax form?

Many jurors saw the documents as the government portrayed them. The key lesson? Provide sufficient context for the jurors — most of whom will not work in environments that either generate those kinds of documents or have such accounting or control functions — so that the jury can appreciate the real significance of detailed, real-time records.

### The Problem of 'Politics-As-Usual'

Although the government will insist that it is prosecuting a criminal case rather than a political trial, a public corruption case is at least as much about the jurors' view of civic life as it is about the elements of a criminal offense. Defense counsel must be alert and must object when the government puts on "politics as usual" or "swamp" evidence or arguments. In one recent trial, the government put on, over defense objection, almost two days of supposedly contextual evidence laying out the matrix of contacts between the defendants and various executive branch staffers, office holders, and board members. None of the contacts were unlawful, a point raised by the defense with each witness on cross-examination. Nevertheless, in the current environment of great skepticism about many institutions, the latticework of contacts and "cronyism" was harmful to the defense. Make every effort to keep it out.[46]

### Jury Instructions: Focus Jury on 'Official'

Jury instructions are of course important in any white collar criminal trial, but they take on added importance in a public corruption trial. As seen above in the history of the government's repeated attempts to unduly expand the public corruption statutes in general and the honest services statute in particular, the government will propose jury instructions that speak in broad terms of wrongdoing and that steer jurors away from the "hard" definitional findings that the law now requires (such as unanimity on at least one "official act," as spotlighted in *McDonnell*, in order to convict on an honest services count). Most pattern instructions for honest services cases, for example, do not fully capture the import of current law, and defense counsel are well advised to pour energy and resources into jury instructions.

## Conclusion

As promised at the beginning, this article offers no magic solutions. White collar criminal trials are tough and public corruption trials are among the toughest. Despite the odds, a well thought out theory of defense, early preparation, and a recognition of the intersection of law, politics, and civics that such cases present will allow for the maximum margin of potential victory.



## Notes

1. Augustine, The City of God.
2. Edwin Sutherland, *White Collar Criminality*, 5 Am. Soc. Rev. 1–12 (Feb. 1940).
3. *Id.* at 2.
4. Eugene Soltes, Why They Do It: Inside the Mind of the White Collar Criminal (2016).
5. 18 U.S.C. § 1343.
6. 483 U.S. 350 (1987).
7. 561 U.S. at 408-09.
8. *Id.* at 409.
9. *Id.* at 410 (internal quotations omitted); *see also id.* at 409-11 & n.44.
10. 136 S. Ct. 2355 (2016).
11. 18 U.S.C. § 201(a)(3).
12. *Id.* at 2368.
13. *Id.*
14. *Id.* at 2369.
15. *Id.* at 2370.
16. *Id.* at 2371.
17. *Id.* at 2370, 2372.
18. *Id.* at 2372-73.
19. *Id.*
20. *Id.* at 2373.
21. *Id.* (quoting *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 408 (1999)).
22. No. 18-1059 (May 07, 2020).
23. The federal program fraud statute bars "obtain[ing] by fraud" the "property" (including money) of a federally funded program or entity. § 666(a)(1)(A).
24. *Kelly*, slip. op. at 9.
25. *Id.* at 14.
26. *Id.* at 15.
27. Brady, 373 U.S. at 7.

28. *United States v. Agurs,* 427 U.S. 97, 108 (1976).

29. *Id. See also Cone v. Bell,* 129 S. Ct. 1769, 1783 n.15 (2009). ("As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure.").

30. *See also United States v. Rittweger,* 524 F.3d 171, 181 n.4 (2d Cir. 2008) ("Complying with the Jencks Act, of course, does not shield the government from its independent obligation to timely produce exculpatory material under *Brady* — a constitutional requirement that trumps the statutory power of 18 U.S.C. § 3500"); *United States v. Jacobs,* 650 F. Supp. 2d 160, 168 (D. Conn. 2009) ("I only remind the government that its *Brady* obligations trump the Jencks Act, that such obligations include the obligation to produce impeachment materials consistent with *Giglio,* and that such material must be produced in time for its effective use at trial.") (citation omitted); *United States v. Lujan,* 530 F. Supp. 2d 1224, 1256 (D.N.M. 2008) ("In this case, the government at the hearing stated its position that *Brady* 'trumps' the Jencks Act, a position with which I agree."); *Ferrara v. United States,* 384 F. Supp. 2d 384, 425 n.20 (D. Mass. 2005) ("Virtually all exculpatory information is contained in a Jencks statement of some witness. If the Jencks Act saved the government in this case, the rule of *Brady v. Maryland* would be eviscerated.") (citations omitted).

31. *See United States v. Cohen,* 888 F.2d 770 (11th Cir. 1984) (defendant can use 404(b) evidence of a government witness's/co-defendant's prior fraudulent scheme to show that the witness could orchestrate the scheme alone and without the defendant's participation). In *Cohen* "[t]he theory of defense was based upon an assertion that Faw and Michael Daidone concocted and executed the fraudulent scheme without the appellants' knowledge or participation. Paw's involvement in similar fraudulent conduct prior to this association with the appellants was critical to support this argument."

32. Philip K. Dick, *How to Build a Universe That Doesn't Fall Apart Two Days Later*, in PHILIP K. DICK, I HOPE I SHALL ARRIVE SOON (1985).

33. *See United States v. Rudolph*, 224 F.R.D. 503 (N.D. Ala. 2004).

34. *Id.* at 511 (citations omitted).

35. *See United States v. Buckley*, 586 F.2d 498, 506 (5th Cir. 1978) (citing *United States v. Eggers*, 427 U.S. 97, 106 (1976)).

36. *See United States v. Griggs*, 713 F.2d 672, 674 (11th Cir. 1983) ("[T]here is some merit to the contention that if the arguably exculpatory statements of witnesses … were in the prosecutor's file and not produced, failure to disclose indicates the 'tip of an iceberg' of evidence that should have been revealed. …").

37. 340 U.S. 462 (1952).

38. *Touhy*, 340 U.S. at 348.

39. *See Westchester Gen. Hosp., Inc. v. Dep't of Health and Human Servs.*, 443 F. App'x 407, 409 n.1 (11th Cir. 2011).

40. *Touhy*, 340 U.S. at 467. *Touhy* was a federal *habeas corpus* petition related to a state court conviction. *Id.* at 463–64.

41. 345 U.S. 1 (1953).

42. *Reynolds*, 345 U.S. at 3–4.

43. *Id.* at 9–10.

44. 5 U.S.C. § 301; *EEOC v. Los Alamos Constructors, Inc.*, 382 F. Supp. 1373, 1378 (D.N.M. 1974) ("This amendment knocked the judicially sanctioned prop out from under the bureaucratic privilege claims"); *Res. Invs., Inc. v. United States*, 93 Fed. Cl. 373, 380 (2010) ("Congress was concerned that the statute 'had been twisted from its original purpose as a 'housekeeping' statute into a claim of authority to keep information from the public and, even, from the Congress.'") (quoting 1958 U.S.C.C.A.N. at 3353)). For an interesting summary of the history of the federal "housekeeping" statutes and the evolution of "*Touhy* regulations," see *Res. Invs., Inc.*, 93 Fed. Cl. 373 at 379–80.

45. *See, e.g.,* Juan G. Villasenor, *How to Properly Seek Testimony or Documents from a Federal Agency*, 45 COLO. LAW. 37, 41 (Aug. 2016) ("the federal agency likely will request representation from the U.S. Attorney's Office … "); *United States v. Vernon*, No. 11–0012–KD, 2012 WL 345361, at *5 (S.D. Ala. 2012) ("the State Department handed this matter off to a Justice Department attorney to handle").

46. The government argued the "swamp" in closing: "You know, unfortunately we're all sort of cynical about our government and how it operates because we're suspicious about what happens behind the scenes. We suspect that instead of our government being for the people and by the people, it's run by the rich and powerful. Well, this trial, if it's done nothing else, has shone a light into one dark corner of [state] politics. And what we saw is ugly and regrettable." ■

## About the Authors


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